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Minimal Administrative Law. Volume II

Subjection to Statute and Law. Application and Interpretation

José Ramón Chaves García

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MINIMAL ADMINISTRATIVE LAW

Minimal Administrative Law

Volume II. Subjection to Statute and Law
Application and Interpretation

José Ramón Chaves García

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Minimal Administrative Law. Volume II. Subjection to Statute and Law. Application and Interpretation

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UNIT 4

SUBJECTION TO STATUTE AND LAW

«...to accept something as obvious as the fact that not every case can be won, for the most compelling of reasons: against our arguments there are always other arguments of roughly the same weight, which to the other side also seem the better ones. (...) The Administration's lawyers must learn and accept this too, and must accept that the position they represent already enjoys a significant legal premium in the iuris tantum presumption that whatever is done by the authorities and agents acting on behalf of the Administration is legitimate, insofar as it is presumed to be directed at satisfying the interests of all. To demand more than that, raising the presumption to the status of an axiom, knowing as we do from centuries of experience that reality is not, and never has been, exactly angelic, is a kind of fundamentalism that is poles apart from what democracy means in our day and that, moreover, prevents the community from harnessing for its own benefit the social energy that administrative justice is capable of generating, and does generate. Because judging the Administration contributes decisively to administering better».

TOMÁS RAMÓN FERNÁNDEZ RODRÍGUEZ, Juzgar a la Administración contribuye también a administrar mejor, Revista Española de Derecho Administrativo, no. 76, 1992.

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I. PRINCIPLE OF JURIDICITY

1. The principle of juridicity

Where there is society there is organisation, and its functioning rests on rules whose force lies in their acceptance. In a remote first phase, these were rules of customary origin; later they would be laid down by a tyrant or approved by the ruling oligarchy, depending on the historical context of the organised group; later still, the democratic seal would make its way as the source of legitimacy for the rules that all lay down for the service of all.

The strength and density of the legal order increase as society develops and as relationships between persons and groups of every kind (social, economic, employment and so on) grow more complex. New needs, new rules; more conflicts, more procedural rules. Public authority extends its powers and its interventionism. The explosion of rules, the plurality of legal sources, envelops everyday life.

Citizens internalise a sense of what is just and entrust its embodiment to the legal order. The principle of juridicity crystallises in their minds and finds outward expression in solemn constitutional declarations. They know that rules exist to organise, and they want to know them and apply them.

Indeed, on the one hand, there is a growing need for legal certainty, so that the consequences of acts or omissions can be known in advance, whether in social life or in citizens' dealings with an ever more powerful and interventionist public authority.

On the other hand, the law will naturally be defended, both from the public judicial institutions and from throats, papers and forums, for the voices and cries of citizens will sound the alarm at any threat to, or erosion of, the established rule. Lawyers, prosecutors and judges will step forward to help resolve conflicts of interest in the light of the rules.

In short, law becomes the framework of the possible, for citizens and public authority alike.

This principle of juridicity is binding on public authority, since the public administrations are creatures of the law (as legal persons and as seats of power), so that their action will be legitimate if it pursues the common good, the public interest, and does so in accordance with the rules that everyone accepts as both its engine and its brake.

The principle of juridicity entails the subjection of all public power, in all its manifestations, to the law. In the Spanish Constitution it is enshrined in Article 9.1: «Citizens and the public authorities are subject to the Constitution and to the rest of the legal order».

Thus, Constitutional Court judgments 133/1995, 37/2012 and 137/2025 have held that «*the principle of juridicity, over and above that of legality, which entails respect not only for rules but also for usages and customs, for the general principles of law and for the legal doctrine of the Supreme Court, which serves to complement the legal order*».

This brings to the fore *the subtle distinction between the principle of legality and the principle of juridicity* as each bears, respectively, on the Executive and its administrative arm.

