

# **ADMINISTRATIVE LAW I**

**CASES AND MATERIALS.  
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## CHAPTER I. THE PUBLIC ADMINISTRATION

### I.- CONCEPT.

The “division of powers” is a political doctrine originated in the writings of Montesquieu. It urges a governmental system structured in three separate branches: the Executive, the Legislative, and the Judiciary. The public administration is part of the executive branch, including the government (Board of Ministers), which has a dual position, both administrative and political.

Although the underlying philosophy of the theory implies that such powers must be independent, in practice they are not whatsoever. Mutual interactions between the three branches are frequent. For example, a relevant part of the Legislative’s action depends on the previous draft legislation from the Executive branch. The Judiciary, though holding complete independent status when it comes to judicial review, lacks complete autonomy with regards to organisational aspects: the appointment proceedings in its Governing Body are strongly influenced by the political parties. Last but not least, decision-making and regulatory making processes in the Executive branch are monitored by the courts. In addition, it has a direct link to the legality principle, and therefore, a relevant subordination to the Legislative.

Dealing with the concept of Public Administration is not an easy task. During Administrative law history, many authors have tried to reach a common point to identify the administrative phenomena; no one has been able to find a definitive result. Three theories have arisen with limited success. Let us test and discuss them.

The **objective doctrine** tries to find either a specific function or formal criteria to explain what Administration is and how it should be. Some authors consider that the “public service” concept is the one that fits best, as every public body must carry out public service activities. However, the theory fails as long as the public service concept significantly changes in time and place. In addition, Administrative bodies carry out many actions that cannot be directly linked to public services (i.e. penalties, tax benefits, etc.).

Other authors prefer to identify Administration with those bodies whose action is always vested with privileges. In particular, with the so called “*autotutela*” privilege. However, the fact is that Administrative bodies do not always act under such privileges. Sometimes they get involved in relations holding the same position as citizens do. Finally, some scholars find the characterising role in the public interest concept (*función típica* o giro or *tráfico administrativo*), but the idea fails for the same reasons as the public service theory does.

The **subjective doctrine** focuses on the legal person that the Law appoints as an Administration body. Therefore, entities holding public legal personality, according to law, will be regarded Administration, and their activity shall be reported under Administrative law and under the supervision of Administrative Courts.

However, the theory has certain inadequacies. Constitutional bodies play functions which are typically administrative in nature, and regardless not being Administrative

entities, actions related to strict liability, labour relations, as well as contracting out, are governed by Administrative law. In addition, some private entities carry out activities which are typically administrative, such as concession holders. Their actions can be challenged to the monitoring authority, becoming administrative in nature. On the other hand, some public bodies play functions typically private or use civil or labour law (i.e. hiring people under labour law schemes). Besides, the Government itself, which is part of the Administration, has a dual position, both political and administrative.

Such difficulties have led some authors to create **eclectic theories**. However, such attempts face the same challenges in order to reach a doubtless point.

## II.- ORIGIN AND HISTORICAL EVOLUTION.

Contemporary continental public administration has its roots in the French Revolution. A modern and more complex administration replaced ancient kingdom structures.

The “division of powers” doctrine was created to safeguard the independence of the executive branch from the remaining powers of the old political system. As a result, the public administration was regarded out of judicial review. No appeal was allowed to challenge its decisions. In exchange, a new governmental yet independent organisation, called ‘*Conseil d’Etat*’, was appointed to monitor every public administration decision and action. This non-judiciary reviewing model is called withheld jurisdiction.

In Spain, a similar model of “withheld jurisdiction” was adopted in the nineteenth century. Public administration supervision always had a limited extent. In 1834 the Supreme Court was created, but without authority to supervise administrative behaviour. Administrative jurisdiction was first entrusted to several ancient non-judiciary bodies, such as the *Consejo de Castilla*, the *Consejo Supremo de Hacienda*, the *Consejo Supremo de Indias*, and the *Consejo Real de las Ordenes*. In 1845, the *Consejo de Estado (Consejo Real)* held all those powers and the ‘Administrative section’ was created.

This situation significantly changed with the Santamaria de Paredes Act (1888), which shifted the “withheld jurisdiction” model into a “delegated jurisdiction” model. Under this scheme, courts held jurisdiction just for certain areas of governmental action. Administrative conflicts were entrusted to lower Provincial Courts completely made up of judges; appeals, however, remained under supervision of the *Consejo de Estado*, whose members were not judges, but officials appointed by the Government.

Finally, the Maura act (April, 5, 1904) withdrew all the supervision powers from the *Consejo de Estado*, giving the Supreme Court full jurisdiction over administrative issues. The third section was laid down so to address administrative law related issues. Notwithstanding, judicial control was always limited to certain matters and higher authorities were out of its scope. In 1956 the first *Ley de la Jurisdicción Contencioso Administrativa (LJCA)* was passed and almost every administrative issue and authority was declared under judicial control. Nevertheless, given the political system, the dictatorship of General Franco, many issues remained out of the judicial scope.

The 1978 the Spanish Constitution preempts judicial review from any limit or derogation; therefore, it is the first time in our history where any administrative conflict can be challenged before the Administrative Courts.

### III.- PERSONIFICATION OF THE PUBLIC ADMINISTRATION IN THE CURRENT LEGAL SYSTEM. KEY FEATURES.

Let us point out the key features of the public administration:

- a.- The public administration must act in accordance with the legality principle (*'principio de legalidad'*) (+ -).
- b.- The public administration has political grounds. It behaves according to political directions, not only strictly implementing the law.
- c.- Every public body enjoys a privilege position. For instance, their reports are presumed to be true, their actions are benefited from the privilege of *'autotutela'*).
- d.- The public administration does not have any private interests.
- e.- The decision making process is carried out according to organisational schemes (Hierarchy, responsibilities, administrative proceedings, etc).

Administrative structures are legal entities according to law. Within every administrative structure there is a bunch of administrative bodies. The administrative structure holds legal personality (not the administrative bodies), which means that it holds rights and duties; it has the ability to have rights and obligations -*capacidad jurídica*-, and the ability to legally act -*capacidad de obrar*-).

Most administrative structures have “public” legal personality, but there are others which personality is deemed “private”. This feature is relevant as it represents the use of different types of law in every legal relation (administrative law or private law), and consequently the intervention of different categories of courts in the case of conflicts.

To determine the extent of each public body capacity to legally act, the law must specify the exact powers that are assigned. Once they are assigned, administrative powers and responsibilities cannot be waived: power is attached to the administrative body and every single one must enforce it on a case by case basis.<sup>1</sup>

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<sup>1</sup> *'Indisponible'* is used in law to describe those parts of law that the parties may not change. For instance, family law is *'indisponible'*, since parties are not usually free to adapt the family regulations to their needs; whereas contract law is said to be available in as much as parties may usually agree on terms different to those put forward by the law.

On the other hand, every administrative structure enjoys “single” legal personality. There are multiple administrative structures (Central Administration, Regional Administration, Local Administration, Corporative and Institutional Administration). As a result, there is not just one single personified administration. All of them enjoy their own legal personality.

Each structure is made up of a group of public bodies without legal personality. They are just branches of government. Their actions reflect on the whole organisation, as administrative structures are fully accountable. On the other hand, citizens have the right to a single response, which does not always happens, as different administrative bodies within the same structure can lay down their own statements on a case by case basis. Assuming such situation could take place, the resulting decision shall be reported null and void ‘*contenido imposible*’.

Other consequences resulting from the single legal personality of public administration is that a single public record system (*registro*) is required in every administrative structure. Citizens are allowed to register documents in other administrative structures as long as a bilateral agreement for exchange is established among them (*convenio*).

Administrations enjoy organisational, financial and functional autonomy. However, such a principle does not apply to administrative agencies. ‘*Administraciones instrumentales*’ (public or semi-private entities founded to implement specific activities and public services).<sup>2</sup>

These key features clearly show the limits concerning agencies’ autonomy:

- They only enjoy powers that are expressly assigned by the parent administrative structure (*Administración matriz*).
- Agency managers and board of directors are appointed by the parent administrative body.
- The agency cannot appeal any decision from the parent administrative body.
- Financial accountability, ‘*responsabilidad patrimonial*,’ will be charged to the parent body. Although the instrumental body has its own legal personality, the parent body is liable because there is no complete financial separation among them. Moreover, the agency is always under a certain level of guidance, supervision and monitoring from the parent body, however, there is a trust relation between them. (*relación fiduciaria, tutelar, culpa in vigilando* and *levantamiento del velo*).

Administrative structures and public bodies are structured following two criteria: hierarchy and competence (*jerarquía y competencia*). Both principles will be addressed in upcoming units.

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<sup>2</sup> We shall use the term: “agency” or “instrumental body” to identify the group of ‘*Administraciones instrumentales*’.



## **QUESTION PAPER.**

I.- Why can the public administration not be completely identified with the public service concept?

II.- List at least three institutions with constitutional relevance that are not part of any administrative structure. They do not belong to the executive branch.

III.- Give an example of a private institution or company whose activity can be in part public in nature; therefore under administrative law.

IV.- Give an example of an administrative body. Check its website and explain its key responsibilities.

V.- What is the key difference between an “administrative structure” and an “administrative body”.

VI.- Assuming that there are several public administrative structures, territorial and functional in nature, how should you explain the sentence: “the public administration has a single legal personality”?

## CASE STUDIES

I.- Let us assume that there is a conflict between the Ministry of Environment (Ministerio de Medio Ambiente) and the Segura river basin authority (Confederación hidrográfica del Segura). The river basin authority is an instrumental body directly linked to the Ministry, although it enjoys full functional autonomy. The conflict arises when the Ministry addresses an executive order the watershed authority must meet, providing their authorities regard it as against the law.

-Is the river basin authority allowed to appeal the order?

-Which entity enjoys legal personality, the river basin authority, the Ministry, or both of them?

II.- Let us suppose that the river basin authority builds a water work; the drainage system breaks and causes flooding in several farming fields. Who should the citizens address the claim to for a fair compensation and redress?

III.- Imagine you are a civil servant working for the Spanish parliament. Parliament starts a disciplinary proceeding against you, given that you almost never go to work. After all the proceeding the Congress hands down a decision consisting on firing you. Which branch of the Judiciary should you appeal to? (Labour Courts, Civil Courts, Criminal Courts, Administrative Courts).

IV.- The Spanish Government submits a draft bill to the Parliament. Is it acting as Administration or as Political body? Could a citizen appeal against this action?

V.- The Spanish Government appoints a Secretary of State. Is he/she acting as Administration or as a Political body? Could a citizen challenge the appointment?

VI.- Government powers and responsibilities are listed in the Spanish Constitution, sections 77, 97 et seq. Identify which of them are political or administrative in nature.

VII.- See the following Board of Ministers' (*Consejo de Ministros*) decision: '*ACUERDO por el que se autoriza el pago del precio en el ejercicio presupuestario de 2013 por importe total de 7V.82I.165,87 euros y un gasto por importe total de IV.9XI.650,28 euros correspondiente al incremento de la compensación financiera, del contrato bajo la modalidad de abono total del precio de las obras: 'Autovía del Mediterráneo (A-7). Tramo: Motril (El Puntalón)-Carchuna, Granada*'. Do you think it is of administrative or political nature?

VIII.- Visit the following website: <http://www.la-moncloa.es/ConsejodeMinistros/index.htm> Press the link: "*referencias*" and find an example of a political decision and another of administrative decision.

## CHAPTER II. ADMINISTRATIVE LAW.

### I.- NATURE.

Administrative law can be defined as a group of laws, rules and regulations characterised for being applied to every legal relation where at least one public body is involved.

Administrative law is part of the so called 'public law'. It is the 'common' law of the public administration and it is broadly a statutory law. The administrative legal system collects concepts and institutions from other legal systems such as civil law, criminal law, or even labour law. In addition, it is self-sufficient; there is no need to bring rules from other areas of law to fill in the gaps.

The following are the distinguishing elements of administrative law, with regards to other legal systems and codes:

a.- **Privileges and powers** in favour of one of the parts of the legal relation, the public administration.

Administrative law acknowledges the privilege of self-enforcing *autotutela*. Under administrative law the burden of challenging administrative decisions shifts to the citizen.

Administrative law conflicts are addressed by a specialised branch of the Judiciary: the *Jurisdicción contencioso-administrativa*. Plaintiffs must appeal first before the upper administrative body, and only later, once exhausted the administrative channel, are allowed to bring the case before the Administrative Courts.

Public officers and workers are subject to a particular and privileged labour legal framework. Cases related to public employees do not fall under the *Estatuto de los Trabajadores*. On the contrary, public employees enjoy what is called 'statutory position' and, among other things, cannot be removed or fired unless they are sentenced in disciplinary proceedings.

Every public asset, no matter if it is real estate, property, stocks, etc., enjoys a privileged position. As long as they belong to the public domain category, they cannot be sold, cannot suffer positive prescription,<sup>3</sup> and cannot be involved in any enforcing proceeding (seizure, foreclosure, etc.). Even when assets are just common goods, several privileges also apply.

b.- **Burdens and limits** affect the public administration.

Administrative bodies have both, a positive and negative link to law. They are obliged not only not to do what the law forbids, which is a common place, but to enforce the law. The Administration cannot waiver the implementation of its responsibilities and powers. Administration lacks free will, unlike citizens.

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<sup>3</sup> The process of acquiring title to property by reason of uninterrupted possession of specified duration. Also called *positive prescription*.

Administrative law brings about lots of formal and procedural burdens, as well as strict financial conditions. Expenses are subject to the public budget.

## **II.- KEY FEATURES.**

a.- Administrative law can be regarded a **‘proactive’** law.

Its rules endorse public intervention on society and economy. Three types of public interest activities characterise Administrative action: limiting, promotion and public services provision. Public bodies have specific mandates and granted broad powers. The main sources of Administrative law are regulations, plans and programs, agreements and contracts, and administrative decisions.

b.- **Efficacy and efficiency.**

Many Administrative law institutions are strictly linked to these principles. Efficacy means that every public body has to act accordingly to the assigned goals. Efficiency means that targets must be met maximising benefits and minimising costs.

The public administration’s targets are not comparable to those of the private companies. It is perfectly possible that administrative policies give rise to financial losses or result in lack of economic benefits. What is relevant is that the public service is completely fulfilled to the lower financial cost possible.

The principle backs up several of the most relevant institutions of the Spanish Administrative law, such as the self-enforcing principle (*autotutela*). Administrative statements are presumed to be true, valid and lawful. As a result, all of them are directly enforceable without previous judicial intervention, which is a formidable privilege. In close connection with this principle, we have that in Administrative law cases every administrative report is regarded as a piece of evidence. Therefore, the other party needs to submit at least one piece of evidence to support his/her position. If not, The case will be lost.

The aim of the self-enforcing privilege was historically to help safeguarding the independence of the executive branch from the judiciary. The idea was to avoid any burden to the executive’s task of changing the society after the French revolution. Today, the aim of efficacy that is implicit in this institution is still present.

It is very essential to clearly understand the difference between lawfulness (*validez*) and efficacy. Every administrative decision, regardless it being correct or not, is perfectly enforceable. The decision, however, may be overturned and declared null and void after an appeal, eventually leading to compensations.

c.- **Public interest.**

The public interest is the purpose of every administrative action. And consequently, it is the aim of the Administrative law. Defining the public interest is not easy and may vary in time and place. In our legal system it is broadly defined in the Spanish Constitution and specified in laws and regulations. It is implied in the constitutional recognition of fundamental and socio-economic rights and principles.

In certain circumstances, an administrative decision conflicting the public interest may be reported as a misuse of power, *desviación de poder*. This fault takes place when the Administration exercises its powers aiming to achieve results that are different to those the legal system pursues.

Every administrative decision must have a reason to show that it is really founded in the public interest. If not, the citizen might challenge the decision.

#### **d.- Open government, public accountability and public participation.**

The public administration manages the public interest and, what's more, the public budget. Therefore, public officers deal with the money of all the citizens and have to use all the resources effectively. Citizens have the right to know how officers manage their money, and the law should provide accurate proceedings to make it real.

Traditionally, administrative law has included certain procedural mechanisms to allow citizens to gain access to public documents and files. Derogations, however, have been broadly applied, and public access frequently hindered. E-administration and open government laws might change the situation towards being more transparent. E-Administration provides a new framework for relations between citizens and government. Every administrative structure must have its own website and electronic office platform.

Before e-administration most public information was accessible at the request of the party. Just the official bulletins and municipal boards used to offer administrative information ex-officio. New technologies have opened new ways to spread information at the government's own initiative, and most official websites provide useful information. The electronic office platform can be used to access information at the petitioner's request as well. The challenge is, however, to have access not only to positive information (open data), but also to sensible information (open government).

### **QUESTION PAPER**

I.- Explain the meaning of the following sentence: administrative law is self-sufficient.

II.- Mention any Administrative law feature that can be regarded as a 'burden' for the public administration. Give reasons.

III.- Explain what is an administrative decision/statement. What about a regulation?

IV.- Why do you think it is relevant to allow citizens to participate in administrative proceedings? Even as members of certain administrative collegiate bodies.

V.- What does misuse of power (*desviación de poder*) mean? Could you give an example? Look for a court decision to give an accurate example.

VI.- What does reasoning, *motivación*, mean when it comes to an administrative decision/statement?

VII.- A liberal state should have a wide-ranging and comprehensive administrative law (true or false). Give reasons.

## **CASES**

I.- A Police officer watches a traffic violation. Does he have to report it, or is he allowed not to do so as long as he finds it appropriate?

II.- The city (municipal government) wants to hire a company to asphalt a road. Is the city allowed to freely choose any company in the market?

III.- A police officer on duty starts reporting cars that are parked in a non-parking area. He is ordered to move away so to attend another case. Ten cars in the same situation are left without reporting. Do you think the police officer is doing right, or maybe he is committing misuse of power by not reporting everyone?

IV.- One citizen reports to the municipal authorities that in many San Juan beach houses illegal work is taking place. Landlords are opening windows, attics or dormer windows without any building permit. In your opinion, is it binding for the Town Hall to start disciplinary proceedings and even urban restoration proceedings (*restauración de la legalidad urbanística*) to face such offences? Bear in mind that the huge number of violations could make it unfeasible.

V.- Given that a civil servant is continuously not meeting his obligations at work, the human resources department reports the situation. The head officer decides to open a disciplinary proceeding for the civil servant. However, there are certain facts regarding the allegedly offence that the disciplinary administrative regulation does not regulate. Can the examining officer (instructor) use labour law (*Estatuto de los Trabajadores*) to draw a preliminary decision?

### CHAPTER III. ADMINISTRATIVE AUTHORITY AND THE SUBORDINATION TO THE LEGAL PRINCIPLE.

#### I.- CONCEPT OF AUTHORITY, *POTESTAD*.

Someone has authority when enjoy the power to affect others' rights in a way they are forced to bear with. Authority and right are different concepts. Authority cannot be waived, transmitted, or modified. On the contrary, individual rights only have such characteristics in specific and exceptional cases. Authority is broad and generic, while individual rights are usually focused on particular aspects.

|                               |                                   |
|-------------------------------|-----------------------------------|
| RIGHT ( <i>derecho</i> )      | OBLIGATION ( <i>obligación</i> )  |
| AUTHORITY ( <i>potestad</i> ) | SUBORDINATION ( <i>sujeción</i> ) |

Administrative authority is characterised by the following aspects:

a.-The exercise of administrative authority **cannot be waived**.

The law assigns the public administration a group of powers and functions. Once assigned, every public body is responsible for implementing them and fulfilling the pursued goals. In case the public body fails to comply with its duties, the citizen can bring the case to Courts according to sections 29 and 30 LJCA (*recurso por inactividad*).

b.- Every power is designed to achieve targets directly linked to the **public interest**. This statement does not mean that the law gives always the administration detailed powers; broad and general powers (*clausulas generales de apoderamiento*) are acceptable as well, but the public interest end must be clearly involved.

c.- Authority is only handed over by law, and the public administration can only enforce it **according to the law**. Whenever an administrative body lays down an enforceable order lacking legislative support, the resulting decision must be declared legally void.

#### II.- METHODS FOR GRANTING POWERS TO ADMINISTRATIVE BODIES.

a.- **Self-awarding powers.**

As discussed above, only the law can empower the public administration. However, as an exception, the public administration may award itself certain powers dealing with the office's internal matters. There is a specific category of regulation in Spain named 'independent regulation', which is precisely intended to regulate organisational matters with no direct effect on citizens. Such type of regulations are approved without previously enabling the legislation.

#### **b.- Express attribution of powers.**

This is the ordinary way to assign powers to the public administration. The law clearly states what powers are conferred, as well as its conditions and limits. As already mentioned, the degree of specificity might vary according to the law.

#### **c.- Implicit attribution of powers.**

Abstract and unspecific powers are not valid; however, implicit powers are acceptable. Public bodies can enforce non-attributed powers as long as they can be inferred from others which have been expressly assigned by law. This alternative helps to fill legislative and regulatory gaps. Analogy, however, is not allowed under Spanish administrative law.

#### **d.- General empowering clauses.**

These type of clauses is not allowed in Spanish administrative law, even in the organisational field. They can lead to arbitrary decisions and jeopardise the efficacy of the legal principle.

However, there are some extraordinary cases where the legal system enables public administration to issue orders or even regulations without previous legislative coverage.

The following are the main cases: a) actions intending to safeguard the public order and safety (*estados de alarma, excepción and sitio*). b) Sections 21 and 25.1 *LRBRL*, enabling majors to pass extraordinary regulations and orders in the event of serious threats and emergency. c) Decisions creating new public corporations to operate business related activities (*iniciativa pública en la actividad económica*).

### **III.- TYPES OF POWERS.**

Conceptually, powers can be broadly different; powers can affect every citizen (*relaciones de sujeción general*), or affect certain individuals with particular links to the administration such as labour relationships, contract relationships, or even users of public utilities (*relaciones de sujeción especial*). Those in the second situation are attached to singular rights and obligations. However, the main distinction takes place regarding the so called: 'regulated powers' and 'discretionary powers'.

Regulated powers are those that are completely defined by law. Issuing an administrative regulated order is an operation just consisting in checking whether the facts are in accordance with the law and, in that case, consequently implement the legal response. No questions of convenience, political expediency, or choosing between equally legal options, will be at stake in regulated powers.

The legal operator shall do the following test so to implement regulated powers in a particular case:



- Confirm and verify the facts, with just certain degree of analysis.
- Automatically implement the legal result.
- No room for assessment, evaluation, or appreciation.

On the contrary, certain room for choosing is precisely the cornerstone of discretionary powers. The administration can decide whether or not, and in which circumstances, to grant the citizen's application, impose penalties, limit rights, etc. Discretionary powers imply exercising authority according to the agency's own judgment. Under this scheme the decision-maker is not committed to enforce the law in a particular manner; nevertheless, he/she shall enforce it according to legal conditions.

One of the reasons why public bodies are assigned such type of powers is because they have experience, expertise, and specialisation. In many areas of government it is impossible to strictly define policies and decisions. Leeway is allowed to adapt rules and policies to change circumstances and demands, and to implement appropriate enforcement policies to attain statutory obligations. Leeway, obviously, must be consistent with statutory provisions.

Hence, administrative bodies have wide discretion in choosing between equally legal solutions to attain the legislature's goals and the public interest. Notwithstanding such margin for action, discretionary powers have relevant regulatory conditions. Defining which administrative body holds the responsibility on a particular matter, the proceeding to be followed, and even certain substantive requirements in which the decision is based, are regulatory conditions out of any discretionary analysis.

Discretionary powers must be used reasonably, impartially, avoiding unnecessary injuries. If not, the agencies' decisions could be challenged claiming for abuse of power (*arbitrariedad*).

We can therefore identify the following features in discretionary powers:

- The decision-making process is not completely objective; on the contrary, there is always a subjective judgment involved in the decision. (*margen de apreciación*). Nevertheless, every choice must be reasoned according to law.
- Questions of convenience or expediency, according to public policies, may be possible in the decision-making process as long as it is allowed by law. (*motivos de oportunidad*).
- Leeway must not lead to an arbitrary decision (*arbitrariedad*). Arbitrariness is clearly the limit when it comes to discretionary powers. The public administration is strongly limited by several tests in order to guarantee citizen's rights before unfair or unreasonable decisions. Protecting the public interest is also involved in it.
- The administrative statement, especially those discretionary in nature, must provide enough reasoning (*motivación*). This is imperative and essential to ensure the decision-making process is fair and lawful. Administrative behaviour cannot be inconsistent and unaccountable. In this regard, a non-transparent

government is a way open for arbitrary decisions based on bad office politics. A citizen's right to defense should be impossible without providing enough information on the grounds of the decision.

In Spain, discretionary powers have been under judicial review since the 1956 *LJCA*, although a comprehensive and full monitoring was not really available before the 1979 Spanish Constitution, and in particular, up until the *LJCA* was significantly amended in 1998.

Discretionary decisions in Spanish administrative law are clearly laid down in section 54 *LRJPAC*.

Let us discuss the current monitoring tests available for discretionary powers:

#### 1.- Monitoring the **regulatory elements (formal and material conditions)**.

- Authority: the administrative body must have authority on the case, both from a subjective (it is the correct public body), objective or substantial (the issue is correct), and territorial (the territory is under the public body jurisdiction) perspective.
- Timing: it is necessary to check whether a deadline has been met by all the parties involved in the proceeding. Not meeting the deadline should lead to lapsing the right to action (*prescripción*), or even expiring the proceeding (*caducidad*).
- An administrative decision can be overturned if the proceeding was not correct in terms of essential formalities (*vías de hecho o defectos formales invalidantes*).
- The relevant public body should not exceed the legal assignment.
- The public body should decide the case according to the public interest as defined by the law. A misunderstanding of the public interest might lead to unfair decisions and even misuse of power.
- The material or substantive regulatory elements (*aspectos de fondo*) must be monitored. For example, penalties are defined by law stating maximum and minimum fines; certain stages of the procedure for awarding public contracts are strictly regulated by law, such as the classification of external contractors; even when appointing high office positions, several pre-conditions might be required by law, such as legal age, academic training, homeland citizenship, etc. Obviously, all those elements are not discretionary, even though they are part of a comprehensive discretionary decision.

#### 2.- Monitoring the **discretionary conditions** of the decision.

Every administrative statement must be reasoned (*motivación*). Reasoning is the key condition so to allow citizens to accurately defend their interests and rights. Knowing

the grounds of the decision is the only way to build the pleadings with perfect knowledge. Otherwise, it would be very difficult to articulate the defence. It is worth remembering that in most cases in Administrative law the citizen is the one challenging the decision, acting therefore as a plaintiff.

Judges have implemented several tests to monitor the discretionary elements of the decision; all of them will be part of the judgment:

- Assessing the correct understanding and interpretation of facts in the decision-making process.
- Assessing the correct understanding of law (legal foundations).
- Analysis of the general principles of law, and in particular the public interest concerned.
- Reasonableness and rationality of the decision.

## **QUESTION PAPER.**

I.- What is a regulated decision (*acto reglado*)?

II.- What is a discretionary decision (*acto discrecional*)?

III.- What is an arbitrary decision (*arbitrariedad*)?

IV.- What is *vía de hecho*?

V.- What is *desviación de poder*?

VI- List and discuss the current tests that are available to monitor discretionary powers.

VII.- Do you think bureaucratic red tape, backlogs, arbitrary decision-making and other inefficient practices hamper private activity?

## CASES.

I.- Identify the discretionary and regulated conditions in the following administrative statements.

a.- An administrative body adjudicates the competition to fill a vacant position in the central administration. The position is granted to XXX according to the following reasons: XXX is graduated in law, as it is required in the bidding terms. He shows evidence of ten years of professional practice, and according to the bidding terms, five years is the minimum term required. The process includes an oral exam. XXX passes the exam getting better marks than the competitors. Although he dealt with fewer concepts than others, his speech stood out more clear and diligent. In addition, the candidate fulfilled an additional legal requirement consisting in not having applied for an identical position in the last two years.

b.- The Town Hall Board modifies the annual municipal budget including an extraordinary credit to finance urgent works. The Board was summoned in due time and manner.

Days before, another Committee (*Comisión informativa de presupuestos*), responsible according to law to report on budget review proceedings (*informe preceptivo*),<sup>4</sup> had given a positive report before making the public call for summoning the Board.

During the Board session, the opposition managed to amend the proposal setting a 2 month deadline to hire the works, so to speed up the procedure. The Board approved the budget appropriation (*crédito presupuestario*) in 250.000 Euros. This financial scheme was published as a bid base (*base de la licitación*).

The Board decides works will be done by a contractor, leaving aside its own internal maintenance service. The complex nature of the works requires externalising the contract. It is worth mentioning that according to the public contracts act, only companies classified under the B1 category can participate such bidding, given the amount and complexity of the contract.

c.- Decision of *Consellería de Bienestar Social* appointing a citizen as *gran dependiente*, grade 3, level 3 (maximum level for handicapped people). As this person is a Spanish citizen, with residence in the Region of Valencia, he/she has the right to be granted subsidies according to Spanish law (*Ley de la Dependencia*). The citizen's functional dependency condition was evaluated according to the national scale, which includes several tests such as: is the handicapped capable of eating alone? Does he/she need help to sit down and get up? Is he/she self-sufficient enough to clean up after him/herself? Does he/she have help from others? In addition, the social context report

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<sup>4</sup> It is relatively frequent that an administrative body is required to issue a report as part of the administrative procedure whereby another different body will make a decision. This requirement may be voluntary or compulsory (in general terms, the latter possibility is the most common). In those cases, administrative laws refer to such report as *informe preceptivo*, which would be roughly translated as compulsory report.

(municipal social services), as well as the health condition report (healthcare centre) both helped to justify the decision.

According to this background, the *Consellería de Bienestar Social* approved the '*programa de atención individualizada*', granting the disabled a monthly allowance of 600 Euros, and providing the petition, granting free admission to a 24 hour assisting living facility or retirement home.

II.- Point out the reasons you find to challenge the administrative decisions described in point c. Consider, for example, arguing about the grading scale, the granted assistance coverage, or the amount of the awarded allowance. What monitoring tests should you use?

III.- Suppose that a citizen's application to be granted the above mentioned benefits is rejected on the grounds of failure to submit certain mandatory documents (i.e. financial personal data). Do you think the authority is basing the decision on discretionary or regulatory criteria?

IV.- Let us assume that a small municipality has limited means to properly clean up one of the beaches under its responsibility; the Town Hall requires the Regional Government's assistance to meet its obligation. Such assistance is not mandatory according to current legislation. Do you find asking the regional government to be lawful notwithstanding it is not stated by law? Identify the type of power the Town Hall is implementing when asking the regional government for assistance.

V.- The power to impose penalties in the case of illegal discharges to water courses (public domain) is assigned to the Júcar river basin authorities (*Confederación hidrográfica del Júcar*) according to the Spanish Constitution. However, protecting the environment is assigned to the regional authorities. In a particular case, the Valencia Regional Government fines a company for making illegal polluting discharges. What should the company do to defend its position?

## **CHAPTER IV.- SPECIAL NATURE AND TYPOLOGY OF ADMINISTRATIVE ACTION. THE SELF-ENFORCING THE *AUTOTUTELA* PRINCIPLE.**

### **I.- THE *AUTOTUTELA* PRINCIPLE, SPECIAL NATURE.**

*Autotutela* basically means that the public administrations can avoid judicial review in an ordinary action, directly enforcing its decisions; citizens are obviously allowed to challenge regulations and administrative statements, but only after they have become effective.

As a result, Administrative judicial review has been traditionally reported as *jurisdicción revisora*. Courts always act after the decision has been implemented, unless provisional measures are granted. And the latter is not as common as it should be.

To fully understand this feature, it is essential to tell the difference between lawfulness and efficacy of administrative decisions and regulations. Both are regarded effective and fully enforceable from the very beginning; actually, from the time they are notified or published. Both decisions and regulations are presumed to be lawful, and citizens have the burden to challenge them. Once the citizen proves the decision or regulation is against the law, the Court will overturn it and its efficacy will cease.

The following list tells the key privileges that can be worked out in accordance with the '*autotutela*' principle:

- Enforceability (*Ejecutividad*). Administrative decisions and regulations are inherently enforceable. This privilege is set forth in sections 56, 57 and 94 of *LRJPAC*.
- Enforcing action (*acción de oficio*). The administrative body does not need to get previous judicial support to enforce its own decisions. This power is only preempted when Courts grant preliminary relief by maintaining the decision's efficacy.
- Injunction relief procedures are forbidden (*prohibición de interdictos*). Injunctions in Spain are brief proceedings which have the intention to grant possession or withhold disputed property. *Ley 1/2000 de 7 de enero de enjuiciamiento civil* sets forth several possessory proceedings characterised for quickly granting preliminary relief. Afterwards, both parties may seek a ruling of the matter in a separate ordinary procedure. However, administrative decisions related to real estate and public domain are immune to possessor's injunctions,<sup>5</sup> with certain exceptions that will be hereinafter studied.
- Appealing administrative decisions, both through the administrative channel or judicial review, does not automatically grant staying execution or deferral of enforcement.

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<sup>5</sup> Conflicts where someone is claiming that another party is infringing on their possession of a piece of land, asset, etc.

As already told, appeals do not stay the statement's efficacy. The decision will not be adjourned or reprieved, unless the upper administrative body or the Court issue provisional remedies. This requires a broad analysis of the public and private interest involved, as well as other aspects such as assessing eventual irreparable and permanent damages, or possible inefficacy of the judicial ruling; *fumus boni iuris* is another test to take into account.

## II.- TYPES OF 'AUTOTUTELA'

### 1.- Declaratory '*autotutela*'.

This feature defines the nature of the administrative decision itself (*ejecutividad del acto*). Every single administrative decision is benefited with a presumption of accuracy and lawfulness. Summing up, the administrative decision is an enforceable order without previous enabling judicial intervention.

The Spanish term '*Título ejecutivo*' refers to a document that, by law, allows the holder to directly enforce it. In private law, it allows to get a pre-judgement attachment on the defendant's goods at the very beginning of the judicial review process,<sup>6</sup> before the trial actually begins. If after trial, the plaintiff's lawsuit is proven to have no merits, the attachment shall be lifted; assuming the Judge rules the case for the plaintiff the opinion shall order the goods to be sold and the resulting amount to be paid to the plaintiff.

In administrative law the meaning of '*título ejecutivo*' is even broader, as the document, in our case the administrative decision, is directly enforceable not only over the citizen's property, but with regards to every other result included in the decision. The decision, thus, declares and even creates rights and obligations for citizens, and all of them have to meet its goals.

### 2.- Executive *autotutela*.

The so called executive '*autotutela*' (*autotutela ejecutiva o acción de oficio*) refers to different proceedings instructed by law that public bodies can undertake to enforce the administrative statements.

Once the decision is correctly notified, the citizen must comply with it; if he/she fails, the public body has to carry out one of the following enforced proceedings:

#### a.- **Seizure proceeding** (*via de apremio*).

When according to the decision the citizen is liable to pay an amount of money, whatever the reason may be, the public administration will start a procedure called *via de apremio*. As a result, as long as the citizen does not pay, his properties and rights will

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<sup>6</sup> Attachment: Preliminary legal seizure of property to force compliance with a decision which may be obtained in a pending suit.

be seized. Therefore, the procedure will end up with an attachment order (*providencia de apremio*).

In such proceeding, the citizen is not allowed to argue the decision that is being enforced. According to Section 167.3 *Ley 58/2003 de 17 de diciembre, General Tributaria*, challenging an attachment order is only possible according to the following merits:

- Complete pay-off or claim for expiry time. In the first case, the offender pays and cancels the debt; regarding expiry, the administrative body cannot enforce the payment because it failed to start the enforcing process within the deadline. It has nothing to do with the lapsing of the offence by statute of limitations; expiry refers in this case to the lapse of time set to enforce the payment.
- Application for deferment, installment payment plan, and set-off of debits or credits. All these options are only available during the period for voluntary payment; once expired, no one –for example a tax payer- can be granted such benefits.
- Other suspension causes of the enforcing procedure (formal reasons).
- Lack of notification of the net amount of money to be paid-off.
- Overturn of the decision imposing the debt that is under the enforcing process.
- Formal defects in the attachment order dealing with error or omission identifying the debt or the debtor.

All the above mentioned appealing grounds are fixed by law. The plaintiff can only use such causes to appeal the enforcing order. If the appeal is based on other grounds the Administrative body or the Court will dismiss the case.

**b.- Infliction of physical force** (*compulsión sobre las personas*).

This way to enforce administrative decisions deals with personal obligations no one else can carry out. It normally refers to situations related to safeguarding the public safety.

**c.- Subsidiary enforcement** (*ejecución subsidiaria*).

Whenever an administrative decision imposes a citizen a duty than can be rendered by someone else, the administrative body should warn that, if he/she fails to comply with it, public employees or a hired contractor will replace him/her. Obviously, in such case the administrative body will charge the citizen the amount of money spent to enforce the decision. In the event the citizen failed to pay-off the bill, the public body should enforce the payment through the seizure proceeding.



The warning stage is an essential part of the proceeding, since subsidiary enforcement cannot be carried out without previous notice. In order to start the proceeding it is necessary to previously have a fully enforceable decision (a non-appealable decision or a challenged decision not suspended by the Court).

This subsidiary enforcement process is usually a separate piece of the; this is relevant to point out, since it has implications concerning deadlines and expiry time.

d.- **Periodic penalty payment** (*multas coercitivas*).

In certain cases, before getting the subsidiary enforcement process started, alternative measures intending to persuade the citizen to voluntarily meet the decision might be helpful. Administrative law allows to impose the offender consecutive fines for that purpose.

The *LRJPAC* lays down a general limit. Fines cannot exceed 20% of the total cost the citizen should be charged by completely meeting the decision.

### 3.- **Reduplicative *autotutela* or *autotutela* in second power.**

Under this concept we are facing additional and arguable administrative privileges. Some of them are currently outdated and obsolete. Others still remain.

There are three main cases:

- Finishing the administrative procedure, including appeals, as a pre-condition to bring the case (the decision) to Courts: exhausting the administrative channel (*agotamiento de la vía administrativa*). This privilege is currently in force. The citizen has the burden to appeal the administrative decision to the upper authority (unless the decision was already delivered by the highest authority) before challenging the decision to Courts. Such burden keeps the citizen out of judicial review during several months and may cause damages or nuisances.
- The direct punishing power (*potestad sancionadora directa*). In Common law it is certainly unusual to give the public administration the power to directly impose on citizens fines or penalties. As a general rule, the public body needs to bring the case to Courts. On the contrary, in our system, the public administration can directly proceed against the offender imposing and enforcing penalties according to law. Then, the offender might challenge the decision, which in certain cases will stay the enforcement according to law,<sup>7</sup> or according to the Court decision.

This power is strongly restrictive for citizen's rights. Actually, it could be argued that one party of the legal relation is limiting someone else's rights, which is certainly impossible in regular relations among citizens. Opposing this argument, it could be said that the public administration is not gaining any personal benefit, as it is just enforcing the law and protecting the public interest.

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<sup>7</sup> For example, section 212.3 *Ley General Tributaria*. (2003) declares that once the offender appeals the decision imposing a fine, enforcement will be immediately stayed. No fee is required and no financial penalty or interest will become due for late payment.

- ‘*Solve et repete*’ rule (not in force nowadays ex section. 24 CE). This classic rule in Spanish administrative law, today obsolete, charged the citizen with the burden to pay before being allowed to seek judicial review. Before issuing the appeal, the citizen had to pay, or to give security for, the fine or whatever other financial liability stated in the administrative decision. If not, the appeal would be dismissed the right away.

This privilege was regarded by Courts to be conflicting section 24 CE, which gives citizens the right to an effective judicial protection (*tutela judicial efectiva*). Putting the payment far above the right to appeal obviously hampers access to judicial review. In addition, section 24 CE is a fundamental right.

### III.- LIMITS TO AUTOTUTELA.

As already discussed, injunctions against the public administration are forbidden as a result of the *autotutela* principle. As a result, citizens cannot intend to get an injunction so to provisionally keep his/her possession or ownership in an expropriation case. Being that true, the privilege does not apply to the following cases, according to section 101 LRJPAC: whenever the public body is acting either out of power (*incompetencia*), or without any proceeding (*vía de hecho*).

On the contrary, the public administration can directly recover its properties using *autotutela* powers (*interdictum proprium*). Such proceeding ends up in a recovery order based on the legal assumption that the offender has unlawfully occupied a publicly owned estate. It will also lead to an eviction order in case the property is occupied by people.

However, the privilege is not always available when it comes to recovering public assets other than public domain (*bienes patrimoniales*). Such public properties are characterised for not being attached to any public service or use. In these cases, *interdictum proprium* is only available when undue occupation has not lasted for more than one year. Otherwise, the public body will have to bring the case to civil Courts.

Regarding public domain, *interdictum proprium* demands the Administration to justify its ownership (*titularidad demanial*). When it is unclear or disputed, the public body should bring the case to civil Courts. Nevertheless, proving ownership is not required referring to coastal areas, public water, livestock or cattle trails (*vías pecuarias*), and other ‘natural’ areas declared publicly owned by law. The only condition is that they must have been previously demarcated (*deslindados*).

On the other hand, the public administration cannot benefit from the privilege of *autotutela* when contradicting its own previous decisions (*doctrina de los propios actos*). Administrative bodies cannot change their decisions without first reviewing them through the accurate proceedings (*revisión de oficio*), with the enabling participation of the *Consejo de Estado* or the Courts depending on the case.

The best way to object enforceable administrative decisions is seeking preliminary relief (*tutela cautelar*). The citizen may ask the upper administrative body (appeal for review),

or the Administrative Court (appeal for judicial review), to withhold the enforcing procedure (sections 104 and 111 *LRJPAC*, and 129 et ss *LJCA*).

