AN ANALYSIS OF THE PROPER INTEGRATION OF REASON, SUBSTANTIAL LEGALITY AND CONSEQUENTIALIST PERSPECTIVE OF THE ADMINISTRATIVE DECISION AND DETERMINATION[1]

UMA ANÁLISE SOBRE A ADEQUADA INTEGRAÇÃO DA MOTIVAÇÃO, DA LEGALIDADE SUBSTANCIAL E DA PERSPECTIVA CONSEQUENCIALISTA DO ATO ADMINISTRATIVO

Phillip Gil França[2]

Abstract

This study aims at analyzing the role of reason of the administrative decision/determination on the principle of legality of the Public Administration on the rail of a consequentialist perspective of Administrative Law. The task will be developed from the understanding that the meaning and the borders of effectiveness of the constitutional norm of legality are defined at the time of application of the principle of legality to reality to which they relate. Therefore, only when determining the subjection of Directors to the legality, in real and certain situations, it can be seen the scope and the object for which it is the principle of substantive legality. So first is to indicate basics on principles of public administration. After, it will to analyze the principle of legality. Subsequently, it is a matter-of proper reason of administrative decisions and determinations. Finally, reflections on the administrative consequentialism will be brought to the debate and thus the conclusions of the study presented will be presented.

Keywords: The principle of legality. Administrative decision/determination; reason. Public Administration.

Resumo

O presente estudo tem como objetivo analisar o papel da *motivação* do ato administrativo na aplicação do *princípio da legalidade* da Administração Pública sobre o trilho de uma perspectiva *consequencialista* do Direito Administrativo. A tarefa será desenvolvida a partir da compreensão de que o sentido e as fronteiras de eficácia da norma constitucional da *legalidade* são definidos no momento da

[1] Paper received in: 11/06/2015. Peer review evaluations in: 14/10/2015 e 17/10/2015. Approved in: 25/10/2015. (Artigo recebido em: 11/06/2015. Pareceres emitidos em 14/10/2015 e 17/10/2015 Aprovação comunicada em 25/10/2015).

[2] Pós-doutor (CAPES_PNPD), Doutor e Mestre em Direito do Estado pela PUC/RS, com pesquisas em 'Doutorado Sanduíche – CAPES' na Faculdade de Direito da Universidade de Lisboa; Membro do Instituto dos Advogados do Paraná; Professor de Direito Administrativo (Mestrado e Graduação) da Universidade de Passo Fundo; autor dos livros 'Controle da Administração Pública', 4. ed. (Saraiva, 2015) e ´Ato Administrativo e Interesse Público', 2. ed. (RT, 2015). Membro pesquisador do Grupo de Pesquisas de Constituição e Direitos Fundamentais (Cnpq) liderado pelo Professor Doutor Ingo W. Sarlet. E-mail: <phillipfranca@hotmail.com>.

aplicação do princípio da legalidade à concreta realidade a que se destina. Logo, apenas quando se determina a sujeição da Administração à *legalidade*, em situações reais e determinadas pode se observar a *abrangência* e o *objeto* a que se destina o princípio da legalidade substancial. Logo, primeiramente é de se indicar noções iniciais sobre princípios da Administração Pública. Após, analisar-se-á o princípio da legalidade. Posteriormente, tratar-se-á da adequada motivação dos atos administrativos. Finalmente, reflexões sobre o consequencialismo administrativo serão trazidas para o debate e, assim, serão apresentadas as conclusões do estudo apresentado.

Palavras chave: Princípio da legalidade. Ato administrativo. Motivação. Administração Pública.

1 INTRODUCTION

This study aims at analysing the role of reason of the administrative decision/determination on the application of public administration´s principle of legality under a consequentialist perspective of Administrative Law.

The task will be developed from the understanding that the meaning and the borders of effectiveness of the constitutional norm of legality (caput of art. 37), Federal Constitution, are defined at the time of application of the principle of legality to the concrete reality to which the principle of legality is related. Then, just when determining the subjection of Administration to the principle of legality, in real and certain situations - by regulating general and abstract aspects of law - one can observe the scope and the object to which the pillar of the state administrative operation is designated, i.e.: acting according to the principle of legality in a substantial perspective.