The principle of legality was born of the need to put a bridle on the executive power within the framework of the separation of powers, and it is two-dimensional: prescriptive (it requires the public authorities to respect the rule) and formally protective (statutes vested with that formal rank are needed to empower the Executive to act). The principle of juridicity is inherent in the rule of law and appears in three dimensions, for it has a prescriptive dimension (it commands, prohibits or guides), a formally protective dimension (it raises up the whole body of rules, whatever their rank) and, in addition, an evaluative dimension (it requires respect for constitutional principles and values).

This is an all-embracing formula that spreads the legal mantle over both the Constitution and the rest of the legal order (statutes, regulations, case law, general principles of law, and so on); and not only over the administrative legal order but over all the legal disciplines of public and private law. And it stretches to cover all persons, private and public, and among the latter all the powers of the State (Legislative, Executive, Judiciary and the constitutional oversight bodies). It is the old aspiration of building a State that is «a government of laws, and not of men» (in the phrase of John Adams, second President of the United States).

The Constitution is the piece of the legal order that secures its cohesion, acting as an integrating matrix; and in the Spanish case, the vortex of this whirlwind of rules would lie in its Article 10.1: «The dignity of the person, the inviolable rights inherent in it, the free development of the personality, and respect for the law and for the rights of others are the foundation of political order and social peace».

This is the impassable limit that acts as an antidote to the four gravest assaults on the principle of juridicity committed by the public administrations: (i) Nobody knows what they do: lack of trans-

parency and disinformation; (ii) They do not do what they should: *action outside the law* (vía de hecho, literally "the path of fact"), that is, action taken outside any procedure or competence (off the "path of law"); (iii) They do what they should not: *arbitrary action*, that is, the capricious or the absurd (prohibited by Article 9.3 of the Constitution); (iv) They do not answer for what they do: *impunity without accountability* (neither on the part of the public legal person nor on that of its authorities).

2. The rule of law

The *State governed by the rule of law* is the realm of the principle of juridicity; by contrast, authoritarian States, States without independent courts, States where fundamental rights are not guaranteed or where conflicts are settled by force rather than by legal reason, are each a *State without law*, where the principle of arbitrariness reigns.

The Constitution's characterisation of the Spanish State as a «State governed by the rule of law» (Article 1.1 of the Constitution) goes beyond rhetoric or literary beauty: it denotes precise features of the legal order, and even an expansive moral strength, for we are dealing with a «*democratic State governed by the rule of law, based on the constitutional principles set out in Article 1.1 of the Constitution, which are in turn values common to the Member States of the European Union and on which the Union itself is founded* (*Article 2 of the Treaty on European Union*)» (Constitutional Court judgment 114/2017).

The concept of the rule of law, an expression coined by Robert von Mohl in 1832 («Rechtsstaat»), was built in the context of the German monarchies of limited power. It would soon be accepted by legal scholars and constitutionalists, and was enshrined in positive law as a benchmark of legitimacy by the Constitutions of democratic States: Germany (Article 28 of the Bonn Basic Law: «The constitutional order of the Länder must conform to the principles of the rule of law»); Portugal (Article 2 of the Constitution: "The Portuguese Republic is a democratic State governed by the rule of law, based on popular sovereignty..."); Poland (Article 2 of the Constitution: "The Repub-

lic of Poland is a democratic State ruled by law that implements the principles of social justice"); or Greece (Article 25.1: "The rights of the human being, as an individual and as a member of the social community, and the principle of the democratic and social State governed by the rule of law are guaranteed by the State"). Even Article 2 of the Treaty on European Union (TEU) expressly lists as values of the Union "respect for human dignity, freedom, democracy, equality and the rule of law".

This hallmark goes beyond the politically correct towards the legally just, for it carries solid and clear implications:

- *The supremacy of the law*: rules are neither advice nor social customs or fashions; they are the guarantee we all give ourselves for the benefit of all and, as such, are binding on those to whom they are addressed.
- *The law as the expression of the general will*: legitimate laws are those that spring from a democratic source.
- *Respect for fundamental rights and public liberties*: laws do not sanctify just any content, only content that respects the core of fundamental rights and public liberties.
- *The existence of independent courts*: the guarantee that laws are duly applied must rest with judicial bodies shielded from the influence of power and from any pressure other than the force that flows from the validity of the rule they must apply.