Administrative bodies and Courts are however reluctant to grant preliminary relief, even though Spanish Courts have progressed into a more open position in this area. The former *LJCA* (1956) only allowed withholding an enforceable administrative order when it was clearly proved that its execution would lead to damages unable or extremely difficult to get redress.

After the CE, things started to change. Several judgments of the Constitutional Court stated that although the *autotutela* principle was acceptable in terms of efficacy, preliminary relief was closely linked to section 24 CE, which states the fundamental right to a full and effective judicial review. Therefore, preliminary relief could no longer be regarded as something seldomly used, or an extraordinary remedy (STC 22/1984 and STC 14/1992, 148/1993, 76/1996, among others).

The new *LJCA* (1998) takes on this jurisprudence and declares that preliminary relief is a judicial discretionary power that Courts may use as often as it is necessary, according to the features of each case. To help the Courts to decide on a case by case basis, the law lists a group of tests which have been broadly developed by the jurisprudence.

- According to section 130.1 *LJCA*, preliminary relief should only be granted when enforcing the decision would result in a situation where the appeal would not have any effect (*pérdida de la finalidad legítima del recurso, periculum in mora*). In other words, the possible positive judgment would not entirely or partially fulfill the plaintiff's claim.
- Detailed evaluation of the public and private interest involved. The Court has to weight the effects of implementing the decision in both areas. Section 130.1 *LJCA* states: '*previa valoración circunstanciada de todos los intereses en conflicto*'. Stressing the relevance of this test, section 130.2 warns against wrong staying decisions that could eventually lead to serious damages either in public or private interests. In such cases, preliminary relief would not be granted: '*perturbación grave de los intereses generales o de tercero*'.
- According to section 728 *LEC*, the Court should take into account the so called: *fumus boni iuris*. This criterion is not enough itself to grant preliminary relief; in other cases, trial would not be necessary. Most cases refer to administrative statements whose features clearly show that they are absolutely null and void.

*Fumus boni iuris* is, however, a stronger test when it comes to remedies against administrative inaction. According to section 136.1 *LJCA* this is the most relevant aspect to bear in mind. The precautionary measure will be granted unless it is clearly shown that section 29 and 30 *LJCA*'s conditions do not meet in the case.

- Another relevant test is the so called *perjuicio irreparable*. Courts have always considered that whenever the decision might lead to big losses impossible to repair, precautionary measures should be granted.

Preliminary relief is not only available under Court supervision; administrative bodies can issue staying orders under citizen's request in appealing proceedings within the administrative channel. Section 111 *LRJPAC* lays down the conditions, which are not significantly different from the above mentioned. It is worth mentioning, however, that the *fumus boni iuris* criteria is expressly mentioned in the section, but with a particular link to one of the causes referred to in section 62.1 *LRJPAC* (null and void causes).

Regarding tax law, adjudication of preliminary relief is even wider open. Preliminary relief is automatically granted in this area, both in the administrative adjudication process and in the judicial process. No caution is required.

#### **IV.- CITIZEN PROTECTION BEFORE *AUTOTUTELA*.**

##### **1- Formalities.**

Administrative proceedings are overly formal. This is certainly a burden for citizens, which must attend a sequence of acts to get the demanded decision. Nevertheless, the procedure is also an important tool to safeguard their rights. It allows a hearing, access to relevant information, submitting evidences and other documents, appealing the final decision, etc. All these actions are essential to protect citizen's rights.

The proceeding is not hetero-compositive; one of the parties involved in the conflict, the public body, delivers the final decision. Meanwhile, the sequence of formalities sufficiently ensures the rights to defence, openness and transparency.

As citizens do, the public body has to meet all the stages of the proceeding. However, failure to observe formal requirements does not necessarily lead to a judgment declaring the decision null and void. Even when the plaintiff gets a favorable judgment, in most cases the public body will be able to review, amend and redress that it's wrong.

Administrative proceedings are complex and diverse; no common sequence of acts exist. However, there is a piece of proceeding that has to be always present: the hearing (*audiencia*). Those who happen to be the concerned parties in the proceeding (applicants or third parties granted legal standing) have the right to be heard and issue their pleadings or allegations during the whole proceeding, but they are expressly allowed to at least in one separate phase, the hearing.

Bureaucratic burdens may lead to weaker outcomes and results in administrative policies, and undermines the effectiveness of enforcing decisions. It also affects citizen's rights, especially in terms of timing. To overcome such undesirable side effects, the following solutions are useful, although they may sometimes lead to additional problems.

- The so called: fleeing (*huida*) from administrative law in a bunch of techniques intended to reach more efficiency. The ultimate goal is to skip from administrative law assuming that its rules and procedures are not suitable in many areas of public action. Especially in those closely related to market or the economy.

Two main solutions have been implemented: from a subjective dimension, by making use of certain categories of legal entities under civil law (*personificación privada*). From an objective dimension, allowing public bodies, agencies, and other public entities to use civil or labor law in certain conditions. Such instrumental use of private law is not compatible with the *autotutela* privilege. Thus, as long as it is used, the public body cannot directly enforce its decisions.

- Another relevant strategy is to facilitate electronic proceedings. E-administration creates new opportunities to reduce bureaucratic burdens. It allows public bodies to share information among them and even to develop proceedings completely online. Besides, it allows citizens to interact with public bodies on the internet, submitting their applications, complaints, documents, appeals, etc 24-7. Public bodies should create an effective platform for Electronic Processing for that purpose.
- In every proceeding, simplifying and reducing timing, administrative and legal requirements, administrative paperwork, or even remove certain steps and phases of the procedure, may lead to better results. Speeding up administrative procedures shall benefit both the public interest and the citizen's rights, and will reduce costs.

## **2.- Decisions declaring rights cannot be changed.**

As already mentioned, once a decision is taken benefiting someone the public body cannot unilaterally impose other terms or conditions. Changing the decision requires attending certain procedures where another entity must take part (*Consejo de Estado* or Courts).

## **3.- Every administrative decision must be reasoned.**

The decision shall state the exact grounds on which it is based. The statement must be communicated, reasons given, all the relevant facts reflected, legal founding, and the conclusion. Reasoning is essential in administrative decisions, since it is the only way citizens are allowed to know the exact grounds of the decision, and consequently appeal with full knowledge and guarantees. Moreover, it allows upper administrative bodies and Courts to fully monitor and oversee the lower bodies' decisions.

Regulated administrative statements (*actos reglados*) have to be reasoned, but discretionary decisions require reinforced reasoning. In the first case it is likely enough to set the facts and the applied regulation, but when it comes to discretionary decisions it is not enough, since the public body is allowed to choose between different options; all of them fully legal. That makes it necessary to explain why the chosen option reflects better the public interest. Otherwise, the public body might be acting unlawfully and arbitrarily.

## QUESTION PAPER.

I.- When we state that the Administrative jurisdiction is *revisora*, what are we trying to express? Is there any exception?

II.- Administrative orders are directly enforceable (*títulos ejecutivos*)'. How do you understand this? Leaving aside administrative law, do you know any other equivalent enforceable orders or documents in our legal system?

III.- Explain the four *autotutela* enforcing techniques or modalities.

IV.- Complete the following table:

| TECHNIQUE   | LEGAL RELATION        |
|---|-----------------------|
| <b>SEIZURE<br/>PROCEEDING<br/>VIA DE APREMIO</b>                | FINANCIAL OBLIGATIONS |
| <b>PHISICAL<br/>FORCE<br/>COMPULSIÓN A<br/>LAS PERSONAS</b>     |                       |
| <b>SUBSIDIARY<br/>ENFORCEMENT<br/>EJECUCIÓN<br/>SUBSIDIARIA</b> |                       |
| <b>PERIODIC<br/>FINES MULTAS<br/>COERCITIVAS</b>                |                       |

V.- What rule means that before issuing an appeal the citizen must pay the amount stated in the notified administrative decision? Is this privilege currently valid? Express your opinion (pros and cons).

VI.- What does it mean that the public administration has always to enforce its own decisions providing they benefit citizens?

VII.- List and explain the type of administrative decisions that require always reasoning.

VIII.- Find and explain the difference between fully valid and effective.

## CASES.

I.-The municipal authority rejects without any reason an application for a building permit, which is a regulated decision. Is the decision valid? Is it effective? How could the concerned party stop it being enforced?

II.- A citizen was granted financial aid (*subvención*) by the Town Hall for a business opening. It has been two months since the amount became due and payable, whilst the Town Hall has not paid off the debt. What kind of obligation is the Town Hall not meeting in this case? What can the citizen do to get the payment?

III.- The Town Hall orders to demolish a building while assuming that its condition is on the point of ruin. The *declaración de ruina* of a building in Spain is a legal condition. It does not necessarily imply the building is on the verge of collapsing. It simply happens when the building is decaying and the cost of rehabilitation exceeds 50% of the total cost of re-building with the same features. Moreover, a demolishing order will only take place when, together with the decay condition, there are additional facts such as risks for citizens or adjacent buildings. Assuming in this case the risks have become clear and noticeable, the order states that demolishing should take place within two months from the notice date. The owner does not meet the order within the granted period. What should the Town Hall do in this case to enforce the order?

IV.- The Town Hall issues a demolition order after declaring a building in ruin condition. However, a heritage protection NGO immediately appeals the decision on the grounds of cultural assets at risk. The NGO brings the case to Court but, assuming that the order is directly enforceable, what should the NGO demand the Court to avoid it?

V.- Consider an administrative inquiry processing an application to become declared disabled. One of the documents is a social record that must be brought in by a publicly owned company: AVASP. S.A. The report states the citizen is not eligible to be declared dependent. All of the public company employees are not civil servants. According to these facts, do you think the report features *presunción de legalidad*?

VI.- An administrative eviction order is deemed final and therefore not appealable. The concerned citizen is occupying a publicly owned apartment without holding any enabling condition (*título*). The public body starts a proceeding seeking for the occupants' removal. What enforcing tools should the public body use in case the citizens do not comply with the notice of termination?

VII- The Town Hall squatted in several private lands to build a road. Although acting under legal authority, it did not use the expropriation proceeding. Actually administrative officers acted without previously enabling the decision resulting from an administrative proceeding (*vía de hecho*). The citizen seeks for injunction relief before civil Courts, intending to recover possession. Is this possible, taking into account that the administrative body is a public institution under administrative law, in theory, to be benefited with the *autotutela* privilege? In other words, should the Court accept the defendant's demur challenging appropriate jurisdiction (on the grounds that civil Courts have no jurisdiction over administrative decisions)? Remember the interactions between the *autotutela* privilege and injunction relief.

X- The Regional Government assumes that achieving better results while developing industrial land would be easier as long as a publicly owned company was created for that purpose. How do you call these type of operations?

XI.- The public administration got a piece of land by participating in the benefits of implementing an urban development plan. According to Spanish zoning law, developers must share part of the capital gains with the Administration. In other words, the administration allows the developer to turn greenfield into urban land creating surplus values; in return, the administration participates in the benefits for free from the result of developed land for public use, as well as plots for building purposes (not for public use). Assuming this background, imagine that a citizen unlawfully occupies one of these pieces of land. The Town Hall puts up with this situation for three years. A new political party wins the next elections and takes office in the municipal government. The new administration decides to recover possession in order to auction the property so to get the benefits. How should the Town Hall recover possession in this case?

XII.- The Administration rejects a citizen's application for a grant stating that the student is not eligible as he has enough financial means. The student appeals the decision on the grounds of a wrong understanding of the actual family income. He shows documents leading to that conclusion. The upper administrative body lays down a statement confirming the lower authority's decision, without giving new reasons to confront such pleadings. What should the concerned citizen do in this case?



## CHAPTER V. SOURCES OF ADMINISTRATIVE LAW. STRUCTURE AND CHARACTERISTICS.

### I.- SOURCES OF ADMINISTRATIVE LAW.

The sources of administrative law are not substantially different to those operating in other areas of law. Thus, the aim of this unit is to focus on sources which are especially relevant in administrative law, as well as in those where the public administration is directly involved or plays a key role in the lawmaking process.

Following a classical approach, sources of administrative law could be classified in:

#### 1.- Primary sources.

The Constitution, Acts and Statutes are the main primary sources (*Constitución y Leyes*). The Spanish legal system is hierarchical, so norms of a lower rank cannot override rules of a higher one. The Spanish Constitution was approved in 1978 and holds the higher status in the legal system. It inspires the rest of the legal system, and its rules must be met by every authority of the state, including the Crown.

International treaties. As stated in section 96 CE, international treaties become internal laws once they have been signed, ratified and published in the Official State Gazette (*Boletín Oficial del Estado*). If the treaty yields constitutional responsibilities and powers to an international organisation or institution, the authorisation must be delivered by means of an Organic Law (section 93 CE).

If the treaty concerns either of the following matters which shall require Parliament's authorisation (section 94 CE):

- a.- Certain matters of political or military nature.
- b.- The integrity of the State.
- c.- Fundamental rights and duties laid down at Title I CE.
- d.- Creates financial obligations for the public treasury
- e.- Involves modifications or repeals some law.
- f.- Requires legislative measures for its execution and enforcement

Any other treaty may be signed by the Government, which shall be reported by Parliament (section 9IV.2 CE). As stated in section 95 CE, any international treaty that might eventually contradict the Constitution shall require prior constitutional revision. Either Government or the Chambers (*Congreso y Senado*) are allowed to ask the Constitutional Court to decide whether the contradiction exists.

Statutes and Acts should be an equivalent concept to the Spanish term (*leyes*). However, the Spanish legal system is made of several instruments: *Ley orgánica*, *Ley*, *Decreto Ley*, *Decreto legislativo*. All of them enjoy the same position in terms of hierarchy but differs both in procedural and material conditions.

- Organic Law (*Ley Orgánica*). Organic Laws have two key differences with regards to ordinary laws (section 81 CE) :

-Organic Laws only regulate certain relevant issues (section 81.1 CE). Among them: the exercise of fundamental rights and public liberties; the Statutes of Autonomy; the general electoral system; the Ombudsman (*Defensor del Pueblo*, section 54 CE); the Council of State (*Consejo de Estado*, section 107 SC); the Constitutional Court (*Tribunal Constitucional*, section 165 CE) and the popular legislative initiative (section 87.3 CE).

-Organic laws require for approval, modification or repeal absolute majority of the Congress in a final vote of the entire bill (section 81.2 CE).

- Statutes (*Ley*). Statute is every piece of legislation whose subject matter is not reserved as to organic laws by the Constitution. Approving process always starts in Congress. After Congress' approval, the bill is discussed in the Senate, which has the power to approve, amend or veto. Whatever the result was, Congress keeps the final decision (section 90 CE). Statutes require simple majority of both chambers.

Within this category the *Decretos ley* and *Decretos legislativos* should be included. Both instruments shall be studied with certain detail later on, as they are approved by the executive branch with a secondary participation of the Parliament.

- Regulations (*reglamentos*) are the most characteristic administrative rule. That is because it is the only typology where the public administration controls the whole regulatory-making process. Regulations are ranked below laws.

The term regulation refers to any general rule dictated by the executive power. However, even though according to Section 97 CE the Government monopolises the regulatory power, other constitutional institutions are also benefited with such power in order to regulate their own internal functioning and procedures. For instance: the Congress and the Senate (section 72.1 CE), the General Counsel of the Judiciary (section 139 LOPJ) or the Constitutional Court (section 2.2 LOTC).

Regulations are created to complete, specify and help to implement acts and statutes; obviously, they cannot either oppose legal rules or regulate issues expressly reserved as to laws. In disciplinary issues, regulations cannot create new offences or violations. As an exception, organisational regulations are not linked to an existing statute, but they only have internal effects (section 23.3 of *Ley 50/1997, de 27 de noviembre, del Gobierno*).

Regarding the central government of Spain, there are the following types of regulations:

- Decrees (*Decreto*) from the Council of Ministers
- Orders (*Orden*) from the Ministers and Delegated Commissions.
- Instructions (*Instrucción*) and notices (*Circulares*) from lower political authorities and high officials of the public administration

The regional governments are also allowed to issue regulations, as well as the local governments. Regional regulations are similar to those of the central government. Regulations at the local level are mainly by-laws.

Administrative statements cannot be regarded rules. They are simply decisions that implement and enforce rules on a case by case basis. Unlike decisions, regulations have the following features:

- **Generality.** The regulation tends to affect all citizens or at least groups of non-individualised citizens.
- **Abstraction.** While decisions focus on specific cases, the regulation tries to cover every possible situation related to its regulatory scope. It intends to plan ahead for future conflicts.
- **As a general rule,** regulations have to be officially published, while decisions are just individually notified (except for massive or plural decisions).
- **Hierarchy.** There is no hierarchy among decisions, while there is between regulations. Some of them enjoy a higher position than others.
- **Regulations are created to remain in the future,** and as a general rule they remain in force up until a subsequent law or regulation repeals or contradicts them.

In 1986, Spain became a member of the European Union and yielded certain state powers to such organisation. European treaties, as international rules, are directly enforceable as part of the national legal system once signed, ratified and published in the Official State Gazette. The Spanish Supreme Court and the European Court of Justice have both sentenced that any conflict between domestic and European Union legislation must be solved according to the principle of supremacy of Community law.

As primary E.U. legislation (*derecho originario*), there are the Union Treaties and the General Principles of Law. In this group the E.U.'s international agreements with third countries should be also included. As secondary legislation (*derecho derivado*) there are several legislative acts (regulations, directives and decisions), together with non-legislative acts (delegated acts, implementing acts, recommendations and opinions, inter-institutional agreements, declarations, resolutions and action programmes). Lastly, there are conventions between member states in the form of coreper decisions and international agreements.

the position of the primary and secondary European law with relation to the different domestic legal sources is certainly arguable. Once a state becomes a member of the European Union the EU law becomes part of its domestic legal system. Its relation with the rest of domestic legal sources will be therefore based on the competence principle, (not the hierarchy principle). As an exception, the Constitution remains in a higher position, since it is the enabling legislation that makes it possible for a state to become a member of the E.U, and therefore adopt the E.U. legal framework.

## **2.- Complementary sources.**

Customary law is not a common source of administrative law but it is present in certain areas such as municipal law, water law, and cattle road regulations (*concejo abierto, aprovechamientos colectivos de aguas, paso de ganado etc*). Moreover, it is always *secundum legem* in administrative law.

This source of law should not be mixed up with the precedent. Precedents are practices and criteria that have to be kept in following decisions. However, precedent is not binding for the administrative body; the body might diverge from the precedent as long as it is sufficiently justified. Then, the key aspect is to provide an accurate reasoning to back up the new decision.

The general principles of law are as relevant in administrative law as they are in other areas of the legal system. Most of them emerge from the Spanish Constitution, either expressly mentioned or implicitly regarded. Courts (case law) and academic studies (*doctrina*) have contributed as well to define each principle of law.

## **3.- Clarifying sources.**

Reporting case law as a source of administrative law is correct even though judicial opinions are not as relevant as in Common law countries. Case law in Spain, as well as in most European continental countries, plays a relevant yet accessory role. While in common law countries case law is a primary source of law, with even a prevalent position in many areas with relation to statutory law, in civil law countries it only provides non-binding criteria for the lower Courts. Courts can diverge from case law on a case by case basis, although their decisions might be challenged before the upper Courts. Upper Courts, however, could accept the new understanding.

To sum up, case law may help the legal operators but it cannot be reported as a source of binding rules.

The same remark goes to the academic studies, which obviously are not a binding source of law. Nevertheless, they are useful and can inspire the legislative, the judiciary, and the administrative bodies.

## **II.- ORGANISATIONAL PRINCIPLES.**

Primary sources of law interact on the basis of two principles. The hierarchy principle means that certain regulatory instruments are prevalent to others. For example, the Constitution prevails in every case, and the acts and statutes prevail over regulations. The idea is that some sources are in a higher position in the legal system.

The competence principle means that every political or administrative structure has its own areas of power. In theory, such spheres should work as separate policy areas, collaborating when interacting or sharing functions (see sections 148-149, et ss. CE).

According to section 149.3 CE, state law can be reported as subsidiary law (*derecho supletorio*) for regional law. Statutes are deemed subsidiary when, though only indirectly applicable, are called to resolve by extension or analogy a point unaddressed by the code. However, after STC 61/1997, March 20, the subsidiary principle must be regarded an exception and is subject to strict conditions. Regions cannot waive its right-duty to regulate any matter under their assigned responsibilities, pretending to use the subsidiary principle to fill in the gap.

### III.- IMPLEMENTATION CRITERIA.

#### 1.- Timing issues:

According to section 2 of the Spanish Civil Code, Statutes come into force 20 days after their complete publication in the official journal or gazette. However, the Statute can anticipate or move forward the *vacatio legis*. With regards to regulations, section 24.4 *Ley del Gobierno* states that they will come into force once completely published in the official journal. The regulation shall state the corresponding date to come into force.

Regarding the time effects, it is worth noting that neither **statutes** nor **regulations** can be regarded retroactive when imposing penalties, restrictions or limiting rights (section 9.3 CE). On the contrary, they can affect previous situations as long as they are more advantageous. The retroactive limitation, however, is not complete. If it was, improvements in the current legal framework should not be feasible. Increasing conditions, limits and burdens are sometimes necessary to reach social goals and safeguarding existing rights should not be a brick wall.

For example, it is reasonable to impose greater safety conditions to industrial companies, even though such decision might lead to greater expenses. The key issue here is to make it in a way the new measures would not be completely unexpected. Enough time to get used to the new situation should be necessary too. In other words, retroactive effect of restrictive rules is only possible as long as the citizen is given enough means and time to change with the new requirements.

The temporary provisions (*disposiciones transitorias*), which are included at the end of laws and regulations, are the core issue for that purpose. Not being careful with such matters in the rule-making process might lead to state liability (*responsabilidad patrimonial ordinaria o responsabilidad del Estado legislador*).

On the other hand, it is acceptable that rules re-define vested rights, even imposing new burdens and conditions, when they do not concern the right's hard core.

Let us focus now on timing conditions with regards to **administrative decisions**. According to section 57 *LRJPAC*, they only become effective and enforceable once notified. Their effects may take place from that moment on or, if stated, move enforcement ahead. Regarding retroactive effects, there is no problem when the new administrative statement is more advantageous. However, limiting and restrictive decisions shall only anticipate their effects as long as all the following conditions should appear:

- The new decision is replacing a previous overturned decision.
- Facts were present in the date the new decision was pretended to become enforceable.
- No other rights or legitimate interests are expected to be damaged.

Laws and regulations cease to be in force when expressly or implicitly repealed. The new rule must be of the same or higher rank. Sometimes, statutes and regulations themselves state a maximum time to be in force, which is quite usual in plans and programmes. Other regulations, or even administrative decisions, may include a defeasance clause (*condición resolutoria*), or a precedent condition (*condición suspensiva*). Extending the deadline is also possible as well as tacit extensions, under certain conditions.

## 2.- Territory.

Statutes and regulations are in force in the territory where the enacting authority holds power. They do not have any effect, as a general rule, out of their borders.

## 3.- Rules of understanding and interpretation.

Administrative law shares the same interpretation rules as the rest of the areas of law do. Principles of law, and in particular the public interest principle, are significantly important in this field.

It is worth noting that regulations are not deemed real understanding of law '*interpretación auténtica*, in the sense that they are always accurate and precise. Regulations come from the executive branch, while Statutes are enacted by the legislative, therefore, such a conclusion would clearly conflict the separation of powers principle.

## IV.- NON-PARLIAMENTARY RULES RANKED AS LAWS.

The Decree-Law (*Decreto-ley*; section 86 CE) is a provisional rule that the Government may issue for extraordinary and urgent matters. It is ranked as law.

These rules are only allowed when extraordinary and urgent reasons require a fast response. The *extraordinaria y urgente necesidad* concept established in section 86 CE is vague (*concepto jurídico indeterminado*). To help understand this concept Courts have stated that decree laws cannot regulate structural matters. In particular, they are not suitable for the following matters:

- Matters that are reserved as to organic laws.
- Basic institutions of the State.
- Fundamental rights of the citizens regulated in Title I CE
- The fundamentals of the Autonomous Communities.
- The general electoral law.

Regarding the fundamental rights, however, decree law is not completely banned. Actually, it would be rather difficult to have decree laws in practice unless they can regulate certain aspects concerning fundamental rights. Almost every relevant issue has something to do with a fundamental right. Therefore, the limit for decree laws is to regulate the essential core of fundamental rights. Regulating incidental issues connected to fundamental rights is according to CE.

Decree Laws must be ratified by Congress within a period of 30 days. The Congress must be conveyed to address this issue. The debate will address the whole decree and the ratification must refer to the whole content. If the decree is not ratified its effects will be *ex nunc*. Thus, it will be regarded valid and effective from the enactment date to the voting session date. From that point on, the decree will be repealed. In the event the Congress was not conveyed to ratify the decree will be repealed too.

Every political group in Congress may apply the decree to be processed as law. Assuming such initiative is allowed, the decree will become a statute. This is particularly useful when intending to gather more political support, introducing improvements, as well as turning a temporary law into a structural law.

The Legislative Decree (*delegación legislativa-decreto legislativo*) is always issued by the government as a result of a previous delegation from Congress (section 85 CE). The resulting rule is also ranked as law.

Legislative delegation must be granted by Basic Law (*Ley de Bases*) whenever it mandates Government drafting a detailed statute (the parliament lays down the fundamentals and government puts forward a detailed statute). As long as parliament only mandates to consolidate several statutes and their amendments into a single text, just an ordinary law is required (consolidated statute, section 82.2 SC).

Delegation must be expressly granted to the government and must refer to a particular matter. It should lay down a specific period of time to fulfill the rule-making process (section 82.3 SC)

The Spanish Constitutional Court (*TC*) has the power to monitor the legislative delegation as well as the legislative decree itself. The Supreme Court (*TS*) is only allowed to supervise whether the legislative decree has exceeded or not the delegation terms and conditions. Although it will be discussed later on, it is worth mentioning that issues included in the decree exceeding the delegation scope must be regarded simple regulations, not enjoying legislative rank. As a result, such parts of the legislative decree can be fully monitored by Administrative Courts (section 82.6 CE and section 1 *LJCA*).

## **V.- EUROPEAN LAW OVERVIEW.**

Together with E.U. treaties, which are actually part of the Spanish legal system once they were adopted, the so called secondary E.U. legislation (*derecho derivado*) plays a relevant role in Spanish administrative law.

**Regulations** are fully enforceable in every member state as soon as they are passed. They feature the same rank as domestic laws. No action is required by the national governments or the legislature to implement EU regulations. Regulations are passed either jointly by the EU Council and European Parliament, or by the Commission alone.

**Directives** are addressed to national authorities, who must then take action to make them part of domestic law. As long as directives are not directly addressed to citizens, they are not directly granted rights or affected by obligations. EU directives establish goals that every member state must meet. Domestic authorities have to adapt their own legislation to achieve the goals.

The E.U. is made up of 27 countries and it would be certainly impossible to lay down a common legislation in many areas not allowing them to adapt their domestic rules to the E.U. policies. Domestic legal systems differ broadly in the European Countries, and its political, territorial and institutional structures make direct enforcement of directives impossible.

Directives specify a deadline for their implementation into domestic law. When states do not meet the deadline, directives become partly in force according to the so called: direct vertical ascending efficacy principle. As a result, citizens become allowed to claim for rights resulting from the directive as long as such rights are to be enforced before the state. The principle does not cover, however, neither claims addressed to other citizens, nor claims from the state to citizens.

Each Member State is responsible for implementing the directives. Regions or local authorities are not responsible before the E.U. institutions.

**Decisions** apply in specific cases, involving particular authorities or individuals. There are laws passed by the EU Council (sometimes jointly with the European Parliament) or by the Commission to address specific cases. This particular feature is probably the main conceptual difference between decisions and regulations. They also create rights and duties completely enforceable for authorities and individuals.

Under the Treaties (Section 258 of the Treaty on the Functioning of the European Union -TFEU-; Article 141 of the Euratom Treaty), the Commission is responsible for ensuring that the EU law is correctly enforced. Whenever a member state fails to comply with the EU law, the Commission has to start proceedings (action for non-compliance) to bring the infringement to an end. Although when doing so the state does not comply, the Commission can bring the case to the European Court of Justice.

The responsible authority is always the state, notwithstanding many European policies are actually implemented by regional or local authorities. The state is internationally liable for noncompliance, irrespective of the authority to which the compliance is attributable.

Under the Commission noncompliance pre-litigation procedure the first step is the so called: pre litigation administrative phase: infringement proceedings. This is actually an opportunity for the state to voluntarily meet the EU Law. The proceeding includes a preliminary investigation, a letter of formal notice, hearing for state's pleadings, and a reasoned opinion. The latter sets out the Commission's judgment. This statement gives



formal notice of the infringement, and is followed by a referral by the Commission to the Court of Justice. After the referral the litigation procedure shall be started.

The Court of Justice of the EU was created in 1952 to ensure the observance of the EU law. It is a relevant source of understanding of EU law and its aim is to judge conflicts between the EU, states and citizens. It is seated in Luxembourg and is made up with three Courts: The Court of Justice, the General Court (1988), the Civil Service Tribunal (2004). The Court of Justice has 27 appointed judges and 8 advocate generals.

The Court has been clearly granted defined jurisdiction in various categories of proceedings:

- **References for preliminary rulings.**

Courts of each member states are the ordinary jurisdiction when it comes to E.U. law enforcement. During the trial, doubts about EU law interpretation may arise. In this case, the national Court can refer to the Court of Justice seeking for clarification. This is also intended to ensure the effective and uniform application of European Union legislation and to prevent divergent interpretations. The Court of Justice's reply is not merely an opinion, but it takes the form of a judgment or reasoned order. The national court is therefore bound to follow such interpretation. Likewise, the Court's judgment binds the rest of domestic Courts before where the same problem was raised.

The national court submits questions to the Court of Justice in the form of a judicial statement (i.e. *Auto*). The concerned parties, the member States and the institutions, can submit written observations to the Court of Justice. Once the written procedure is closed, the parties can apply for a hearing (oral argument). One of the Judges issues a report about the hearing and the Advocate General delivers his/her opinion. This marks the end of the oral stage.

The Judges deliberate on the basis of a draft judgment drawn up by the Judge-Rapporteur. Judgements are taken by majority and pronounced in open court.

For references, the EU law envisages a simplified procedure.

- **Direct actions:**

These actions try to determine whether a member state has fulfilled its obligations under the EU law. Before bringing the case to the Court of Justice, the Commission conducts a preliminary stage including a hearing. Afterwards, the Commission may bring an action for infringement before the Court of Justice. Member states are also allowed to bring that action. The judgement has to be complied, in other cases, the state shall become liable of a fixed or periodic financial penalty.

- Actions for annulment. Regulations, directives or decisions can be challenged by interested parties seeking for nullity.

- Actions for failure to act. These actions refer to cases where the different institutions, bodies, agencies etc. of the EU fail to act, Jurisdiction to hear such actions is shared between the Court of Justice and the General Court according to the same criteria as for actions for annulment.
  - Appeals. The General Court’s judgements can be challenged before the Court of Justice.
  - Reviews. Decisions of the General Court, made on appeals against decisions of the European Union Civil Service Tribunal, may in exceptional circumstances be reviewed by the Court of Justice.
- **Applications for interim measures**

Applications for interim measures seek suspension of every order that might produce serious and irreparable damage to a party.

## Flowchart of procedure

| <b>Procedure before the Court of Justice</b>   |   |   |
|--|---|---|
| <i>Direct actions and appeals</i>  |   | <i>References for a preliminary ruling</i>  |
| <b>Written procedure</b>   |   |   |
| Application<br>Service of the application on the defendant by the Registry<br>Notice of the action in the Official Journal of the EU (C Series)<br>[Interim measures]<br><br>[Intervention]<br>Defence/Response<br>[Objection to admissibility]<br><br>[Reply and Rejoinder] | [Application for legal aid]<br><br>Designation of Judge-Rapporteur and Advocate General | National court's decision to make a reference.<br>Translation into the other official languages of the European Union. Notice of the questions referred for a preliminary ruling in the Official Journal of the EU (C Series). Notification to the parties to the proceedings, the Member States, the institutions of the European Union, the EEA States, and the EFTA Surveillance Authority. Written observations of the parties, the States and the institutions |
| The Judge-Rapporteur draws up the preliminary report.  |   |   |

|   |
|---|
| General meeting of the Judges and the Advocates General.    |
| Assignment of the case to a formation [Measures of inquiry] |
| <b>Oral stage</b>   |
| [Hearing; Report for the Hearing]                           |
| [Opinion of the Advocate General]                           |
| Deliberation by the Judges.                                 |
| Judgment  |

Optional steps in the procedure are indicated in brackets.

\* Source: [http://curia.europa.eu/jcms/jcms/Jo2\\_7024/](http://curia.europa.eu/jcms/jcms/Jo2_7024/)

## QUESTION PAPER.

I.- Why is the precedent not regarded a source of law?

II.- What does *vacatio legis* mean?

III.- What does *interpretación auténtica* mean?

IV.- Providing that fundamental rights are regulated only by organic laws, the decree law should clearly not regulate them. However, when regulating many areas of law it is difficult not to indirectly affect fundamental rights. To what extent can the decree law regulate such matters?

V.- What is the use of a legislative decree (consolidated statute)?

VI.- Imagine a decree law comes into force. After 24 days in force, the Parliament rejects its ratification. What should happen to all the cases regulated under the decree during those days?

VII.- Is the Supreme Court allowed to monitor a legislative decree?

VIII.- What does it mean when a directive has a direct ascending vertical effect?

## **CASES.**

I.- The Board of Ministers pass a decree implementing a number of energy saving measures. Among such measures, the decree states that cars will not be allowed to speed up 110 Km/hour. Is this a regulation or an administrative decision? Justify your answer.

II.- The Board of Ministers pass a decree appointing Mr. X as Secretary of State. Is this a regulation or an administrative decision?

III.- Search on the internet examples of regulations and administrative decisions. You can check any of the electronic offices currently available at public bodies' websites.

IV.- The Board of Ministers pass a decree approving the regulation to protect heritage assets. Do you find it correct according to the principles concerning the sources of law?

V.- The Town Hall agreed to grant a citizen a building permit. Do you find it correct?

VI.- A regional decree regulates water discharges on public waters within the Jucar watershed. The regulation only concerns discharges within the boundaries of the Valencia Region. Do you find it correct?

VII.- A Regional decree states that every condominium must install fire extinguishers on every floor. It established a 3 year deadline and provides grants to help finance the building update. Obviously, the rule concerns previous rights as it imposes new burdens to property. Do you think the decree is lawful?

## **CHAPTER VI.- REGULATIONS AS A SPECIFIC SOURCE OF ADMINISTRATIVE LAW.**

### **I.- CONCEPT AND CHARACTERISTICS.**

Regulations are the typical way the public administration states rules. Unlike decisions, they concern every citizen or situation (*generalidad*). They lay down norms abstract enough to create specific guidelines for their implementation (*abstracción*). With regards to their timing conditions, they intend to state rules that will remain in force until another law or regulation states otherwise (*vocación de permanencia*).

As their main features we should stress the following:

- Every regulation must be done according to law. Regulations against law are always null and void. Regulations must complete, clarify, or even state particular procedures and rules so to help implementing laws. There is just one category, the so called: independent regulations (*reglamentos independientes*) that are completely disconnected from a previous law. Such type of regulations focus on internal matters related to the administrative structure of public bodies. Notwithstanding, even such regulations cannot break the law.
- Regulations fall under ordinary judicial review. Administrative Courts enjoy exclusive jurisdiction to address regulations.
- Regulations must be reasoned. During the process leading to their creation, the government must give reasons to justify their necessity and accuracy.

### **II.- LAWFULLNESS AND EFFICACY FOR REGULATIONS.**

#### **1.- Formal conditions.**

- Competence.

Not every single administrative body enjoys regulatory power. Thus, it is relevant to determine whether the incumbent body is acting under its responsibility. That depends on what the law states, but as a general rule, only the upper bodies in the hierarchical administrative structure have such position.

Delegating regulatory powers is not allowed in Spanish administrative law. Unlike administrative decisions, regulations can only be made by the public body entrusted by law.

There are different types of regulations, all of them hierarchically ranked according to the enacting authority position. In the State Administration (*Administración General del Estado*), the Board of Ministers enact Royal Decrees (*Reales Decretos*); Ministers approve Ministry Orders (*Ordenes Ministeriales*); Directors (*Directores Generales*) pass notifications (*circulares*) and directives '(instrucciones). Other individual or collegiate

bodies may also enjoy regulatory powers, as well as certain constitutional institutions such as the Parliament or the Senate do with internal efficacy. The same can be said regarding other independent administrative bodies such as Universities, the Spanish Central Bank, etc.

Sometimes, such regulations create rights and duties having effects out of the internal organisation, which is relatively frequent regarding citizens or companies under their supervision. Such scheme is similar to those adopted in the different Regional Governments. Local Governments have regulatory powers as well, taking the form of ordinances and plans. The main regulation, however, is the organic regulation (*reglamento orgánico*), which states the internal regulatory framework in the Town Hall.

- Hierarchy.

As stated above, all the regulations are hierarchically ranked, and their particular position depends on the position of the regulatory body within the administrative structure.

| Regulations and ranking structure | President            | Board of Ministers                      | Ministers                    | Director General                              |  |
|-----------------------------------|----------------------|---|------------------------------|---|--|
| upper                             | <i>Real Decreto.</i> |   |                              |   |  |
|                                   |                      | <i>Decreto del Consejo de Ministros</i> |                              |   |  |
|                                   |                      |   | <i>Ordenes Ministeriales</i> |   |  |
| lower                             |                      |   |                              | <i>Circulares, Instrucciones Resoluciones</i> |  |

- Proceeding.

Section 24, *Ley 50/1997, de 27 de noviembre, del Gobierno* states a common procedure for every regulation. Regions have their own procedure, which as a general rule is similar to state procedure. *The Ley 7/1985, de 2 de abril, Reguladora de las Bases del Régimen Local* defines the local government regulatory making process.

Let us describe the key stages in the regulatory-making process:

- Starting stage: the proceeding gets started with a decision of the competent executive body (*Centro Directivo*). The executive body shall make the proposal (*proyecto de reglamento*), including a report on the desirability and opportunity of regulating the issue (*informe de oportunidad*). An economic memorandum stating the economic results and goals expected when implementing the regulation is also required (*memoria económica*).

- In addition, depending on the kind of regulation it may be necessary to collect different reports (*informes, dictámenes preceptivos*), as well as studies to support the project. Sometimes public calls and enquiries allowing public participation are made (*consultas*).

These are the most frequent reports in the regulatory-making process:

- Gender report (*informe de impacto de género*). Required since the 2003 Government Law amendments.
  - General Technical Secretariat Report (*Informe de la Secretaria General Técnica*). Not required when the new regulation is just amending a previous one.
  - State Advisory Council Report (*Informe del Consejo de Estado*). Not required for independent regulations.
  - Ministry of Finance and Public Administration report. Just required when the regulation concerns the distribution of powers among the State and Regions. This department is responsible for Government action in territorial policies, including regions and local authorities.
- Hearing.

Depending on the kind of regulation and the concerned groups, the hearing will be opened to everyone or will be offered to the citizens that are directly concerned (*interesados*), normally NGOs, associations and representative entities. As long as the regulation may be harmful to a particular group of citizens, it will be due to have a specific hearing with the association or corporation representing their interests. Let us think about a regulation concerning doctors: the College of Physicians will be due to be heard.

Providing the hearing is open to all citizens, any natural or juristic person, regardless of such person's nationality who wishes to file pleadings, to provide information, or to make a proposal in this phase of the proceeding, will be entitled to do so.

- Approval of the regulation by the relevant regulatory making competent body, and official publication (*BOE, DOGV, BOP*).

## **2.- Material conditions.**

- The regulation must be consistent with the general principles of law and the prohibition of acting arbitrarily (*interdicción de la arbitrariedad*).

The Spanish Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal enactments, the no retroactivity of punitive measures that are unfavourable to or restrict individual rights, the certainty that the rule of law will prevail, the accountability of the public authorities, as well as the prohibition against arbitrary action on the part of the authorities.

Regulations are discretionary in nature under Spanish legislation. Therefore, all the supervision techniques available to monitor discretionary powers are fully applicable. Reasoning, however, is not expressly required unlike administrative statements, although it usually appears in the explanatory statement accompanying the regulation (*exposición de motivos*). The principle of preclusion of arbitrariness takes us to what is called material justice.

The Supreme Court has declared regulations null and void on the following grounds so far:

- Lack of enough objective reasoning, or lack of rational or reasonable reasoning (*justificación objetiva suficiente o falta de fundamento racional o razonable*).
- Lack of proportionality.
- Poor assessment of facts.
- Bias.
- Inconsistency.
- Misuse of power (*desviación de poder*).
- Infringement of the principles of good faith and legitimate expectations (*confianza legítima*).

In addition, Courts can sentence the Administration to pass required regulations when not complying with the duty to approve them within the deadline (*inactividad*).

- The regulation must meet the legality principle (*ajuste a la materia reglamentaria*). Regulations cannot regulate matters that are expressly reserved as to legislation<sup>8</sup> (*reserva de ley*).<sup>9</sup>

Legal conditions are those contained formally and substantially in a Law; regulations cannot interfere with such a principle.

- Non-retroactivity of penalty or restrictive regulations (*disposiciones sancionadoras o restrictivas*). Such limit does not mean that regulations cannot impose new burdens, limits or restrict individual rights. If it was that way, no innovation and improvement would be possible. However, new limits must be justified and the regulation must provide guarantees to allow citizens to adapt themselves to the new situation (transitional provisions, compensations, etc.).

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<sup>8</sup> This term is often used in European Union documents.

<sup>9</sup> *Reserva de ley* is a principal of civil law for which there is not a precise equivalent beyond due process. However, the same idea is usually expressed in English-language legislation except as provided by law.' In US law, there is the doctrine of preemption where the Federal (national) government has jurisdiction over a particular subject, State legislatures may not legislate, because the field has been preempted by the Congress.