Thus, it is defined that the consequences of applying the principle of legality, through adequate reason of its use to the subsumption of the fact in relation to the referred constitutional principle, are as important as the definition that administrative decision/determination needs to starts from a legal provision.

That is, it is not just enough to enjoy own attributes of administrative legality (according with the idea of presumption of truthfulness, legitimacy and validity), administrative decision/determination also needs to follow consequences that comply with values of the law in the real word in order to be indicated as administrative decision

or determination in full harmony with the principle of legality. Finally, for effective control of such conclusion, a robust and consistent reason of administrative decision or determination, proportional to the impact that will bring to the real world, is a task that is imposed on public manager.

Thus, first, one shall indicate the basic principles of public administration. After this, the focus of the study will be directed towards the principle of legality. Subsequently, one will deal with the adequate reason of administrative decisions/determinations. Finally, reflections on the administrative consequentialism will be brought to the debate and thus, a study´s conclusion will be presented.

2 PRINCIPLES OF LAW APPLYING TO PUBLIC ADMINISTRATION

Principles of law applying to Public Administration - as gender normative kind, parallel to rules - indicate the legal value to be followed by concrete embodiment of State, considering its constitutional duty to enforce and serve subordinates according to proportional limits of necessary interference in everyone's life and in each of State citizens. They represent the shackles and bondages of Public Administration in face of powers they have to well execute mandatory and adequate public administration, as a constitutional duty of good public governance, efficient in its nature and effective in its results.

The specific principles of public administration arise from specialization, the legal branch in question, from general principles of law as a way to identify subjections of the state executive branch, as it is up such state function to manage the public burden of promoting the People's intersubjective development, power holder that maintain the state and its citizens.

According to Eduardo Garcia and Tomas Enterría-Ramón Fernández, "the general principles of law express the basic material values of a legal system, those on which this is built as such, the fundamental ethical and legal convictions of a community." (ENTERRÍA, FERNÁNDEZ, 2014, p. 98). As authors point out, the general principles of law "are not just some vague ideas or moral trends that can explain the meaning of certain rules, but technical principles, fruit of the legal life´s

experience and that only through this can be seized" (ENTERRÍA, FERNÁNDEZ, 2014, p. 99).

In the wake of the thesis defended in this study, of the need for real enforcement of principles for the achievement of its meaning, amplitude, scope and vector function of acting in an intersubjective environment, Spanish authors express important lessons:

> To general principles of law, to the extent that they are real drivers of their own technique, it does not get there at all, by means of a simple process of deduction or reduction from the first ontological or moral truths that will no doubt be very important to place law in a general system, but, in principle, very little to penetrate its intimate analytical framework, from which concrete solutions will come forth.
> The general principles of law, it is possible to say so, are the fruit of its own legal life and manifest thus by two fundamental ways; the practice of applying law, and more specifically, the case law, which is the practice endowed with greater *auctoritas* and at the same time, holds greater capacity to shape the future application, and the jurisprudence, or the legal science, to the extent that it meets its own function, which is not a mere conventional scheme of law with expository or didactic purposes, but illuminate the institutions of the legal system; explain their own connections and enable a more finely tuned operation of this. (ENTERRÍA, FERNÁNDEZ, 2014, p. 102)

Klaus Bosselmann (2015, p. 65), by dealing with principles of law, reminds that, fundamentally, law has a function of serving. The legal system can not initiate and monitor social change by itself; however, it may provide some parameters for direction and extension of social change. If these parameters are sufficiently clear and reflect what society feels about the changes taking place, they will be effective. If they are not clear or ignore social realities, they will have little impact. It is essential, therefore, to define parameters clearly and realistically .

Principles are goals, purposes to be achieved by the public manager's activity while represent legal constraints of his activity. They express an established premise in an evaluative level higher so that the interpreter can materialize the law to reality necessary of path indication to be followed.

They indicate what is to be defined or realized, while structure and format what it has already been done, linking the consequences of what one intend to do as well as what it has already been achieved. Thus, they represent structural drivers of applied law and, equally, underlie the system to give direction and answers to issues supported

by this same legal setting. Thus, logically, they must be read from a constitutional perspective and systematic legal structure in which it is involved.