The concept has been enriched today with two additional distinguishing features: on the one hand, *legal certainty*, linked to the idea of the rule of law (Constitutional Court judgment 222/2003); and on the other, *transparency*, that is, a State whose organisation, functioning and evaluation are laid open to public knowledge, so that citizens can act accordingly (Articles 23 and 105(b) of the Constitution).

In any event, the constitutional model forms a solid, closely knit mesh of guarantees, beautifully expressed by Constitutional Court judgment 27/1981, since constitutional principles «*are not watertight compartments; on the contrary, each of them acquires value in relation to the*

others and insofar as it serves to promote the higher values of the legal order upheld by the social and democratic State governed by the rule of law».

3. Effective judicial protection

A) Formulation

Democratic laws that give substance to rights are worthless if they are not complied with. Independent courts are of little use if their mission gets bogged down in formalities, time limits and procedural conditions.

It is crucial that the courts provide shelter when the application of the laws or the rights of citizens are in danger; that the protection afforded by the courts go beyond the right of access to justice and materialise in the attainment of real justice: effective judicial protection.

This explains why, when the Magna Carta was sealed (1215), King John «Lackland» of England undertook not to deprive free men of their property or their liberty «except by the lawful judgment of their peers», a commitment that, in a historical leap, would lead to the well-known Fifth Amendment to the Constitution of the United States (1789), which provides that no one shall «... be deprived of life, liberty, or property, without due process of law»; the Universal Declaration of Human Rights of 1948 lays down the right of everyone «to an effective remedy», and the European Constitutions now in force include references to the right to go to court in defence of one's rights.

Hence Article 24.1 of the Constitution enshrines, in terms as beautiful as they are forceful: «*All persons have the right to obtain the effective protection of judges and courts in the exercise of their rights and legitimate interests, and in no case may they be left defenceless*». This provision raises up a fundamental right that guarantees all the other fundamental rights. It is inspired by the Italian Constitution of 1947 (Article 24), the Bonn Basic Law of 1949 (Article 19) and the Portuguese Constitution of 1976 (Article 20), but with the original addition that

such judicial protection must be «effective», a clear and realistic goal that wards off substantive defencelessness.

B) Guarantee

The undesirable pathological situation of «defencelessness» has been defined by the Constitutional Court as «*a substantive notion characterised by entailing a substantial deprivation or diminution of the right of defence; an appreciable impairment of the principles of adversarial proceedings and equality of arms between the parties that prevents, or seriously hinders, one of them from being able to plead and prove its own right in the proceedings,* [...] *that the defencelessness be caused by the improper conduct of the court*» (Constitutional Court judgment 40/2002).

Likewise, an application of the law that was «*arbitrary, manifestly unreasoned or "unreasonable" could not be regarded as founded in law and would infringe Article 24.1 of the Constitution* (*Constitutional Court judgments 23/1987, of 23 February, legal ground 3, and 24/1990, of 15 February, legal ground 4*), *although this does not guarantee that the judicial reasoning will be correct, nor that a particular claim will succeed*» (Constitutional Court judgment 102/2000).

To sum up, the Constitution seeks to guarantee that everyone, without exception, may be entitled to a reasoned judicial answer on the merits; but, being realistic, it does not impose a right to infallibility (although it does mean providing for procedural applications and appeals that favour the tendency towards getting it right).

In sum, the guarantee of compliance with the law rests on a threefold responsibility borne by each of the leading players in the legal theatre.

The *responsibility of the legislature* to pass procedural laws incorporating techniques, means and conditions that help bring the defence of rights into the light of justice. Or, what amounts to the same thing, to remove the economic, technical or legal obstacles that hinder or prevent access to justice.

The *responsibility of judges* never to lose sight of the fact that they serve the law alone, and to keep engraved in neon letters that forms are an instrument, for their mission is not to referee a tangle of for-

malities and procedures but to give answers on the merits, that is, «to judge and to have what has been judged enforced» (Article 117 of the Constitution).