An example might be: 'The Secretary of ... may establish regulations prohibiting the use of ..., except as provided by law.' The meaning is that parliamentary or congressional legislation may be enforced by administrative regulation, but may not be limited or contravened by administrative regulations.



- *Inderogabilidad singular*. According to this principle, no administrative decision can preempt a regulation to be implemented in a single case.<sup>10</sup> In other words, the decision-making authority is not allowed to waive implementing a regulation when deciding a case, even if the authority considers that its derogation should benefit public interest.<sup>11</sup>

### III.- TYPES OF REGULATIONS.

#### 1.- Executive regulations.

These types of regulations are created to implement or even complement laws. Laws frequently refer to them in order to regulate particular situations, or even by means of general clauses. Notwithstanding, referrals are only allowed to provide the law that regulates the key issues and conditions (*prohibición de remisiones en blanco*).

In any case, in order to verify that the regulatory-maker did not go beyond its limits, a case by case analysis shall always be required. There are *escalas de intensidad de la reserva de ley*. For example, the reserve as to legislation is not the same regarding penalties or promoting measures.

On the other hand, '*deslegalización*' is allowed in Administrative law. Such a situation takes place when a law states that a subject, which is not reserved as to legislation according to the Constitution, but it was regulated by law, and can be hereinafter regulated by regulation. In other words, the legislative branch is delegating the power to regulate a particular matter to the executive branch. The regulatory rank of the matter will be lowered. However, the resulting regulation will, in fact, be able to repeal previous laws. The legislative can revoke such privilege at any time while enacting a new law.

#### 2.- Independent regulations.

These regulations are approved regardless of any existing law. A previous delegatisation is not needed. Independent regulations are only suitable as long as the subject matter has not been previously regulated by law. In addition, they are not allowed to regulate matters reserved as to legislation. Their natural area is the internal organisational field.

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<sup>10</sup> The preemption doctrine derives from the Supremacy Clause of the Constitution which states that the 'Constitution and the laws of the United States...shall be the supreme law of the land...anything in the constitutions or laws of any State to the contrary notwithstanding'. This means, of course, that any federal law--even a regulation of a federal agency--trumps any conflicting state law. Preemption can be either expressed or implied. When Congress chooses to expressly preempt a state law, the only question for courts becomes determining whether the challenged state law is one that the federal law is intended to preempt. Implied preemption presents more difficult issues, at least when the state law in question does not directly conflict with federal law.

<sup>11</sup> In legal English, derogation means that a law or regulation is exempted for a single case.

### 3- Regulations of necessity.

Regulations of necessity are only suitable in exceptional and temporary situations. In fact, they are only available, in accordance with section 21 *LRBRL*, in cases of catastrophe or major disasters. Majors can take exceptional measures in such cases, including regulatory instruments which are even capable to waiver laws.

### 4.- Others.

In modern administrative law many other specific regulations have arisen in the last years. The nature of some of them is under discussion, given that some of them might be reported just as administrative statements rather than regulations. The following are the main examples:

- Plans.
- Certain agreements (collective labour agreements)
- List of work posts (RPT).
- Technical standards (ISO, UNE...).
- Codes of ethics and charters of services for the citizen.

## IV.- REGULATION MONITORING.

### 1.- General rules.

- Regulations can only be reported null and void (*nulos de pleno derecho*).
- Annulment causes are stated in section 62.2 *LRJPAC*: regulations against the Constitutions, laws or other regulations highly ranked. Regulations concerning matters reserved as to law, as well as retroactive regulations concerning existing individual rights as long as they unlawfully restrict or limit them.
- Validation (*convalidación*) is not possible for regulations.
- There is no deadline for non-direct appeals, but direct appeals must be done according to legal timing conditions.
- Regulations can be overturned as a result of a citizen's appeal or even at the administration's own initiative (*Ex officio*).
- Annulment has knock-on effects on every resulting decision pronounced under the regulation (*ex nunc*).
- According to the Supreme Court, certain formal failures are not enough to invalidate a regulation (omission of non-substantial stages of the proceeding). In addition, when trying a non-direct appeal, formal shortcomings are not suitable.

### 2.- Monitoring and appealing procedures.

- Passive system: non-application of regulations.

According to section 6 *LOPJ*, Courts must not enforce unlawful regulations when dealing with particular cases. Judges may question the legality of any regulation

and, in such case, decide on not enforcing it. Such a monitoring power is called *Control judicial difuso*. However, according to this method, the concerned regulation shall not be declared null and void, and therefore the ruling will not have *anerga omnes* effect. It will just have intra-procedural effect.

Citizens or even administrative bodies are not allowed to use such power; only the judiciary can do so.

- *Ex officio* review.

According to section 102.2 *LRJPAC*:

*‘En cualquier momento, las Administraciones públicas de oficio, y previo dictamen favorable del Consejo de Estado u órgano consultivo equivalente de la Comunidad Autónoma si lo hubiere, podrán declarar la nulidad de las disposiciones administrativas en los supuestos previstos en el artículo 62.2’.*

Challenging *Ex officio* a regulation always requires a previous positive report from the Council of State (*Consejo de Estado*). As long as the regulation is declared null and void under such procedure, annulment will have *erga omnes* effects.

Unlike administrative decisions, the so called *acción de nulidad*’ is not allowed regarding regulations. Thus, citizens cannot apply the administration to start *Ex officio* procedures.

It is worth pointing out that annulment is significantly different from repealing when it comes to results. Annulment has retroactive effects, while repeal does not. In addition, annulment leads necessarily to challenging every non-final administrative decision implementing the regulation.

- Appeal to the Administrative Courts.
  - Direct appeal. Every regulation can be directly challenged to Courts. The deadline is 2 months, starting at the date the official publication of the regulation took place. After the trial, the judgment will have general efficacy and will be officially published.
  - Non-direct appeal. After the above mentioned deadline, no direct appeal is allowed. However, it should be uneven to keep a regulation that infringes the legal system valid and effective. Therefore, there is an indirect system to challenge such regulations with potential general effects.

Once a citizen is notified of an administrative decision damaging his rights, he is allowed to bring the case to the upper administrative body, and then to Court. Providing that the decision is actually implementing a regulation that might be considered null and void, the citizen can rely on that premise to support his/her appeal. In other words, he/she will challenge the decision on the grounds of a possible illegal regulation.

Eventually, the Court might declare the administrative decision null and void according to such reasons, and the judgment would have intra-procedural effects; it will only concern the administrative decision, not the regulation.

However, in order to purge the legal system from invalid regulations, current legislation allows Courts to open one of the following procedures: a) If the judgment is made by the Supreme Court or by the Court responsible to address the regulation, the Court shall quash both the administrative decision and the regulation. b) In other cases, the Judge or the Court shall have to issue a '*cuestión de ilegalidad*' by means of an '*auto*'. This '*auto*' must be officially published.

Whatever the new judgment on the legality of the regulation was, it will not change the previous judgment about the legality of the administrative decision. However, the ruling about the validity or nullity of the regulation will have '*erga omnes*' effect. The regulation will therefore be overturned.

- Appeal to the Constitutional Court.

Section 161.2 CE states an appeal before the Constitutional Court that allows the Central Government to challenge regulations made by the Regions:

*'El Gobierno podrá impugnar ante el Tribunal Constitucional las disposiciones y resoluciones adoptadas por los órganos de las Comunidades Autónomas. La impugnación producirá la suspensión de la disposición o resolución recurrida, pero el Tribunal, en su caso, deberá ratificarla o levantarla en un plazo no superior a cinco meses'.*

The appeal is regulated in the LOPJ, as a '*conflicto de competencias*'.

The appeal can be also issued by citizens both before the ordinary jurisdiction or the Constitutional Court. Standing rights, as we can see, are broad in this case.

## **QUESTION PAPER.**

I.- What are the main differences between an administrative decision and a regulation?

II.- Point out what kind of regulation belongs to each of the following administrative bodies:

- -*Presidente del Gobierno.*
- -*Pleno del Ayuntamiento.*
- -*Pleno de la Diputación provincial.*
- -*Consell de la Generalitat.*
- -*Consejo de Ministros.*
- -*Ministro.*
- -*Comisión delegada del Gobierno.*

III.- What does *inderogabilidad singular* mean?

IV.- Can regulations be deemed annulable?.

V.- List and explain the null and void causes that might affect regulations.

VI.- Are administrative appeals (within the administrative channel) available and possible to challenge a regulation?

VII.- Explain what an indirect appeal against a regulation is.

VIII.- Is the public administration allowed to waive enforcing a regulation in a particular case, providing it might be against the law?

IX.- What does *deslegalización* mean?

### **CASES.**

I.- The Town Hall passes a law regulating begging. The regulation empowers local police to drive out homeless begging on the streets. The law does not establish expelling as a penalty or sanction applicable in this situation, but it also states that begging can be regulated by ordinance. Do you find the above mentioned correct according to law? Imagine that a NGO in the aim to protect immigrants and disadvantaged people comes to your office asking for advice. What would you say?

II.- The Town Hall passed the city planning on January 20<sup>th</sup>, 2010. One developer, which is your client, applies for a building permit. The Mayor rejects the application on the grounds that it is inconsistent with the urban planning. The reason for rejecting the application is arguable, as the plan might be eventually reported against the law. What should you do in this case?

III.- The Court decides not to enforce one regulation assuming it is null and void. Is the Court acting right?

IV.- The Valencia Regional Government passes a regional planning scheme (*Plan de ordenación territorial*) in order to regulate river bed protection and management. Regions are responsible for territorial planning and environmental protection according to the Spanish Constitution. Providing the area is situated within the River Júcar demarcation, and taking into account that the State is responsible for inter-regional basins, do you think such a plan would be lawful? What should the State River basin Authority (*Confederación Hidrográfica del Júcar*) do in this case?

V.- Imagine that a law states that all the *infracciones y sanciones* scheme applicable under its scope will be laid down by a regulation. Explain the likely legal outcomes for such a law and the resulting regulation.

## **CHAPTER VII. ADMINISTRATIVE STRUCTURE. SELF-ORGANISING POWERS.**

### **I.- THEORY OF THE ADMINISTRATIVE ORGANISATION (*Teoría del órgano*).**

The Spanish term *órgano* has certain close concepts in common law systems: administrative body, agency, authority, council, board.

The ability of the public administration to define its internal organisation is broad. (freedom of organisational schemes). However, there are some limits to be met.

- Administrative bodies must be able to comply with the assigned public goals (aptitude).
- Organisational rules and schemes will not negatively affect constitutional rights and duties; in addition, they must be according to law.

The current *órgano* concept comes from ancient Canon Law, and therefore it is based on the canonical concept of '*sede*'. The key feature of the concept is that decisions become independent from the individual, in other words, from the administrative body holder. The body remains, regardless the holder.

Section 5.2 *Ley 6/1997, de 14 de abril, de Organización y Funcionamiento de la Administración General del Estado (LOFAGE)* states the following definition of '*órgano*':

*'Tendrán la consideración de órganos las unidades administrativas a las que se les atribuyan funciones que tengan efectos jurídicos frente a terceros, o cuya actuación tenga carácter preceptivo'.*

Administrative bodies have a particular position in the hierarchical structure of every public organisation. They have specific powers and duties. They must be correctly funded, in the sense that they must have budget credits available.

### **II.- COLLEGIATE BODIES.**

Collegiate bodies are those made up of two or more individuals. In the event they are completely made up of authorities or civil servants, they are reported to administrative collegiate bodies; however, as long as citizens or private entities are allowed to participate they should be considered joint committees, boards, etc.

Every single collegiate body has an internal regulation or by-law (*estatuto*). It is a regulatory instrument that establishes its composition, structure, mandate, functions, workings, etc.

- Members:

- President or Director

The president holds representative powers. He must convene the meetings and lay down the agenda (*orden del día*). According to the body regulations the president might have casting vote (*voto de calidad*). He monitors compliance with laws and regulations. In the event of vacancy at office by death, resignation, disability, or by any other legal or statutory reason, the office cannot remain vacant. Another member will temporarily take office until another director is appointed by the Board. According to law, it is the Vice-President, the older member, or the one holding higher hierarchical status or authority.

- Secretary.

Depending on the type of collegiate body, the secretary can be a full member or just a civil servant assigned to give the body support. The following are the key tasks for the Secretary

- Holds preparatory functions.

- Draws up the minute of every meeting session. He/she takes care of secretarial tasks at the hearing, records the various declarations, and takes the transcripts of the hearing.

- Certifies body's agreements and decisions and has legal authority to attest documents (*fe pública*).

- Other members.

Every appointed full member of the collegiate body holds the following rights and duties:

- Right to be called to the meetings and provided with all the relevant information.

- Right to know the agenda in advance.

- Right to participate in the debates.

- Right to vote.

- Civil servants who are members of the body cannot abstain or refrain from voting in the meeting.

- All the members can make suggestions and ask questions.

-Substitution of members and delegation of voting rights is allowed.

-Other duties can be stated in the body's regulations.

- Operating conditions:

To be validly convened, the president, secretary, and ½ members should be present in the second call.

Only the issues on the agenda can be addressed in the meetings. However, the Board can discuss matters out of the agenda providing all the members present or being represented, unanimously agree to discuss them.

Agreements will be made by simple majority unless otherwise stated by law or regulations.

After each Board session the secretary is responsible for collecting the agreements and draw up the minute. The minute is a summary record of the meeting. It must be ratified in the following session of the Board.

As validity requirement, each decision of the Board must meet the following aspects; otherwise, the resulting agreement will be deemed null and void:

- Quorum.
- Correct call.
- Right to access information and participation rights.
- Correct majority.

Every other fault would lead to annullability (*anulabilidad*) or just to report an irregularity without invalidating effect (*irregularidad no invalidante*)

### **III.- ORGANISATIONAL TECHNIQUES.**

#### 1.- Authority.

Authority is the legal ability to do something: passing regulations or making decisions. It is expressly assigned by the law and regulations. There are three types of powers: objective authority (*competencia material*), territorial authority (*competencia territorial*) and hierarchical authority (*competencia jerárquica*). Every conflict regarding the distribution of powers should be brought before the Administrative Courts for judicial review. However, as long as the conflict arises between the State and Regions, the Constitutional Court might also intervene.



Let us focus on certain dynamics in the distribution of powers that are intended to reach unity in administrative action (*técnicas de reconducción a la unidad*). Let us see different options to enhance administrative performance.

- Devolution of powers (*transferencia*). There are two options: decentralisation (*descentralización*) and deconcentration (*desconcentración*).

Devolution of powers towards other public bodies is a common place in Spanish bureaucracy. It can be defined as the transfer of governance responsibilities to other public bodies, in the form of decentralisation or deconcentration.

Decentralisation is usually referred to as the transfer of powers from the central government to another administrative structure. Decentralisation is regarded as a way to increase effectiveness in administrative action. It implies a broad delegation of authority with appropriate controls. Authority is transferred to a new legal entity or to a different legal entity already created. There are three types of decentralisation: political, administrative and fiscal. Many privatisation processes takes place in the name of decentralisation.

On the other hand, deconcentration refers to every transfer of powers and responsibilities from central agencies to their own field offices. It can also be defined as the transfer of administrative responsibilities to lower administrative levels within the same administrative structure. Subsequently, it does not imply the creation of a new legal personality whatsoever.

Both instruments may help to ensure effectiveness in administrative action. However, greater costs, duplicated structures, flee from administrative proceedings, etc, are the downside.

Several characteristics are usually present in devolution processes:

- Powers are usually permanently assigned. Thus, reversal might require complex proceedings.
- It requires enabling law or at least enabling regulation.

- Delegation (Section 13 *LRJPAC*)

Delegation means transferring power from certain public bodies to others within the same administration. As a general rule, delegation comes from upper bodies to lower bodies, though it is not necessary to have a hierarchical link between them.

To be carried out, an express decision officially published is needed (*BOE*, *DOGV*, and *BOP*). The delegating body keeps and retains the power, just transferring its execution and enforcement.

Certain powers cannot be delegated (i.e. regulatory making powers). Normally, delegation is not granted for specific issues, quite the opposite, it remains until

revocation. Each delegation shall point out the limits and, where appropriate, the length of the delegation. The delegating authority is allowed to reverse delegation regardless time and conditions. Decisions adopted by delegation are regarded as done by the delegating authority. This is particularly relevant to decide the authority holding jurisdiction to address eventual administrative appeals.

Sub-delegation is forbidden. Delegation between different administrative structures (with single legal personality) is possible as long as stated by the law. In addition, section 13 *LRJPAC* enables delegation when it comes to territorial administration and other public entities.

- Call back (*avocación*)

This situation happens when the upper body takes over a competence that was originally assigned to a lower body. However, call backs are always referred to a single matter, a particular case, leaving the distribution of powers intact.

In the case the power was previously delegated to another body, call back does not mean the termination or withdrawal (*revocación*) of the original delegation. It will remain operative since call backs only concern single cases.

Every call back should be reasoned and justified in technical, economic, social or territorial grounds. Consequently, call backs are always reasoned decisions. Citizens, however, cannot appeal against the decision, since call backs are just non-qualified procedural decisions (*acto de trámite no cualificado*). The citizen is just allowed to appeal the substantive decision taken by the upper body on the grounds of an improper call back.

- Management delegation (*Encomienda de gestion*).

With management delegation an administrative body is handed over a particular assignment so to carry out material, technical or managerial activities, as well as public services. Such an entrustment is likely to happen among bodies of the same administration, but it is even possible between different administrations.

Let us give some examples of administrative matters that might be entrusted to other administrative bodies under management delegation:

- Conducting proceedings (except for giving the decision ending the proceeding).
- Performing certain steps of the proceeding.
- Enforcing administrative decisions.
- Developing computer applications.
- Drafting technical reports.
- Seeking for legal advice.
- Etc.

This tool should not be mistaken for public contracts for managing public services or with the contract for supplies. In management delegation neither actual the transfer of competencies nor transfer of essential elements takes place (the entrusted body will never state the final decision in the proceeding).

Whenever the management delegation is entrusted to other administrations or entities, a common agreement and official publication is required. When delegation takes place within the same administration, among their own bodies, the agreement is not mandatory, although it might be done. Official publication, however, is always necessary.

- Delegation of signature (*Delegación de firma*).

With this solution neither the power nor the execution is transferred. The delegating authority is deemed the author of the decision in every case. Thus, the document including the decision shall clearly point out the delegating authority.

Given that delegation of signature has neither significant effect on citizens, nor a deep impact on the distribution of powers, official publication is not needed. It is forbidden to use this technique in penalty proceedings and decisions.

- Substitution and Replacement (*Sustitución y suplencia*).

Substitution works among different administrative bodies, whereas replacement concerns the official holding position in the administrative body. In both cases there are no changes in competence distribution.

## 2.- Hierarchy.

Administrative bodies are often related to each other under hierarchical relations. However, even within the same administration, bodies pertaining to different departments or structures may only be connected through competence relations. Orders from upper bodies are mandatory for the lower ones. Upper bodies have the power to overturn lower bodies' decisions in appeal proceedings.

## 3.- Direction.

Whenever an administrative body holds direction power before others a supremacy position among them is presumed. There will not be a hierarchical relation in that case. Normally, such relations are regulated by guidelines and general instructions (*Directrices e instrucciones generales*).

## 4.- Monitoring.

Supervising is often present among administrative bodies subject to hierarchical relations. Monitor tasks are assigned to specific bodies within the administrative

structure (i.e. General Intervention Board for the State Administration (IGAE), Services Inspectorate, etc.)

#### 5.- Coordination.

Within the organisational structure, coordination can be performed by creating specific administrative bodies.

The *LRJPAC* creates one coordination body called Conferencias sectoriales and it opens the door to other specific bodies (section 5). According to section 6, any administrative body, or even the administrations among them, can reach agreements (*Convenios*) to foster coordination of related policies. They can also promote joint projects and programs, according to section 7.

Another relevant way to achieve coordination is submitting reports. It is broadly common that Spanish legislation demands reporting schemes in the different proceedings. Reports should express the opinion of the relevant body in every field concerning its power within the on-going proceeding. Such reports can be voluntary, mandatory (*preceptivo*), or even legally binding (*vinculante*). It will depend on the nature of the powers involved and the potential clash between their respective fields.

On the other hand, coordination can be achieved via consulting. According to *Ley 50/1997, de 27 de noviembre, del Gobierno*, a consulting stage is allowed within the procedure to pass regulations (section 24).

#### 6.- Cooperation.

When two or more administrative bodies cooperate they are acting in equal position. There is no hierarchical or directive relation between them.

Ordinary ways of cooperation are:

- Sharing information.
- Assistance.
- Creation of new administrative bodies to develop or enforce mutual or related competencies.
- Joint plans and programs.

Every administrative body can enter into collaboration agreements, which sometimes may lead to delegations or management delegations. Section 6 *LRJPAC* precisely refers to one type of such agreements.

## QUESTION PAPER.

- I. What do you think the sentence *libertad de formas organizativas* means?
- II. On what grounds should an administrative decision made be claimed null and void by a collegiate body?
- III. What is the main difference between *decentralization* and *deconcentration*.
- IV. Providing an administrative body is delegating a power to a lower body, and afterwards it decides to call back the power in a particular case, what should it be the correct answer:
  - a.- It withdraws delegation.
  - b.- Delegation stays operating.
- V. Can the power to rule appeals against administrative statements be delegated? What about the power to pass regulations?
- VI. Do you think delegating responsibilities to administrative bodies within the same administration is lawful? What if delegation is in favour of other administrations?
- VII. Is a call back open to challenge?
- VIII. Assuming that issuing reports is a way to achieve coordination between public bodies, could you give an example? Do you think reporting is the best way to coordinate policies?

## CASES.

- I. The Town Hall understands that the social housing policy would be better administered by creating a public entity with private legal personality; for example, by means of a stock company with public capital. Do you find it possible? In that case, should that company be allowed to decide who protected houses should be awarded to, rejecting other applications?
- II. All the members of a collegiate body are summoned at 2 p.m. (first call) and 3 p.m. (second call). Not having enough quorum at the first call, the session starts at 2:15 p.m. and a few minutes later the decision is unanimously adopted. A few days later, a member who was present during the session appeals the decision on the grounds of the infringement of calling conditions, as well as the infringement of the

member's right to participate. He focuses on the argument that the session started before scheduled.

III. Complete the following table:

| Authority   | Central | Deconcentrated | Decentralised |
|---|---------|----------------|---------------|
| MINISTER  | X       |                |               |
| <i>SUBDELEGADO DEL GOBIERNO</i>   |         |                |               |
| REGIONAL GOVERNMENT TERRITORIAL DEPARTMENT  |         |                |               |
| JUCAR HYDROGRAPIC AUTHORITY.  |         |                |               |
| COUNCIL OF THE REGIONAL GOVERNMENT  |         |                |               |
| MAYOR   |         |                |               |
| SPORTS MUNICIPAL BOARD ( <i>Patronato municipal de deportes</i> )                             |         |                |               |
| STATE-OWNED STOCK COMPANY FOR WATER MANAGEMENT ( <i>Sociedad estatal de aguas</i> ) (AQUAMED) |         |                |               |
| AENA  |         |                |               |

- IV. Assume that one power is delegated. You apply for a grant. The upper body calls back the case. The head of the administrative body calling back the power has manifest enmity with you. Should you appeal against the call back decision?
- V. Ebro Watershed Authority delegates the Regional Administration of Catalonia the power to collect the dumping tax for discharges made to public rivers, providing discharges are made within the region. Do you find it possible and lawful? Months later, it also delegates the power to conduct proceedings and lay down decisions so to award dumping authorisations in Catalonia. Is it possible? If the regional administration rejects a company application for a dumping permit, could the company appeal such decision?
- VI. In case the Mayor delegates the signature in a Counsellor (lower position in the hierarchy ladder), can the resulting decision be appealed before the Mayor?

## CHAPTER VIII. NATIONAL STATE ADMINISTRATION.

### I.- GENERAL CONCEPTS.

State Administration is regulated in the Law 6/1997, April 14<sup>th</sup>, *de Organización y Funcionamiento de la Administración General del Estado (LOFAGE)*. In addition, as government is a branch of State Administration, the Law 50/1997, de 27 de noviembre, *del Gobierno*, must be regarded as a relevant part of its legal regime.

The upper bodies in the hierarchy scheme are:

- *Presidente*
- *Consejo de Ministros.*
- *Comisiones delegadas del Gobierno.*

At a lower level we have:

- Directive level:
  - *Ministros.*
  - *Secretarios de Estado.*
  - *Órganos directivos:*
    - *Subsecretarios y Secretarios generales. (Delegados del Gobierno, rango de Subsecretario)*
    - *Secretarios generales técnicos y Directores generales.*
    - *Subdirectores generales (Sub-Delegados del Gobierno).* At this level authorities are not qualified as *Altos Cargos*.
  - *Embajadores and Representantes permanentes before international organisations.*
- Organisational units: *Servicios, Secciones, Negociados* (in the correct hierarchical scheme).
- Administrative units: basic organisational units in every organisational structure. It includes single job positions and public workers sharing a common leader (such administrative units are complex, gathering two or more public workers to carry out public functions).

Heads of administrative units are responsible for the correct operation of their members. They are responsible for the accurate execution their tasks. The administrative units are defined in the RPTs (*relaciones de puestos de trabajo*), which are approved according to their regulations. All of them are part of a single administrative body.

## II.- BODIES.

The administrative structure of the State consists of two main areas. Firstly, numerous administrative bodies are located in the capital of Spain, Madrid, with jurisdiction over the whole country. They are called central bodies. Secondly, central administration approaches the citizen creating peripheral branches outside Madrid, at the capitals of the different regions as well as at the capitals of the provinces.

Peripheral administration is sort of administrative deconcentration, and therefore it does not result in creating new entities with legal personality. Neither central nor peripheral administrative bodies enjoy legal personality, it is the administrative structure who does.

### 1.- CENTRAL BODIES.

- The GOVERNMENT (*Gobierno*)
  - PRESIDENT/PRIME MINISTER (*Presidente*)
  - VICE-PRESIDENT (*Vicepresidente*)
  - BOARD OF MINISTERS (*Consejo de Ministros*).
  - DELEGATED COMMISSION (*Comisiones delegadas*).
  - GENERAL COMMISSION OF SECRETARIES OF STATE AND SUBSECRETARIES (*Comisión general de Secretarios de Estado y Subsecretarios*).
  - SUPPORTING BODIES (*Órganos de apoyo*).
    - GOVERNMENTAL SECRETARIAT (*Secretariado del Gobierno*).
    - CABINET (*Gabinete*).
- MINISTERIAL ORGANISATION.
  - MINISTER (*Ministro*)
  - SECRETARY OF STATE (*Secretario de estado*)
  - SUBSECRETARY (*Subsecretaría*)
    - SUBSECRETARIES (*Subsecretarios*)
    - -GENERAL TECHNICAL SECRETARY (*Secretario General Técnico*).
  - -HEADS OF COMMON SERVICES (Legal advisory services, Financial services, International cooperation services, Department of information, Department of advertising, etc.).



- -SECRETARY-GENERAL (*Secretario general*).
- -DIRECTOR-GENERAL (*Director General*)
- -SUBDIRECTOR-GENERAL (*Subdirector general*).

## 2.- PERIPHERICAL BODIES

- DELEGATES OF THE GOVERNMENT/GOVERNMENT'S REPRESENTATIVE (*Delegado del Gobierno*).
- ISLAND DIRECTOR (*Director Insular*).
- SUBDELEGATES OF THE GOVERNMENT (*Subdelegado del Gobierno*).
- SERVICES
  - INTEGRATED SERVICES (*Servicios integrados*).
  - NON-INTEGRATED SERVICES (*Servicios no integrados*).

## 3.- INTERNATIONAL BODIES.

- DIPLOMATIC MISSIONS (EMBASSIES).
- NON-PERMANENT REPRESENTATIVES.
- DELEGATIONS.
- CONSULATES.
- OTHER INSTITUTIONS (i.e. *Instituto Cervantes*).

## 4.- CONSULTING AND SUPERVISING BODIES.

- STATE ADVISORY COUNCIL (*Consejo de Estado*).
- COLLEGIATE COORDINATION BODIES.
  - SECTORAL CONFERENCES (*Conferencias Sectoriales*).
  - FISCAL AND FINANCIAL POLICIES COUNSEL (*Consejo de Política Fiscal y Financiera*).
  - INTER-TERRITORIAL HEALTH CARE SERVICE COUNSEL (*Consejo Interterritorial del Servicio General de Salud*).

-NATIONAL COMMISSION FOR LOCAL ADMINISTRATION (*Comisión Nacional de Administración Local*).

- INTER-MINISTERIAL COMMISSIONS.

## 5.- SUPERVISING BODIES.

- INTERNAL SUPERVISION:

-GENERAL TECHNICAL SECRETARIAT AND COMMON SERVICES (*Secretaría General Técnica y Servicios Comunes*). These bodies carry out legal supervision of administrative activities.

-GENERAL INTERVENTION BOARD OF THE STATE ADMINISTRATION (*Intervención General del Estado*). This essential body monitors the economic and financial behaviour of the administrative bodies, including state revenue and public expenses. There are delegated intervention boards in every Ministry.

-DIRECTION-GENERAL OF ADMINISTRATIVE ORGANISATION AND PROCEEDINGS.

-STATE AGENCY FOR THE ASSESSMENT OF PUBLIC POLICY AND SERVICE QUALITY. (*Agencia Estatal de Evaluación de la Calidad de los Servicios*).

-CENTRAL AND REGIONAL ECONOMIC ADMINISTRATIVE TRIBUNALS (*Tribunales Económico-Administrativos*).

- EXTERNAL SUPERVISION. Several non-administrative bodies monitor public administration bodies. None of them belong to the executive branch. On the contrary, they are part of the legislative or judicial branch:

- COURT OF AUDITORS. (*Tribunal de Cuentas*)

- OMBUDSMAN/PARLIAMENTARY COMMISSIONER (*Defensor del Pueblo*).

## CHAPTER IX. THE REGIONAL ADMINISTRATION

### I.- BASIC LEGISLATION.

Each Region has its own legislation so to regulate its internal organisation. For example, in the Region of Valencia the relevant legislation is:

a) *Ley 5/1983, de 30 de diciembre, del Consell.*

b) *Decreto 198/2009, de 6 de noviembre, del Consell, por el que se establece la estructura orgánica básica de la Presidencia y de las Consellerias de la Generalitat.*

### II.- ORGANISATION OF THE GENERALITAT VALENCIANA.

1.- Central bodies.

- Directive level.

The Council of the Regional Government (*Consell*) passes organic regulations for each Regional Ministry (*Consellería*). The Regional Ministers implement internal organisation schemes according to such organic regulations. Every Regional Ministry is structured into three key levels: Superior bodies, Directive level and Administrative level.

Superior bodies are the President, Vice-President, Council of the Regional government (Generalitat), Regional Minister and Regional Secretary (*Secretario autonómico*). All of them work under the supervision of the President.

Regional Secretaries direct and coordinate the Management Bodies (*Centros directivos*), which are accountable before the Regional Minister.

The following are their executive functions and competences of the Regional Secretary:

- Implement the powers and responsibilities related to the assigned area or activity.
- Boost, promote and coordinate programs and projects to be implemented by management bodies under his supervision and dependence, monitoring the fulfillment of goals, aims and purposes set out by the President, Vice-President or Regional Ministers.
- Hear and rule on administrative appeals brought against decisions of the Management bodies under their dependence and supervision, providing such decisions do not exhaust the administrative channel.
- Any other functions expressly laid down by law or delegated by the upper bodies.

In the directive level we find the Deputy-secretary (*Subsecretario*), the Director-general and other Head officers (*altos cargos*) holding director-general rank.

Under strict dependence of the President and Regional Minister, the Deputy-Secretary would monitor all the services under his area. He/she is head of the staff and monitors common services and archives. He/she also backs up and assists the rest of administrative bodies in every Regional Ministry.

Director-Generals are the head of each managing area within the Regional Ministry. Their most relevant functions are:

- Manage the internal organisation and direct the services in the areas under their supervision.
  - Supervise, check and monitor how every service is working and reaching the goals.
  - Hand down the first administrative statement or decision in most administrative proceedings; unless the upper bodies: Regional Minister, Regional Secretary or Deputy-Secretary held the power.
- Administrative level.

The remaining administrative bodies are part of the so called administrative level. All these units work under the authority of the above mentioned bodies. The level is structured in the following units:

- Deputy-Director general (*Subdirecciones generales*)
- Services
- Sections.
- Units.
- Departments (*negociados*).
- Others

In every Regional Ministry there will be a single General Administrative Secretariat (*Secretaría General administrativa*), under Deputy-secretary supervision. They give legal advice to all the bodies in the administrative level.

## 2.- Peripheral organisation.

According to the current Valencian Regional Government organisational structure, peripheral organisation is mainly made up of the Territorial Departments (*Direcciones territoriales*). They are branches of each Regional Ministry based on Alicante and Castellón.

## CHAPTER X. LOCAL GOVERNMENT.

### I.- THE PRINCIPLE OF LOCAL AUTONOMY.

The autonomy of local governments is declared in section 140 of the Spanish Constitution. Given the concept is particularly broad and unspecific, the Constitutional Court has clarified its meaning in STC 32/1981. These are the most relevant statements:

Local autonomy has a core area *núcleo indisponible* made up of a group of particular matters of local concern. Only municipalities and provinces can regulate and manage such areas of power. Moreover, local authorities are just liable before their voters; other authorities should refrain from giving commands, orders or guidelines to them. On the other hand, we are not before an indirect administration as the European Union administration is. They are not delegated administrations either.

Neither the central administration the nor regional administration can monitor local policies. No opportunity or political supervision is allowed. The Constitutional Court stated that local authorities should have their own regulatory and decision-making field, and therefore they have to be granted enough responsibilities by law.

There are several ways to protect local autonomy:

- As a general rule, regulations and decisions concerning local autonomy can be challenged before Administrative jurisdiction. As long as they unlawfully breach the principle they should be reported null and void.
- With regards to laws concerning local autonomy, different options appear in legislation:
  - The *LBRL* creates a joint Parliamentary Commission (State-CCAA) with legal standing so to bring appeals on unconstitutionality before the Constitutional Court.
  - The *LOTC* states a direct constitutional process called: conflict for the defence of local autonomy *Conflicto en defensa de la autonomía local*. The legal standing is strictly limited here. As a general rule, the appeal must be issued by a minimum number of municipalities. However, in cases of laws stating rules concerning specific municipalities (*leyes medida*), the local government directly involved will benefit from legal standing.

There are several principles inherently linked to the local autonomy principle:

- Local governments are in fact a kind of political and administrative decentralisation technique.
- Local entities must have democratic-functioning and be financially sustainable.
- They do not hold legislative power.

- They have the following non-delegated powers:
  - Organisational power
  - Regulatory-making power.
  - Financial and Tax raising powers.
  - Expropriator authority.
  - Power to Monitor and manage their own assets.
  - Power to impose penalties.
  - Decision-making power and enforcing power.

## **II.- SOURCES OF LOCAL LAW.**

### 1.- BASIC LAW:

- *Ley de Bases del Régimen Local (LBRL)*
- *Ley de Haciendas Locales (LHL)*

### 2.- COMPLEMENTARY LAW.

- *Texto Refundido de Régimen Local (TRRL)*
- *Reglamento de bienes de las Corporaciones Locales.*
- *Reglamento de población y demarcación territorial*
- *Reglamento de organización y funcionamiento y régimen jurídico de las corporaciones locales.*
- *Reglamento de servicios de las corporaciones locales.*

### 3.- IMPLEMENTING LEGISLATION:

- Regional laws and regulations related to local governments.

### 4.- ORGANIC REGULATION.

### 5.- BY LAWS AND BANDOS

## **III.- SPECIAL LEGAL FRAMEWORKS.**

1.- Open council (*Concejo abierto*): small municipalities operating in assembly sessions where every resident is allowed to participate.

2.- Large population municipalities (*Ley 57/2003 de 16 de diciembre, de modificación de la LBRL*). The 2003 act created a new Title X in the law. The new rules are intended to regulate municipalities over 250.000 residents, towns over 175.000 residents, and every regional or provincial capital regardless the number of residents. Smaller municipalities fall before this law in certain conditions.

The authority of the mayor is reinforced under this framework as an executive body, as well as the Government Board (*Junta de Gobierno*).

One of the news of the law is the foresight of directive staff, whose members does not necessary belong to the local corporation. They can be hired among external professionals.

The law creates new participative bodies such as the Social Counsel (*Consejo Social*) or the Districts. A new Advice and Claim Commission (*Comisión de sugerencias y reclamaciones*) is also stated in the law. In addition, the City Council (*Pleno del Ayuntamiento*) loses executive functions in favour of Mayors, concentrating on regulatory-making functions.

3.- Madrid and Barcelona.

- Madrid: *Ley de Capitalidad de 2006*.
- Barcelona: *Carta Municipal (Ley de 1998 de la Generalitat)*.

#### **IV.- TYPES OF LOCAL ENTITIES**

- MUNICIPALITY
- PROVINCE
- ISLAND ADMINISTRATION.
- INSULAR COUNCIL (*Consejo Insular*). Balears.
- CABILDO INSULAR. Canary islands.
- COMARCAS
- METROPOLITAN AREAS
- COMMONWEALTH OF MUNICIPALITIES (MANCOMUNIDADES)
- CONSORTIUM
- MINOR LOCAL ENTITIES

## VI. STRUCTURE OF LOCAL ADMINISTRATION.

### 1.- Territory.

- City boundary (*término municipal*). This is the area where the Town Hall has jurisdiction.
- According to *LBRL*, municipalities can be merged (*fusionados*). Spin-offs (*excisiones*) are also possible. Conditions for both operations are strictly laid down in the law.

### 2.- Residents.

Local law states a category of residents called *vecino*. Such residents have both political and administrative full rights. They can vote, are eligible in the local elections, and enjoy all the public services displayed in the municipality.

A relevant institution in local law is the register of inhabitants *padrón*. To achieve the category of *vecino* getting registered is a pre-condition. Registration of third country citizens does not lead to automatically get the rights registration grants. It will depend on the legal situation of the immigrant according to homeland security regulations.

Section 18 *LRBRL* states the following resident's rights:

- Being eligible and elector in local elections according to law.
- Participate in local policy-making according to law and, in every case, when collaboration was expressly required by local authorities.
- Enjoy and use, according to law, all the public local services, including communal rights according to customary law.
- To contribute, in proportion to his economic capacity, to the payment of the public services, as well as personally collaborate with authorities as stated by law.
- Being informed, prior reasoned application. Lodge applications before the municipal administration regarding files, records and municipal documents, according to section 105 CE. This right is granted in order to help reaching transparency and accountability of authorities and staff.
- Apply for popular consultations on local interest issues.
- Demand the creation or provision of public services providing they are under municipal power (*competencias propias obligatorias*)
- Pursue the popular initiative according to section 70 bis *LRBRL*

### 3.- Organisation.

#### 3.1. Members of Local Government:

- Counsellors (*Concejales*).



Councillors, including the members of the opposition, enjoy the so called: *'ius in officium'*. Such a constitutional right means that every councillor has the right to be informed on any relevant issue, to participate in the different bodies, to be paid according to law, to be registered in Social Security, and to challenge municipal decisions and regulations, etc. Among their duties, we should stress their accountability for the decisions in which they participate, in addition, they must keep the incompatibilities conditions when carrying on their duties, etc.

A relevant issue regarding councillors has to do with the consequences that defectors (*tránsfugas*) must bear with. Given that the position of councillors in the different bodies of the Town Hall is personal, and therefore do not belong to the political parties, defectors remain in their seats and cannot be removed. They automatically become part of the coalition of minority parties (*grupo mixto*). They will be part of the plenary, but they can be removed from other bodies providing their on-going commitment should mean over-representation in the body. If other case, they will remain in their seats.

- Mayor (*Alcalde*).

While councillors are directly elected by the citizens, the mayor will be appointed by the elected councillors among them. It is the president of the municipality, holding directive and executive powers. The mayor is the top position in the hierarchical ladder.

### 3.2. Bodies.

- MAYOR.
  - It is an essential body.
  - It holds executive power.
  - It represents the municipality in both political and administrative terms.
  - It has directive powers.
  - It is allowed to make *bandos* and necessary regulations.
- PLENARY.
  - It is an essential body.
  - It monitors every other municipal body.
  - It holds regulatory making and taxation power. It passes the annual budget.
- DEPUTY MAYOR (*Teniente de Alcalde*).
  - It is an essential body. It is just one of the councillors appointed to substitute the Mayor in cases of sickness, holidays, and every other absence causes.
- GOVERNING BOARD (*Junta de Gobierno*).

- This is not an essential body. It is only required in municipalities which population is over 5.000, as well as whenever the organic regulation states it is necessary.
  - It is made up of the Mayor and 1/3 of the counsellors.
  - It holds assistance functions, as well as executing functions delegated by the Mayor.
  - Its meetings are not public.
  
- INFORMATIVE COMMISSION.
  - This is not an essential body either. However, it is required in municipalities over 5.000 population, as well as whenever stated by the organic regulation.
  - It gets issues prepared to be discussed in the plenary.
  - It is made up of counsellors of every political group according to proportional criteria.
  - Defectors can be members, but only when they had a seat before becoming defectors. They cannot pretend to become member of every single informative commission, since they would become overrepresented and would break proportionality.
  - Commissions can be permanent or special (for particular purposes).
  
- ADVICE AND CLAIM COMMISSION.
  - This body is only mandatory in large population municipalities.
  - Its main task is monitoring every other municipal body.
  - It is made up of representatives from all the political groups.
  
- SPECIAL COMMISSION OF AUDITORS (*Comision especial de cuentas*).
  - It is an essential body and therefore must be established in every municipality. It will be made up of representatives from all the political parties.
  