And the *responsibility of the Administration of Justice* to provide judges with the human and material resources that make their work possible, as well as with facilities and equipment that ensure a standard of judicial service within reasonable times, and to refrain from imposing tax burdens that hinder private individuals' access to the courts.

It does no harm to invoke one last pillar of responsibility, one that is often forgotten. The *responsibility of citizens* to contribute to the struggle for law: by taking an active part in elections to legislative bodies; by bringing a public action (acción pública), a popular action or other kinds of legal proceedings against injustice; by taking part in procedures for the approval of regulations with submissions and objections; or by voicing public criticism of the Executive to steer it back towards what is just and effective, and, of course, should the need arise, by using voice and word to ward off any attempt to destabilise the constitutional model.

In particular, in the contentious-administrative sphere the governing principle is «*the review of all action of the public administrations subject to administrative law, whether consensual* (*in the form of an agreement*) *or unilateral* (*in the form of an act or, if you will, a general provision*). *Where there is submission to statute, there is submission to jurisdiction* (…) *The subjection of all public authorities to statute* (*Articles 9.1 and 9.3 of the Constitution*) *extends to the Public Administration itself* (*Article 103.1 of the Constitution*), *as a principle inherent in the rule of law*» (Supreme Court judgment of 12 July 2019, appeal no. 2079/2016).

II. THE LONG ROAD TO FULL CONTROL BY LAW

4. From raw administrative power to legitimate administrative power

The State is sovereign, and no internal power, whether political, social or economic, may usurp or manipulate it. Sovereignty is one, but it has three heads: the three powers into which it is divided, yet which complement one another. The functions of each power (Legislative, Executive and Judicial) are limited in their exercise by the field of action of the others. Checks and balances of each power in magical equilibrium.

As García de Enterría pointed out in his now legendary work «La lucha contra las inmunidades del poder» (1962): «The history of Administrative Law is that of the reduction of the Administration's resistance to full judicial review by means of the creation of circles of action immune from judicial review».

Indeed, administrative power becomes legal power when the source of its force lies in rules that empower it to decide and to impose what it has decided; but for us to be able to speak of a legitimate legal power, that is, one subject to the law, there must be limits set against that might.

That function of controlling the executive power is provided by administrative law, whose history has been one of conquering territories of immune power, growing in strength and refining its techniques for bridling administrative power.

According to Professor García de Enterría's celebrated study, there are three strongholds of arbitrary power that have been besieged by the law, with the hammer blows of case law and the chisel of legal scholarship, after the starting gun fired by the French Revolution.

They are political acts, discretionary acts and regulatory powers: three classic bastions of executive power that administrative law has stormed and sacked.

5. Political acts

Governments want to deliver on their programmes and serve their electorate, but they also face decisions that must objectively be taken on grounds of expediency, weighing up interests and sacrifices, benefits and costs, and that cannot be subjected to the control of courts which may well know about legal technique but are laymen in the difficult game of politics.

These are the inevitable decisions of political power in its pure state, expressed in acts of government. Classifying the decision as political masks its justification by invoking lofty reasons of State, which, without further explanation, allows judicial review to be evaded.

It is that lofty underlying reason that surfaces in the political act, as the expression of an executive power on the warpath and making no concessions. That is why political acts have traditionally been immune from all control (e.g. a declaration of war, decisions on extraditions or pardons, the appointment of an ambassador, the freezing of the national minimum wage, and so on).

But political acts are the flagships of executive power, and they must not carry just any cargo, nor enjoy impunity in a State governed by the rule of law, since our Constitution prohibits arbitrary action on the part of all public authorities and establishes the accountability of all of them (Article 9.3 of the Constitution), including the Government.

Indeed, the periphery and consequences of these political acts will come to be reviewed if they affect fundamental rights, and will moreover give rise to a right to compensation for those harmed. Added to this is the case-law criterion that *interprets their field of action restrictively,* from both a formal and a substantive point of view. From the formal point of view, inasmuch as only the Government may adopt political acts, not as an administrative body but as the constitutional body responsible for the political direction of the State (Article 97 of the Constitution). And from the substantive point of view, inasmuch as only those acts whose content and function are strictly matters of high government will count as political acts. Graphically put, there-

fore, so-called "political acts" are on a kind of "probation" overseen by the courts, although they retain an irreducible sphere of decision free from all control.