- SUPPORTING BODIES
  - GENERAL SECRETARIAT (*Secretaria general*).
  - GENERAL INTERVENTION BOARD (*Intervención general*).
  - TREASURY DEPARTMENT (*Tesorería*).
  
- PARTICIPATION BODIES and DECONCENTRATED MANAGEMENT BODIES.
  - SOCIAL COUNCIL.
  - TERRITORIAL PARTICIPATION COUNCILS
  - DISTRICTS.
  - MANAGEMENT OFFICES (*Gerencias*), BOARDS (*Patronatos*), etc.

- DECENTRALIZED BODIES.
  - SELF GOVERNING BOARDS (*Organismos autónomos*)
  - PUBLICLY OWNED STOCK COMPANIES (*Sociedades de capital public*).
  - SEMI-PUBLIC STOCK COMPANIES (*Sociedades de capital mixto*).

#### 4.- Powers and responsibilities (LBRL)

The list of local competencies is stated in sections 25 and 26 *LBRL*. The first section declares which of them are common to every local government whereas the second states the group of powers that are qualified as mandatory according to the number of residents. Section 86.3 *LBRL* qualifies some of them as reserved as to local administration. This means that municipalities are allowed to prevent certain activities and services from being practiced by citizens or private companies. They will remain under public ownership and can be even declared as a monopoly.

## VI.- THE PROVINCE

Provinces are political divisions with a long historical background. Most *CCAA* have two or more provinces, although some regions are made up of just one province. The latest does not have provincial administrative structures, since regional administration take charge of their responsibilities.

Those having provincial administration share a similar organization and structure as municipalities. Although having their own area of responsibilities according to law, they can carry out regional competencies via deconcentration. However, this is rarely used in practice. On the other hand, they can be benefited from delegations or management delegations from the *CCAA* or the State.

Among their main activities, we should stress:

- Assistance to municipalities.
- Annual plan for works and services (*Plan provincial de obras y servicios*).
- Provision of supra-municipal services.
- Cooperation and territorial planning.

## QUESTION PAPER

I.- What does it mean that the local administration should not be deemed as indirect administration?

II.- Providing one *ley orgánica* states rules infringing the local autonomy, what should a single municipality do to challenge the law? What challenging options do exist?

III.- Are the municipal governments allowed to create new administrative bodies even if they are not stated in state or regional legislation?

IV.- Decide whether the following sources of law are directly (*carácter pleno*) or just subsidiary enforceable (*carácter supletorio*):

- *Ley de bases.*
- *Texto refundido de régimen local.*
- *Reglamento de bienes.*
- *Reglamento de organización y funcionamiento.*
- *Reglamento orgánico.*
- *Ordenanza municipal.*
- *Legislación autonómica.*
- *Reglamentación autonómica de régimen local.*

V- What is a *comarca*?

VI- What is a metropolitan area?

VII.- What is a consortium?

VIII.- Let us think about a body that is not stated in the Spanish local legislation: ‘The resident’s Ombudsman’. Should it be possible to establish it in a particular city using an organic regulation?

IX.- Is the Town Hall allowed to freely create decentralised bodies or publicly owned companies to administer their activities?

XIV.- Is the Town Hall allowed to administer public services through private companies?

## CASES.

I.- The Town Hall provisionally passes the Land Use Plan (*Plan General de Ordenación Urbana*). It hands the dossier on to the Regional Government. The corresponding branch of the regional government returns the record raising several legal

objections. In its opinion the plan infringes the legal standard of minimum green areas. Is this intervention correct? As another objection, the regional body states that developing new residential areas in the northern part of the city is suitable, but it finds it more interesting to focus major developments in the south; therefore, it objects the plan. Do you find it correct? Give reasons to justify your answers.

II.- Municipal governments have power to administer water supply according to sections 25 and 26 *LRBRL*. In addition, it is a reserved service under section 86.3 *LRBRL*. Given such background, what should happen if several citizens living isolated in non-urban areas apply for an extension of current water supply facilities so to get access to the service? Do they have the right to get the service? Before getting access from the municipal networks, could they try an alternative supply from a private company that owns groundwater rights close to the supply area?

III.- By *Mancomunidad de L'Alacantí de servicios* statement it is decided to incorporate representatives from the Environmental Protection Regional Agency as full right members of the body. Do you find this decision correct and valid?

IV.- Aiming to influence local elections in a small municipality, registration of 30 new residents is processed just five months before the Election Day. What is your opinion about such behaviour; do you find such decision suitable to be challenged?

V.- As a general rule, can someone be registered as resident in various municipalities at the same time?

VII.- A local counsellor is denied access to relevant municipal information. Such information is relevant to carry out political duties. What should be the concerned right in this case? What challenging procedure could the counsellor try to protect his rights? Are all municipal councillors, regardless if they belong to the government or the opposition, eligible to have plenty access to municipal information?

VIII.- A Councillor defector apply for becoming part of an informative Commission in the Town Hall. According to law, such a right actually benefits to all the political groups. Defectors are automatically deemed non-affiliated councillors (*concejales no adscritos*), in other words, they are not part of any political group. Before current legislation, defectors used to join the so called mixed group. However, recent amendments in local law, after the anti-defecting agreement signed by all the political parties, repealed such statement. Therefore, defectors do not belong to any political group whatsoever. Given such condition, do you find the above mentioned application allowable?

## **CHAPTER XI. CORPORATIVE AND INSTITUTIONAL ADMINISTRATION.**

### **I.- CORPORATIVE ADMINISTRATION.**

Under this category there are administrative structures which has a main feature that is they are made up of just private parties, citizens in most cases. They are not formally regarded as public administrations, although implicitly they are. *LRJPAC* and *LJCA* declare their actions fall into their field whenever they implement and execute public functions.

Such organisations represent rights of certain collectives or interests. They have authority only over their members and are allowed to make administrative decisions. Beyond their public functions, their actions shall fall within private law. Staff members and employees are not civil servants. When entering into contracts, they use the Civil Code, not the administrative legislation, and their assets are private as well.

Regarding their members, it is worth noting that most of them have to become part of the organisation to be allowed to carry out certain professional activities. Therefore, it is not completely free to become a member.

Types:

- PROFESSIONAL ASSOCIATIONS (i.e. Bar Association).
- CHAMBERS OF COMMERCE.
- OTHERS (CHAMBERS OF AGRICULTURE, USERS OR IRRIGATION DISTRICTS (*Comunidades de usuarios de aguas*), and URBAN CONSERVATION ENTITIES).

### **II.- INSTITUTIONAL ADMINISTRATION.**

1.- Concept and characteristics.

Institutional Administration is group of entities and assets that the parent administration (founder) creates, in order to carry out public services and other activities away from the main bureaucratic structure.

Such entities enjoy legal personality even though their organisation and functioning is strongly influenced by the founder. Given their instrumental condition, these entities do not have self-interests. Otherwise, they manage some of the parent's administration responsibilities. Between the parent body and the institution there are monitoring relations (appointment of the upper managerial bodies, strategic guidelines, ex-ante supervision about plans, programs, budget, etc.). As a result, their autonomy is merely operative.

Entities under supervision cannot appeal parent bodies' decisions. Some of them act under Administrative law, however, others use private law in their ordinary relations

(labour or civil law). Even in such cases, part of their activity shall be regarded administrative in nature and therefore under administrative law (*actos separables*).

## 2.- Legal regime.

The following are the key laws governing institutional administration:

- *Ley 6/1997, de 14 de abril, de Organización y Funcionamiento de la Administración General del Estado. (LOFAGE).*
- *Ley 28/2006, de 18 de julio, de Agencias Estatales para la mejora de los servicios públicos.*
- *Ley 47/2003, de 26 de noviembre, General Presupuestaria. (LGP)*
- Specific regional and local government's law.

## 3.- Fundamentals.

The main aim to create institutional entities is to achieve greater efficiency. In addition, lowering public deficit, reducing financial supervision and even benefiting from tax cuts and exemptions are frequently additional objectives.

What is more, under the efficiency principle, Administration tries to reduce bureaucratic burdens preempting from limitations arising from Administrative law. This phenomena has been defined as flee from Administrative law '*huida del Derecho administrativo*'.

## 4.- Types (State Administration):

- *ORGANISMOS PUBLICOS (LOFAGE).*
  - ORGANISMOS AUTONOMOS.*
  - ENTIDADES PUBLICAS EMPRESARIALES.*
- *-INDEPENDENT AGENCIES (Administraciones independientes y otras entidades estatales de derecho público).*

This group is regulated under their own specific legislation. In turn, LOFAGE shall only be applied to fill gaps arising from the specific legislation. This organisational model is clearly inspired in American agencies. Their independent status tries to prevent from political influence in strategic sectors. As a general rule, the appointment of the Director is usually done by the Prime Minister. Though they might receive guidelines, orders and instructions from the territorial Administration are strictly forbidden.

Independent agencies enjoy financial autonomy and can appoint their own staff members. Even though they are not submitted to direct governmental monitoring, they always have parliamentary monitoring. Only in exceptional cases their decisions can be challenged within the administrative channel before the parent

Administration by specific and limited appeals *recurso de alzada impropio*. Certain entities enjoy regulatory-making powers.

Let us make an attempt of classification:

a. Entities regulating and monitoring markets and public services:

- BANCO DE ESPAÑA.
- FONDO DE GARANTÍA DE DEPÓSITOS
- CNMV
- AGENCIAS REGULADORAS DE SERVICIOS PUBLICOS UNIVERSALES (CMT, CNE, CMSP).
- COMISION NACIONAL DE LA COMPETENCIA.

b.- Entities created for the protection of individual or collective rights:

- CONSEJO DE SEGURIDAD NUCLEAR
- AGENCIA DE PROTECCIÓN DE DATOS.

c.- Other entities with varied ends:

- AEAT
  - INSTITUTO CERVANTES.
  - ICEX.
  - UNIVERSIDADES NO TRANSFERIDAS (UNED)
  - SEPI
  - AUTORIDADES PORTUARIAS
  - CNI
  - CONSORCIOS DE ZONA FRANCA
  - PUERTOS DEL ESTADO
- etc.*

- PUBLIC ENTITIES WITH SPECIAL NATURE. LOFAGE refers their regulation to specific legislation. That is the case of the social security management entities (*Entidades Gestoras de la Seguridad Social*):
  - INSS (Organise economic benefits and grants access to the health care system, retirement pensions, disability benefits, family and motherhood benefits, etc.)
  - IMSERSO (Governs non-contributive pensions as well as other social programs).
  - ISM (Organises social benefits related to the marine sector).
  - TESORERIA GENERAL DE LA SEGURIDAD SOCIAL (Registers companies, employees, and organises the contributions and other aspects of financing).

Every Regional Administration and the Local Administration itself have their own specific categories of institutional administration.



In addition, there are special entities with greater autonomous status such as the UNIVERSITIES. They are created by regional or state law and have their own internal regulations and organisational structure. Their autonomy is expressly stated in Spanish Constitution.

### **III.- PRIVATE ENTITIES IN THE STATE PUBLIC SECTOR.**

#### **1.- COMPANIES. (*Sociedades*)**

They are expressly recognised in *LOFAGE* as public entities in nature. We can classify them in the following categories:

-Assets in private companies (*Patrimonio empresarial público*). Administrations frequently participate in the capital structures of private companies. They are shareholders.

-Public companies (*Sector empresarial publico*). Companies are private in nature whereas all their capital is publicly owned. Another option for the government is to own more than 50% of the capital share while enjoying complete control on the company. Certain companies have industrial or commercial purposes, though others just have public purposes such as building public works. Their losses do not count as public debt or public deficit in the national accounting system.

Administrative law is only applicable in the above mentioned *actos separables*.

#### **2.- FOUNDATIONS.**

Foundations are assets which are associated to particular ends. Although public foundations are made up of public assets, private participation in their capital structure is possible. They enjoy private legal personality and they cannot hold public functions.

These entities are governed under *Ley 20/2002 de 26 de diciembre*. The General Law of Foundations and the Civil Code area only indirectly applicable, and might be invoked to resolve a point unaddressed by the law, a gap in the specific law. Administrative law, in general, shall concern only the so called *actos separables*.

## QUESTION PAPER

I.- Strictly speaking, Can corporative administrations be regarded Public Administrations?

II.- Why do you think professional associations actually exist? What about commerce chambers? Do you find the mandatory integration of professionals or companies in such structures correct?

III.- Institutional Administration is often referred to as an instrumental administrative structure. Why instrumental?

IV.- What are the key differences between *organismo autónomo* and *entidad pública empresarial*?

V.- What are the key differences between *entidad pública empresarial* and *sociedad de capital público*?

VI.- What does *actos separables* mean?

## CASES

I.- Visit the following website:

<http://www.igae.pap.minhap.gob.es/sitios/igae/es-ES/ClnInvespe/Paginas/invespe.aspx>

What is your opinion about the number of public entities still existing today in Spain?

II.- According to the information on the website, find the nature of every institution listed below:

- *AGENCIA EFE.*
- *ADIF.*
- *RENFE OPERADORA.*
- *AGENCIA ESPAÑOLA DE COOPERACIÓN INTERNACIONAL PARA EL DESARROLLO (AECI)*
- *FUNDACION AENA.*
- *MUFACE*
- *AGENCIA ESPAÑOLA DE PROTECCIÓN DE DATOS*
- *CORPORACION RADIO TELEVISIÓN ESPAÑOLA*
- *CONFEDERACIÓN HIDROGRÁFICA DEL JÚCAR*
- *AUTORIDAD PORTUARIA DE ALICANTE*
- *FUNDACION COLECCIÓN THYSSEN-BORNEMISZA.*
- *AGENCIA ESTATAL DE METEOROLOGIA*

- *TESORERIA GENERAL DE LA SEGURIDAD SOCIAL*
- *HIPÓDROMO DE LA ZARZUELA*
- *AENA*
- *CONSORCIO CASA DEL MEDITERRANEO*
- *CONSORCIO DE COMPENSACIÓN DE SEGUROS*
- *SEPI DESARROLLO EMPRESARIAL*
- *INSTITUTO CERVANTES*
- *MUSEO NACIONAL DEL PRADO DIFUSION*
- *NAVANTIA*
- *RADIO NACIONAL DE ESPAÑA*
- *INSTITUTO PARA LA DIVERSIFICACIÓN Y AHORRO DE ENERGIA.*
- *PARADORES DE TURISMO DE ESPAÑA*
- *FUNDACION VICTIMAS DEL TERRORISMO*
- *CONSEJO DE SEGURIDAD NUCLEAR*
- *AGENCIA ESTATAL DE LA ADMINISTRACION TRIBUTARIA.*
- *UNIVERSIDAD INTERNACIONAL MENENDEZ PELAYO.*
- *FUNDACIÓN GENERAL DE LA UNIVERSIDAD MENENDEZ PELAYO.*
- *COMISION NACIONAL DE LA COMPETENCIA*
- *PUERTOS DEL ESTADO*

## CHAPTER XII. THE ADMINISTRATIVE STATEMENT.

### I.- CONCEPT AND CHARACTERISTICS.

The Administrative statement or decision has been simply defined as: *acto jurídico unilateral de la Administración sometido al derecho administrativo* (GARCIA DE ENTERRÍA). Another more complex definition from the same author might be useful as well: *Declaración de voluntad, juicio, conocimiento o deseo, realizada por la Administración pública, en ejercicio de una potestad administrativa distinta a la reglamentaria.*

The administrative statement is the central concept of Spanish Administrative law. The existence of an administrative decision is essential to create rights and duties under Administrative law. Judicial review, moreover, requires a previous decision (express, implicit or just an omission) to be challenged. That is why administrative jurisdiction has been traditionally taken as a reviewing jurisdiction.

We should stress the following features of administrative statements:

- It is a statement (*declaración*).

The decision can be express and written, which is the ordinary way to grant or reject authorisations, concessions, allowances, registrations, certifications, impose penalties, among others. Sometimes, however, the statement is just tacit, unstated or implied, which happens when the decision comes up or is concluded from another expressly written decision.

Finally, the decision can be presumed in case the administrative body fails to hand down a decision within the deadline. The presumption should be positive (positive silence) or negative (negative silence) depending on different conditions, although the general rule is that failure to grant a decision should be regarded as a positive and allowing decision. Legal exceptions, however, are broad according to the law. In fact, implied rejections are a common place in many areas of administrative law.

We should stress that the institution of administrative silence works always with regards to proceedings started on citizen's request. Failure to make a decision in *Ex officio* proceedings leads to different results. When the proceeding is leading to declare or enforce citizen's rights, the lack of an express decision within the deadline will have positive implied effect. On the other hand, in proceedings restricting rights or imposing penalties the result will be expiration (*caducidad*).

According to the different types of express decisions, administrative statements can be listed as:

- Declarations of political or administrative will: STATEMENTS.
- Expressing opinions, criteria or giving data: REPORTS, ACCOUNTABILITY REPORTS (*rendición de cuentas*).
- Statements of intentions: PROPOSALS

- Expressing knowledge: POLICE REPORTS (*atestados*), CERTIFICATIONS, DECISIONS GIVING CITIZENS ACCESS TO INFORMATION, VALIDATIONS (*diligencias*), ANNOTATIONS (*anotaciones*), REGISTRY ENTRIES (*anotaciones en registros*), MINUTES (assemblies, meetings), SETTLEMENTS (agreements), CERTIFICATES, TRANSCRIPTIONS, RECORD OF EVIDENCES, etc (*actas y similares*), etc.<sup>12</sup>

- The statement is unilateral:

All the administrative decisions are one-sided statements carried out by public bodies. Only public bodies are allowed to make administrative decisions, since every action carried out by citizens or private companies during the proceeding are not administrative decisions but an action of a party in the proceeding (*acto de parte*).

On the other hand, administrative decisions are not contracts as no acceptance or agreement from the other party is needed to become enforceable.

- It is not a regulation.

Administrative statements are not rules; they concern to individuals or selected and identified groups, instead of the whole community. They are not abstract, and do not remain in force as a part of the legal system. Actually, their efficacy comes to an end in a particular moment, once the recipient is notified and benefits from them or meets the requirements. As a conclusion, they do not have the features regulations must have.

- It is the result of strictly regulated or discretionary powers.

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<sup>12</sup> Several examples:

|                                |   |
|--------------------------------|---|
| <b>acta constitutiva</b>       | articles of incorporation, bylaws   |
| <b>acta de adhesión</b>        | adhesion contract   |
| <b>acta de asamblea</b>        | minutes of the assembly, minutes of the meeting                             |
| <b>acta de clausura</b>        | act of closure  |
| <b>acta de conciliación</b>    | conciliatory settlement   |
| <b>acta de declaración</b>     | record of evidence of the witness   |
| <b>acta de denuncia</b>        | complaint, police report  |
| <b>acta de entrega</b>         | delivery receipt, delivery certificate                                      |
| <b>acta de fundación</b>       | foundation charter  |
| <b>acta de grado</b>           | academic transcript, school transcript                                      |
| <b>acta de manifestaciones</b> | voluntary affidavit   |
| <b>acta de recepción</b>       | <i>UK</i> acknowledgement of receipt<br><i>US</i> acknowledgment of receipt |
| <b>acta notarial</b>           | <i>US</i> notarized document<br><i>UK</i> notarised document                |
| <b>levantar acta</b>           | to take minutes, record the minutes   |

Administrative statements are the result of a decision-making proceeding. Decisions without proceeding should be deemed null and void (*vías de hecho*). Throughout the proceeding, the public body will be implementing regulated powers (strictly defined by law), or discretionary powers (with certain margin for interpretation and even for making a choice between equally legal alternatives).

To perform such powers in a particular case the administrative body must be legally vested of power. If not, the resulting decision will be deemed null and void or just annulable, according to the relevance of the lack of jurisdiction.

- Administrative decisions are under Administrative Law.

Not every decision from an Administrative body falls within administrative law. A small part of administrative actions are subject to private law (civil law or labour law). However, only decisions not excluded from administrative law are actual administrative decisions and remain under administrative court's jurisdiction.

Administrative statements have the following features:

- They are the final step in a process where a public body enforces laws and regulations in particular cases.
- They create rights and obligations, according to law.

## **II.- TYPES OF ADMINISTRATIVE DECISIONS**

### 1.- DEFINITIVE AND PROCEDURAL DECISIONS (*Actos definitivos y de trámite*).

Definitive decisions end the proceeding and create rights and obligations. Procedural decisions are part of the decision making process and help to build the definitive decision.

Definitive decisions are commonly named: *ACUERDO* or *RESOLUCIÓN*.

The administrative proceeding is made up of a bunch of stages from the application or the decision to initiate proceedings to the final decision. Every step in the proceeding is intended to prepare the definitive decision.

Most procedural statements have the aim of expediting procedural administrative action. However, some of them have material content (i.e. decision not accepting to open the probationary period, not accepting certain means of prove or evidences, reports and opinions (*dictámenes*)).

One of the main reasons why we separate these types of statements from those considered definitive is because procedural decisions are not suitable for appeal unless they are regarded *qualified procedural decisions*. Pleadings against procedural acts are

perfectly possible but no appeal would be accepted against them. The concerned party (*interesado*) must wait until the final decision comes up to lodge the appeal.

Qualified procedural decisions, which are separately appealable as already mentioned, are those having at least one the following features:

- They directly or indirectly decide about the merits of the case, the substance of the case.
- They make it impossible to continue with the proceeding.
- They cause serious lack in legal protection (defenselessness) (*indefensión*).
- They create irreparable damage.

## 2.- DECISIONS EXHAUSTING (OR NOT EXHAUSTING) THE ADMINISTRATIVE CHANNEL (*actos que agotan la vía administrativa*).

- Decisions not exhausting the administrative channel.

These are definitive decisions issued by bodies having at least one upper hierarchical body. The concerned party needs to lodge an administrative appeal before the upper body to exhaust the administrative channel (*recurso de alzada*). In other case, the decision will become final and therefore unappealable. The upper body's decision will exhaust administrative remedies, and full access to Courts will be opened.

- Decisions exhausting the administrative channel.

Certain definitive decisions exhaust the administrative channel since they are taken by the upper body in first instance or after an appeal.

However, other possible situations leads to exhausting administrative remedies as well. Section 109 *LRJPAC* clearly states the list of administrative decisions with such effect:

*Artículo 109 Fin de la vía administrativa.*

*a) Las resoluciones de los recursos de alzada.*

*b) Las resoluciones de los procedimientos de impugnación a que se refiere el artículo 10VII.II.<sup>13</sup>*

*c) Las resoluciones de los órganos administrativos que carezcan de superior jerárquico, salvo que una Ley establezca lo contrario.*

*d) Las demás resoluciones de órganos administrativos cuando una disposición legal o reglamentaria así lo establezca.*

*e) Los acuerdos, pactos, convenios o contratos que tengan la consideración de finalizadores del procedimiento*

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<sup>13</sup> According to section 107.2 *LRJPAC*: *Las leyes podrán sustituir el recurso de alzada, en supuestos o ámbitos sectoriales determinados, y cuando la especificidad de la materia así lo justifique, por otros procedimientos de impugnación, reclamación, conciliación, mediación y arbitraje, ante órganos colegiados o comisiones específicas no sometidas a instrucciones jerárquicas, con respeto a los principios, garantías y plazos que la presente Ley reconoce a los ciudadanos y a los interesados en todo procedimiento administrativo. En las mismas condiciones, el recurso de reposición podrá ser sustituido por los procedimientos a que se refiere el párrafo anterior, respetando su carácter potestativo para el interesado. La aplicación de estos procedimientos en el ámbito de la Administración Local no podrá suponer el desconocimiento de las facultades resolutorias reconocidas a los órganos representativos electos establecidos por la Ley.*

No administrative appeal is available in these cases except for the so called '*recurso de reposición*'. Obviously, the concerned party is allowed to challenge the decision to Courts. However, if he/she decides to lodge the *recurso de reposición*, the same administrative body will make a new decision confirming or overturning the latter. After that, no more administrative appeals will be available and the concerned party should file the appeal to Courts.

Assuming the concerned party neither file the *recurso de reposición* nor file the appeal to Courts within the deadline, the definitive decision will become final and unappealable.

### 3.- FINAL DECISIONS (*Actos firmes y consentidos*)

These administrative decisions *causan estado*. We have a final decision when the concerned party does not file an appeal (administrative or judicial) within the stated deadline. As a result, the decision will no longer can be appealed neither before administrative authorities nor before the Courts.

When having plural recipients' decisions (*actos con destinatario plural*), the administrative statement will only become final for those who do not lodge the appeal.

### 4.- STATEMENTS CONFIRMING OR REPRODUCING PREVIOUS DECISIONS (*actos confirmatorios o reproductorios de anteriores*).

Certain administrative decisions do not produce any innovation. They simply confirm or reproduce previous statements. As a result, such decisions cannot be challenged. Sometimes, concerned parties repeat previous applications which were already decided, with the aim of reviving the submission period for an appeal. In other cases, the citizen challenges an enforcing decision which is only implementing a previous final decision, with the aim of challenging directly the latter.

### 5.- ADVANTAGEOUS AND DISADVANTAGEOUS DECISIONS (*Actos favorables, desfavorables o de gravamen*).

- Advantageous decisions.

Favourable or positive decisions are those recognising citizens' rights. Public bodies cannot disregard their own positive decisions, even if they are against the law. In such cases the body must get reviewing proceedings started challenging its own decision in order to declare it null and void; meanwhile, it cannot disregard the decision's existence and efficacy.

The following list states the most relevant positive administrative statements:

- ADMISSION (*Admisión*).



- CONCESSION (*Concesión*)
  - LICENSE/AUTHORIZATION (*Autorización*)
  - APROVAL/ENDORSEMENT (*Aprobación*).
  - EXEMPTIONS (*Dispensas*).
  - CERTIFICATES (*Certificados*)
- Adverse decisions (*actos desfavorables o de gravamen*).

Adverse decisions are often penalties, but many of them are just ordinary statements modifying, reviewing or terminating previous rights.

Let's point out several examples:

- PENALTIES (*Sanciones*)
- EXPROPRIATION (*Expropiación*).
- MANDATORY ORDERS (*Ordenes preceptivas*).
- PROHIBITIONS (*Prohibiciones*).

All adverse decisions must be founded and backed up in the law. Regulations are not suitable to limit existing rights without legal coverage (*reserva de ley estricta*).

Adverse decisions must be strictly reasoned (*motivación estricta*) and can be freely revoked by the acting administrative body according to law. Unlike positive decisions, which can only be reversed after conducting reviewing proceedings, adverse decisions can be just reversed by an administrative decision.

#### 6.- SINGLE DECISIONS AND DECISIONS WITH PLURAL RECIPIENTS (*Actos singulares y actos con destinatario plural*)

Most administrative decisions are addressed to a single person or to an identified group of citizens with legal personality. As a result, they are usually notified rather than published. However, sometimes the decision is addressed to a group of people not personified or even not completely identified. For example, massive statements concerning collectives such as contractor bidders in tender proceedings. Another good example deals with applicants for job vacancies in the public administration to be filled through competitive examinations. Communications and decisions are usually officially published in these cases.

#### G.- ADMINISTRATIVE STATEMENTS AND PRIVATE STATEMENTS MADE BY ADMINISTRATIVE BODIES.

The public body's activity is not completely subject to Administrative law. Certain decisions fall within private law such as an attempt to reduce bureaucratic burdens and increase efficiency. That is the case of labour law or civil law, which are frequently used to regulate legal relations between public bodies and other parties. While decisions under administrative law have to be challenged to administrative Courts, private decisions have to be brought before labour or civil Courts.

## H.- POLITICAL/GOVERNANCE DECISIONS.

The *LJCA* excludes political decisions from administrative Courts' jurisdiction. National defence, international relations, homeland security, command and army administration, are typical examples of areas where governance decisions will be present.

Although governance decisions fall outside administrative law, certain elements of the decision can be monitored under administrative law schemes; we are referring to the so called: *actos separables*. These are regulated elements such as the power or the proceeding. Other aspects such as the so called: *conceptos jurídicamente asequibles* fall under public supervision as well. These are other regulated issues or even discretionary elements (facts, legal founding, general principles of law, reasonability and rationality; however, the heart of the decision will remain off the scope of Administrative Courts.

## III.- ELEMENTS OF THE ADMINISTRATIVE STATEMENT.

### 1.- SUBJECTIVES.

Administrative decisions must be done by an administrative body holding authority (material, territorial and hierarchical) for the case.

With regards to the administrative officer heading the body, he must have been appointed by the correspondent authority and taken office (*toma de posesión*). He must be in 'active service' and should not have any direct relation to the matter or the concerned parties. If he does, he should abstain from addressing the matter (*abstención*) or can be objected and challenged by any interested party (*recusación*). On the other hand, collegiate bodies must meet their regulations related to members' participation.

The individual receiving the administrative statement is the concerned party, holding a right or a legitimate interest. He can be a citizen, a company, or even another administrative body.

### 2.- OBJECTIVES

- FACTUAL CIRCUMSTANCES (Presupuesto de hecho).

Factual circumstances are regulated elements that the public administration cannot disregard, in the sense that they work as a precondition in the decision-making process. However, assessing facts can include discretionary reasoning.

- THE SUBJECT MATTER (Objeto del acto):

The decision must be legal, fair and just; in other words, not unlawful. The subject matter of the decision will include the regulated elements as well as the discretionary conditions and all the collateral agreements (clausulas accesorias). Among the latter, we should point out condition clauses, deadline, clauses stating ways to comply with the decision, etc. All the collateral clauses should obviously stem from the law.

The core clauses and conditions of the administrative statement must be:

- CERTAIN.
  - POSSIBLE.
  - COMPLETE.
  - CONSISTENT.
- 
- PURPOSE AND CAUSE (Fin y causa).

Administrative goals are always public ends. Administrative bodies do not have self-interests. Public interest is therefore one of the cornerstones of administrative action and administrative law. Acting out of the public interest's bounds should be deemed '*misuse of power*' (desviación de poder), and the resulting decision will be regarded annulable according to section 63 LRJPAC:

Section 63.1. LRJPAC. Annulability:

*'Son anulables los actos de la Administración que incurran en cualquier infracción del ordenamiento jurídico, incluso la desviación de poder'.*

Causation in administrative law is the 'social end' (función social) that is involved in every law or regulation. Its entire purpose, its foundation, its rationale must be the public interest. (i.e. safeguarding public safety, improving road traffic safety, economic policy and development, etc).

Ex post lack of causation might lead to decaying the efficacy of the decision. A good example is the 'reversion clause' in expropriation proceedings. As long as the programmed public works are not done within the legal deadline, title and control of such property shall immediately revert and vest in the original owner. The owner should pay back the compensation he received as payment for the mandatory acquisition.

### 3.- FORMAL ELEMENTS.

- The proceeding.

The administrative proceeding is a series of procedural decisions and parties' acts leading to a definitive statement. Some of the stages are more relevant than others. Those of the lower relevance would lead to minor procedural irregularities. In upper stages of relevance, formal defects or violations could result in annulability. Only some of them, the most relevant ones, will result in a null and void definitive decision.

One of the most relevant formal violations is omitting the hearing (audiencia). Such stage in the proceeding is essential since it allows the citizen to have all the relevant

information about the case (records are open and can be checked). In addition, it allows the citizen to lodge the final pleadings. Omitting the hearing is a cause of nullity according to section 62 *LRJPAC*.

This section states the list of causes of nullity, including those related to formal offences:

*Art. 62.1. Los actos de las Administraciones públicas son nulos de pleno derecho en los casos siguientes:*

- a. ...
- b. *Los dictados por órgano manifiestamente incompetente por razón de la materia o del territorio.*
- c. ...
- d. ...
- e. *Los dictados prescindiendo total y absolutamente del procedimiento legalmente establecido o de las normas que contienen las reglas esenciales para la formación de la voluntad de los órganos colegiados.*
- f. ....
- g. ...

Letter (b) refers to decisions taken by administrative bodies without material or territorial competence. Lack of hierarchical power is only a cause of annullability and can be easily repaired by the upper body. Letter (e) is broader, since it includes two alternatives. First, it refers to what is called 'vías de hecho'. Such violation takes place whenever the public body takes a decision without any proceeding, or omitting essential procedural stages. The latter should include stages such as the hearing. Second, it refers to the most serious formal violations in collegiate bodies: those infringing quorum, supply of information, calling rules, and participation rights.

Although formal violations are a good ground for appeals, most of them are relatively effective. Only violations leading to defenselessness, or regarded essential, will be effective in terms of annulment. However, most of them can be corrected during the administrative or judicial appeal procedure. Even when rectification is not possible, causes of annullability only lead to take the proceeding back (retroacción) to the point when failures took place. Once corrected, the decision could be reproduced again.

As a conclusion, just the most relevant formal defects, especially those leading to nullity, or those impossible to correct (prescription, expiry, etc), are really worth to claim.

- The decision formal structure.

Administrative decisions are generally written, although some of them can be oral. Such expressions, such as verbal orders, acoustic or visual signs, etc, can be formalised as a written statement later.

These are the key parts of a typical administrative decision:

- **HEADING (Encabezamiento).** It will include the competent body.
- **INTRODUCTION (Preámbulo).** It will state the rules concerning the authority of the acting body.

- SUBSTANTIVE CONTENT (Contenido sustantivo). This will include the reasoning, the legal founding, assessments and reports, other evidences, etc).
- ENACTING/OPERATIVE PART (Parte dispositiva). This is the decision, the statement declaring rights, obligations, or imposing penalties.
- PLACE, DATE AND SIGNATURE (Lugar, fecha, firma).
- DATA ON NOTIFICATION OR PUBLICATION. One of the statements of every decision is ordering its publication or notification, as well as the way it should be done.
- INFORMATION ABOUT AVAILABLE REMEDIES, DEADLINE AND REFERRAL TO THE COMPETENT BODY.

Certain informal actions should not be regarded administrative decisions (Communications, oral information, etc).

Every single administrative decision must be notified or officially published. However, the so called SERIAL DECISIONS can be included in a single statement, with single notification or publication.

The new technologies are increasingly present in public administration proceedings. As a result, in the last few years a new type of administrative decisions has appeared, the so called: TELEMATIC DECISIONS. These are automated administrative decisions (actuaciones administrativas automatizadas), in other words, administrative decisions automatically created by a computerised system, according to preexisting available data. It must not be confused with ordinary administrative decisions which are electronically delivered and notified.

#### **IV.-THE ADMINISTRATIVE SILENCE - TACIT CONSENT OR DISENT – ABSENCE OR LACK OF REPLY: ALLEGED DECISIONS.**

Administrative judicial review was originally designed as a reviewing jurisdiction (jurisdicción revisora). Only administrative statements were suitable to appeal. As a result, there was a real need to create an instrument so to grant citizens the right to appeal when the responsible public body refrained to make a written decision in the case. These are the roots for the so called ‘silencio administrativo’, which we attempt to translate ‘*administrative silence*’. The resulting fictional decisions can be understood as well as ‘*alleged acts*’.

##### **1.- OBLIGATION TO EXPRESSLY ANSWER.**

The administration must provide a written response whenever a citizen addresses it so to make applications, suggestions, proposals, complaints or requests for information.

Reiterative lack of reply certainly violates the principles of good administration. Lack of reply allows the concerned party to get access to the judiciary, but it does not exempt the administration from the obligation to answer.

Section 42.1 LRJPAC: ‘Obligación de resolver’.

*‘ La Administración está obligada a dictar resolución expresa en todos los procedimientos y a notificarla cualquiera que sea su forma de iniciación’.*

General deadline to issue a definitive administrative statement is 3 months. By regulation, deadline can be extended up to 6 months. By law, more than 6 months is possible, but it must be justified by overriding reasons of general interest.

The time limit for notifying the decision is not a period of prescription but of expiration or lapsing of the legal action (caducidad). This means that any interruption in the proceeding, as a general rule, will not result neither in an extension of the deadline nor in a suspension in the proceeding. Another relevant result is that once the expiry date is reached, the public body will have to start a new proceeding as long as the limitation period was not elapsed. In other words, there was no interruption of the limitation period during the administrative proceeding; the statute of limitations was just suspended assuming that the definitive resolution would come up within the deadline.

There are, however, several potential suspension scenarios according to law. Suspension must be granted by the competent authority, reasoned and notified. Here is the list of cases where suspension is suitable:

- Requesting corrections. According to law, in case of wrong or incomplete applications the public body must grant the citizen ten working days after notice for correcting the application. If the citizen fails the application shall be filed. While this period is pending, the expiry time will be stayed.
- Cases where a prior declaration or report from a E.U. authority is required.
- Cases where a perceptive and mandatory report from other public body must be included in the proceeding. The expiry date can be held up to 3 months in these cases.
- Cases where decisive technical reports or adversary reports are essential. The expiry time will become stayed as long as it is necessary to perform the studies.
- Opening negotiations to settle proceedings between contending parties (terminación convencional).

Deferral of proceedings is allowed providing enough reasoning. The time extension will not last more than the original deadline for the main proceeding.

Obligation to expressly answer lasts forever, even in case of prescription of the action, expiry time, withdrawal, renunciation, waiver, declining, or ex post lack of cause. In such cases, the statement shall declare it.

## 2.- ADMINISTRATIVE SILENCE.

- General features.

The aim of this concept is to create a legal fiction of an administrative statement. Dealing with alleged acts with positive effect, the fiction will create an administrative decision with plenty of effect. Regarding alleged acts with negative effect, the fiction

will not generate an administrative statement itself, but a simple presumption with the only effect of opening the judicial-review process.

Although positive alleged acts are fully effective and enforceable, no one has the right to do what the law forbids or does not allow. Unlawful results should not be granted by means of administrative positive silence. No one should become enriched without just cause. However, as Administration cannot disregard its responsibilities from its own decisions, even when they are implicit, and in particular cannot ignore its positive decisions, starting an *ex officio* reviewing process and assuming state liability will be the result.

In conclusion, late administrative decisions, notified out of time, are not tied to the particular effect of the alleged act, regardless positive or negative, but the consequences will be significantly different. Let us work out the different situations.

- Lack of reply in proceedings started under one parties' request.

Section 43 *LRJPAC* lays down the general principle that no reply equals a positive response (*silencio estimatorio*). It certainly strengthens citizen's rights. Failure to take a decision will be regarded as a positive decision.

However, in certain cases omission must be interpreted as a refusal. The application or appeal is rejected in these cases (*silencio desestimatorio*), thus leaving open actions before Courts. Let us see the cases stated in Section 43:

- When according to Spanish legislation or E.U. law administrative omission to reply is stated as a refusal.
- Proceedings where the concerned party is exercising the constitutional right of petition.
- Whenever the party would result in obtaining rights related to public domain or public service.
- Lack of adjudication in appealing processes, except in cases of 'double silence'. This happens both, when in the main proceeding and in the appeal proceeding the administrative body fails to make a decision.

As above mentioned, positive alleged acts are actual administrative decisions, fully effective; confirming or reproducing late decisions are perfectly possible. If the late decision has to be restrictive, the positive alleged decision must be *ex officio* reviewed. One of the nullity causes according to *LRJPAC* precisely takes place whenever: '*Express or tacit decisions, which are contrary to the legal system, create powers or rights without a proper legal basis and lacking the essential conditions required by law*'.

In case the alleged decision granted rights without legal basis, but not lacking essential conditions, the alleged decision would be just annulable; in that case reviewing is not

always possible, since *Ex officio* review is no longer available after 4 years, which is the deadline to review annulable statements.

To enforce positive alleged decisions it is enough to carry out what the citizen applied for. However, in many cases it is not possible and the citizen has to apply the public body for mandatory enforcement (i.e. applications related to public subsidies). In the event of a new rejection or lack of reply, he enjoys legal standing to challenge the decision before Courts.

In contrast, as alleged decisions with negative effect are just fictions, the competent authority can lay down a late decision just revoking the former. In addition, the alleged decision cannot become a 'consent decision' ever. Although both *LRJPAC* and *LJCA* lay down certain deadlines (3-6 months) to appeal negative alleged decisions, such due dates are not effective. The Supreme Court stated that as alleged decisions are a mere fiction they can never become final decisions. Therefore, both legal deadlines are just indicative and by no means mandatory.

- Lack of reply in proceedings started at administration's own initiative (ex-officio).

Own initiative proceedings have a deadline according to the law or the regulation governing the case. According to the legal certainty principle administrative proceedings should not last indefinitely. Suspension cases are the same as the ones above mentioned.

Section 44 *LRJPAC* states the following rules:

- In proceedings leading to granting rights or having positive effect, reaching the deadline without getting an express decision must be regarded as a rejection. (silencio desestimatorio).
- When the proceeding is intended to have a restrictive result, including penalty proceedings, going beyond the legal period will make administrative action to become expired. (Caducidad). The body must issue a decision stating expiration.

## **V.- THE EFFICACY OF ADMINISTRATIVE DECISIONS.**

Every administrative decision enjoys a rebuttable presumption of validity (*iuris tantum*). To enjoy such presumption the decision must just have minimal external lawful conditions.

Efficacy can be subject to several conditions:

- **CONDITION PRECEDENT** (Condición suspensiva). One future fact must take place so the decision to become effective
- **RESOLUTORY or DISSOLVING CONDITION** (Condición resolutoria). Once the future fact takes place it operates the revocation of



the obligation, placing matters in the same state as though the obligation had not existed. It does not stay the execution of the obligation. It only obliges the party to restore what he has received in case the event provided for in the condition takes place.

- EX-POST APPROVAL OR EX-POST AUTHORISATION (Necesidad de aprobación o autorización posterior). Actually, this is sort of condition precedent.

The efficacy starting point is the notification or publication of the administrative statement. Let us discuss about both cases.

As a general rule notification must be done within 10 days from the date the decision was passed. This deadline is part of the general one the administrative body has for issuing a definitive decision in the proceeding. This has to be taken into account in terms of alleged decisions.

Notifications shall include the whole subject matter of the decision. It must be done in the place the citizen has communicated as his residence for notification purposes; as long as citizens do not communicate their residence, notification should be done wherever the Administration was aware of their last-known residence.