Constitutional Court judgment 83/2016 had occasion to recall the earlier doctrine of Constitutional Court judgment 196/1990 that *"not all the activity of the Government, whose functions are set out in Article 97 of the constitutional text, is subject to Administrative Law. It is beyond doubt, for example, that, in general, this is not the case of activity relating to relations with other constitutional bodies, such as the acts regulated by Title V of the Constitution, or the decision to send a bill to the Cortes Generales (Spanish Parliament), or other similar acts, through which the Government also performs the function of political direction conferred on it by the aforementioned Article 97 of the Constitution"* (*Constitutional Court judgment 45/1990, legal ground 2*). *In such cases, "the Government acts as a political body and not as a body of the Administration; it does not exercise administrative powers or adopt acts of that nature and, for that very reason, its action cannot be classified as 'administrative' action whose review falls, under Article 106.1 of the Constitution and Article 8 of the Organic Act on the Judiciary (LOPJ), to the courts of law".*

The contentious-administrative jurisdiction's remaining redoubt of review centres on the perspective of consequences, as reflected in Article 2(a) of the 1998 Contentious-Administrative Jurisdiction Act (LJCA), which confers on the contentious-administrative courts jurisdiction over the matters arising in relation to «the judicial protection of fundamental rights, the regulated elements and the determination of any compensation that may be due, all of this in relation to acts of the Government or of the Governing Councils of the Autonomous Communities, whatever the nature of those acts».

6. Discretionary acts: meaning and types

The legislature cannot envisage each and every possible situation in the subject matter it regulates down to the last minute detail, nor is it able to predict all the cases or forms in which the general interest may arise in everyday life or in line with future political choices. The leg-

islature lays down general rules by formulating general statements, but it cannot turn a statute into a catalogue of commands, prohibitions, offences and penalties stretching to infinity, which, by their density and length, would turn the legislative text into a confusing and useless tool.

Indeed, it is not easy to foresee the cases of public utility that will justify a particular expropriation, or which road or public work will require it, or which buildings will in future be deemed to be in a state of ruin, or what emergencies will arise that warrant ordering civil servants to perform exceptional tasks. What is certain is that there will be needs and that measures will have to be taken, but since these are unforeseeable (and depend on how the circumstances of the case present themselves), the legislature confines itself to laying down the premises or general concepts that will provide the answer, so that the Executive can act in the specific case.

Nor would it be practical for statutes to tie the hands of the Administration with regulations which, in complex scenarios or ones subject to unforeseeable change, would compromise its capacity to decide, as the Executive or an autonomous power, what kind of civil servants it should have and what powers they should be given.

It is to overcome these objective problems stemming from the limitations of legislative technique that the legislature uses open legal concepts, such as the public interest, the interest of the service, effectiveness and so on. In this way, statute places its trust in the government or the Administration to apply the rule in the specific case by identifying that general interest.

At this point, it is worth distinguishing several types of discretion linked to three degrees: proper discretion (maximum), mixed discretion (intermediate) and improper discretion (minimum).

a) So-called *proper discretion* is linked to the principle of expediency and is frequently labelled «political discretion». It operates when it comes to deciding on options linked to the conclusion of an international treaty or diplomatic action, the approval of urban planning, local budgets, deciding the route of a road or the loca-

tion of some other facility of general interest, or the granting of a declaration of public utility to an association, for example. And, of course, the exercise of regulatory power, which enjoys a very wide margin of governmental decision, although it is trimmed at its outer edge by what statutes lay down, and conditioned at its base by the justification, reports and participation that emerge in the procedure for its approval.