Regarding the ways to carry out and receive notifications, it can be done by any means as long as it leaves written record and acknowledgement of receipt. Let us check the different options:

- Personal notification: voluntary appearance at administrative offices.
- Notification at the citizen's residence. It can be done by post office services (correos), telegram, private delivery services, notarised document, visit of the police or administrative officers, etc.

Unexpected events might make notification difficult in some cases. Let us discuss the possible situations and the legal result.

- The recipient is not found at the address he appointed for notification purposes.
  - o Anyone in the home can take charge of the document, prior showing an ID.
  - o If no one is willing to take charge of the document, the officer should take note and try again later within the following 3 days. Doing this the same day, after several hours, is accepted as valid notification by Courts.
  - o As long as the notification attempt is unsuccessful, the officer will leave notice in the mailing box. In addition, he shall write a note in the notifications list at the post office. The citizen has up to 15 days to collect the document from the post office. After this time limit, the post

office shall send the document back to the administrative body so to continue proceedings.

- The residence is unknown, the citizen rejects receiving the notification, or the notification is not collected from the post office within the deadline.

In these cases the notification will be regarded legitimately done. The following stage in the proceeding is the notification by edicts (notificación edictal), which is a kind of official publication.

Special rules govern electronic or telematic notification. Every citizen has the right to be notified by electronic proceedings. However, to make such right become effective, the prior adaptation of the administrative structures and proceedings is required. Thus, although the right is clearly recognised by the law, its actual implementation often depends on implementing regulations, the adaptation of formalities, and in most cases, financial support to fund the purchase of programs and equipment.

The electronic notification therefore is only valid as long as the citizen chooses such an option, as well as whenever he voluntarily accepts this way of notification when offered by the authority. This voluntary approach, however, does not apply to everyone. Companies and other legal entities can be forced to accept electronic notification in certain proceedings providing it is stated by the law or regulations.

Electronic documents and records must be part of an electronic folder (carpeta electronica) with plenty access both by the administrative body and the concerned party. All the stages in the electronic procedure will be registered in the electronic folder. Sometimes, the party must register his communications, documents, pleadings, etc, using electronic signature, though it is not always required.

With regards to electronic notifications, every concerned party must give an email address for suitable notifications; acknowledgement of receipt is easy to prove once the citizen opens the file, but the problem might arise when the citizen does not check the email address or voluntarily rejects to open the communication. To avoid misconducting such as inattentiveness or voluntarily lack of checking not to be notified, the law states that the notice will be deemed legally done after 10 calendar days in every case the recipient does not open the computer application or the electronic file.

Publication is an alternative way of notification. It has the same effect in the following cases:

- Statements with plural recipients.
- Statements affecting several applicants.
- Statements in competitive or tender proceedings.
- Whenever the law or regulation states publication as the method of communication.
- Whenever public interest suggests publication as the best communication way.

Sometimes, publication complements notification not replacing it.

## **VI.- SUSPENSION OF EFFICACY AND EXTINCTION OF ADMINISTRATIVE ACTS.**

### **1.- SUSPENSION.**

This is a provisional measure which is rendered on administrative or judicial appeals. The aim of suspension of decision's efficacy is to bring the proceeding to a fair and effective conclusion. In addition, it is intended for limiting or avoiding damages of difficult or impossible redress.

The measure is regulated in sections 111 *LRJPAC* (administrative proceeding) and 120-130 *LJCA* (judicial proceedings). Both sections point out the following criteria to help decision-making:

- Damages of impossible or difficult redress.
- Balancing every single interest in conflict as a whole.
- *Fumus boni iuris*.
- Safeguarding the complete efficacy of the resulting decision or judgment in the administrative or judicial appeal.

As a general rule, suspension must be granted whenever nullity causes are potentially present. However, in practice administrative bodies and Courts restrictively apply such a criteria, since it involves an anticipated analysis of the substance of the matter. The Supreme Court has continuously stated that suspension should only be granted in such cases when nullity is 'obvious and evident' (*casos ostensibles y evidentes*).

The interested party can apply for suspension in any stage of the proceeding, which will be assessed by separate inquiry. Along this separate proceeding the administrative body can require the applicant to provide security deposit so to respond to eventual damages to public interest or third parties.

Administrative silence is positive in this matter and the deadline to expressly respond about granting suspension is 30 days.

In case of the special judicial procedure for the protection of fundamental rights stated in *LJCA*, the general rules discussed before are completely reversed. Suspension becomes the general rule unless the public body shows serious damages to public interest.

In *ex officio* review proceedings suspension are also available according to section 104 *LRJPAC*, but just in case of potential damages of impossible or difficult redress in public interests.

### **2.- EXTINCTION.**

Administrative decisions will have no longer effect in the following cases:

- The decision has been fully enforced. It has exhausted its legal effects and will no longer be effective.
- The decision has expired. Some administrative decisions have limited time effects.
- Decisions under resolutive condition.
- Decisions impossible to fulfill due to unexpected causes happened after the decision was made.
- Decisions declared annulable or null and void in appealing proceedings before the upper administrative body or Courts.
- Decisions revoked due to *ex officio* reviewing processes.

## **VII.- VALIDITY AND NULLITY OF ADMINISTRATIVE DECISIONS. THE THEORY OF INVALIDITY.**

In Spanish administrative law, the violation of the most relevant legal principles in both regulatory-making and decision-making processes leads to nullity. Regarding administrative statements, less relevant offences might however lead just to annullability.

Let us discuss about both results.

### 1.- ANNULABILITY (*anulabilidad*)

This the ordinary situation for unlawful decisions; there is no list of causes of annullability in the law. However, according to section 63 *LRJPAC*, the following should include the possible cases of annullability:

‘Any infringements, offences or violations of law, including abuse of power’ (*Cualquier infracción del ordenamiento jurídico incluida la desviación de poder*).

There is a wide list of offences that might be regarded as annulable causes:

- Hierarchical lack of power.
- Abstention or recusal.<sup>14</sup>
- Vice of consent.
- Infringement of law and regulations.
- Violation of discretionary limits.
- Lack of reasoning.
- Imposition of improper conditions.
- Violation of calling and public tendering conditions for bidders.
- Error in assessment of facts
- Etc.

Formal offences lead to annullability as long as the resulting administrative decision is unable to achieve its aim and purpose, as well as whenever its implementation should

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<sup>14</sup> Recusal is used when a board or administrative body member has a conflict of interest and must abstain from voting on any issues relating to that private interest. If not, it might be recused by interested parties from all deliberations on the matter.

create defencelessness for the concerned party (*principio de instrumentalidad de las formas*).

The Supreme Court has stated several tests so to help deciding when formal defects should end up in annullability. These are the main cases:

- Lack of due process (*limitación de garantías en el procedimiento*).
- The resulting decision should have been otherwise in the case that the offence had not taken place.
- Lack of hearing having as a result that the concerned party was unable to lodge pleadings during the proceeding. The lack was not repaired during the process.
- Refusal of an application to have access to the administrative records (*vista del expediente*), providing the citizen could not gain access to relevant documents.
- Rejection of relevant evidences the citizen aimed to give during the proceeding.

If we take a closer view, most of the listed violations can be easily rectified during the administrative or judicial procedure. Thus, the disabling efficacy of formal offences and defects just comes down to determining whether the offence has really been a relevant condition in the decision-making process, as well as clarifying whether the offence could have been repaired during the administrative proceeding or the judicial process or not.

In the case that the decision would have been another, three different cases may arise:

- The decision itself is correct and lawful regardless the formal violation (i.e. the citizen does have the right). The resulting decision must be regarded completely valid.
- The decision itself is not correct and lawful (*Vicio de fondo + Vicio de forma*). The resulting decision will be Annulable.
- The legality of the substantial decision cannot be precisely stated. Then, the resulting decision will be deemed annulable. In fact, this is the only case where formal offences themselves generate an invalid decision.

Administrative decisions notified past the deadline, even when it is essential in nature, can be perfectly valid and effective. Time-barred decisions do not always become invalid. Actually, as already mentioned, administrative bodies must always give an answer, regardless of the time-frame of the decision. Late decisions will be lawful unless they create defencelessness or damage the concerned party or third parties' interests.

On the other hand, deadlines in administrative proceedings are not mandatory in many cases. In contrast, time limits are always mandatory in the judicial process both for the administration and the citizen. Missing the deadline will result in losing procedural rights.

Many annulable decisions can be 'validated' or 'confirmed' (*Convalidado*), as soon as the public administration corrects the formal violation. The validating decision shall become enforceable from the very day it is notified and can even have retrospective effect. The new decision validating the former cannot change its substance and content. It will just complete it. Otherwise, the public body would be forced to start an *ex officio*

reviewing process. Cases of error, fraud or a representative's overstepping its commitment, among others, are likely to be validated.

Certain annulable decisions can be 'converted' into others so to become plenty valid (*Conversión*). Such operation takes place when certain procedural decisions are plenty valid and can themselves produce a different definitive administrative statement lawful and valid. Conversion leads to a new decision keeping the parts of the former which does not infringe legal or jurisdictional limits, while erasing those which are fatally flawed and do not adhere the rule of law.

Annulable decisions do not necessarily result in automatic annulability of the on-going related decisions (*transmission o comunicación de invalidez*).

Moreover, illegal procedural decisions do not necessarily make the rest of procedural decisions become illegal (*principio de conservación de actos*).

## 2.- NULL AND VOID DECISIONS.

The most relevant offences shall have the effect of declaring the decision 'null and void' (*nulidad del pleno derecho*). These are the most serious formal and substantial faults. Nullity makes the presumption of validity decline. Appeals based on the grounds of nullity causes will be granted suspension of the administrative decision. Enforcing null and void decisions is not possible unless they become final, and even in such situation, the public body could start *ex officio* reviewing proceedings.

Nullity causes are clearly stated in section 62 *LRJPAC*:

1. *Los actos de las Administraciones públicas son nulos de pleno derecho en los casos siguientes:*

- a) *Los que lesionen los derechos y libertades susceptibles de amparo constitucional.*
- b) *Los dictados por órgano manifiestamente incompetente por razón de la materia o del territorio.*
- c) *Los que tengan un contenido imposible.*
- d) *Los que sean constitutivos de infracción penal o se dicten como consecuencia de ésta.*
- e) *Los dictados prescindiendo total y absolutamente del procedimiento legalmente establecido o de las normas que contienen las reglas esenciales para la formación de la voluntad de los órganos colegiados.*
- f) *Los actos expresos o presuntos contrarios al ordenamiento jurídico por los que se adquieren facultades o derechos cuando se carezca de los requisitos esenciales para su adquisición.*
- g) *Cualquier otro que se establezca expresamente en una disposición de rango legal.*

2. *También serán nulas de pleno derecho las disposiciones administrativas que vulneren la [Constitución](#), las leyes u otras disposiciones administrativas de rango superior, las que regulen materias reservadas a la Ley, y las que establezcan la retroactividad de disposiciones sancionadoras no favorables o restrictivas de derechos individuales.*

Cases (1.b) and (1.e) were already discussed above when addressing formal offences. The case listed as (2) was addressed when discussing about regulations. The remaining causes deal with substantial aspects which are certainly worth analysing here.

Letter (a) deals with decisions damaging fundamental rights. According to the Spanish constitution, rights stated between sections 14 and 30, including the right to conscientious objection are suitable to be challenged before the Constitutional Court through a privileged and abbreviated procedure called *recurso de amparo*. In addition, the party can bring the case to ordinary Courts being benefited from an abbreviated procedure for fundamental rights as stated in *LJCA*.

The case listed in letter (c) concerns certain administrative decisions which are impossible to enforce due to factual or legal conditions. For example, declaring someone who is not Spanish or citizen of an E.U. country eligible for working positions in the public sector linked to homeland security should be impossible to enforce because it directly conflicts the law.

Letter (d) refers to decisions resulting from major offences such as those with criminal relevance (prevarication, bribery, etc.). Such decisions are deemed null and void. Nullity can only be declared once there is a final judgment in Criminal Courts. Meanwhile, the decision will be effective unless the Court states a provisional measure declaring stay of efficacy. Such measure should be probably granted given that one of the legal causes of suspension takes precisely place whenever the decision is eventually null and void.

Letter (f) is clearly thought for positive alleged decisions, although it might operate with written and notified decisions as well. As already discussed, notwithstanding the alleged decision is regarded as having positive effect, no one is eligible to benefit from something that is against the law. To back up such principle, *LRJPAC* raises the level of the offence to the null and void category.

Finally, letter (g) opens the list of null and void cases to every other one stated by law.

Declaring a decision null and void leads to the following results:

- Null and void decisions cannot be validated or confirmed.
- Null and void decisions can be converted into valid decisions.
- As well as annulable decisions, null and void decisions do not necessarily result in the automatic invalidity of on-going related decisions.

### 3.- FORMAL OFFENCES WITHOUT INVALIDATING EFFECT: MINOR PROCEDURAL IRREGULARITIES (*Irregularidades no invalidantes*).

Minor offences which neither undermine the essential elements of the decision, nor create defencelessness, should be regarded as a simple irregularity. The final decision meets the basic requirements and would have been the same assuming the offence had not taken place.

## QUESTION PAPER

- I.- Explain the concept *tactos separables*.
- II.- What are the key structural features of any administrative decision?
- III.- What is the difference between a definitive and a procedural decision?
- IV.- Is the citizen allowed to appeal a decision which exhausts administrative remedies? Give reasons and explain.
- V.- What happens when the concerned party does not file an appeal against a decision which does not exhaust the administrative channel? What if the decision does actually exhaust administrative remedies?
- VI.- When does a decision become final and what are the consequences in such cases?
- VII.- Give two examples of favourable decisions and two others of negative decisions. Briefly explain what they consist of.
- VIII.- Governing decisions of the Board of Ministers can be challenged before the Administrative Courts. Give reasons to support such statement.
- IX.- What does abstention and recusal mean?
- X.- What is a hearing and what is its legal relevance?
- XI.- What is the point of saying that administrative silence is a legal fiction?
- XII.- Explain what are the effects of positive alleged decisions.
- XIII.- Explain what are the effects of negative alleged decisions.
- XIV.- Are late decisions unnecessary as long as we already have an alleged decision? Are late decisions legally bound and tied by the effect of the alleged decision?
- XV.- In *Ex officio* proceedings lack of giving an answer might lead to two different results. Which are they?
- XVI.- How should an administrative notification be legally carried out?
- XVII.- When is a publication required?
- XVIII.- What cases lead to staying the administrative decision's efficacy?
- XIX.- What are the annulability causes? Are they stated by law?
- XX.- List the causes of nullity and briefly explain their key features?



XI.- Prepare the following administrative decisions:

- Decision to initiate disciplinary proceedings (*acuerdo de incoación de expediente sancionador*).
- Draft resolution in disciplinary proceedings (*propuesta de resolución en expediente sancionador*).
- Definitive decision granting financial aid for housing (*acto definitivo de concesión de subvenciones para adquisición de vivienda*).
- Procedural measure opening the period for the production of evidence in a disciplinary proceeding. (*diligencia para que se declare abierto el periodo de prueba en expediente sancionador*).
- Certificate of attendance to the ‘...’ seminar (*certificado de asistencia a un seminario*).

## CASES.

I.- Decide whether the following statements refers to administrative decisions or not. Point out their actual nature (administrative, political or private) in each case:

- a.- Building permit granted by the Major.
- b.- Appointment of Minister by the Spanish Prime Minister.
- c.- Hydrological report included in the proceeding for approval of zoning regulations for residential land-use in urban areas (*plan parcial de reforma interior*).
- d.- Decision awarding AQUAMED S.A., which is a private company publicly owned, a supply contract for the Regional Government.
- e.- Decision granting a discharge permit to a private company by the President of the Jucar River Basin Authority.
- f.- Order of the President of one Irrigation District (*Comunidad de regantes*) imposing water distribution conditions to the farmers who are members of the District.
- g.- Notice and publication of a public call for hiring a civil servant (tenure position) in the Town Hall of Alicante. The decision is held by the corresponding Department.
- h.- Decision of the contracting body excluding 25 candidates assuming they are not eligible due to lack of enough professional skills.
- i.- Penalty imposing a fine by the Traffic Deputy Director of the correspondent Ministry.
- o.- A group of landowners are summoned to appear for onsite layout (*replanteo*) within the time stated in the Expropriations Act. After the meeting the authority issued a variation order (*acta de replanteo*)

p.- General Director of the Ministry of Agriculture and Environment's decision rejecting granting financial aid to several applicants.

q.- Alleged decision not granting financial aid. General Director of Agriculture should have made the decision. The alleged decision became effective 9 months ago.

## II.- Discuss what expected results the following cases shall have:

a.- Juan's cousin, who is the General Director of the Regional Ministry of Environment of Valencia grants Juan financial aid to help turn a farming facility located inside the Font Roja pre-park area into an organic farming facility, which is significantly more environmentally friendly. Funding is to be implemented under the following programme: 'Assistance to improve environment in agricultural areas in natural parks and neighbouring ('pre-park') areas'.

b.- One citizen is notified a definitive decision. Notification lacks several relevant formal elements such as the indication of available remedies. The citizen files an appeal (*recurso de alzada*) on the grounds of defencelessness since he was not correctly notified, and requesting the upper administrative body to declare the decision null and void. What do you think should happen in this case?

c.- A citizen receives a telematic notification of an administrative decision. He checks it in his electronic folder and decides not to open it. Do you think the notification was correctly done and therefore fully effective?

d.- One citizen applies for a building permit. Application is registered on December the 30th. The time limit for notifying the decision is two months. The lack of answer in this case has positive effect in this case according to law. On March the 1st, the citizen receives notification rejecting the permit. Do you find it correct? Explain your point.

e.- An administrative body starts a disciplinary proceeding. The time limit for notifying the resulting decision is 6 months from the day the decision to initiate the proceeding was taken. The public body makes a decision imposing a penalty 9 months later. What is the legal situation in this case?

f.- An officer tries to notify a person an administrative decision in his residence at 9:00 am. At 12.00, the officer stops by the apartment again and the person is not still there. Personal notification, therefore, cannot be done. The officer leaves a note in the mailing box. Do you find the whole proceeding correct?

g.- The concerned party, which has not been personally notified, does not appear in the mailing office and does not collect the certified mail. What do you think should happen in this case?

h.- Providing one citizen receives a demolition order involving a building he owns, he decides to appeal the decision requesting the enforcement to be stayed until the Court rules the case. In fact, the citizen appeals on the grounds on an eventual illegality of the zoning regulations of the city. The citizen is actually lodging an indirect appeal against the regulation, although challenging the single decision that directly concerns his

property rights (*recurso indirecto contra reglamentos*). Do you think stay of execution should be granted providing that the building does not have cultural values (heritage laws are not applicable though)?

III.- Choose whether the following cases are null and void or just annulable. Justify your answers.

a.- Decision made by the Subdelegate of the Government in Alicante preventing a group of applicants from promoting a legitimate demonstration.

b.- Town Hall authorities grant a developer a building permit in land excluded from urban development (*suelo no urbanizable*).

c.- Occupation of plot for public purposes without previous notice to the owners.

d.- Positive alleged act recognising a citizen as holding dependent adult status. Later on, it is proved that the recipient was not really in such condition.

e.- Administrative statement not addressing several relevant aspects of the matter (lack of reasoning).

f.- The Mayor grants a friend a building permit. He is convicted of a felony (*prevaricación*).

g.- The municipal governing board (*Junta de Gobierno*) grants a building permit which should have been granted by the Major according to law.

h.- Traffic fine imposed on the grounds of a wrong Police report.

i.- Rejection of an application for a license on the grounds of a negative technical report. The concerned party does not agree with such report.

j.- One citizen receives two conflicting notifications from two different administrative bodies.

k.- One regulation lists and regulates a series of offences eventually breaking the principle of reservation as to law, which is fully applicable in the disciplinary field (art. 25.1 CE).

l.- The competent authority grants a citizen a permit to open a pharmacy. The citizen forged his degree so to become eligible. He was sentenced for falsification and the judgment became final three years later. Notwithstanding, a few days after being granted the permit he actually got the required degree.

## CHAPTER XIII. ADMINISTRATIVE PROCEEDINGS.

### I.- CONCEPT, NATURE AND IMPLEMENTATION.

The administrative proceeding is a group of formal steps leading to a definitive decision. All the documents except for the definitive decision are procedural stages intended to build a reasoned and fair definitive decision. Procedural and substantive statements make up the administrative record, which can be electronic or physical.

Every single democratic state has a regulation of administrative proceeding. Some of them have created a regulatory structure mostly based on case law, such as the common law countries and others such as France or even the European Union. Others, however, have created a legal framework so to deal with procedural aspects. This model is adopted in the USA (1946 Administrative Procedure Act together with the constitutional doctrine of procedural due process), Germany (1976 Federal law), Italy (1990 law), and obviously Spain (1956 Administrative procedure Act).

Although judicial review and administrative proceeding share common principles and even targets, their nature and ends actually differ. While judicial review tries to reach a fair and impartial judgment, administrative proceeding tries to maximise the so called 'general interest', which is interpreted by one of the contending parties. It does not mean that the administrative proceeding is merely a formality, but there is no getting away from the fact that public administration becomes both, judge and party, in the administrative proceeding.

With regards to the nature of the proceeding, it is worth mentioning that it is a relevant tool to protect citizen's rights, since it allows them to know all the fundamentals of the case and to actively participate, lodging allegations, and even appealing to upper authorities. Moreover, proceeding helps monitor administrative actions.

On the other hand, it is important to stress that the administrative proceeding is a formal structure made up of various parts (single decisions). All the procedural stages are intended to end up in a definitive decision; thus, they are instrumental to the final decision and are structurally related to each other. Every single procedural stage must be valid. All of them have their own causation and purpose. As a result, all of them might be challenged, although only those considered relevant enough (*cualificados*) can be separately brought to Courts.

Sometimes, procedural decisions are built up in separate procedural inquiries (*piezas separadas*).

The decision-making process requires following the proper proceeding. The *LRJPAC* is the basic law for every administrative structure with regards to the due process regulation. However, the law does not state a complete proceeding structure; on the contrary, it only lays down key principles and settles down certain essential procedural stages.

When it comes to institutional administrative bodies, administrative procedural rules are somewhat applicable to a certain extent, depending therefore on the type of the agency

we are dealing with; it is necessary to bear in mind that certain entities do not fall within Administrative law framework. Corporate bodies are subject to their specific law, but administrative proceeding will be required when acting in public capacity. Both institutional and corporate bodies, when acting under private law, will only be subject to *LRJPAC* proceeding rules with regards to the so called *actos separables*.

Despite being essential and necessary, administrative proceeding certainly creates bureaucratic burdens, sometimes unnecessary, and may impede citizen's quick access to a final decision or judicial review. Excessive red tape is negative for the economy as well. Simplifying proceedings and reducing regulatory burdens is likely to be one of the current key challenges of most governmental policies in Europe.

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market is a good example. 1999 amendments in *LRJPAC* also included a reference to 'simplifying proceedings' and removing unnecessary bureaucracy. However, in practice, little or nothing has been done.

So far, excessive procedural burdens have been a good pretext to what is named as: 'administrative law getaway' (*huida del derecho administrativo*). The flee from Administrative law is common when it comes to creating and operating public entities under private law schemes, and tactically using private law in regular legal relations such as contracting out, staff regulations, etc.

Procedural regulation has moved forward in the last few years due to the development of the new technologies in public administration's operations. Law 11/2007 de 22 de junio, de acceso electrónico a la Administración, states the key rules in this area. Telematic proceedings are likely to be one of the most interesting areas of research in administrative law in the next years. It allows not only to simplify proceedings, but also to encourage public participation, and as a result, helps to achieve new grounds for transparency and accountability.

2007 Electronic Access to Administration Act gives citizens the right to establish relations with administrative bodies through electronic means. This is consistent with section 35 *LRJPAC*, which grants citizens several rights to enable full access to administrative information, files and records. In addition, according to section 6 of 2007 Act, citizens have the right to get online information, seek advice, lodge applications and pleadings, file complaints, suggestions, make payments, transactions, and file appeals against administrative decisions and regulations.

To make such a right fully effective and enforceable, it is necessary to adapt proceedings and to invest in technology platforms. ITS applications should be mature, sufficiently interoperable, and efficient enough to support a growing pattern of electronic relations between administrative bodies and citizens. 2007 Act states that such capacities should be operational in the State Administration before the 31<sup>st</sup> of December 2009. Regional and local governments, however, are only bound to offer electronic proceedings depending on their budgetary possibilities. Recent amendments in 2007 law, (*Ley 2/2011, de 4 de marzo, de Economía Sostenible*), obliges such administrations to create a program for the implementation of new technologies in their proceedings, scheduling a progressive adaptation (new paragraph 5 of the 3<sup>rd</sup> final provision of 2007 law).

## II.- PRINCIPLES.

Given that there is not a common and uniform administrative proceeding framework, and providing that many *LRJPAC* provisions are merely supplementary of special procedures, the greatest contribution of *LRJPAC* is to create a bunch of common principles that ensure a minimum of uniformity.

### 1.- Principle of contradiction.

The examining body must grant both parties in the proceeding enough possibilities to participate. Equal treatment and allowing contradiction becomes essential in due process (section 85.3 *LRJPAC*).

According to STC 8th of June 1981, section 24 CE must be interpreted as there is not a valid proceeding, regardless judicial or administrative, where contradiction is not fully guaranteed to all the parties in every single procedural stage. For example, as a general rule Police reports are regarded as mere declaration of facts (*denuncia*) unless ratified by the officer during the proceeding so to allow contradiction (then they become a piece of evidence).

Section 31 *LRJPAC* states that every citizen holding concerned rights (*interesados necesarios*) must be called to the proceeding. Not meeting such obligation would lead to declaring the resulting decision null and void on the grounds of defencelessness. In addition, citizens just holding legitimate interests in the case will become parties in the proceeding providing they voluntarily appear (*interesados no necesarios*). Becoming a concerned party (*interesado*) in one proceeding ensures that those benefited from such position become allowed to fully and actively participate in the proceeding.

Concerned parties have the following rights:

- Actively participate in the proceeding.
- Right to be informed of the current stage of the proceeding.
- Get copies of every decision regardless procedural or definitive.
- Identifying authorities and civil servants.
- Lodge allegations and pleadings.<sup>15</sup> File documents during all the stages of the procedure before the definitive decision.
- Proposing evidences, administrative actions in defence of their rights, and take part and be notified of every relevant procedural step.
- Appeal the definitive decision.

(Sections 35, 78, 79, 81, 84, 85 *LRJPAC*).

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<sup>15</sup> Pleadings: a formal document in which a party to a legal proceeding sets forth or responds to allegations, claims, denials or defences. In federal civil procedure, the main pleadings are the plaintiff's complaint and the defendant's answer. Allegations are appropriate in a complaint or similar document.

All the above mentioned rights are actually instrumental to reach fair and actual contradiction, and therefore, to ensure the right to be heard.

## 2.- Principle of procedural economy (swiftness and efficacy).

This principle is essential to reduce bureaucratic burdens and has multiple effects. Reducing steps in the proceeding, limiting deadlines, sharing information and documents between administrative bodies, among many other operative measures, are regular ways to turn proceedings faster and eventually more efficient. However, implications of the principle go further.

The principle is clearly implicit in the legal and judicial assessment of formal offences. As already discussed, such offences rarely lead to annulation or nullity. Annulation, which only leads to repeat the wrong stages in proceeding, is even more restrictive. Techniques such as conversion and validation and principles stating, that decisions do not necessarily result in declaring on-going related decisions annulable, are also inspired on this principle.

Allowing public bodies to provide a common decision for a number of similar cases is a logical outcome of the principle. The law states that separate but connected on-going proceedings should be taken on by the authority holding the closest and more specific competence.<sup>16</sup>

In the current *LRJPAC*, the principle of efficacy is expressly stated in section 3.I. Paragraph 2 goes even further imposing ‘efficiency’ as general criteria. Section 57 states that as long as several procedural decisions can be gathered in just one it must be done that way (not consecutive). Finally, section 73 allows gathering administrative records when they are closely linked.

The limit for the procedural economy is not limiting citizen rights and guarantees, as well as not to break the law.

## 3.- Principle ‘*in dubio pro actione*’.

The right of individual or collective actions in administrative proceedings must be interpreted in the sense of granting full participation. This is particularly relevant when evaluating legal standing, and therefore, qualifying someone’s position as a concerned party (*interesado*). (STC of July 11<sup>th</sup>, 1983).

Another result arising from this principle is that most formalities in citizen’s documents are not relevant whatsoever in the proceeding. Even certain deadlines are not strict for citizens. For example, although it is during the hearing when citizens are allowed to file pleadings, nothing prevents citizens from filing allegations during the whole proceeding.

*LRJPAC* states particular applications of this principle:

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<sup>16</sup> See Sections 38-39, 1958 LPA, which are still in force with supplementary effect

- Section 102 states that citizen's error identifying the type of appeal does not prevent from admitting and processing the appeal.
- Section 92.1 requires Administration to warn the concerned party about the expiry date of the proceeding almost 3 months before it will take place, in the event the proceeding had become stayed from his fault. Without proper warning, the declaration of expiry would not be effective.
- Sections 71 and 76 impose administrative bodies the obligation to grant the citizen a period of 10 days to rectify his/her application or submit additional documents (*subsanción*). Not meeting such demand will result in withdrawing from the current proceeding (*desistimiento*). Deficiencies are not only formal failures; on the contrary, Courts even accept substantial defects as suitable to be corrected. For example, paying fees out of time.

#### 4.- Principle of *Ex officio* expediting administrative procedure (*Ex officio* principle).

The public body has to drive along the proceeding even without request from any concerned party. The onus in pressing on and driving the case ahead relies always on the public body; when citizens do not meet their procedural obligations they get procedural disadvantages, but it is the public body the one that must keep the proceeding moving ahead meeting the deadlines. The principle is clearly stated in section 74.1 LRPAC.

Administrative proceeding is intrinsically 'inquisitorial' and decisions do not depend on what the citizen has brought to the proceeding. On the contrary, decisions should address every relevant issue of public interest.

Section 78.1 *LRJPAC* states what is called investigative measures (*actos de instrucción*), including every administrative action leading to acknowledge and verify every relevant data and information to be dealt with in the case. Every stage must be carried out *Ex officio*, notwithstanding citizen's request, including the 'evidence hearing' (*periodo de prueba*). (section 80.2 *LRJPAC*).

Section 41 *LRJPAC* holds the competent authorities responsible from properly driving proceedings and removing every set back. Such responsibility is backed up in sections 35.1.j (citizen's rights in the proceeding) and 42.7 (obligation to answer). In addition after 1999 *LRJPAC* amendments, section 47.2 apparently opens the door to strict liability in these cases (*responsabilidad patrimonial*).

#### 5.- Legal standing (*legitimación*).

Overall or universal standing (*acción pública*) is only available in certain areas of administrative law such as heritage protection, zoning law, coastal law, or access to



environmental information. Most fields of administrative action, however, require certain qualification to participate. Such qualification arises from particular links with the subject matter. According to *LRJPAC*, it is necessary to hold a ‘concerned right’ (*derecho subjetivo afectado*) or a ‘legitimate interest’ (*interés legítimo*). Those who finally become part of the proceeding are called: ‘concerned parties’ (*interesados*).

Due to section 24 CE, having a direct, personal and legal interest involved is no longer necessary. The current figure legitimate interest is less demanding than ‘direct interest’ in terms of granting access to the administrative proceeding and judicial review. Indirect affected interests therefore allow legal standing. Certain collective rights are benefited from legal standing as well according to specific rules such as the so called ‘diffuse rights’ (*derechos difusos*).

The same standing conditions are required for judicial review purposes in section 7.3 *LOPJ*, including corporative standing, associative standing and group standing. When it comes to collective action, Sections 18 and 19 *LJCA* grant legal standing in the following cases:

- Corporations
- Associations.
- Trade Unions.
- Groups of concerned citizens.
- Unions without legal personality.
- Independent or autonomous patrimonies.

Section 31 *LRJPAC* replicates such standing scheme for administrative proceedings, specifying the following cases:

- Rights or legitimate interests:
  - Whoever that promotes a proceeding holding concerned rights or legitimate interests, both individual and collective.
  - Whoever that, despite of promoting the proceeding, hold rights eventually affected in the proceeding.
  - Whoever that, despite of promoting the proceeding, hold legitimate interests, both individual or collective, which could be eventually damaged in the proceeding; providing they voluntarily appear in the proceeding before the definitive decision.
- Diffuse interests: associations and representative organisations of economic and social interests, holding collective legitimate interests, will have legal standing according to statutory conditions.

## 6.- Principle of impartiality.

Section 103 CE demands objectivity and impartiality in administrative behaviour. However, administrative bodies are both judge and party in the decision-making process; in fact, impartiality, which is essential in judicial review, must be regarded in a different way in administrative proceedings.

*LRJPAC* tries to fill out such principle in a number of sections. For example, disciplinary proceedings must have two different phases: investigation and decision-making (section 134). Abstention and recusal rules are another example (sections 28 and 29). Another attempt to make the principle effective can be found in tender proceedings, whose conditions are stated in the Public Sector Contract Act.

#### 7.- Principle of transparency and accountability.

From 1889 (*ley Azcarate*) administrative records cannot be secret. That law precisely stated a particular stage for the exhibition of documents and hearing to allow citizens access to the records. Notwithstanding, limits to full access were always present in Spanish Administrative law.

Section 105 CE refers to hearings in administrative proceedings, as well as to accessing to administrative records and registries. Particular rules about it are found in statutory provisions.

*LRJPAC* dedicates Section 37 to that purpose. Such regulation has its roots in the 1966 Free Information Act (U.S), which is the main precedent. To summarise, this section grants concerned citizens full access to every document in the file (papers, images, sounds, digital format, etc.).

However, the same Section states a number of limits: privacy data, nominative documents (accessible only for their owners as well as third parties holding rights or legitimate interests involved), prevailing public interest reasons, prevailing third party's interests, as well as other cases excluded by law.

Moreover, access is directly forbidden in particular cases:

- Political decisions
- Decisions not subject to Administrative law.
- Homeland security and defence.
- Decisions related to criminal investigations when releasing information might damage third parties or difficult investigations.
- Commercial or industrial secrets.
- Monetary policies.

Access in other cases depends on their particular statutory requirements:

- Classified matters (official secrets).
- Medical documents and records.
- Electoral archives.
- Official statistical studies.
- Register of births, marriages and deaths, Criminal Register (*Registro Central de Penados y Rebeldes*), and other public registers.
- Administrative documents related to elected political representatives (parliaments and municipal boards).

- Historic archives

Applications must be specific, identifying the requested documents; general requests of information or access should not be granted. In addition, applications that might disrupt the ordinary functioning and efficacy of administrative bodies should be rejected (*grave perturbación del funcionamiento del servicio*). Certain limits, in fact, derive from sectorial law or general principles such as the ‘abuse or misuse of rights’, intellectual and industrial property, official secrets, etc.

Citizens that have been granted access to administrative records are allowed to get copies and certificates. Whenever citizen’s requests or suggestions lead to general answers arising new interpretations of statutes and regulations, as well as current proceedings, they must be published for everybody’s knowledge.

Section 35 states several useful rights to grant transparency and accountability:

- Right to identify authorities and officers.
- Right to get information and advice related to proceedings (legal and technical advice)

Certain sectorial law implements and even broadens access rights. That is the case of environmental access to information, which is thoroughly expanded under Law 27/2006, *de 18 de julio, por la que se regulan los derechos de acceso a la información, de participación pública y de acceso a la justicia en materia de medio ambiente*. The law implements in Spain the Directives 2003/4/CE and 2003/35/CE.

#### **h.- Principle of gratuity.**

Although *LRJPAC* does not expressly state this principle, it arises from the very nature of the administrative proceeding. No taxes are required to become a party in administrative proceedings, although it was not always this way (i.e. *timbre*). Notwithstanding, administrations are allowed to require citizens to pay taxes for certain documental services such as expediting copies.

With regards to the costs of certain pieces of evidence, section 81.3 *LRJPAC* states that authorities can charge the cost the citizen must pay, and even request advance payments (*anticipos*) subject to definitive settlement (*liquidación definitiva*).

### **III.- LEGAL STANDING.**

Determining legal standing in administrative proceeding depends on the joint interpretation of sections 31 and 35 *LRJPAC*, which respectively state the concept of concerned party and the rights in the proceeding. Let us discuss the key aspects.

#### **1.- Concerned right (*Derechos subjetivos*).**

This concept of right in administrative law has the same scope as in private law. Rights are recognised by laws, contracts, or favourable administrative decisions. Citizens

holding right are *interesados necesarios*, and therefore they always have to be called to the proceeding. Infringing such obligation should lead to a null and void statement due to defencelessness. Calling the citizen will not be necessary as long as he/she has already participated in the proceeding as an applicant or has appeared at his/her own initiative.

Providing the citizen has been correctly summoned, and in the event he/she does not appear, the proceeding shall continue in his absence. The same will take place whenever the right holder is not localised or identified. Right holders are always interested parties in the proceeding regardless they are present or not.

## 2.- Legitimate interest.

The relation with the case is supposed to be smaller than in case of holding a right. Becoming a concerned party in these cases requires a positive action in the proceeding, either appearing as an applicant or after being called. Calling the holder is only required when the relation with the case arises during the investigation and he/she is clearly identified.

In sum, citizens become concerned parties by means of legitimate interest in two cases:

- Those who file an application or appeal.
- Those who appear in proceedings already in progress (*personación*).

Holding legitimate interest requires at least an eventual damage or benefit directly derived from the administrative proceeding. Benefits might be material, legal or even moral. Complete evidence of such benefit is not needed; a mere circumstantial evidence (*indicio*) should be enough (STS July 5th 1972). With regards to damages, competitive interests are included, thus concerning participants in tender or competitive proceedings. Being neighbour, or professional, might be regarded as legitimate interest in certain cases according to sectorial law.

When citizens do not receive the citation, the resulting decision will be annulable on the grounds of a relevant formal offence leading to defencelessness.

Experts, witnesses, or complainants are not parties in the proceeding. Nor those participating in the public information stage with no particular right or legitimate interest involved.

According to section 35 *LRJPAC* concerned parties enjoy the following procedural rights:

- Being informed of the current status of the proceeding and get copies of all the documents. They can get stamped copy of the submitted documents and keep the original documents unless otherwise reasonably instructed.
- Identifying the authorities and officers in charge.
- Using official languages according to law.
- Lodging pleadings and providing supporting documents in any phase of the proceeding before the hearing.

- Not being obliged to file documents that regulations do not require. They should not be made filing documents already in possession of the acting body.
- Getting information as well as legal and technical advice for projects, actions or applications.
- Being granted access to registries and records according to law.
- Being correctly treated by authorities and civil servants.
- Demanding accountability for public officers and the Administration itself.
- Others stated by law.

Concerned parties can lodge allegations and documents by digital means. At any time they can change to the ordinary written means, unless otherwise instructed in the regulations. Only when legislation bans digital means the public body can reject such type of communication. On the other hand, certain statutes expressly require the use of digital means. In such cases, electronic proceeding is mandatory.

According to section 27 *LAE*, e-communications have the same effect as ordinary ones, providing transmission and receipt are properly authenticated (*constancia fehaciente*).

With regards to legal capacity, civil rules are applicable to administrative proceeding. However, minors have legal capacity in some areas such as education. Citizens can participate in the proceeding by means of a representative. The lack of formal representation does not impede filing the document, lodging the application, appealing, or whatever other action; however, the corresponding authorisation must be submitted within 10 working days. The pro-action principle operates in this case.

#### **IV.- ADMINISTRATIVE PROCEEDING STRUCTURE**

##### 1.- Place.

Administrative bodies have their own physical or IRS head offices (*sede física o electrónica*). Both places have a single entry point for documents, the Registry. Every administrative building which is accessible to the public must have a Registry office according to section 38 *LRJPAC*. Together with the common or general Registry office, certain administrative bodies have their own auxiliary registries. Registries must keep physical and electronic books to make the annotations every time one document enters or exits the body.

The following are the available registries to lodge documents in administrative proceedings:

- Competent body's headquarters and website.
- In State and Regional Administration, documents can be filed not only in the competent body but in any other bodies' registers. With regards to municipal administration, they only share documents with other registries prior specific agreement.
- Post offices (documents must be presented in an open envelop for checking and validation).

- Consulate and Embassy's registries according to law.
- Others according to law.

In case the application is registered in a different office from the one it should have been, the starting date to calculate the deadline to decide the case will be the day the application arrives in the register of the processing body. However, the relevant date in terms of meeting deadlines concerning the citizen will be the day he registered the application.

In State Administration, working operation in Registry offices is clearly laid down in *Real Decreto 772/1999, de 7 de mayo*. Every Regional Administration has its own regulations.

Agreements between Administrations are essential to meet the target: 'one single point of contact' or 'one-stop window' (*ventanilla única*). That is especially relevant with regards to municipal administrations. ITC proceedings make it easier to achieve.

Although *LRJPAC* had certain rules governing telematic registers, section 38.9 was repealed by *LAE*. In addition, detailed regulation was passed by *Real Decreto 1671/2009, de 6 de noviembre*, por el que se desarrolla parcialmente la *Ley 11/2007, de 22 de junio, de acceso electrónico de los ciudadanos a los servicios públicos*.

According to it, Administrative bodies in the State Administration, together with state entities (*organismos autónomos*) must create an 'electronic office' (*sede electrónica*) in their website. An administrative decision made by the upper authority (Ministers or Directors of public entities) shall state the working rules of the office. The e-address shall be clearly set. The responsible authority for the office shall be appointed and will be clearly identified on the website. Services shall have enough contact data (phone, fax, physical offices, etc.). There should be a space to lodge suggestions and complaints. Sharing electronic offices are also encouraged prior agreement.

Within the e-office there must be a registry point. Every administrative department needs an electronic registry unless a common registry is established. In State Administration a common registry was created by section 31 *LAE*.

Documents should only be rejected in the following cases:

- Documents addressed to bodies or entities not belonging to State Administration unless agreement.
- Electronic documents attaching malicious codes or viruses.
- When standardised documents are required and the citizen does not fill all the gaps in the required fields. Inconsistencies and omissions. Standardised documents are previously laid down by the acting body, which decision can be challenged.
- Documents that should have been registered in specific electronic registries.

In case the document is rejected the citizen must be notified and given the chance to correct the failure. If he/she does not, registration will not take place. Given that e-offices are opened 24-7, documents can be lodged every day at every hour. Interruptions in service must be published and reasoned, and will last the time necessary to fix

problems. Unplanned service disruption must result in an extension of upcoming deadlines.

E-registries must provide a receipt ensured through an electronic signature. E-signatures must be supported by an authenticated digital certificate. It will include copy of the citizen's document or reference, the date and time of registry and registry number, as well as the identification of attached documents with their digital fingerprint. The receipt will communicate the maximum deadline for notification as well as the effects of possible alleged decision.

Citizens bear with I.D. requirements to become allowed to lodge documents in public registries. In many cases, the document should be ensured through advanced electronic signature, based on a qualified certificate which is created by a secure signature creation device. Electronic signature should offer equivalent assurance with regards to the functionalities attributed to a signature. Spanish I.D. is regarded advanced electronic signature.

According to Law 59/2003, *de 19 de diciembre, de firma electrónica*, it is necessary to distinguish between advanced electronic signature (*firma electrónica avanzada*) and qualified electronic signature (*firma electrónica reconocida*). Directive 1999/93/EC on a Community framework for electronic signatures, also states the difference.

The Directive addresses several forms of electronic signatures:

- The first one is the simplest form of the electronic signature and is given a wide meaning. It serves to identify and authenticate data. It can be as simple as signing an e-mail message with a person's name or using a PIN-code. To have a signature the authentication must relate to *data* and not be used as a method or technology only for *entity* authentication.
- The second form of electronic signature is the advanced electronic signature. This form has to meet the requirements defined in Article 2.2 of the Directive. The Directive is neutral technology, but in practice this definition refers mainly to electronic signatures based on a public key infrastructure (PKI). It uses encryption technology to sign data, which requires a public and a private key.

Section 3.2 of Spanish law states that this signature allows authorities to identify the signatory and acknowledge any following change in data already signed. The signature is uniquely linked to the holder and it includes all relevant data uploaded when it was created. In addition, this signature remains always under the holder's exclusive control.

- Lastly there is a third form of electronic signature mentioned in Article 5.1, the 'qualified electronic signature'. This consists of an advanced electronic signature based on a qualified certificate and created by a secure-signature-creation device. It needs to meet the requirements in Annex I, II and III.

This kind of signature is recognised under section 3.3 of Spanish law. Effects of such a signature are exactly the same as handwritten signature.

The 'signatory' is identified in the Directive as '*a person who holds the signature creation device and acts either on his own behalf or on behalf of the natural or legal person or entity he represents*'. Though the Directive does not state it, the signatory of a qualified electronic signature (article 5.1 of the Directive) can only be a natural person, as long as this form of signature is equivalent to the handwritten one.

## 2.- Time.

Although relevant, administrative deadlines are not always essential enough to lead to annulment or even nullity. Formalities are just instrumental in administrative law, not an end themselves, and therefore annulments based on formal offences (including time) are not a commonplace.

However, failure to meet the deadline might have serious results since it might lead to an alleged decision. Prescription and expiry date are also relevant results. Citizens may get procedural disadvantages, in particular when definitive decisions turn into final, consented and thus, unappealable decisions. In addition, those who do not correct applications in time shall withdraw the proceeding.

As a general rule, deadlines in administrative law must be calculated as working days (*días hábiles*) which excludes Sundays and other non-working days. Only when expressly stated by law, deadlines should be calculated as calendar days (*días naturales*).

Whenever laws and regulations lay down a day-deadline (i.e. 10 days deadline), the last day should be calculated taking into account if it is a working day or calendar day. In case the due date is Sunday or another non-working day, the closing date shall be the next working day.

When deadlines are laid down in months or years, the key problem is to determine the date the deadline is actually expired when the closing day does not exist or is not a working day (several months does not have 31 days or end on Sunday or holiday). Deadlines should end on the last day of the closing month or year; however, when that day is not a working day, time limit will be extended to the next working day.

In every case, regardless of the deadlines calculated by days, months or years, the starting point of the period will be the next day after notification or publication. In cases of alleged decisions, the starting point will be the next day the alleged decision becomes effective).

Given that in Spain there are not only national holidays, but also regional and even local ones, working and non-working days are not always the same in every territory. The criteria will always be the most favourable for the citizen. Thus, the particular day will be regarded as non-working day to all purposes.

## 3.- Formalities.

Citizens do not need legal representation in administrative proceedings (*postulación*), since no strict formalities in applications, documents, and appeals, are required. In



addition, the administration provides standardised documents quite often, which use is sometimes mandatory. That makes it even less relevant to have legal representation.

Section 70 *LRJPAC*, however, states several formal conditions for applications. The applicant must be identified (personal data) and will communicate his/her residence (essential to notify decisions). He/she should declare the preferred notification means (electronic or ordinary). It is necessary to indicate the place and date, as well as signing the document. Another relevant element is identifying the administrative body the applicant is addressing the document to. No more formalities are needed, although it is advisable to clearly, quite simply and briefly report facts, the legal founding, and the petition.

In addition, the applicant should take into account the rules stated in section 35 *LAE* (*Electronic proceedings*), as well as the relevant provisions of law 59/2003 *de 19 de diciembre* (Electronic signature). In electronic proceedings, standardised applications are mandatory and must be supplied by the electronic office. Applications and other attached documents must be always registered with advanced electronic signature. Some standardised documents are partially filled by the computer system, in which case the citizen only needs to complete and sign it.

An electronic document is everyone keeping information in digital format. It should be digitally signed by officers legally vested with authority to attest documents (*fe pública*).

Administration can impose additional conditions for digital signature in administrative proceedings. Such conditions should be objective, proportioned, transparent, and non-discriminatory. They shall not hinder or restrict digital certification services in proceedings where several administrations are taking part.

With regards to the contents of the administrative electronic documents, Spanish law does not require special formalities. Nevertheless, the *Real Decreto 1465/1999, de 17 de septiembre, por el que se establecen criterios de imagen institucional y se regula la producción documental y el material impreso de la Administración General del Estado*, states certain standardising conditions.

In State Administration, e-documents will be done in Spanish. They can be done in other official languages (regional languages) when addressing peripheral administrative bodies. Even in these cases, whenever any concerned party in the proceeding communicates their wish to use Spanish, the whole proceeding will be done in such language. Documents in other language will be just reported in the co-official language to the parties expressly applying for it.

In Regional Administrations, language use is regulated according to their own legislation (section. 36 *LRJPAC*). According to *STC 82/1986 de 26 de junio*, Spanish should be guaranteed whenever any concerned party applies for it. As a result, every document addressed to that party must be translated into Spanish. The same has to be done with documents having effects out of the region (in regions without the same co-official language). Such regulations concerns local authorities as well.

#### **IV.- Stages of the proceeding.**

An average proceeding consists of the following sequence of actions:

##### 1.- Initiation.

The starting point of every proceeding is a first action which may be done both by citizens or the administration itself. There are therefore two kinds of proceedings. Those opened at the citizen's request (*a instancia de parte*), by means of an application, and those opened at the administration's own request (*de oficio*), by means of a procedural decision initiating the procedure (*acto de iniciación o incoación*).

*Ex officio* proceedings might start either by the responsible body's own decision, following orders of upper bodies, accepting reasoned request from other bodies, or by prior citizen complaint (section 69 LRJPAC).

It is worth mentioning the difference between petition and application. Petitions do not lead to any administrative proceeding. According to Law (*Ley orgánica de 12 de noviembre de 2001, reguladora del derecho de petición*), every single citizen is allowed to address a petition to public authorities even without any legal standing status. However, no formalised administrative proceeding is started and the citizen is just granted the right to get an answer about the case. Applications, however, automatically create an administrative proceeding and the citizen becomes entitled to get a formal administrative statement.

Another relevant distinction concerns the terms report and application. While the first one is deemed a mere communication of facts that might eventually leads to an *Ex officio* proceeding, applications require legal standing and lead to a formalised proceeding at citizens' request. As long as citizens report an offence they only have the right to be notified in case the authority decides to open a proceeding, not having any right to be reported subsequent procedural decisions.

Before opening the proceeding, the administrative body can carry out a preliminary stage called preliminary investigation or reserved investigation, which does not necessarily become part of the proceeding. It will become part of it as long as the administrative body decides to open the proceeding according to the results of the preliminary stage.

Cases must be addressed following a temporal sequence according to the application's date of entry. As long as the decision initiating the proceeding is notified to the concerned parties the limitation period (*prescripción*) becomes interrupted. However, deadline to make a decision in ordinary proceedings (alleged decision) and expiry date in *ex officio* proceedings (*caducidad*) shall get started. The administrative body can order preliminary measures to assure the final decision's efficacy (section 72 LRJPAC).

These are the key conditions for issuing preliminary measures:

- The measure should not create damages difficult or impossible to repair.
- It should not unfairly infringe legal rights.

- It should assess all the public and private interests involved, with particular attention to the principle of proportionality.

As a general rule, preliminary measures will be taken prior hearing the parties, although it is possible to order them *inaudita parte.*; they might be taken in every stage of the proceeding and should be lifted as long as justifying reasons ease up. Preliminary measures, regardless the procedure, are directly appealable and must be strictly reasoned.

When applications are wrong, the public body must give a 10 day period to correct; if the citizen does not comply with such obligation he/she will be considered as having abandoned the application (*desistimiento*) and the procedure will be filed.

## 2.- Investigation (*instrucción*).

Principle of *ex officio* expediting an administrative procedure means one stage in the proceeding follows another according to the authority's own initiative. *LRJPAC* states several sub-phases within the investigation stage. Let us discuss the key phases:

- Allegations.

There is no specific stage for allegations in the proceeding. Concerned parties can file allegations at any time before the hearing.

- Public information disclosure.

Opening the proceeding to public participation is not mandatory unless expressly instructed by law (section 86 *LRJPAC*). When it becomes mandatory, the acting body must make a public call in the Official Gazette, opening a period for allegations (20 days or more). This is actually a kind of hearing open to everyone regardless their condition of concerned parties. Not submitting allegations does not impede concerned parties to appear later in the proceeding.

The definitive decision has to address all the submitted allegations either individually or in groups, otherwise it will be annulable. As long as the public information stage is mandatory it must be carried out, otherwise the resulting decision will be annulable. The constitutional principle of participation is at stake.

- Reports.

Reports are a key point in the proceeding given that decisions must be reasoned. Technical or legal reports are essential to and to feed the forthcoming debate and form a judgment. Reports are evidence as well and are regulated in sections 82 and 83 *LRJPAC*. Sometimes the law states that certain reports are required, otherwise the definitive decision becomes annulable. As a general rule, administrative report content is not binding (opinions, assessments, etc.).

In many cases, administrative bodies have to issue reports within other administration proceedings. This is particularly common in complex cases involving different

authorities. Assuming that most of these reports are required by law, omission in reporting could hamper the progress of the proceeding. Consequently, *LRJPAC* states that any delay in reporting does not impede the acting body to continue the proceeding. Late reports, when coming from other administrations, are not necessarily taken into account when settling the case.

When the acting administration does not address the reporting body to draw the report, the resulting decision should be regarded null and void. This is particularly clear when the reporting body is the Council of State (*Consejo de Estado*). Mandatory reports must be followed by the acting body. If not, the decision will also be null and void.

Non mandatory reports are relevant since they will become part of the judgment's reasoning. According to the Supreme Court, they are presumed to be valid, fair and certain, and must be regarded as evidence. The concerned party can oppose to them by submitting their own evidences. No evidence is better than the other.

Together with mandatory and non-mandatory reports, certain sectorial legislation includes a *tertium genus* that might be called *determining reports (informes determinantes)*. This intermediate category has a difficult interpretation and must be regarded on a case by case basis. Their omission is not always the cause of nullity. (*STS de 14 de abril, 12 de mayo de 2003 y 18 de febrero de 2004*).

- Evidences.

Regardless of the relevance of evidences in the proceeding, *LRJPAC* pays relatively little attention to their regulation (section 80). In principle, every piece of evidence regulated in civil procedural law is suitable in administrative proceedings. There is an evidence stage in administrative proceeding to be opened whenever there is an argument about the facts. Unnecessary or inappropriate pieces of evidence can be rejected by means of a reasoned decision. Citizens will be charged with the costs unless the public body is bound to carry out the proposed piece of evidence according to law.

Although citizens can apply for the evidence period, the acting authority can open such a period at its own initiative. Simple contradiction in facts obliges the public body to provide at least minimum prosecution evidence (*prueba de cargo*). Pursuant to the Spanish procedural law (Article 217 *LEC*), the burden of proof is either on the party which asserts its claims, or on whoever contradicts them by claiming new facts.

Administrative reports are benefited from a *presumption of certainty and fairness*, but it does not imply that such reports shift the burden of proof to citizens. Such presumption, according to the Supreme Court is limited to undisputable objective facts directly noticed by officers. It will never benefit simple global discernments, appraisals, or legal califications. (*STS de 19 de enero de 1996*).

Section 137.3 *LRJPAC*, as regards to disciplinary procedures, clearly states the presumption of innocence. As a result, facts reported by inspecting officers will be deemed as a piece of evidence, despite every other pieces of evidence to the contrary issued by citizens. The first ones, thus, are not more valuable than the second ones. Both must be equally assessed by the acting authority. In short, what we have here is just a rebuttable presumption, a prosecution or inculpatory piece of evidence (*prueba de*

*cargo*) that can be perfectly shattered by other pieces of evidence submitted by the defence (*pruebas de descargo*).

Decisions rejecting pieces of evidence submitted by citizens, or even rejecting opening the evidence phase, might lead to declare the definitive statement annulable. To have such effect either the resulting decision must create defencelessness or it can be reported that the decision would have been different otherwise.

The evidence period will last from 10 to 30 days according to section 80.2 *LRJPAC*. The taking of evidence (*práctica de la prueba*) must be done according to civil law (CC and LEC). Obviously, every piece of evidence must be discussed by parties, as the administrative proceeding is an adversary proceeding.

The most relevant pieces of evidence in our legal system are:

- Public or private documents.
- Confession.
- Personal inspection.
- Experts/expert witness (*prueba pericial*).
- Witness evidence.
- Rebuttable-non rebuttable presumptions (*prueba por presunciones*).
- Circumstantial evidence (*prueba por indicios*).

A confession is currently known as examination or cross-examination (*interrogatorio de partes*) according to *LEC*. After 2000 amendments, section 315 *LEC* admits this kind of evidence in cases involving public administration:

*Article 315. Questioning in special cases.*

*1. Where the State, an autonomous region, a local authority or any other kind of public body should be a party to the proceedings and the court should accept their testimony, they shall be sent a list containing the questions put forward by the party seeking the taking of evidence and which the court may deem relevant once the taking of such evidence is admitted without waiting for the trial or hearing, so that they may be answered in writing and the responses filed before the court before the date set for such hearing or trial.*

*2. Once the written answers are read at the trial or hearing, any additional questions which the court may deem relevant and useful shall be answered by the court representative of the party that had sent such questions. Should such court representative justify that he is unable to answer the questions, a new set of written questions shall once again be sent as a final procedure.*

*3. The provisions set forth in Article 307 shall apply to the testimonies described in this Article.*

According to section 307, which is titled: *refusal to testify, evasive or inconclusive responses and admission of personal facts*:

*1.- Should a party summoned to testify refuse to do so, the court shall warn him at the hearing that the facts referred to in the questions may be ascertained as being true unless a legal obligation to keep a secret should exist, as long as the person called to testify has been personally involved in them and their ascertainment as being true may turn out to be fully or partially harmful to him.*

2.- Where the responses given by the party called to testify are evasive or inconclusive, the court shall warn him as set forth in the preceding paragraph on an Ex officio basis or at the request of a party.

With regards to rebuttable and non-rebuttable presumptions, it actually means shifting the burden of proof to citizens, since they become forced to submit evidence to overthrow the proof adduced by the administration.

Circumstantial evidences are admissible although they have to be completely proved. Mere suspicions are not acceptable as evidence. A more intensive reasoning is therefore required in these cases.

The general rule is the freedom to assess and evaluate every piece of evidence (*prueba libre*). Regulated evidence (*pruebas tasadas*) is extraordinary in our legal system (the value of certain pieces of evidence is already stated by law). Only public documents as well as examination or cross-examination can be reported regulated evidences.

Administrative assessment is not mandatory for Courts. Judicial review is not a simple cassation procedure (which is limited to assessing the interpretation of the law), but a complete judicial review. Thus, the Court may assess the pieces of evidence in a different way, and even order new pieces during the adjudicatory proceeding.

- Draft resolution

Before issuing the definitive decision a draft resolution must be done and notified. The investigating body, after processing the case, shall submit a draft proposal to the authority holding the power to settle the case. This stage is not expressly regulated in *LRJPAC*, even though it is mentioned in section 84 which places it immediately before the hearing.

Omitting this stage would lead to an annulable decision as long as the formal offence is not corrected when issuing the definitive decision. In fact, in most cases between the investigating body and the decision-making body there is hierarchical relation, which shall validate the definitive decision.

- Exhibition and hearing.

Allegations, documents, and any other action can be done during the whole proceeding. However, there is one specific stage for that purpose: the hearing. It is an essential phase, since omission leads automatically either to a null and void decision (a number of judgments regard such formal offence as an absolute lack of proceeding), or to an annulable decision (invalidating formal offence).

Once issued the draft resolution, the investigating authority must notify all the concerned parties reporting that the file is opened to full exhibition. Allegations are welcomed during a 10 to 15 days period. When facts or allegations other than those submitted by the concerned parties are not going to be addressed to rule the case, exhibition and hearing is redundant and can be omitted.

Exhibition of all the records must be complete. Restrictions of section 35 *LRJPAC* does not apply, since accessing documents is not here a way to participate in public affairs, but a way to defend personal rights or interests. In addition, without plenty access it would be impossible to guarantee full judicial review (section 24 C.E.)

Between the hearing and the definitive decision no other administrative formality is stated. If further actions are taken during such period a new hearing should be done before settling the case.

- Particular conditions in electronic proceedings.

*LAE* states certain specific rules for the investigating phase in electronic proceedings. Section 36 states that the concerned party must be granted access to the system, so he could check at least the processing status unless otherwise instructed by law. Such information shall include the list of procedural decisions already done, including date of issuance and summary.

### 3.- End of the proceeding.

Section 87 *LRJPAC* lists the type of decisions that terminate proceedings:

- Statement (decision, order, etc.) (*Resolución administrativa*):

This is the ordinary way to terminate proceedings. Administrative bodies have to give an express decision in every case. Such obligation is unavoidable and cannot be waived, even in case of lack, deficiency or obscurity of applicable regulations (section 89.4 *LRJPAC*).

It must keep the decision, the reasoning (at least by means of transcribing reports), as well as information about available reviewing proceedings, competent body and deadline (sections 54, 58.2 and 79.2 *LRJPAC*). These are, actually, the elements required for administrative notifications.

The principle of consistency (*congruencia*) is essential with regards to the administrative statement. Definitive and final decisions must answer all the facts, legal founding, allegations, and in general, to every claim reported by the concerned parties; and obviously, addressing public interest conditions. Reasoning must be logic and rational.

The dispositive Principle, which holds that the parties have the power of disposition on their rights, both procedural and substantive, does not work in administrative proceedings the same way it works in civil procedure.

Section 218 LEC states the principle of '*Exhaustive effect and coherence of the judgments*', which means that: '*Judgments must be clear, precise and coherent with the claims and with the other pleas of the parties, as deduced in due time during the proceedings. They shall make the statements required by the latter, convicting or acquitting the defendant and resolving on all issues in dispute that were the object*

*of the debate. The court, without deviating from the cause availing of factual grounds or fundamental points of law different from those the parties had the intention to enforce, shall resolve in accordance with the rules applicable to the case, even if they have not been correctly mentioned or alleged by the litigants’.*

In administrative proceedings, which deal with public interests, the logic is different since parties’ free will is not present. The administrative body is not tied to the claims brought to the proceeding by the parties (Sections 89 and 112 *LRJPAC*).

Inconsistency by omission (*incongruencia omisiva*) is perfectly acceptable in administrative proceedings. However, *ultra-petita* inconsistency (the decision goes beyond the limits of the action), *infra-petita* inconsistency (the decision does not address all the elements of the action), and *extra-petita* inconsistency (the decision includes elements that no party have brought to the proceeding) have different results from those arising in civil process.

In proceedings initiated at citizen’s request, or in appealing proceedings, the decision should not place the applicant in a worse position.

In appealing proceedings, the decision should totally or partially uphold or dismiss the action, ruling for the plaintiff (citizen) or the defendant (administration).

Formal offences can make the administrative body to order reconsidering or reopening proceedings (in the lower body) before ruling the case (Section 113 *LRJPAC*).

Lacks of consistency might lead to an annulable decision on the grounds of defencelessness, or even to a null and void decision on the grounds of non-existent motivation.

In sum, the principle of consistency means that the definitive decision should answer all allegations filed during the proceeding, as well as give a judgment on every aspect, including those relevant that no party have brought to the proceeding. The only condition is that all the merits of the case had been brought to discussion and contradiction during the proceeding.

- Voluntary dismissal/abandonment of action (*desistimiento*).

The citizen expresses willingness to terminate the proceeding, but keeps the action. Since deadlines are actually expiry periods in administrative law (*plazos de caducidad del procedimiento*), the underlying right is always kept unless it is no longer actionable due to the statute of limitations (*plazos de prescripción del derecho*).

Dismissal can be done at any time during the proceeding. It may be done by appearance in administrative offices (orally), or submitted in writing. Dismissal will not be effective until the authority expressly agrees. Section 91 *LRJPAC* states two cases for rejecting dismissals or waivers. Firstly, cases where public interest is involved, and continuing is advisable to protect it. Secondly, whenever third parties’ rights are involved and someone apply for continuing the proceeding. In that



particular case, dismissal or waiver will only be effective for the party and the proceeding shall continue with the others.

- Waiver (*renuncia*).

The citizen expresses willingness to give up a right. All the rules discussed when addressing voluntary dismissal of action are applicable to waivers.

- Unexpected cause that impedes settling down the case (*imposibilidad material de finalización por causas sobrevenidas*).

This type of termination is regulated in section 87.2 *LRJPAC*. The administrative body must make a decision stating the reasons to declare the proceeding finished. We are dealing with cases such as death of the concerned party, physical destruction of the object (i.e. building collapse), etc.

- Expiry (*caducidad*).

When a deadline comes to an end and the authority has not issued the decision expiry time takes place. However, the administrative body is not released from its obligation to deliver an express administrative statement. In this case, such statement will only declare that expiry time has happened.

Let us discuss every possible situation:

- Stay *ex officio* proceedings for reasons attributable to the citizen. Deadline will be interrupted and the proceeding will become pending. However, the acting administrative body can continue the proceeding. The citizen shall lose procedural rights.
- Stay *ex officio* proceedings due to causes attributable to the acting authority. As already stated, the administrative body is always bound to lay down an express statement in every case. When proceedings are expected to have positive effects on the citizen the lack of answer is regarded as a rejection. In disciplinary proceedings, as well as in every other restrictive proceeding, omitting the decision will result in expiry. The corresponding decision declaring expiration will file the case.
- Stay in proceedings started at citizen's request due to causes attributable to the citizen. The administrative body must warn the citizen three months in advance about the expiration date to prevent him from an unexpected expiry. Omissions should be only related to essential procedural actions; otherwise, the effect of omitting actions should only be losing procedural rights.

- Agreements to settle proceedings (*fórmulas convencionales de terminación*).

This kind of termination is based on principles such as efficiency, efficacy, and even on the grounds of procedural economy goals. Such agreements, however, are strongly restricted in administrative law, since they can hide a waiver in exercising administrative powers and duties. In addition, agreements cannot

lead to imposing greater burdens than those arising from the Law. Otherwise such clauses would be regarded null and void.

List of current available termination schemes:

- Compromise agreements (*transacción*).

The Spanish Civil Code regulates compromise agreements in section 1809. It always implies transferring rights among citizens. In administrative law, such agreements are possible but extraordinary, given the principles of legality, public interest, and the principle stating that administrative powers cannot be waived.

As a result, these agreements are usually limited by both formal and substantial conditions. For example, they are strongly limited with regards to public assets, as well as in relation to Treasury rights and taxes.

- Agreements under section 88 *LRJPAC*.

This section states a wide range of agreements available to citizens and administrative bodies, assuming they are not contrary to law. There are certain matters where they are not possible.

Specific legislation must regulate such agreements. Section 88 defers their actual implementation to specific laws. There are particular examples in expropriation law (expropriation agreements), public contracts law (mutual renunciation), and zoning law (urban planning agreements).

Section 141 *LRJPAC* states a particular case in strict liability proceedings. Under agreement, cash payments can be replaced by reparations in kind where appropriate. In addition, cash payments can be charged by installment when agreed.

- Termination of the proceeding by electronic means.

Section 38 *LRJPAC* allows notifying administrative resolutions by electronic means, although under the condition that procedural regulations enable such means.

Section 39 regulates the so called *automated administrative action*. Under this scheme citizens shall receive not only an electronic administrative notification, but also an administrative decision created by the computerised system itself. This requires the previous definition and approval of technical specifications, programs, technical support, as well as information system auditing including the source code.

#### 4.- Enforcing. (*fase ejecutiva*).

Enforcing focuses in making the administrative decision fully effective. Any other purposes would lead the enforcing order to be regarded annulable on the grounds of lack of proceeding (*vía de hecho*). Before starting the enforcing stage the administrative

body must notice the citizen so he can lately comply with the order. (section 95 *LRJPAC*).

The enforcing authority has to choose the less restrictive enforcing scheme due to the principles of *favor libertatis* and *proportionality*.

There are four enforcing schemes under Administrative law:

- Enforcing order (*Vía de apremio*).

According to section 97 *LRJPAC* this enforcing scheme is suitable for payment obligations. The amount should be clearly stated in the definitive or final decision, although it might be calculated later. In this case the decision shall only lay down criteria to calculate the amount due and payable.

This proceeding is regulated in tax regulations, (*Ley 58/2003, de 17 de diciembre, General Tributaria. Artículos 163 y ss. y Real Decreto 939/2005, de 29 de julio, por el que se aprueba el Reglamento General de Recaudación*).

Let us discuss the key features:

The enforcing proceeding is always started *Ex officio*. The goal is to collect debts expired and unpaid during the voluntary payment period. There is no deadline for ending the proceeding. The starting point is a statement called *Providencia de apremio*, which equals a Court's judgment in terms of enforcing power. Pending debt, surcharges and a requirement for payment are the key elements of the document.

A deadline for payment is granted in the statement. During such period the citizen can pay the total amount of the debt plus 10% as enforcement surcharge. Late-payment interest is not settled in that case.

If the citizen does not pay within the deadline, the agency can either execute existing guarantees or attach debtor's assets by means of debt collection. The execution of attached assets and rights is carried out by means of public auction, direct award or tender proceedings.

Late-payment interests, as well as the costs incurred by the Tax Agency during the enforcing procedure shall be requested and collected.

The procedure shall be concluded on account of one of the following three causes:

- Payment.
- Agreement whereby the debt is declared fully or partially uncollectable, upon declaring all the parties liable for payment bankrupt.
- Agreement to extinguish the debt for any other cause.

In cases where the debt is declared uncollectable, the enforcement procedure will be renewed in the future upon communication of the solvency of any of the parties liable for payment.

Challenging the enforcing order (*providencia de apremio*) is possible through reversal or economic-administrative claim. According to section 167.3 *LGT*, appeals may only be based on the following grounds:

- Full payment.
  - Expiry date involving the enforcement proceeding.
  - Application for deferral and payment installment.
  - Compensation with other credits.
  - Other legal causes suitable for suspension.
  - Lack of proper notification of the statement imposing the debt.
  - Annulment of the administrative statement declaring the debt.
  - Inaccuracies, errors or omissions when identifying debtor or debt.
- Subsidiary enforcement (*ejecución subsidiaria*).

Certain administrative decisions impose citizens the duty to carry out some action (*obligaciones de hacer*). Some obligations, actually, are personal and unable to be performed by someone else (*personalísimas*), but most of them are not (*no personalísimas*). In the latter cases, enforcing is possible by subsidiary enforcement.

Administrative officers or companies hired for such purpose shall carry out the imposed action charging the cost to the liable party. The amount can be provisionally declared due and payable in advance, before execution; in such case, the final cost will be compensated once the works got finished.

- Recurring fines (*multas coercitivas*).

Specially in case obligations are unable to be performed by someone else, in case of negative obligations (refraining from doing something), or even as a way to avoid subsidiary enforcement, Spanish legislation authorises public bodies to lay down recurring penalties so to convince citizens to voluntarily comply with their duties.

*LRJPAC* states certain quantitative limits. In particular, the total sum of penalties should not exceed 20% of the total cost of the required action. In addition, the Law must expressly authorise imposing such penalties to enforce decisions. Since we are not before disciplinary measures, rules applicable to disciplinary proceedings are not applicable. Consequently, recurring fines are compatible with other fines and penalties that could have been charged for breaking the law.

The obligations suitable to this enforcing scheme are personal obligations to do or not to do something, providing the Administration do not find it convenient to use physical force, regardless they are suitable to carried out by someone else or not.

- Physical force (*compulsión sobre las personas*).

Physical force is an acceptable mean to achieve compliance when it comes to personal not to do obligations. Express legal coverage is always necessary in these cases. The key legal framework is stated by *Ley orgánica 1/1992 de 21 de febrero, de protección de la seguridad ciudadana*. In case of positive obligations that no one else can fulfil

physical force is sometimes an option (i.e. leaving a building in decaying condition or about to collapse).

Authorities have limited scope of action when using physical force, and the use of weapons is extraordinary.

- Warrants authorising entry to private residences (*autorización judicial de entrada en domicilio*).

This Court decision ensures that entrance in private residences is based on a well-founded administrative decision. The Court must monitor that such measure appears *prima facie* to be correct and proportional.

Supervision is not, obviously, deep and comprehensive. It only addresses the key legal requirements of the decision:

- (a) The authority is actually competent.
- (b) The decision appears *prima facie* to be lawful and is fully enforceable.
- (c) Enforcing the decision necessarily requires entry to residence.
- (d) Affection to privacy will be limited to what is strictly necessary to grant compliance with the decision.

Such warrants are expressly mentioned in section 96.3 *LRJPAC*. Administrative Courts are competent for issuing such warrants, according to section 8.5 *LJCA*. Entry to residences is a common place in expropriator proceedings, administrative evictions, evictions in cases of buildings declared in risk to collapse, demolition orders, etc.

Warrants are not required to enforce final judgments. They are only necessary to enforce administrative decisions.

Determining what a residence exactly is might be sometimes challenging. Section 91.2 *LOPJ* finds it necessary to get a warrant when entering not only residences, but also to 'other buildings or places which access requires the owner or possessor's consent'. Such broad and uncertain criteria could actually refer to every single private property. However, it should be stressed that the aim judicial supervision is to grant privacy, not to grant every other owner's rights. Hotel rooms should therefore be included, but no commercial premises open to the public, for example, not.

- Interception of private communications.

This extraordinary measure can be ordered according to section 579.4 *LECRIM*, as well as under the conditions stated in *Ley orgánica 2/2002 de 6 de mayo, de control judicial previo del CNI*. It obviously requires judicial monitoring.

- Preliminary internment before deportations.

This measure is stated, in immigration laws and must be carried out under judicial supervision.

- Exercising private rights.

Sometimes administrative decisions deal with civil law rights such as property rights, civil contracts, possession status, etc. In such cases, the administration, as every other legal entity, must bring the case to civil Courts.

- *Ultra vires*: decisions taken without proceeding (*actuación por la vía de hecho*).

Every single administrative definitive or final decision should be the result of an administrative proceeding. When Administration does not comply with the legal formalities to the point that it might be considered that no substantial proceeding has been carried out, we are facing *ultra vires*. It should be noted, however, that certain laws or regulations are so clear that no formalities are required to grant enforcement. In addition, enforcing obligations arising from public contracts does not always require formalities. In such cases we are not before *ultra vires*.

Whenever *ultra vires* takes place, the citizen can react throughout civil actions or can choose challenging the administrative decision before the Administrative Courts.

Section 30 LJCA states:

‘In cases of *ultra vires* action, the party concerned may file a demand for cessation of said action with the acting administration. If the demand is not lodged or is not heeded within ten days of submission, a claim for judicial review may be presented directly’

## CHAPTER XIV.- REMEDIES IN ADMINISTRATIVE PROCEEDING.

### I.- *EX OFFICIO* REMEDIES (*REVISIÓN DE OFICIO*).

Favourable administrative statements must be kept and enforced by the administrative bodies. The body cannot simply disregard them by issuing a new statement worsening a citizen's position (*la Administración no puede ir contra sus propios actos declarativos de derechos*). Such principle is brought to administrative law from the civil law principle called: estoppel. The principle of legal certainty as well as the protection of legitimate expectations are also involved in this rule.

It is worth noting that administrative decisions sometimes have a double effect. They grant rights and benefits while imposing burdens and restricting rights. Obviously, limitations to *Ex officio* review shall reach only the favourable side of the decision. Revoking the negative side will be easier, since it can be done under section 105 *LRJPAC*, which states that negative decisions may be directly revoked without particular formalities.

So long as positive decisions should prevail, the administrative power to reverse a wrong decision is limited. Let us discuss the different options:

a.- *Ex officio* review based on legal grounds.

Regardless of the concession of rights or benefits, administrative officers must monitor the legality of every administrative decision. Thus, whenever the administrative body becomes aware of an illegal previous decision, whether positive or negative, it must correct the situation.

b.- *Ex officio* review based on opportunity reasons.

Either because of changes in public interest interpretation, or because of a new legal framework, authorities may be bound to back over their own previous decisions. Such behaviour, though possible, could certainly result in finding the Administration liable for every damage actually caused.

c.- *Ex officio* review as a result of disciplinary measures.

Specific legislation in certain areas states *ex officio* review as an additional result in disciplinary proceedings. This is the case, for example, of water law. Serious violations such as discharges containing great pollutant load might lead not only to penalties and fines, but to reviewing water rights to concession holders without compensation.

d.- Agreements resulting in reviewing previous administrative decisions.

Decisions can be subject to condition precedent or cancellation clauses. As long as the future event takes place the right or obligation shall come to an end.

Cases (a) and (b) are the common place for *Ex officio* review cases. Rules governing such proceedings concern to every territorial administrative body as well as to every public entity operating under administrative law.

*Ex officio* review is available on the following grounds:

a.- *Ex officio* review due to nullity causes (Section 102 *LRJPAC*).

This proceeding concerns both to administrative decisions and regulations. It is always started by the administration, although citizens may apply for initiation. This action, called nullity action, is only available with regards to nullity clauses. The key feature in this proceeding is that the administrative body must bring the case to the State Council, aiming to get a favourable report which is in this case mandatory. In case the acting body is part of the regional or municipal administration, the reporting authority is the Regional Advisory Council. It is worth highlighting that in order to declare the decision null and void under this proceeding the Council must agree.

This remedy is only available as long as the decision is final, as well as with regards to regulations in any case. In the event the case was under judicial review, the body should wait for the judgment or accept the claim (*allanamiento*), reaching the same result.

There is no deadline for nullity action and *Ex officio* review on nullity grounds. Nullity causes are not affected by the statute of limitations (*no prescriben*). The only limit is stated in section 106 *LRJPAC*, referring to the time the administrative body took to react, as well as other circumstances that make reviewing contrary to equity, good faith, someone else's rights, or the Law. Such broad concepts actually turn the power to start *ex officio* review proceeding as a discretionary power.

As above mentioned, although this remedy is always started at the Administrative body's initiative, nullity action) is also possible. In such case the proceeding is started *ex officio* regardless the citizen's request.

The administrative body shall accept or reject the citizen's action on a preliminary assessment of the case. It will be rejected if the application is not based on nullity grounds or clearly lacks legal basis. Rejection can be challenged to Administrative Courts. If the Court rules for the plaintiff, it will order the administrative body to start the reviewing proceeding. Otherwise, nullity action could be turned into an indirect way to challenge final decisions no longer appealable at citizen's request.

Once started *ex officio* review, the subsequent proceeding does not differ from regular administrative proceedings (provisional measure staying the effects of the decision, calling to interested parties, submitting reports, evidences, allegations, exhibition and hearing, definitive decision). The only distinguishing feature is the mandatory report of the State Counsel, which statement is binding.

The deadline is 3 months according to section 102.5 *LRJPAC*. Lack of taking an express decision will be regarded as rejection. If the proceeding results in declaring the challenged statement null and void, it will be become terminated with *ex tunc* (retroactive) effects. Administration could be found liable for damages depending on the specifics of the case.



b.- *Ex officio* review due to annulable causes (Section 103 LRJPAC)

Administration cannot directly review favourable annulable administrative decisions; Section 103 LRJPAC clearly states that the Administration must challenge its own decision to Administrative Courts. Before, the authority shall conduct a proceeding so to reach a *declaration of adverse effects (declaración de lesividad)*.

Legislation lays down several conditions to be met. The first one is a temporal limit. Declaration of adverse effects cannot be issued after 4 years from the date the administrative decision was signed (not the notification date). Moreover, all the concerned parties must be heard. Decision must be reasoned and should explain the public interest involved. Proceeding should not take more than 6 months, otherwise it shall expire.

Within 2 months after notifying the declaration, the authority is allowed to file the lawsuit (*demanda*) before the Administrative Court (section 4V.4 LJCA):

*'The period for filing for judicial review an action harmful to the public interest shall be two months long, counting from the day following the date of the declaration confirming that the act is harmful to the public interest'.*

c.- *Ex officio* review of non-favourable decisions (section 105 LRJPAC).

Section 105 LRJPAC grants Administration the power to review their own restrictive decisions as well as rectify their errors. Such action can be done at any time providing it does not mean unlawful waivers or exceptions. Principles of equal treatment, legality, and public interest should be granted too.

With regards to the grounds of the decision, it must be based on nullity or annulability causes. Reversal might be partial, concerning just the restrictive conditions of the statement.

There is no deadline to start this proceeding. The acting body must hear every concerned party and must decide the case within 3 months from the starting point. Failing to lay down a decision will lead to expiry.

The citizen does not have the right to apply for this review, even if legality reasons backs up his claim. Otherwise, deadline for appeals would not make any sense and this proceeding could be used to revive final decisions. Thus, unlike *ex officio* review for nullity causes, where reviewing is mandatory for the Administration, in these cases starting the proceeding is completely discretionary.

Section 105 does not say anything about *ex tunc* or *ex nunc* effects; in fact, Administration shall decide on a case by case basis according to law. The above mentioned section 106 LRJPAC is also applicable in these cases.

On the other hand, section 105.2 grants administration the power to rectify at any time material, factual or arithmetic errors. The decision is not illegal and is no way revoked. It will be justly corrected and will remain effective.

## **II.- APEALS AND OTHER ADMINISTRATIVE REMEDIES: *ALZADA, REPOSICIÓN AND RECURSO EXTRAORDINARIO DE REVISIÓN.***

From the citizen's perspective, administrative appeals are a guarantee of their rights. From the Administration perspective, they are a relevant instrument to internally monitor its own decisions. It can be seen as a bureaucratic burden as well, since most appeals have no practical effect and just delay judicial review.

To qualify an action as an 'appeal' two key elements must be present. Firstly, its exclusive object must be an administrative decision aimed to be declared annulable or null and void. Secondly, such a decision must have been done according to Administrative law. Whenever an action does not meet both conditions we might be before a report (*denuncia*), a complaint (*queja*), a claim (*reclamación*), a suggestion (*sugerencia*), a requirement (*requerimiento*, i.e. to stop *ultra vires*, to fight against administrative inaction) or a preliminary claim before issuing civil or labour actions (*reclamaciones previas a la vía civil o laboral*).

*LRJPAC* allows replacing administrative appeals for alternative proceedings. Section 107.2 refers to conciliation conferences, mediation proceedings, arbitration before independent collegiate bodies, as well as other settlement proceedings.

Only one single appeal is admissible in the administrative stage except for the so called extraordinary reviewing process (*recurso extraordinario de revision*).

The ruling of the case must be clear and consistent with the merits of the appeal, although it might also refer to matters not alleged by the concerned party. When addressing new facts or documents is essential within the appealing proceeding, the acting body must always grant a new hearing. The decision will never make the citizen's original position worse.

Let us discuss several general principles for appeals:

### 1.- Parties. Legal standing:

Appeals are only available for the concerned parties in the first proceeding.

### 2.- Object:

Appeals are only available against definitive decisions or qualified procedural acts. Other procedural stages, as well as final decisions, cannot be challenged. Moreover, there is no administrative appeal against regulations, which should be directly challenged to Courts.

Definitive decisions must not exhaust the administrative channel to allow a hierarchical appeal; otherwise, the citizen can choose whether to lodge an appeal for rehearing before the decision-maker body or directly file an appeal before Courts.

(Sections 107 and 109 *LRJPAC*).

### 3.- Proceeding:

Appeals are always filed at the citizen's initiative. The document must include at least the following conditions:

- a) Citizen's I.D
- b) Identification of the challenged decision.
- c) Pleas in law and grounds for appeal.
- d) Identification of the place and preferred means for notification purposes.
- e) Identify the authority to which the appeal is addressed.
- f) Place, date and signature (section 110 *LRJPAC*).

Errors identifying the remedy are not relevant. The grounds of appeal shall be nullity or annulable reasons, and formal offences should not be alleged by those who took part in them and might be deemed responsible.