In short, these are governmental and administrative decisions that seek to identify the general interest and escape judicial review, which obviously lacks the elements needed to replace that assessment.

b) So-called *mixed discretion*, or «strategic discretion», which involves taking decisions with a wide margin of judgement on the basis of an objective and outwardly expressed justification. It has an internal and an external dimension. (i) Internal. These are decisions adopted by the Administration to structure administrative power itself and provide it with resources; they rest on the so-called power of organisation, with a wide margin of freedom as to their design, conditions or allocations; this is the case of the approval of Job Position Lists, organisational structures or Public Employment Offers; (ii) External. These are decisions adopted on objective bases and scientific or technical fieldwork, such as the approval of River Basin Plans, Port Space Utilisation Plans, the setting of Subsidy Programmes for sectors in crisis, or the approval of the Public Employment Offer, for example. In these cases, the technical criterion or specialised proposal does not bind the authority, which may give its reasons as to the expediency of accepting it, qualifying it or departing from it. However, once that decision has been taken, it may be reviewed as regards its periphery, forms and procedural steps, as well as from the perspective of the determining facts or the interests at stake, duly proven. It is even possible, through expert evidence before the court, to show that the decision taken was manifestly wrong and therefore invalid.

c) So-called *improper discretion*, that is, so-called «technical discretion», involves setting an objective criterion in an evaluative matter that belongs to technical or specialised knowledge, and which must be presumed to be correct. This is the case of the assessment of competence by project Evaluation Committees or by selection boards assessing the competence of candidates for the civil service.

That technical criterion is normally laid down by a specialised and impartial collegiate body, which submits its proposal to the authority, and the latter cannot depart from its substantive assessment. Likewise, that criterion enjoys a presumption of correctness, and it may be reviewed by the courts if a serious and manifest error is shown, either because the error is patent or because contrary expert evidence reveals it. In any event, judicial review stops at the invalidity of the technical judgement, without being able to substitute it, except in cases where a lack of any room or margin for decision has been proven («zero discretion»).

7. Techniques for reviewing discretionary acts

Discretionary powers spring up, in principle, orphaned of precise legal criteria for their review, but they are not untouchable. Discretionary powers amounted to a field of free decision for governments and administrations, which fostered many abuses, and moreover with decisions resistant to judicial review, since judges were hardly willing to venture into censuring the administrative assessment, let alone substituting their own decision for it.

In any event, discretion rests on a tripod of regulated elements. In the first place, *the purpose of the discretionary power* will always be the general interest, and not a blank cheque that the authority can fill in for private ends or for ends manifestly contrary to the general interest. In the second place, *the competence of the body*, because only whoever has been expressly granted the power may exercise it, no more and no less. And in the third place, *the procedure* to be followed, because every administrative decision, whether at the request of a party or

ex officio, is subject to certain minimum procedural requirements, failure to comply with which may have invalidating consequences.

That is why administrative law would take up the challenge of reconquering control and would apply legal techniques to review the Administration's application of discretionary concepts, with valuable tools such as:

- the force of the general principles of law, which crystallise the essence of universal values;
- the need for a statement of reasons or justification that must accompany the taking of a discretionary decision, since what lacks reason is what is arbitrary;
- the verification of the real purpose that inspires the decision, since power that strays from the goal of the general interest is power usurped for private or abusive ends (reviewable through the technique of misuse of power);
- And review on the basis of the existence of the determining facts, that is, verification of the factual premises on which the rule conferring the discretionary power rests.

In short, there is a series of techniques for judicial review of the Administration's use of discretionary power, the shadow of which obliges the Administration to take special care when exercising it.

Well then, the executive power bears the burden of properly substantiating its discretionary judgement, whether it is a matter of proper or improper discretion, or mixed discretion, and it has been stated succinctly that: «*from the perspective of judicial review of its legality, which extends to the possibility of reviewing* (1) *compliance with the general limits legally imposed on the non-technical discretionary activity of the Administration —such as those relating to the competence of the body, the procedure followed, the determining facts, suitability for the purpose pursued and the operation of the general principles of law—; review* (2) *extending to the safeguarding of the principle of equality of all participants in competitive procedures, to the* (3) *need for a statement of reasons, and, in relation to the latter, as the case law set out indicates,*

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