Appeals do not have a formal proceeding but due process must be granted. Let us discuss about the key stages:

#### a.- Provisional measures.

Staying the challenged decision could be granted according to the specifics of the case. Sometimes, suspension is effective *ope legis*; that is the case of the disciplinary proceeding, given that penalty decisions are only enforceable as long as they exhaust the administrative channel (section. 138.3 *LRJPAC*). Once the appeal is decided, the penalty becomes enforceable unless the Courts expressly rule a provisional measure against it.

Deadline for granting suspension is just 30 days and not getting an answer is deemed positive: suspension shall be granted. Such measure might be extended to the judicial phase under citizen's petition. The Court shall immediately rule for extending or cancelling it. Sometimes the concerned party is bound to submit an appeal bond to be granted the measure. Decision must be notified to every concerned party.

#### b.- The following phase is the hearing.

Hearings are essential in two cases:

- Whenever new facts or documents arise in the case, providing they were not submitted or registered in the original file and are relevant to the decision. Exhibition and hearing is essential in this case so to allow the concerned party plenty knowledge about the new elements and let him/her file pleadings and documents to argue them.

- Whenever other parties, together with the one that has filed the appeal, have rights or legitimate interests involved in the proceeding. They are not only those who were already concerned parties in the proceeding, but every other that might have become concerned according to the new facts arisen during the appeal process. In both cases, such parties must be called to the proceeding, be granted access to all the documents, and have a hearing.

Failing to guarantee a hearing shall lead the resulting decision to be declared null and void, assuming defencelessness should be clearly evidenced.

The proceeding ends with a decision (*resolución*), although alternative dispute resolution proceedings are allowed. The decision must be reasoned and consistent. It might rule the case for the plaintiff upholding the appeal, granting totally or partially requests. It might dismiss the appeal totally or partially as well. In addition, it might declare the appeal bar to proceeding (*inadmisión*) when lacking essential requirements not suitable to get corrected (i.e. late appeals, decisions unable to appeal, etc.).

The proceeding might also end up due to waiver (*renuncia*) or abandonment (*desistimiento*). Agreements for alternative dispute resolution are also possible but limited, given that appeals are basically focused on legal grounds. It is likely that a transaction could be implemented with regards legal interpretation issues.

The following are the appeal proceedings currently available under Spanish Administrative Law:

- APPEAL FOR REHEARING (RECURSO DE REPOSICIÓN) (Sections 116 and 117 *LRJPAC*)

An appeal for rehearing may be filed before the acting administrative body to challenge administrative decisions ending up the administrative channel. This is just an option for the citizen unlike hierarchical appeals, which are mandatory to exhaust the administrative channel and bring the case to Court. In fact, this remedy is only admissible as long as hierarchical remedies were not available to address the case, given that the acting authority is the upper body in the organisation.

Deadline to submit the appeal is two months from the date the challenged decision was notified (starting the following day) or could be regarded as a negative alleged statement (the following day as well). Deadline for ruling the case is one month counting from the date the document was registered.

Once the citizen has filed the appeal he/she has to wait for an express decision or, eventually, for an alleged decision. Meanwhile, the case cannot be brought to ours. Alleged decisions are always negative in these appeal proceedings since double silence cannot take place unlike in hierarchical appeals.

With regards to tax proceedings, appeals for rehearing are optional as well. However, after the appeal the citizen is still not allowed to bring the case to Court as it is necessary to previously file an appeal before the Central or Regional Administrative Economic Tribunal.

- HIERARCHICAL ADMINISTRATIVE APPEAL (*RECURSO DE ALZADA*) (Sections 114 y 115 *LRJPAC*).

This is a mandatory remedy since the concerned party has to lodge the appeal before the upper administrative body to eventually open the judicial channel, unless the challenged decision arises from the upper administrative body in the organisation. In other words, it is always binding to file the appeal providing the challenged decision does not exhaust the administrative channel.

Certain appeals involve different administrations or entities. This is the case of appeals to the parent administration related to decisions taken by the monitored entity. Besides, decisions taken by concession holders in municipal public services can be challenged to the municipal authorities. Such appeals are known as: *recursos de alzada impropios*. Section 82 *Ley 50/1998 de 30 de diciembre, de medidas fiscales, administrativas y de orden social* states the key rules to conduct such appeals when concerning public entities' decisions (*organismos autónomos*)

Certain administrative bodies are not under hierarchical monitoring. That is the case of several collegiate bodies created to conduct tender proceedings (hiring committees, contract award panels, economic tribunals, etc.). When their decisions do not exhaust the administrative channel, appeals should be filed either before the body they are assigned to or, alternatively, before the body that appointed the president or director of the challenged body. (art. 114 *LRJPAC*). Some of them, however, exhaust the administrative channel as the expropriation tribunals (*jurado provincial de expropiación*).

With regards to peripheral state administration, *Real decreto 1330/1997 de 1 de agosto, que regula los órganos que han de resolver los recursos presentados frente a los órganos de las Delegaciones del Gobierno*, states particular rules. The Government Representative has the power to rule appeals filed against lower bodies' decisions. The decisions are appealable before the Minister.

Deadline to lodge hierarchical appeals is one month from the next day after the administrative decision was notified or published. On the other hand, notice has to give the citizen enough information about the time limit; otherwise the period will not run. In case of alleged acts, deadline for appeal is three months from the next day the alleged decision took place according to Law. However, such deadline is actually not mandatory. The period will not be regarded started until the citizen makes any action from which it might be inferred that he knew the negative effect of the decision. In addition, it is worth remembering that the obligation to answer never expires.

Late appeals shall not be accepted and the challenged decision shall become final and not suitable for appeal. The appeal should be lodged before the upper body; however, if the citizen files it before the challenged body it will be referred to the upper body within 10 days. The challenged body must report about the case and send full copy of every document in the file (section 114.2 *LRJPAC*).

The time limit to lay down the statement is three months. Alleged decisions will be regarded negative unless *double silence* takes place. The latter happens when the citizen is in fact challenging a previous alleged decision.

- APPEAL FOR EXTRAORDINARY REVIEW (*RECURSO EXTRAORDINARIO DE REVISIÓN*) (11VIII.1 *LRJPAC*)

Unlike appeals discussed above, this remedy is deemed extraordinary as it is only available against certain qualified administrative final decisions. It is admissible as long as one of the following causes takes place:

- Error as to the facts resulting from documents that were already in the file. Regardless of this option to file an appeal, in this case it would likely be easier and advisable to directly apply to the authority to rectify the mistake according to section 105.2 *LRJPAC*.
- New documents not included in the administrative file appear, providing they are essential to rule the case, regardless of if they were created after issuing the decision (such documents must prove that the decision is based in a wrong understanding of facts or legal grounds).
- Decisions significantly influenced by documents or testimonies which are found false by Courts in final judgment.
- Decisions stated as a result of felonies and violations involving misconduct in public office such as corruption/malfeasance (to deliberately issue a decision/ruling that is contrary to law (*prevaricación*), bribery (*cohecho*), misappropriation of public funds (*malversación de fondos públicos*), etc. The felony must have been declared by Courts in final judgment.

The last two cases are in fact nullity causes, as the original decision was issued as a result of criminal offences. Therefore, in order to rectify the situation it would be enough to conduct an *Ex officio* reviewing proceeding.

When it comes to deadlines, this remedy shall be correctly filed in the first case as long as 4 years from the date the challenged decision was notified had not went by. In the rest of the cases the deadline is just 3 months starting from either the day the documents were known, or from the day the judgment became final.

The appeal must be lodged before the decision-making body, which shall also be competent to rule the case. If accepted, the body must refer the case to the State or Regional Council for a mandatory report. The deadline to rule the case is three months and the lack to hand down express answer is deemed as not allowing the citizen's petition. The decision is appealable to Court, which cannot judge the original administrative decision, but only the grounds for rejecting this extraordinary appeal.

- PRELIMINARY CLAIMS BEFORE CIVIL OR LABOUR APPEALS (*RECLAMACIONES PREVIAS A LA VÍA CIVIL O LABORAL*).

These administrative remedies are mandatory if the citizen wishes to file a lawsuit to Courts in civil or labour matters. Administrative decisions can be under civil or labour

law; challenging such decisions to the proper jurisdiction requires trying these preliminary procedures in advance (section 120 *LRJPAC*). Such remedies are not actually administrative appeals, since the challenged decisions are not subject to Administrative law.

In fact, these remedies are sort of a mandatory settlement hearing (*conciliación*). It is worth noting that they are not required when the challenged decision comes from a public company or foundation.

Alleged decisions are regarded negative in both proceedings. The deadline for ruling the claim is 3 months in civil hearings and 1 month in labour hearings. Filing the claim automatically leads to staying the deadline to file the lawsuit before civil or labour Courts.

- SPECIAL APPEALS (RECURSOS ADMINISTRATIVOS ESPECIALES).

Specific legislation such as public contracts law can create singular appeal proceedings. Section 107.2 *LRJPAC* expressly allows to create such remedies with the condition that they should be addressed to independent collegiate bodies. Such remedies would substitute hierarchical appeals. Cases in Spanish legal system are strongly limited.

One example is the Claim Commission stated at *Ley Orgánica 6/2001, de 21 de diciembre de Universidades*, which is an independent collegiate body where conflicts related to recruitment competitions for staff provision in Universities can be lodged. On the other hand, the Spanish Public Contracts Law (*Real decreto legislativo 3/2011, de 14 de noviembre, por el que se aprueba el texto refundido de la Ley de contratos del sector público*) states an appeal to address conflicts in tender proceedings. The procedure, which is abbreviated, becomes mandatory for contracts exceeding certain quantitative and qualitative limits.

The common downside is that these appeals bring the case to the administrative monitoring authority, instead of bringing it before an actual independent external body.

*LGT* (Tax law) and *Decreto 520/2005 de 13 de mayo*, state an appeal proceeding to challenge tax related decisions to the *Economic-Administrative Tribunals*. Such Tribunals are administrative bodies of the Ministry of Finance. They are completely separated bodies with no direct relation to management, monitoring and tax collection bodies. They enjoy a broader range of independence.

- ALTERNATIVE DISPUTE RESOLUTION (ADR) (*TERMINACIÓN CONVENCIONAL*).

Section 107.2 *LRJPAC* states three *out of Court* settlement proceedings. Let us discuss about them

a) MEDIATION. An appointed person assists the parties to negotiate a settlement (mediator). Mediation has a structure, timetable and dynamics that ordinary negotiation lacks. The process is confidential and might be enforced by law as long

as parties agree in advance. Participation is voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process. He/she does his/her work by lowering tensions, improving communications, interpreting issues, providing technical assistance, and exploring potential solutions.

- b) **CONCILIATION:** It is a process whereby an independent person (conciliator) addresses the parties separately in an attempt to resolve their differences. He/she issues a non-binding decision. Conciliator has no authority among parties but tries to reach an agreement about his decision. The aim of the proceeding is to bring about a negotiated settlement.
- c) **ARBITRATION.** Parties refer a dispute to the arbitrator or arbitral tribunal, whose decision (the award) they agree in advance to be bound. Arbitrator imposes a decision that is legally binding for both parties and therefore fully enforceable before Courts.

In Administrative law, out of Courts settlement proceedings are limited. Agreements are only allowed providing the law expressly authorises them and fall within particular formal conditions. The lack of freedom of choice (*autonomía de la voluntad*) in many cases makes settlements especially difficult.

Such limited framework contrast with the broad development of these strategies in other legal systems. That is the case, for example, of the United States where since 1990 a specific law endorses and encourages these proceedings in federal agencies' cases (Administrative Dispute Resolution Act (ADRA) The law states proceedings such as mini trial, fact-finding, convening, facilitating, or summary jury trial.

In Spain, the *LRJPAC* states two different settlement methods:

- **ALTERNATIVE DISPUTE RESOLUTION. SECTION 88 *LRJPAC* (*TERMINACION CONVENCIONAL*).**

Section 88 *LRJPAC* allows Administration and citizens reaching agreements to settle proceedings. The resulting administrative decision shall lay down the resulting conditions. Eligible parties for reaching agreements are both public and private entities. The terms and conditions of the agreement shall be legal and referred to tradable matters. Public interest must be always kept and guaranteed. Mediation and conciliation are possible ways to reach such agreements.

- **ALTERNATIVE DISPUTE RESOLUTION PROCEEDINGS UNDER SECTION 107.2 *LRJPAC***

Mediation and conciliation proceedings can be used to settle administrative appeals according to this section. Both means, which are self-compositional, are admissible in Administrative law. Arbitration, however, which is a hetero-compositional dispute resolution proceeding, is uncertain given the specifics of Administrative law (Administration cannot waive exercising its powers).

As a result, reference to arbitration in administrative legislation is rare. Some can be found in the *Estatuto básico del empleado público* (art. 45), as well as in *Ley general*



*presupuestaria* (Section 7.3). Another example is shown in *Ley de Contratos del sector público* (Section 39). With regards to contract law, only public entities with private legal personality are eligible to join arbitration proceedings.

Agreements can be reached even once the administrative channel is exhausted, as well as during the judicial review process (section 77 LJCA). It is a privilege of the Judge, once the complaint (*demanda*) and the answer to the complaint (*contestación a la demanda*) have been submitted, to ask both parties to acknowledge facts and documents, as well as to reach an agreement to settle the case (frequent with regards to conflicts related to money quantification).

When parties reach the agreement, the Court shall issue a resolution (*Auto*) declaring the proceeding terminated as far as the agreement does not infringes the law or damages someone else's interest or the public interest itself. In the meanwhile, the judicial process will not become stayed unless every party applies for it.

Finally, it is worth mentioning section 7 *Ley 47/2003, de 26 de noviembre, General Presupuestaria* (General Budgetary Law), which states the limits applicable to disposal Treasury rights.

- Treasury rights and assets cannot be disposed, mortgaged, or leased unless expressly stated by law.
- Waivers, cancellations (*condonación*), discounts or moratorium in tax revenues are only possible when expressly authorised by law.
- Judicial or extrajudicial compromises related to Treasury assets, as well as arbitration affecting them, must be authorised by the Board of Ministers by Royal Decree, prior State Council hearing.

## CHAPTER XV.- STRICT LIABILITY IN PUBLIC ORGANISATIONS.

### I.- CONCEPT AND FEATURES.

Strict liability in public organisations has its roots in civil law. The key distinguishing feature between civil liability and administrative liability is said to rest in the broader scope of liability in the public sector. While liability in civil law is based in damages caused by willful misconduct in the course of people's activities, as well as damages caused by negligence, administrative liability does not require such conscious or intentional behaviour.

Section 1902 CC states that *'the person who, as a result of an action or omission, causes damage to another by his fault or negligence shall be obliged to repair the damage caused'*. In addition, Section 1903 CC declares that *'the obligation imposed pursuant to the preceding article shall be enforceable not only as a result of one's own actions or omissions but also of those of such persons for whom one is liable (...) the liability provided in the present article shall cease if the persons mentioned therein should evidence that they acted with all the diligence of an orderly paterfamilias to prevent the damage'*.

At first, administrative liability was charged to civil servants instead of the public body itself. With the continuous growth of state responsibilities and functions, such approach proved to be unsuccessful and insufficient. Progressively, both law and Courts found the Administration responsible for damages occasioned by its officer's actions or omissions. Civil servant's responsibilities shall therefore have only internal effects in the organisation as a result of disciplinary proceedings.

1954 Expropriation law (*LEF*) was the turning point in the traditional conception of administrative liability. From here on, responsibility of public organisations are no longer addressed by civil law, assuming specific principles and rules. More recently, the Spanish Constitution stated in section 106.2 that: *'Private individuals shall, under the terms laid down by law, be entitled to compensation for any harm they may suffer in any of their property and rights, except in cases of force majeure, whenever such harm is the result of the operation of public services'*.

Section 139.1 *LRJPAC* reiterates such principle including as strict liability damages unlawfully caused by laws imposing obligations and burdens that the citizen's is not legally bound to bear with. On the other hand, according to section 121 CE, *'damages caused by judicial error as well as those arising from irregularities in the administration of justice shall give rise to a right to compensation by the State, in accordance with the law'*.

Therefore, it is crystal clear that the administration's budget shall cope with every compensation that may arise from an administrative action, legislative activity, as well as judicial activity. The latter case is regulated in sections 292 et ss of the Organic Act governing the Judiciary (*LOPJ*). Section 292 *LOPJ* states that *'damages caused to any assets or rights through judicial error as well as those resulting from abnormal operation of the Administration of Justice, shall grant those who have suffered damage the right to compensation from the State, except in cases of force majeure pursuant to the terms of this Title'*. Before judicial errors the concerned party is allowed to file a

complaint to the Ministry of Justice, which shall investigate the case and eventually draft a preliminary decision prior report of the Council of State. The Board of Ministers shall lay down the final compensation.

Public liability in Spain is direct and strict. Proving willful misconduct or neglect is not required to become eligible for a compensation and repair. Causation, however, must be clearly evidenced. There must be a direct or indirect link between the damage and the administrative action or omission, regardless of such activity being under administrative or private law.

Damages should be effective and valuable; they must be suitable to individualise and therefore link to a particular person or identified group. Future damages will not be compensated under this procedure. However, compensation shall include both, actual losses (*daño emergente*) and lost profits or earning potential (*lucro cesante*). Eligible damages are physical or moral.

Given that liability arises regardless of a normal or abnormal operation of public services, lawful activities will be the common place in the first cases, while most willful misconducts or reckless behaviour shall be linked to the malfunction of public utilities. With regards to the *vis major* exception, it shall only take place as long as facts and circumstances were unable to avoid according to the current state of the art in sciences, technics and knowledge.

On the other hand, simple annulment of administrative decisions or regulations does not lead itself to strict liability.

In sum, these are the key merits to base liability claims:

a.- Damage.

It must be effective, valuable, individual and unlawful.

b.- Assignment of responsibility (*imputación del daño*).

Every public body, including public entities can be reported liable for damages. Damages caused by contractors or concession holders should be charged to them, unless they were following direct orders from the monitoring administrative body.

When liability is traceable to several Administrations acting together, all of them shall be found jointly and severally liable (*responsabilidad solidaria*). Sometimes, damages arise from actions or omissions performed by different administrations without prior agreement or collaborative scheme. In such case, liability should be traced according to their respective responsibilities, the protected public interest, or the grade and intensity of respective action. If such analysis is not possible, they will be regarded jointly and severally liable as well (section 140 *LRJPAC*).

In addition, as Administrations currently have liability insurance, the concerned party shall sue the insurance company together with the Administration. Administrative Courts shall be competent to rule these cases and Administrative law shall be enforced (no civil law) regardless such companies are privately owned.

c.- Objective elements of the claim.

Administrative statements, alleged decisions, ultra vires, omissions, as well as regulations, are eligible to resulting in strict liability. Regulations have to be previously reported null and void, since lawful regulations only generate strict liability in extraordinary circumstances. That is the case, for example, of damages resulting from changes in urban planning according to zoning law.

d.- Causation.

There must be a direct link between the action or omission and the damage. The problem is that in most cases several causes and conditions, not all of them attributable to the acting body, may participate in the result. Courts have created three different tests to establish causation:

- Excusive causation (*causalidad exclusiva*). In this case, damage is strictly linked to administrative action or omission when carrying out or monitoring public services.
- Equivalence in conditions (*equivalencia de condiciones*). There are several causes for the damage, all of them necessary to create the damage. If any of such causes had not taken place, the damage would have not arisen. In these cases, every acting body, regardless public or private, will be liable in terms of jointly and severally liability. Courts actually try to get the administrative body involved to guarantee the compensation.
- Sufficient causation (*causalidad adecuada*). Although several causes are present, only one of them is qualified enough to cause the damage. Such analysis shall determine the attribution.

## II.- PROCEEDINGS.

Sections 142 and 143 *LRJPAC* states the proceeding for strict liability of public organisations. *Real Decreto 429/1993 de 26 de marzo*, completes such regulation.

Let us discuss the key conditions.

1.- Timing.

Citizens can lodge an application for strict liability within one year from the date the action, omission, or the fact causing damages took place. The problem is that, in practice, it is not always easy to set and prove the starting point.

With regards to physical and moral damages, deadline shall get started as soon as citizen heals, or permanent complications are determined. Another difficult case arises when calculating deadline in cases of regulations declared null and void. The one year period shall get started the day the final judgment is published in the official gazette.

## 2.- Stages:

Strict liability proceeding can get started '*Ex officio*' or at citizen's request. When initiated *Ex officio*, if beneficiaries neither appear in the first allegations phase nor in the hearing phase, the proceeding shall conclude. The ordinary situation, however, takes place when citizens apply for compensation. The application shall clearly express:

- Damages and date of production.
- Public service activity involved.
- Causation between damages and public service.
- Quantification of damages and applied compensation.
- Pleadings, documents, evidences, and any other relevant information. The concerned party shall request Administration to open the evidence phase and admit the taking of evidences.

The Administrative body must investigate the case. Applications for taking of evidences can be accepted totally or partially; when rejected, the acting body shall clearly state the reasons to consider the proposed evidences irrelevant. The authority has to require other bodies whatever reports are deemed necessary. Finally, once the investigation comes to an end, the authority shall offer a hearing before issuing a draft decision.

After the draft decision is done, it must be reported to the Council of State or Regional Council for mandatory report. Such collegiate consultant bodies shall give their opinion about causation, quantification of damages, final amount due and payable, as well as about the means of payment. The report, although it is a mandatory stage in the proceeding, is not binding when it comes to its statements.

Once the above discussed procedure has come to an end, the responsible body must make a definitive and reasoned decision. The responsible body is always one of the upper ones in every administrative structure, such as the Minister, the Board of Ministers, the Regional Minister, the Mayor, etc. It depends on each case. Alternative dispute resolution is available in these cases, but the agreement shall be previously reported by the Council of State or the Regional Council.

Maximum deadline to reach a decision is six months. Lack of answering is deemed to have a negative effect (rejection). Given that decisions are laid down by the upper bodies, they exhaust the administrative channel and leave the case up to judicial review.

There is, however, an abbreviated proceeding regulated in sections 142.2 and 143 *LRJPAC*. It may be used whenever causation and valuation of damages are crystal clear. Phases of this procedure are similar to the ordinary one, but deadline to get a decision is significantly shorter, just 30 days.

## CHAPTER XVI. JUDICIAL REVIEW (I).

### I. ORIGINS AND FUNDAMENTALS.

In the origins of modern Administrative law, during the years of the French Revolution, monitoring administrative regulations and decisions became sort of what have been called: *withheld jurisdiction*. Supervision was taken over by the Administration itself, not allowing the Judiciary to interfere in administrative action. As we know, the climate of mistrust between the executive power and the judiciary led to adopting the *autotutela* principle, benefiting administrative decisions from direct enforcement.

In France, this type of self-monitoring was assigned to a specialised independent institution called *Conseil d'Etat*. At first, this body was regarded a mere advisory body, since the upper executive bodies withheld the responsibility to lay down a judgment, but its reports were almost always accepted. It was not until 1872 that the *Conseil d'Etat* was granted the power to fully judge administrative conflicts.

In Spain, before 1956 Administrative Judicial Review Act (*LJCA*), monitoring over administrative behaviour was extrajudicial as well, according to a model known as delegated jurisdiction. Several consultative state and provincial bodies had the power to address non-binding draft decisions to the executive authorities dealing with conflicts.

In 1888, such scheme partially changed with the *Ley de Santa María de Paredes*, which is regarded as the first Act trying to lay down a common legal framework for judicial review. However, that legal scheme was just an attempt to improve supervision, but did not manage to completely restrain administrative action. Both Provincial Courts and the specialised Courtroom at the Supreme Court, created in 1904, had a mix composition of judges and administrative officers.

With regards to the scope of such jurisdiction, it was certainly poor at that moment, since discretionary decisions (including regulated decisions with discretionary elements) were excluded from supervision. For those actions under monitoring (strictly regulated statements), a high level of legal standing was required: an affected individual right, thus excluding legitimate interests, was essential to be granted access to judicial review. In addition, political statements, broadly interpreted, were also excluded as (including public safety decisions and the regulatory-making power).

Enforcing the judgments relied on the Administration, and the Board of Ministers was granted the power to declare any judgment unenforceable. Moreover, public funds and assets were prevented from seizure proceedings. With such a limited framework, we can clearly state that there was no actual supervision of administrative decisions by Courts.

After 1939, situation got worse in a context of dictatorship. Actually, in 1938 every option to challenge executive decisions was stayed and it was not lifted until 1944. A

new law restored the Administrative appeal scheme, but increased and reinforced the exemptions (broadening the political decisions' exemption, excluding labour relations, etc.). Such an old fashioned and authoritarian scheme was partially replaced by the 1956 LJCA.

1956 LJCA assigns all the supervision over administrative action to Courts for the first time in Spanish history. It creates a specialised jurisdiction within the Judicial Power of the State. In addition, Courts are granted broad power to monitor administrative behaviour, including the French concept *excess de pouvoir* (*desviación de poder*).

Obviously, given the existing political framework, political decisions remained out of the judicial review. In contrast, discretionary decisions were included. With regards to enforcing the judgments, not enforcing them remained as a prerogative of Administration, but causes backing up such decision were reduced. Prohibition of seizing public assets remained as well. To speed up proceedings, an abbreviated process was stated.

The next step in the updating process of judicial review in Spain dates back in 1978, with the Spanish Constitution. Our Constitution collects a group of relevant principles in terms of judicial review as the new democratic context imposes. Section 24 CE clearly grants every citizen the right to be granted full access to judicial review and to be benefited from an effective defence of his rights before Courts. In addition, section 24 is defined as a fundamental right itself, which reinforces its efficacy.

*Section 24*

*I. All persons have the right to obtain effective protection from the judges and the Courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense.*

*II. Likewise, all have the right to the ordinary judge predetermined by law; to defense and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defense; not to make self-incriminating statements; not to plead themselves guilty; and to be presumed innocent. The law shall specify the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding allegedly criminal offences.*

Section 106 CE, on the other hand, states:

*Section 106*

*I. The Courts shall check the power to issue regulations and ensure that the rule of law prevails in administrative action, and that the latter is subordinated to the ends which justify it. II. Private individuals shall, under the terms laid down by law, be entitled to compensation for any harm they may suffer in any of their property and rights, except in cases of force majeure, whenever such harm is the result of the operation of public services*

Finally, section 103 *CE* states the complete obligation of public administration to follow the law, which therefore implies its full subordination to Court supervision:

*Section 103*

*I. The Public Administration shall serve the general interest in a spirit of objectivity and shall act in accordance with the principles of efficiency, hierarchy, decentralization, deconcentration and coordination, and in full subordination to the law.*

With regards to enforcing the opinions, section 117.3 assigns such proceedings as an exclusive power regardless of the kind of process to the Judiciary. Only one limitation is kept if section 132, declaring public assets as free of seizure.

*Section 117.3*

*The exercise of judicial authority in any kind of action, both in ruling and having judgments executed, is vested exclusively in the Courts and tribunals laid down by the law, in accordance with the rules of jurisdiction and procedure which may be established therein.*

*Section 132.*

*The law shall lay down the rules governing public and communal property, on the basis that it shall be inalienable, exempt from prescription and seizure, and it shall also provide for the case of disaffection from public purpose.*

Such sections, given their direct effect, led to implicitly repealing every sections of 1956 *LJCA* opposing such principles. The new 1998 *LJCA* finally collects all of them.

## **II.- NATURE AND FEATURES OF JUDICIAL REVIEW.**

Judicial review reaches the regulatory conditions of every administrative statement, including its goals (misuse of power). With regards to discretionary elements, monitoring shall include the relevant facts, general principles of law, legal grounds, rationability and reasonability. Judicial review appears to be therefore significantly deep and broad.

However, the principle of separation of powers limits Courts in their monitoring powers, in the sense that they are not allowed to substitute administrative action. When supervising administrative behaviour they can check whether the public body has met legal standards, including discretionary powers, but in most cases cannot change the challenged decision for another. Keeping these limits on a case by case basis is certainly difficult; one of the greatest challenges in Administrative law is precisely to distinguish whether the Judge is going beyond his limits or is keeping them.



Judicial review has traditionally not displayed a comprehensive monitoring in this field. Plaintiffs have been always allowed to claim for annulation with regards both to decisions and regulations, but claims intending the recognition of rights were unavailable. Section 24 CE overcame such limitations allowing Courts to grant citizen protection as well as adjudicating in favour of citizen's rights (*pronunciamiento de condena*). From that point we have been involved in an on-going process aiming to extend judicial monitoring scope.

The current *LJCA* recruits such approach in the following sections:

*Section 71.1. When the ruling upholds the claim for judicial review:*

*a) It shall declare the protested provision or act unlawful and quashed in full or in part or shall order the challenged action stopped or modified.*

*b) If the claimant sought acknowledgement and reinstatement of a legal situation specific to an individual, the ruling shall acknowledge the said legal situation and take such measures as necessary for the full reinstatement of the said legal situation.*

*c) If the measure consists in issuance of an act or performance of a legally binding action, the ruling may set a period for compliance with judgment.*

*d) If a demand for damages is upheld, the right to redress shall at all events be declared, indicating likewise who is obligated to pay compensation. The ruling shall also set the amount of the compensation when asked expressly by the claimant to do so and sufficient proof is a matter of case record. Otherwise the bases for determining the amount shall be established and the definitive specification of the amount shall be deferred until the judgment execution period.*

Sections (b), (c) and (d) are clear examples of full jurisdiction, and goes beyond the traditional approach of simply declaring the decision or regulation annulable or null and void.

Both perspectives are laid down as well in section 31:

**Section 31.**

*I. The applicant may seek to have acts and provisions amenable to challenge under the preceding chapter declared unlawful and rendered void or quashed, as applicable.*

*II. The applicant may also seek acknowledgement of a legal situation specific to an individual and appropriate measures for full reinstatement of that situation, inter alia, payment for damages.*

Section 32 goes even further granting direct access to Courts even in cases of inaction as well as regarding actions without proceeding (*ultra vires*).

**Section 3II. I.** *When an application is made for judicial review of administrative inaction under Section 29, the applicant may seek to have the court sentence the administration to discharge its obligations pursuant to the specific terms in which those obligations are established.*

*II. If the object of the petition is a material action constituting ultra vires action, the applicant may seek to have the action declared unlawful and quashed and may seek the other measures provided for in Section 31.2 where appropriate.*

As regards with the latter section, it is worth noting that allowing direct access to judicial review against administrative inaction, as well as in cases of ultra vires, is one of the best examples of how Administrative Jurisdiction is progressively leaving behind its traditional *reviewing condition (carácter revisor)*. Such feature has traditionally meant that Administrative Courts had only the power to review regulations or express administrative statements. Actually, the concept of administrative silence was precisely created so to avoid keeping such behaviour out of judicial review. Creating a fiction of administrative decision allowed Courts to address such cases.

1956 *LJCA* stated an important breach in the principle allowing claims seeking acknowledgement of specific legal situations to individuals, as well as every appropriate measure for the full reinstatement of citizen rights, including charging payments for damages. However, the presence of an administrative decision, whether it's express or implicit, remained as a condition to proceed.

What 1998 *LJCA* actually represents is the final overcoming of such limitations allowing full judicial review. The object of the process is now clearly defined as any administrative behaviour *actuación*, which includes not only express or alleged decisions and regulations, but every other material action conducted without procedure (*ultra vires*), as well as the simple omission of a required action.

### **III.- PARTIES AND OBJECT OF ADMINISTRATIVE APPEALS.**

#### **1.- SCOPE**

- From an objective point of view, Administrative Courts hear every claim against actions coming from administrative bodies acting under administrative law. They shall address conflicts related to regulations including plans and programs, as well as legislative decrees overstepping the limits of delegation (Section 1.1 *LJCA*).

They shall monitor every kind of administrative action, regardless express or alleged decisions, ultra vires or simple inactivity, providing such activity is subject to Administrative law.

- From a subjective point of view, section 1.2 *LJCA* states that Administrative law shall concern every kind of public bodies, including territorial administration as well as institutional, corporative and independent agencies. What is more, certain issues administrative in nature, when addressed by non-administrative institutions with constitutional relevance, such as asset management, strict liability, or labour relations, shall be heard under this proceeding.

On the other hand, challenging decisions from the special administration for electoral processes (*Ley Orgánica 5/1985, de 19 de junio, del Régimen Electoral*

*General: LOREG*) must be done to Administrative Courts. *LOREG* precisely states a special procedure to address such cases, while *LJCA* shall be only applied to fill possible gaps in such regulation.

With regards to Public companies and Foundations, their actions are out of Administrative Courts' scope except for certain parts of their activity, involving public interest conditions that remain under Administrative law. Such subordination to Administrative law arises either as a result of the *actos separables* theory, or as a result of particular legal frameworks. That is the case of the special administrative appeal before administrative Courts stated in Public Contracts law (*LCSP*).

- From a formal point of view, administrative jurisdiction on a case by case basis must be determined according to the following criteria:
  - Political decisions. Judicial review is limited to fundamental rights, regulated elements, as well as strict liability.
  - Private contracts agreed between Administration and citizens. Only preparatory and awarding decisions are under Administrative Courts' supervision.
  - Regulations and decisions dictated by Public Law Corporations carrying out public functions. The *LJCA* does not regard such institutions as administrative bodies in terms of judicial review (section 1.2), extending administrative judicial review only to actions of *administrative in nature*.
  - Monitoring certain concession of the holders' decisions in public service areas, as long as they imply enforcing delegated administrative functions, according to the law governing the area.
  - Although the *LJCA* does not say anything on the so called *excluded sectors* (water, telecommunications, energy, etc.), they enjoy their own legislation from 1998, where it is stated the citizen's right to appeal private companies' decisions before administrative bodies in certain conditions. Obviously, as soon as the Administrative body rules these conflicts citizens are automatically granted access to Administrative Courts.
  - Strict liability claims, regardless the nature of the action causing damage. This is a significantly relevant rule, as it appoints the whole matter of public liability to the Administrative Courts. The particular nature (public or private) of the legal relation between the Administrative body and the citizen does not make any difference in this field. Administrations shall never be sued before civil Courts, even when it has a civil liability insurance with a private insurance company. 2003 amendments in *LOPJ* prevented civil Courts from addressing these cases even when the claimant sues only the private insurance company.
  - Matters expressly assigned to other jurisdictions (Civil, Labour, Criminal Courts) as long as they are related to Administrative action. That is the case of penalties imposed by administrative bodies due to infringements in social security law, Trade Unions law, among others.

- Conflicts of jurisdiction between Courts and Administrative bodies. Such conflicts are assigned to a special Court (Conflicts Court) made up with members of the Supreme Court and the Counsel of State (*Ley orgánica 2/1987 de 18 de mayo, de conflictos jurisdiccionales*).
- Negative or positive conflicts of competence (*conflictos de atribuciones*) among bodies within the same Administrative structure. In these cases the Administrative structure itself shall decide the case. Courts shall not intervene.
- Questions referred to Court for a preliminary or incidental ruling (*cuestiones prejudiciales o incidentales*). Administrative Courts shall address cases that according to their nature should have been filed before other Courts (civil or labour), as long as they are closely related to an Administrative appeal and are essential to rule the case. For example, sometimes it is necessary to decide about property rights before deciding a conflict related to expropriation.

The decision about such issues shall be handed down *incidenter tantum*, that is to say, for purposes of deciding the case, regardless of what any other Court might rule in the future. Thus, neither it will become a legally settled matter *res iudicatae*, nor it will have out-of-Court effects.

Nevertheless, preliminary or incidental ruling does not extend to criminal or constitutional matters (post-Constitutional statutes). In the first case, the Court shall stay the proceeding and refer the question to the criminal Court. In the second case, the Court shall rise a question of Constitutionality to the Constitutional Court; the same operational will take place with the European Court of Justice with regards to E.U. law (Section. IV.II. *LJCA*)

## 2.- PARTIES.

Parties in Administrative proceedings are the Administration (normally as defendant) and the citizen (normally as plaintiff). However, it is not rare that two or more Administrations litigate each other. The key point is that one Administration must always be part of the procedure.

- The public Administration.

Public administrations shall be understood to be, for the purposes of legal standing in Judicial proceedings:

- The state administration.
- The regional administration.
- The entities belonging to local administrations.
- The entities organised under public law that are dependent on or linked to state, regional or local entities.

In addition, certain entities not belonging to the Administration can become part of Judicial proceedings providing their activity is often close to administrative body's one. That is the case of the bureaucratic nature of several activities displayed by the Congress of Deputies, the Senate, the Constitutional Court, the General Council of the Judiciary, the Court of Auditors and the Ombudsman, likewise by the corresponding entities in the regions.

- Citizens.

The Code of Civil Procedure (*LEC*) states the conditions to hold capacity to file proceedings (legal standing). However, according to *LJCA* minors defending their legitimate rights and interests might also enjoy this position according to law. Non-personified groups of citizens and unions shall also have capacity to file proceedings according to law.

With regards to legal standing conditions, natural or legal persons holding legitimate rights or interests are granted such position. In addition, it enjoys legal standing every corporation, association, trade union, group and entity defending legitimate collective rights and interests concerned by administrative action.

Quite often, administrative bodies act as plaintiffs and litigate to each other. With regards to Spain being a complex state where powers are strongly divided, conflicts frequently arise among public in different Administrations. On the other hand, in certain relevant cases, the Prosecution Service can be party to the proceedings

Administrative Courts grant legal standing to personified entities organised under public law, to citizens in public interest claims according to law, as well as to entities defending gender bias cases, including Trade Unions and Associations (prior authorisation of the concerned citizen is required in such cases).

Although in most cases Administration plays a role of defendant in administrative conflicts, we should remember that administrative *Ex officio* reviewing processes, on the grounds of annulable reasons, require the Administrative body itself to challenge its own decision before Courts, prior declaring the decision as damaging the public interest.

Sometimes, claims against administrative action concerns someone else not directly involved in the case. It happens in cases where the judicial opinion might involve damages or loses in someone else's assets or rights. That is the case, for example, of those benefited from the challenged decision. Obviously, all of them shall be recognised legal standing in the process as co-defendants with the challenged administration, and must be called to appear in the process.

- Courts.

Judicial structure in Spain is made up of independent, irremovable judges and magistrates, subordinated only to the law, and exclusively responsible for judicial reviewing, pronouncing judgment, and ensuring enforcement of judgments.

There are four jurisdictional areas:

- Civil
- Criminal
- Administrative
- Social
- Military (special chamber of the Supreme Court)

With regards to Courts, there are:

- Single Judge Courts:
  - Justices of Peace (*Juez de Paz*)
  - District Courts (*Juzgados de Primera Instancia*)
  - Examining Courts (*Juzgados de Instrucción*)
  - Criminal Courts (*Juzgado Penal*)
  - Administrative Courts (*Juzgado de lo Administrative*)
  - Social Courts (*Juzgado Social*)
  - Juvenile Courts (*Juzgado de Menores*)
  - Parole Courts (*Juzgados de Vigilancia Penitenciaria*)
- Panel of Judges Courts
  - Provincial Courts (*Audiencia Provincial*)
  - High Courts (*Tribunales Superiores de Justicia*)
  - National Courts (*Audiencia Nacional*),
  - Supreme Court (*Tribunal Supremo*).

Single Judge Courts usually judge cases that have not been previously addressed to any other Court. They are, therefore, the first step for judicial review in most cases. However, although Panels of Judges normally intervene as appeal Courts, sometimes, according to law, can also be the first step for those seeking judicial review in cases of significant relevance. What is more, in Administrative law conflicts, the nature and position of the challenged administrative authority may be decisive in terms of addressing the conflict first to Panels of Judges.

Judicial review of cannot be postponed (*improrrogable*). In other words, Courts shall only address cases that fall under their sphere of competences. Actually, during the judicial process, one of the first steps is to decide whether the Court holds jurisdiction on the case. Such analysis is done *Ex officio* and the result is notified for hearing.

Not only can jurisdiction not be postponed, the same happens with regards to *competence*. Although in Common law systems jurisdiction and competence are fairly the same, in Spanish law they are not equal terms. While jurisdiction, strictly speaking, refers to the distribution of the different areas of law (administrative, labour, civil or criminal law) among groups of Courts, competence has to do with the particular sphere of cases that every Court within the same jurisdictional area is allowed to judge.

In particular, Administrative Courts are made up of the following bodies:

a) Single-judge administrative Courts (*Juzgados de lo contencioso administrativo*).

According to section 90 *LOPJ*, these Courts are made up of just one Judge. They have provincial status, although they can be based in several towns within the province. In addition, their jurisdiction can be extended to several provinces within the same Region. 2003 amendments in *LOPJ* widened their jurisdiction to new issues, resulting in a new composition of section 8 *LJCA* (14<sup>th</sup> Additional provision *LOPJ*).

They address all cases related to municipal affairs except for regulations and zoning plans. They also have jurisdiction on a number of administrative decisions of the regional administration, except for those dictated by the upper body: the Regional Council. Strict liability not exceeding 30.050 Euros falls within their jurisdiction as well.

Decisions and regulations laid down by peripheral state and regional bodies are addressed by these Courts, as well as decisions (not regulations) adopted by organisations, bodies, entities or corporations organised under public law whose competence is not nationwide. However, conflicts greater than 60.000 Euros, as well as those related to public property, national public works, condemnation under sovereign right of eminent domain or special properties, are beyond their competence.

Cases related to nationwide competences or beyond such quantitative limits shall therefore be reported to Single-judge central administrative Courts.

Likewise, it falls within their competence to authorise restrictive measures that health authorities report urgent, even if they mean restricting freedom or any other fundamental right. In addition they shall hear and grant authorisations for entering residences and inspecting homes, business venues, land and means of transport when the owner refuses to it.

b) Single-judge central administrative Courts (*Juzgados Centrales de lo Administrativo*).

These judicial bodies did not exist within the original *LOPJ* framework, but were incorporated in the 1998 amendments. As a result, the *LJCA* established them with the aim to deconcentrate functions from the National Court. They are single-judge courts and their competences have significantly grown after 2003 *LOPJ* amendments. They are

based in Madrid, although their jurisdiction extends to the whole country. They shall hear cases related to State Administration decision-making, including public entities.

In addition to the competences referred to in subsection (a), related to qualitative and quantitative conflicts greater than those that single provincial Courts are allowed to hear, several relevant competences must be highlighted. In particular, they shall hear decisions handed down by ministers and secretaries of state in matters of financial liability, as long as the claim does not exceed 30,050 Euros, decisions related to political asylum, and decisions in oversight proceedings handed down by the Spanish committee on discipline in sport.

c) Administrative divisions of the Regional Superior Courts (*Sala de lo Administrativa de los Tribunales Superiores de Justicia*).

The territorial scope of Regional Superior Courts is the Region where they are based or part of it. As a matter of fact, regions such as Andalusia and Castilla León have more than one division based in different provinces. Divisions have different sections as well. Every Division, including the Administrative Division, is a collegiate judicial body made up of at least 3 Judges. One of them, at least, must be specialised in administrative procedure.

Their jurisdiction shall depend on the place where the challenged Administrative Body is based. However, in labour, special properties, and penalties, the issue of the venue of jurisdiction shall depend on the plaintiff's free will deciding between his/her own residence or the place where the body is based. In zoning law conflicts, expropriation, and in every issue related to private property shall depend on the territory the real state is located. In cases involving several interested parties, jurisdiction shall be assigned to the Judicial Body holding office in the place where the challenged administrative body is based.

These Courts can sometimes hear cases as trial Courts (*primera instancia*), and even without any appeal option (*única instancia*). Normally, they shall hear cases as an appeal Court or even as a cassation Court.

Most Court cases are related to regional administrative law conflicts. A great deal of cases are actually appeals against rulings made by single administrative Courts. In addition, they are qualified to hear the most relevant issues arising from local authority's action, such as regulations. They hold a residual power as they shall hear every decision of local and regional entities that are not expressly assigned to single-judge administrative courts.

Decisions related to election boards others than those under Single Courts jurisdiction shall be brought to Regional Courts. Prohibitions related to citizen's demonstrations are another relevant issue under their jurisdiction.

Another important field concerns decisions made by administrative bodies of the state administration whose competence is nationwide and whose institutional level is lower



than a minister or secretary of state; monitoring powers, however, it only concerns matters of personnel, special properties, as well as condemnation under sovereign right of eminent domain.

They shall hear conflicts of competences between single-judge administrative courts working in the same Region, as well as appeals for doctrine unification (contradictory judgments of different Divisions and Sections of the Regional Courts with regards to regional law). Another area of work are the so called: appeals in the interest of the law (with relation to judgments of Single-Judge Courts related to regional law conflicts).

This Court addresses *recursos de queja* against Single-Judge Courts rulings, as well as *recursos de revision* against final rulings from the same Courts,

d) The Administrative Division of the National Court (*Sala de lo Administrative de la Audiencia Nacional*).

The Administrative Division of the National Court is made up of a variable numbers of sections depending on the number of cases. This Court only addresses conflicts related to the State Administration. The key cases are the following:

As a trial Court (without previous judgement), the National Court hears claims for judicial review in connection with regulations and decisions of Ministers and Secretaries of State, including personnel matters referring to the creation or termination of tenure positions of civil servants.

Likewise, the National Court hears conflicts related to inter-administrative agreements. What is more, it addresses decisions of economic administrative nature dictated by the Ministry of Finance, the Exchequer, and by the Central Economic Administrative Court, except in relation to taxes transferred to the Regions (Regional Courts shall be competent in the latter cases).

According to *LJCA* 4<sup>th</sup> Additional Provision, it shall address appeals against decisions handed down by independent agencies (*administraciones independientes*) such as the Bank of Spain, CNMV, etc. Judgments are unappealable.

When it comes to appeals against judgments of lower Courts, it shall be competent to hear those handed down by Single-Judge Central Administrative Courts. It shall also hear conflicts of competence between them, as well as *recursos de queja* and *recursos de revision*.

e) The Administrative Division of the Supreme Court (*Sala de lo Administrative del Tribunal Supremo*).

The upper judicial body in the hierarchical ladder in Spanish Judiciary is the Supreme Court. The Court is structured in several chambers according to the nature of the matters assigned. With regards to Administrative law conflicts, the Division responsible on

these matters is the *Sala de lo Contencioso Administrativo* (3<sup>rd</sup> Division), which according to law can be divided into as many sections as advisable in view of the number of cases.

In particular, 3rd Division is currently divided into 7 sections. Cases are distributed according either to the nature of the matters in conflict or the position of the challenged bodies.

Although in most cases the Court acts as a Court of appeals, in certain cases it shall intervene as a trial Court. As a matter of fact, it shall happen with regards to regulations and decisions dictated by the Council of Minister, Delegated Government Committees, General Counsel of the Judiciary, as well as regulations and decisions in matters of personnel, administration and asset management laid down by the Congress of Deputies, the Senate, the Constitutional Court, the Court of Auditors and the Ombudsman.

When it comes to acting as Court of appeals, it shall hear every kind of appeals against decisions handed down by lower Courts (administrative divisions of superior Courts and the National Court), as well as those dictated by the Court of Auditors.

Likewise it shall hear claims related to electoral legislation arising from the electoral administration.

Appeals in the interest of the law, as well as appeals for doctrine unification and appeals for review shall be entrusted to a particular and special section of the administrative Division.

f.- Special Division of the Supreme Court ext. Section 61 *LOPJ*.

This division is made up of the President of the Supreme Court, all the Presidents of the Divisions, as well as the older and younger Judges of each Division. With regards to Administrative law conflicts, such Division addresses *recursos de revision* filled against Supreme Court rulings handed down as trial Court.

Proceedings of recusal or disqualification against Presidents of Division, or against more than two Judges of the same Division, must be filed before this special Division as well. In addition, claims for state strict liability in cases of judicial error caused by a judgment of the Supreme Court are included.

### 3.- OBJECT.

- Cases suitable for appeal.

As already mentioned, cases suitable for appeal have significantly grown as a result of the latest legislative reforms in administrative procedural law. The ‘revising’ character

of Administrative judicial review has made way for a new scheme where every illegal administrative behaviour falls within such Jurisdiction.

Regarding express or alleged statements, the key condition is that the citizen must have exhausted the administrative channel. In addition, decisions must be definitive (not final), except for qualified procedural acts.

Both regulated and discretionary decisions are appealable, as well as mere political statements with the limitations already discussed in this work. New decisions reproducing or confirming previous final statements do not give new grounds for appeal. Claims should not be accepted for processing in such cases (*inadmisión*). In addition, enforcing statements, when the enforced decision is already final, cannot be challenged on the grounds of eventual illegalities in the latter decision.

Mere explanatory decisions handed down to clarify previous decisions cannot be challenged either, as long as they do not add new conditions to the original decision.

On the other hand, regulations and overstepping legislative delegations can also be appealed. Appeals can be direct or indirect, and involve the whole regulation or just parts of it. Rulings shall have *erga omnes* effect in direct appeals, and shall normally have retrospective effects. Proceeding is preferential in these cases, and shall be proceeded before appeals against administrative decisions.

Indirect appeals against regulations, built on the grounds of an eventual illegality in the enforced regulation, should not be only based in formal grounds according to section 27.1 *LJCA*. The ruling shall declare the challenged decision null and void, but the regulation shall remain in force. However, for legal certainty reasons, *LJCA* states several rules to quash the regulation.

Thus, when the indirect claim was addressed to the Court holding competence both to monitor the decision and the regulation, it shall declare the regulation null and void. The Supreme Court, actually, shall always make such judgment. In other cases, the Court shall raise a *cuestión de ilegalidad (auto)* to the Court holding the power to monitor the regulation's lawfulness. This will lead to a new procedure where the regulation's validity or nullity shall be declared with *erga omnes* effect.

A relatively recent appeal, introduced in 1998 *LJCA* amendments, allows citizens to directly appeal against administrative lack of action (*inactividad material*). We are not talking about formal omissions (alleged acts), but about simple inaction when doing or not doing something is required. This situation might take place, according to law, in the following cases:

- Lack to enforce final decisions.
- Lack to enforce regulations as long as no administrative decision is needed to implement them.
- Contracts and agreements stating specific and definite actions in favour of the concerned party (frequently linked to public utilities).

In these cases it is enough to require the Administrative body to meet its obligations; in case it is rejected or the citizen does not get any answer, the case can be directly brought to Courts. Obligations should be immediately enforceable, which means that no further administrative decisions are required to define, precise or specify the obligation. The obligation must also be certain, determined and not generic.

It is worth noting that *ultra vires* is also directly appealable to Administrative Courts. Before 1998 *LJCA* amendments, concerned citizens were only allowed to use civil injunction processes in particular cases stated by law. Prior request to the Administration, before bringing the case to Courts, is not mandatory, although possible.

- Potential claims.

Plaintiffs in the judicial review process can issue the following claims:

- Declaratory claims (*pretensiones declarativas*). It pretends the Judge to declare decisions or regulations annulable or null and void.
- Full Jurisdiction claims (*Pretensiones de plena jurisdicción o de condena*). They pretend Court issues an order imposing administration specific actions in addition to declaring the act invalid. There are three key requests for full jurisdiction:
  - Being granted individual benefits in terms of rights and legitimate interests (*situaciones jurídicas individualizadas*).
  - Ordering the administrative body to restore damages (*restablecer la situación jurídica infringida*) (obligations of action).
  - Claims for damages and compensation (*pretensión indemnizatoria*).

Obviously, requiring the Court to lay down judgments substituting the administrative power in timely or discretionary matters is unable according to section 71.2 *LJCA*.

- Consistency.

While the plaintiff and the defendant set the limits of the case in other proceedings, and the ruling itself is bound to the parties' claims, the principle of consistency is not fully applicable in Administrative law given that Courts must guarantee the public interest. Thus, whenever the Court finds that parties have not correctly defined their demands and opposing arguments, it shall apprise them by *providencia*, setting 10 days to lodge allegations.

In case the Court does not conduct such stage and rule the case exceeding the parties' claims, we shall have *extra petita* inconsistency. Inconsistency by omission will take place whenever the Court does not sentence on every claim. Besides, when Courts go

beyond the limits of the claim as brought by the parties, we shall have *ultra petita* inconsistency. Such cases guaranteed from section 24 *CE* would have not been granted.

- Plurality of claims or appeals:

Let us discuss three specific motions (incidents) intending to speed up proceedings:

- Order consolidating cases (*acumulación de pretensiones*). The plaintiff can combine various claims into a single case. This will lead to a judicial order consolidating claims unless he considers more effective to conduct separate processes.
- Order consolidating appeals (*acumulación de recursos*). Whenever several citizens, or even one citizen, file appeals challenging the same regulation or decision, or linked decisions, the Court may decide to consolidate cases prior hearing all the concerned parties.

In cases of massive appeals (*recursos en masa*), *LJCA* allows Courts not to consolidate cases. Instead, the Court shall conduct one procedure dealing with just one case on a preferential basis. The rest of appeals shall become suspended. As soon as the Court sentences the case, the ruling shall be automatically extended to the other cases.

- Once the process has got started, whenever the Judge gets to know that any other administrative decision or regulation is linked to the case, it shall order parties to extend the appeal (*ampliación del recurso*) so to address it. This situation will take place before alleged decisions as long as during the trial the Administrative body lays down an express written decision. Plaintiff shall abandon the claim in case the decision benefits him or shall apply for an extension of the appeal otherwise.

## CHAPTER XVII. JUDICIAL REVIEW (II).

### I.- APPEALING FOR JUDICIAL REVIEW.

The appeal for judicial review is a document issued by the concerned citizen or the affected Administration, where the Court is required to declare the challenged regulation or decision contrary to law and, where applicable, to declare it annulable or null and void. In addition, the plaintiff may include other petitions such as being granted benefits or compensations in strict liability cases.

The document for appeal is a summarised document that must only include the regulation or decision challenged, as well as the inactivity or *ultra vires* situation; in addition, the interested party must apply the Court to admit the appeal, referring and enclosing certain documents.

- Documents showing representation of the appellant, unless such documents were submitted before at the same Court because of a previous proceeding; in this case the plaintiff shall require the Court to issue a certificate and include it in the Court file.
- Document showing plaintiff's legal standing when the right or legitimate interest has been awarded the plaintiff due to third parties' transmission (inheritance, etc.).
- Copy of the challenged decision or regulation, indication of the administrative file or official gazette instead. In cases of Administrative inaction or *ultra vires*, the plaintiff shall mention the responsible administrative body, as well as the administrative file when applicable; he shall add every other data deemed relevant to identify the object of the appeal.
- Document showing compliance with every legal requirements for issuing appeals in case of legal entities; such requirements will depend on the statutes and regulations governing such entities. Such documents will not be required in case they had already been shown as a result of the first requirement (documents showing representation of the appellant).

The deadline for filing the appeal is two months from the following day after notification or publication of the challenged decision or regulation. In cases of alleged decisions, the deadline is six months from the following day after the effects of silence took place.

When the Administration does not enforce its own final decisions, the concerned parties might apply for its enforcing and, in case it is not done within one month period, they shall have two months to file the appeal from the day the month period became expired.

In *ultra vires* cases, the concerned party can require the Administrative body to stop acting. This is not a mandatory step in the proceeding. When the requirement has no effect within a period of ten days, the citizen is allowed to file the appeal within a period of ten days. As the requirement is not a mandatory step, the citizen can directly

challenge *ultra vires* to Court; in these cases, it shall be done within a 20 day period after the administrative action determining *ultra vires* got started.

The deadline to lodge an appeal, when it comes to conflicts between two different administrative bodies, is two months unless otherwise stated by law.

It is worth noting that in Spain there are two essential elements that any complaint must comprise of. Firstly, stating clearly the facts. Secondly, there is a required section called Legal Grounds, in which the Plaintiff sets out the basis in law of your Complaint. And under that heading, it must be invoked the Court's jurisdiction and set forth other procedural matters. That would be a separate sub-section under Legal Grounds. Lawyers would, therefore, identify the two discreet sections appropriately. Nothing of that is included in the appeal document.

A typical document of appeal could be the following:

### **AL JUZGADO/SALA DE LO ADMINISTRATIVO**

Don ..., Procurador de los Tribunales, (o Abogado) en representación de Don ... , cuya representación acredito mediante la escritura de poder que debidamente bastanteadada acompaño,

#### **COMPAREZCO Y DIGO:**

Que de conformidad con el art. 25 de la Ley de la Jurisdicción Contencioso-Administrativa, y dentro del plazo legal de ..... interpongo recurso Administrativo contra el acuerdo/artículo .... del (reglamento), dictado (aprobado) con fecha ..., y que me fue notificado (fue publicado) el día ..., asunto que se tramitó en el expediente n: ...,

De conformidad con el art. 45 de la misma ley, con este escrito acompaño (la documentación aportada puede variar según las circunstancias del caso):

UNO. El documento que acredite la representación del compareciente, salvo si figurase unido a las actuaciones de otro recurso pendiente ante el mismo Juzgado o Tribunal, en cuyo caso podrá solicitarse que se expida certificación para su unión a los autos.

DOS. El documento o documentos que acrediten la legitimación del actor cuando la ostente por habérsela transmitido otro por herencia o por cualquier otro título.

TRES. La copia o traslado de la disposición o del acto expreso que se recurran, o indicación del expediente en que haya recaído el acto o el periódico oficial en que la disposición se haya publicado. Si el objeto del recurso fuera la inactividad de la Administración o una vía de hecho, se mencionara el órgano o dependencia al que se atribuya una u otra, en su caso, el expediente en que tuvieran origen, o cualesquiera otros datos que sirvan para identificar suficientemente el objeto del recurso.

CUATRO. El documento o documentos que acrediten el cumplimiento de los requisitos exigidos para entablar acciones las personas jurídicas con arreglo a las normas o

estatutos que les sean de aplicación, salvo que se hubieran incorporado o insertado en lo pertinente dentro del cuerpo del documento mencionado en la letra a) de este mismo apartado.

Por ello,

**AL JUZGADO/LA SALA SUPlico:** Que tenga por presentado este escrito con los documentos que le acompañan, me tenga por comparecido y parte en representación de ..., y tenga por interpuesto recurso Administrativo contra el acto mencionado del ..., interesando la devolución de la escritura de poder previo testimonio en autos, por ser general y precisarla para otros usos.

En ..., a DD de MM de AAAA.

## **II.- Proceeding for judicial review.**

1.- Ordinary proceeding.

- Preliminary proceedings.

In cases of *Ex officio* review, on the grounds of annulable causes, Administrative bodies must declare the decision adverse to the public interest, before filing an appeal for judicial review to quash the decision.

In litigation between public administrations, claims for judicial review may not be filed in administrative proceedings. Nevertheless, when one administration files for judicial review against another, the former may first instruct the latter to repeal the provision, annul or revoke the act, cease or modify the material action or initiate the activity it is obligated to perform. It certainly happen the same with regards to decisions taken by administrative bodies deciding upon special appeals and complaints in matters of contracting.

- Filing the appeal and petitions for files.

Claims for judicial review shall be initiated in a written application according to what was mentioned above. The Court Clerk shall examine *Ex officio* the validity of the party's appearance as soon as the application has been submitted. If it is deemed valid, the clerk shall admit the claim. In case of incomplete applications or when the Clerk deems that the requirements are not met, he/she shall immediately instruct the claimant to remedy the failure. Failing to correct the application shall lead to declaring the proceedings closed.

Claims against action that are harmful to public interest differ substantially from those issued by citizens or administrations in ordinary appealing proceedings. They shall be



initiated in the form of a suit accompanied by the declaration confirming that the act is harmful to public interest and the administrative file. When it comes to challenging regulations, *ultra vires* or administrative inaction, the process shall also be initiated by means of a suit in which the challenged provision, act or conduct shall be specified and the grounds for its unlawfulness shall be stated.

After checking the case for admission, the next step is to give third parties or the citizens in general notice of the claim. In cases of administrative decisions, publication is not always required; actually, it shall take place only at claimant request or when the Judicial Clerk deems it necessary. However, when challenging regulations, publication is necessary as regulations extend their effects to undetermined citizens. This phase is called the announcement of the appeal (*anuncio del recurso*), and the aim is to allow third parties holding legitimate interest in upholding the lawfulness of the challenged provision to appear in the proceeding.

Next, the Court Clerk shall instruct the administration to dispatch the administrative file and to summon all the interested parties. The Court supervision will not be possible without the documents included in the Administrative file. In addition, the plaintiff, once the file is lodged in the Court, shall have the chance to check all the documents and therefore build the arguments properly.

The essential nature of this procedural phase made that the 1998 *LJCA* amendments strongly focused on creating stronger means to make administrative bodies comply with such an obligation. This includes imposing fines to the authorities or civil servants who willingly do not comply with it. If failure to comply extends, the Court might even inform the Prosecution Service for criminal responsibility. The original file or a copy thereof shall be sent in full, with its pages numbered, authenticated where appropriate, accompanied by a table of contents (likewise authenticated) listing the documents therein contained.

On the other hand, summoning every interested parties is the best way to guarantee everyone's right to defence. Although in most cases it is the Administration who plays the role of defendant in Administrative judicial proceedings, sometimes citizens or private companies may benefit from keeping the decision as it currently is. They could even get damages in case it is declared void. Thus, while in the case of administrative bodies it is considered they have appeared in the proceeding when they dispatch the administrative file, third parties must be expressly summoned. It is the challenged administrative body, under Court supervision, which must convene every right or legitimate interest holder.

After examining the administrative file, the Court shall declare the application inadmissible when it holds no jurisdiction or competence, the applicant holds no legal standing, the application has been filed against an activity not amenable to challenge, or the period for filing applications has expired. In addition, the Court may refuse to admit the application when other, substantially identical claims have been dismissed. In *ultra vires* cases, the Court may also refuse the case if it is evident that the administrative

body held competence and acted in conformity with the procedure. In cases of presumed inaction, the Court shall not admit the case if it is evident the administration had no specific obligations with the applicant.

Non admission orders are amenable to appeal and must be issued before hearing the parties.

- Submission of the Claim and statement of reply.

Once the administrative file is received at Court and verified, the Court Clerk must deliver it to the plaintiff, giving a twenty-day period to file a suit. If the suit is not submitted in due time the Court in due time the Court shall declare the suit lapsed. When the suit has been filed, the Court Clerk shall serve the suit, including the administrative file, on the defendant parties who have appeared, giving twenty days to reply.

The defendant administration shall be the first defendant to lodge its reply. When other defendants apart from the administration are to reply, they shall all lodge their replies simultaneously, even if not acting under a single director.

In the statement of claim and the defendant's reply, the findings of fact, considerations of law and arguments presented shall be duly separated. The plaintiff is not tied in with regards to the grounds that have been laid before the administration during the administrative proceeding. Before the Court Clerk there is another phase for correcting defects, and once finished, the Court Clerk shall admit the suit. Otherwise the court clerk shall report it to the judge, who shall decide on its admission.

The parties shall enclose with their statement of claim or reply the documents on which their right is directly grounded. After the statement of claim and reply, the parties shall be allowed no additional documents beyond those found in cases of strict liability. Nevertheless, before the parties are called to appear before the court or to submit closing arguments the plaintiff may additionally submit documents whose object is to upset arguments contained in the replies and that highlights disagreement over the facts.

After the stages discussed above, the Court Clerk shall declare the lawsuit ready for trial. However, the case could be set for judgment in case the plaintiff demands the Court to decide the case (*por otro sí*) without evidence period, hearing, or closing arguments, providing the defendant does not oppose this petition. When none of them demanded such stages to be conducted in their claims and replies, the case will be set for judgment as well.

- Preliminary pleas.

Within a very short period, just in the first five days of the period established to file the reply, the defendant may issue allegations trying to prove lack of competence of the Court or reporting the claim to be inadmissible given the following grounds:

- a) Where the administrative court has no jurisdiction.
- b) Where the claim has been filed by a person who is incapable, not duly represented or without legal standing.
- c) Where the object is provisions, acts or actions not amenable to challenge.
- d) Where the claim concerns *res judicata* or the same case is pending in another court.
- e) Where the initial statement of claim is submitted in untimely fashion.

Such grounds, save that of lack of competence, may nonetheless be argued in the reply, even if dismissed as a preliminary plea. The court clerk shall serve the prior pleas to the plaintiff providing a five day period to correct any defects. A ruling dismissing preliminary pleas shall not be amenable to appeal and shall order the defendant to reply to the suit within the period remaining. A ruling upholding preliminary pleas shall declare the claim for judicial review inadmissible.

- Evidence period.

In order to be granted a period for evidence within the procedure, the parties should apply for it in their statements of claim and reply, or complementary pleas (in cases of new facts referred by the defendant). Those applying for conducting the evidence period must define the points of fact to which the evidence refers, and the pieces of evidence proposed. The Court shall discretionarily decide which proposed means of proof are relevant enough to be granted.

Evidence shall be handled under the general rules established for civil proceedings. Panels of judges might delegate these proceedings to lower Courts. Even if any of the parties have requested the evidence period, the Court may rule *Ex officio* to open the evidence period. Parties, obviously, will be allowed to participate by issuing allegations.

- Hearing and closing arguments

Parties may petition for a hearing and for the submission of closing arguments. However, if they deem it profitable, they can request the lawsuit to be declared ready for judgment. Said petition must be formulated after the principal petition in the statement of claim or the defendant's reply, or made in writing after the evidence period has got concluded. If the parties have not lodged any petitions whatsoever, the Court may, in exceptional circumstances, rule to hold a hearing or to receive closing arguments.

Hearings allow the parties to state their case succinctly. The hearing shall be recorded and an electronic document should be drawn up and authenticated by applying a recognised electronic signature when possible.

The Court shall call for closing arguments, which must address the facts, the evidence submitted, and the considerations of law on which the demands are based. Questions not brought up in the statement of claim or the defendant's reply cannot be introduced at the hearing or in the closing arguments. When the Court finds new grounds relevant for the judgment, different from the grounds pleaded to be discussed at the hearing or closing arguments, it shall notify the parties for hearing. Later on, the day for voting and sentencing shall be scheduled and the Court shall declare that the lawsuit is ready for judgment.

- Other modes of procedure termination.

The claimant may abandon the claim at any time prior to issuance of judgment, the defendants may accept the claimant's demands except in clear violation of law.

If, after a claim for judicial review is filed, the defendant administration fully recognises the claimant's demands in administrative proceedings, the Administration must inform the Court; The Court shall dismiss the case prior offering a hearing to both parties.

When the trial deals with matters amenable to compromise, the Court *Ex officio* or at party's request, may submit to the parties for their consideration the opportunity to acknowledge facts or documents, likewise the possibility of reaching an agreement ending the controversy. Proceedings shall not be stayed during the conciliation attempt unless both parties agree. The conciliation attempt may be made at any time prior to the day when the lawsuit is declared ready for judgment.

If the parties reach an agreement, the Court shall hand down an order declaring the procedure finished, provided that the agreement terms are not manifestly unlawful or injurious to the public interest or third-party interests.

## 2.- Short proceeding.

The 1998 *LJCA* created a new procedure for judicial review of administrative decisions based in the principles of orality and immediacy. While ordinary proceedings are mostly written, this procedure is broadly oral. It is regulated in section 78 *LJCA*. In 2003 cases under such procedure were significantly increased due to the introduction of new motives enabling its use.

Single-judge administrative courts and single-judge central administrative courts may use this short procedure to hear cases arising over public administration personnel, foreign citizens, non-admission of applications for political asylum, doping in sport, and

all matters involving sums of 30,000 Euros or less. Claims for Administrative inaction ex section 29 *LJCA* can be conducted under this procedure as well.

Judicial review shall be initiated by filing a suit, enclosing the document or documents on which the plaintiff grounds his/her right and the documents required by law. Where the Court Clerk finds the court to hold jurisdiction and objective competence, he/she shall admit the claim. Otherwise, he/she shall report to the Court, which shall decide accordingly.

After the suit is admitted, the Court Clerk shall notice the defendant administration, who must summon the parties to a hearing. He shall instruct the defendant administration to dispatch the administrative file at least fifteen days prior to the date for which the hearing is scheduled. That notwithstanding, if the claimant requests (in the claim) a ruling with no need for evidence or hearing, the Court Clerk shall serve notice thereof on the defendants to enable them to reply within twenty days, The defendants may request a hearing, in which case, the Court Clerk shall summon the parties to the hearing. Otherwise, he/she shall close the proceeding with no further formalities and the rule shall be delivered.

After the administrative file is received, the Court Clerk shall send it to the plaintiff and the interested parties, who have appeared, enable them to submit arguments at the hearing. After all or some of the parties have appeared, the judge shall declare the hearing in session. If the parties fail to appear or if only the defendant appears, the Court shall deem the plaintiff to have abandoned the claim and shall award costs to him/her. If only the plaintiff appears, the Court shall order the hearing to proceed in the defendant's absence.

The hearing shall begin with the claimant's statement of the fundamental points of the claimant's requests, or ratification of the statements made in the statement of claim. Forthwith, the defendant may put to the court such arguments, commencing with any questions concerning jurisdiction, objective and territorial competence, and any other fact or circumstance that may hinder the valid prosecution and conclusion of the proceedings.

After the defendant has been heard on these questions, the judge shall issue a decision. If he/she orders the trial to continue, parties can raise procedural questions; if not, or if such questions arise and the judge decides to proceed with the trial, the parties shall be allowed to speak in order to establish clearly the facts. If there is no agreement on the facts, evidence shall be proposed. Once the evidence is deemed relevant and therefore admitted, such evidence shall be submitted forthwith.

When the controversy is purely legal and evidences are not proposed or are deemed not relevant, and the parties do not wish to submit closing arguments, the judge shall hand down a ruling without further delay. When the hearing takes place, questions question shall be proposed orally, without admitting written interrogatories. Documents

containing written questions and cross-questions shall not be admitted for securing oral evidence.

When the number of witnesses is excessive and, in the view of the judicial authority, the witnesses' statements may constitute pointless repetition of testimony concerning matters that have been made sufficiently clear, the judicial authority may limit the number of witnesses at its discretion. In the taking of expert witnesses, the general rules on the selection of experts by random drawing shall not be applicable.

Parties may appeal against the judge's decisions to refuse evidence or to admit evidence denounced as obtained in violation of fundamental rights by filing a petition for reconsideration at once, to be substantiated and decided upon forthwith.

Should the judge deem that there is some relevant evidence that cannot be submitted at the hearing and no *mala fides* on the part of the person burdened with furnishing the evidence is involved, the judge shall stay the hearing. The competent court clerk shall immediately schedule the place, date and time for resuming the hearing without the need to give further notice.

After the submission of any evidence and any closing arguments, parties may be allowed to make any oral statements at the conclusion of the hearing, before the hearing is terminated. The hearing shall be documented. When the recording media cannot be used for any reason, the court clerk shall draw up a record of each session.

### **III.- The ruling.**

The ruling shall lay down one of the following judgments:

- a) Non-admission of the claim for judicial review.
- b) Upholding or dismissal of the claim for judicial review.

The ruling shall moreover contain the appropriate award of costs.

The ruling shall declare the claim inadmissible in the cases discussed above. It shall uphold the claim for judicial review when the regulation, decision, inaction or *ultra vires* commits any legislative infraction, including misuse of power (exercise of administrative powers for purposes other than those laid down by legislation). It shall declare the challenged regulation or decision unlawful and quashed in full or in part, or shall order the challenged action stopped or modified. If the claimant sought acknowledgement and reinstatement of a legal situation specific to an individual, the ruling shall acknowledge the said legal situation, and take such measures as necessary for the full reinstatement of the said legal situation.

If the measure consists in issuance of an act or performance of a legally binding action, the ruling may lay down a period for compliance with judgment. If a claim for damages is upheld, the right to redress shall be declared, indicating likewise who is obligated to

pay compensation. The ruling shall also decide on the amount of compensation when asked expressly by the claimant and sufficient proof is a matter of case record. Otherwise, the assessing criteria shall be established and the definitive specification of the amount shall be deferred to the enforcing period.

A ruling declaring a claim for judicial review inadmissible or dismissed shall have effects amongst the parties only. Quashing of a provision or act shall have effects for all persons affected. However, final rulings quashing a general provision shall have general effects as of the date of publication of the judgment, except for final decisions dictated before the quashing order takes general effect. Upholding of claims for acknowledgement and reinstatement of a legal situation specific to an individual shall have effects amongst the parties only. Nevertheless, such effects may be expanded to third parties

Rulings may be modified if after pronouncement, decisive documents are recovered; the same shall take place when the ruling was handed down by virtue of certain documents which have been acknowledged as and declared false, as well as in cases where the ruling was handed down by virtue of oral evidence and later the witnesses were found guilty of giving false testimony. Moreover, if the ruling was handed down by virtue of bribery, breach of official duty, violence or some other fraudulent machination, the ruling must be modified.

#### **IV.- Appeals against writs (*providencias*), orders (*autos*) and rulings (*sentencias*).**

1.- Appeals against procedural decisions: writs and orders.

Petitions for reconsideration (*recurso de súplica*) may be filed against writs and orders not amenable to appeal to a higher court or to the Supreme Court.

Appeals for reversal (*recurso de reposición*) are possible unless otherwise stated by law, except for orders deciding upon appeals for reversal, or petitions for clarification.

Orders (*autos*) handed down by Single-Judge Courts are open to appeal to the upper hierarchical Court in the following cases;

- a) Orders ending separate proceedings for precautionary measures.
- b) Orders in proceedings aiming to enforce judgments.
- c) Orders declaring non-admission of the claim for judicial review, or making the claim impossible to continue.
- d) Orders in electoral challenging proceedings.
- e) Orders handed down in application of provisional measures requested in appealing proceedings against judgments.

## 2.- Appeals against rulings.

- Ordinary appeal to the next higher Court.

The rulings of single-judge administrative courts and single-judge central administrative courts shall be appealable to the next higher court, except for the following cases:

- a) Cases involving sums of 30,000 Euros or less.
- b) Cases concerning election matters.

The following rulings shall always be amenable:

- a) Rulings declaring the appeal inadmissible in the case in subparagraph a) of the paragraph above.
- b) Rulings handed down in the procedure for the protection of fundamental personal rights.
- c) Rulings deciding on litigation amongst public administrations.
- d) Rulings deciding on indirect challenges to general provisions.

Appeals to the next higher court are admissible with both devolutive and suspensive effects, unless otherwise instructed by law. In addition, the Court may at any time, at the request of the interested party, take the pertinent precautionary measures to ensure future enforcing of the ruling. The mere filing of an appeal to the next higher court does not stay enforcing proceedings. Actually, the parties favoured by the ruling may request provisional execution.

Likewise a bond or some security may be demanded to cover liability. In that event provisional execution may not take place until the bond or measure is completed in the case records. Provisional execution shall not be ordered when it may cause irreversible situations or damage impossible to redress. Parties shall have the right of a hearing in any case. Public administration, however, is exempted from furnishing a bond.

The notice of appeal shall be filed with the court that handed down the ruling at issue in a well-reasoned document that must contain the arguments on which the appeal is based. If not filed at the end of fifteen days, the Court Clerk shall declare the ruling final. If the submitted notice meets the requirements established in the paragraph above and refers to a ruling amenable to appeal, the court clerk shall hand down a decision admitting the appeal. The parties may ask for the admission of evidence refused or not duly submitted in the previous trial.

After checking the appeal for admission, the Court shall refer the case records and the administrative file, in the company of the documents filed, to the higher court, summoning the parties to appear before the upper Court. The parties may ask the



judicial authority to schedule a hearing, to receive closing arguments, or to declare the lawsuit ready for judgment forthwith.

The court clerk shall decide if a hearing and closing arguments is to be held. When the hearing has been held, or the closing arguments have been submitted, the Court Clerk shall declare the lawsuit ready for judgment. The Court shall lay down a ruling.

- Ordinary appeal to the Supreme Court.

Rulings handed down by the National Court (not in appeal proceedings) and by the Regional Courts (not in appeal proceedings) shall be appealable to the Supreme Court.

Exceptions are made for:

- a) Rulings referring to questions of personnel, save where they affect the creation or termination of the service relationships of career civil servants.
- b) Rulings, regardless of the matters at issue, in cases involving sums of 600,000 Euros or less, except for the special procedure for the defence of fundamental rights, in which case appeals shall be in order regardless of the sum involved.
- c) Rulings handed down in the procedure for the protection of the fundamental right to freedom of assembly to which Section 122 refers.
- d) Rulings on election matters.

The following orders are also amenable to appeal to the Supreme Court, in the same events provided for in the preceding section:

- a) Orders declaring the claim for judicial review inadmissible or making it impossible to continue.
- b) Orders ending separate proceedings for suspension or other precautionary measures.
- c) Orders laid down in execution of the ruling, whenever the orders settle issues not directly or indirectly decided upon by the ruling or the orders contradict the terms of the judgment being executed.
- d) Orders handed down provisional execution of rulings.

In order to prepare an appeal to the Supreme Court it is a necessary requirement to have filed a petition for reconsideration beforehand. An appeal to the Supreme Court must be founded on one or more of the following grounds:

- a) Abuse, excess or defect in the exercise of jurisdiction.
- b) Incompetence or improper procedure.

c) Non-observance of the essential forms of the trial due to violation of the rules regulating judgment or governing procedural acts and guarantees, provided that, in this latter case, the party has been rendered defenceless.

d) Violation of the rules of the legislation or jurisprudence applicable in the settling of the debated issues.

Appeals to the Supreme Court shall be prepared via notice of appeal entered at the lower Court. It must contain a statement of the intention to appeal, with a succinct explanation of how the necessary requirements of form are met. Should the ten-day period expire and no appeal have been prepared, the ruling shall become final. If the preparatory document meets the requirements, and refers to a decision appealable to the Supreme Court, the Court Clerk shall deem the appeal prepared. Otherwise the clerk shall report to the Court, which shall decide accordingly.

If the appeal is held to be prepared, the Clerk shall summon the parties to appear and file the appeal within the stated period before the Supreme Court. He/she shall forward the original case records and the administrative file as well. The filing of an appeal to the Supreme Court shall not forestall provisional execution of the challenged ruling. The parties favoured by the ruling may request provisional execution. A security bond may be demanded to cover liability. The lower Court shall refuse provisional execution when it may cause irreversible situations or damage impossible to redress.

The appellant must appear before the Supreme Court and lodge the notice of appeal stating the well-reasoned grounds on which the appeal rests, and citing the legislation or jurisprudence the appellant considers violated. If not, the Court clerk shall declare the appeal lapsed. After the appeal has been filed, the Court Clerk shall forward the proceedings to the reporting Judge. The decision to admit or not to admit the appeal shall then be examined and submitted to the division for deliberation.

The division shall hand down an order of non-admission in the following cases:

a) The appeal requirements have not been observed or the challenged decision is not amenable to appeal.

b) If the invoked in the notice of appeal are not included amongst those above listed as motives of cassation.

c) When the legislation or jurisprudence supposedly violated is not cited; if the cited legislation or jurisprudence bears no relationship whatsoever to the debated issues; or if it was necessary to have requested correction of the failure and there is no record of any such request having been made.

c) If other substantially identical appeals have been dismissed on the basis of merits.

d) If the appeal is manifestly ungrounded.

e) In cases of an unidentified amount not referring to direct or indirect judicial review of a general provision, if the appeal is grounded on the reason in Section 8VIII.I.d) and the case is regarded as lacking Supreme Court interest whereas it does not affect a large number of situations or is not sufficiently general in content.

Non-admission is eventually held by means of an order, and in most cases it will award of costs to the appellant. The order is not appealable.

Where the appeal is admitted, the Court Clerk shall deliver a copy of the appeal to the defendant and give him/her a period to lodge their opposition in writing. When the period has expired, whether opposition has been submitted or not, the Clerk shall schedule a date and time for the hearing should the division so decide, or otherwise shall declare that the lawsuit is ready for judgment. The Supreme Court shall hand down a ruling after the hearing or the declaration that the lawsuit is ready for judgment.

- Appeals to the supreme court for doctrine unification.

Appeals to the Supreme Court for doctrine unification may be filed against rulings handed down by the administrative divisions of the Supreme Court, the National Court and Regional Courts, when different pronouncements are reached with respect to the same litigants or different litigants in an identical situation, on the merit of largely the same findings of fact, considerations of law and demands.

- Appeals to the supreme court in the interest of the law.

Rulings handed down by administrative judges and rulings pronounced by administrative divisions of Regional Courts and of the National Court may be challenged to the Supreme Court by public authorities when the decision is deemed seriously injurious to the general interest and wrong. Only the correct interpretation and application of legislation issued by the State and having a telling effect on the challenged judgment may be tested through this appeal procedure.

- Appeals against decisions of the court clerk.

Appeals for administrative reversal may be filed against procedural rulings (*diligencias de ordenación*) and non-final decrees (*decretos no definitivos*) issued by the court clerk.

## **V.- Special procedures.**

### **1.-Procedure for the protection of fundamental rights**

Section 53 *CE* states a special procedure for judicial protection of fundamental rights, which are those comprised between section 14 and 30 of the Spanish Constitution, including the conscientious objection. Administrative jurisdiction shall address such

issues. Citizens might also challenge the regulation or decision to the Constitutional Court through the appeal for protection of fundamental rights regulated in *LOTC*.

These claims shall always be processed as preferred claims and the procedure is particularly fast. The application for judicial review shall clearly and precisely state the right or rights whose protection is sought and concisely state the basic arguments on which the application is founded. On the day of application submission or the following day, the Court Clerk shall urgently instruct the appropriate administrative body to dispatch the file accompanied by any reports and data. Upon dispatching the file, the administrative body shall notify all who appear as concerned in the file. Such notice shall enclose a copy of the application and will summon the parties to appear at the Court as co-defendants.

The administration upon dispatching the file and the other defendants upon appearing may submit a well-reasoned petition for non-admission, and petition for a hearing. When the administrative file is received at the Court, the Court Clerk shall so notify the parties giving two days to submit arguments.

After deciding on admission, and providing that it is decided to carry on with the special procedure, the Court Clerk shall lay before the claimant the file, giving the claimant eight days in which to lodge the suit and enclose the documents. When the suit is lodged, the Court Clerk shall serve notice thereof on the Prosecution Service and the defendant parties, giving them a shared, unextendable period of eight days to submit their pleas.

After such step, the judicial authority shall decide on the admission of evidence starting a phase for evidence proposal and submission that shall in no case be longer than twenty days. Finally, the judicial authority shall hand down a ruling within five days of the conclusion of proceedings. Devolutive appeal to the next higher court shall always be possible against rulings of single-judge administrative courts.

## 2.- Questions of illegality

The Court that declared a decision null and void in an indirect appeal concerning a regulation must lodge a question of illegality to the competent Court within the five days following the day when the case records show the ruling to be final. The question must be restricted exclusively to that section or sections whose declaration of illegality served as the basis for upholding the suit and declaring the decision null and void.

The Court shall summon the parties, enabling them to appear and lodge arguments. The Clerk shall order publication of the order raising the question in the same official periodical where the questioned regulation was published. At the end of the period for appearing and entering arguments, the Clerk shall declare the procedure concluded. The ruling shall be handed down within ten days of the said declaration. The ruling shall partly or entirely uphold or dismiss the question, save where some procedural

requirement is missing and cannot be corrected, in which case the question shall be declared inadmissible.

When the ruling settling the question of illegality has become final, the court clerk shall notify the judge or multi-judge court that raised the question. The ruling shall not affect the particular legal situation stemming from the ruling handed down by the lower Court that raised the question. Final rulings dismissing questions of illegality shall also be published.

### 3.- Procedure in cases of prior administrative suspension of resolutions

In cases where by law the administrative suspension of acts or resolutions of public entities or corporations must be followed by the judicial review, *LJCA* states certain specific procedural rules.