"The whole law, but in a very special way, Administrative Law, as today imposes the Constitution unequivocally, is necessarily built on a system of general principles of law that not only supply the written sources of law, but also give these all its meaning and they are ahead of all its interpretation". (OSSELMANN, 2015, p. 104) As it is argued in this study, it is from the the real problems, in the real world, that we observe the meaning and the scope of a principle.

The authors Eduardo Garcia de Enterría and Tomas Enterría-Ramón Fernández thus highlight this idea, again, when dealing on the general principles of law applied to the universe of Administrative Law in the following passage of his doctrine: "These general principles of law do not provide by deduction of prime moral truths, but they are technical principles, which mainly move the basic mechanism of law, which are the institutes; and its development and perfection are the result of the legal life, a discovery made by the treatment of concrete problems ". (OSSELMANN, 2015, p. 104)

R. Limongi França (2010, p. 199-200) equally emphasizes that the treatment of the practical aspect of the application of the general principles of law is as important as its theoretical development. Therefore, it indicates two essential facets of the question concerning general principles of law when their necessary enforcement: 1st) the systematic perspective; 2nd) the prospect of individualized formulation of each principle.

Thus established, in the same manner as general principles of law, principles of public administration represent the Republican ties of action taken by Public Administration . In this sense, they determine, when systematically observed that State´s administrative action must be made with responsibility and feasibility of accountability for all administrative decisions/determinations (regardless of whether they are statutory limited or discretionary). The emphasis of course, is placed on the principles of public administration expressed in the caput of art. 37 of the Brazilian Federal Constitution, namely: legality, impersonality, morality, publicity and efficiency.

So, principles of public administration are legal vectors created to conduct administrative action in accordance with the established legal paths, from goals of development and system maintenance as well as citizen's protection and promotion.

3 PRINCIPLE OF SUBSTANTIAL LEGALITY OF PUBLIC ADMINISTRATION

Every Public Administration's action shall follow the tracks of the constitutional values of legality by expression found in the caput of art. 37 of the Brazilian Federal Constitution. Legality[3] given here must be understood in the sense that administration must act according to what the law strictly establishes and by the best interpretation of law targeting to maintaining harmony of the system and achievement of constitutional principles and policies enshrined in art. 3 of CF / 1988.

In other words, legality[4] is the interpretation product of legal system that performs the actual promotion of man as a human being passive of perception

[3] According to Patricia Baptista (2003, 94 p.), "among constitutional principles of administrative law, one has to distinguish, before any other, the principle of administrative legality. Legality is indeed the cornerstone of the development of this law branch. Brazilian Constitution of 1988, for example, beyond the general clause due to the Democratic State (art. 1) and individual rights and guarantee (art. 5, II), the legality was still inserted in the heading of article. 37, where it is identified as the first sectoral principle of public administration".

[4] Indeed, the principle of legality has gone through a whole evolution, closely followed by Brazilian law, since it is formulated. With the 1891 Constitution, introduced to the Law Liberal State concerned with civil rights and liberties. Due to this concern, the principle of legality had a narrow sense: the Administration can do whatever the law does not prohibit (it was the principle of of freedom to exercise without an arbitrary interference of government, which almost identifies with the principle of freedom of choice). From the Constitution of 1934, it was possible to talk about Social State, a welfare provider state, which has been expanding its operations to cover the economic and social areas, with a consequent strengthening of the Executive Power. The principle of legality was extended to cover acts downloaded by the Executive, with the force of law, and extended to the entire range of administrative activity. The principle of legality has come to mean that Public Administration can only do what the law allows (principle of positive linkage). With the 1988 Constitution, it was opted for the principles of State under the Rule of Law. Two ideas are inherent in this kind of state: a broader conception of the rule of law and the idea of citizen participation in the Administration and control of public administration. Regarding the first point, the democratic rule of law intended to link law to the ideals of justice, that is, submit the State not only to law in purely formal sense, but to law covering all values inserted expressly or implicitly in Constitution. In this sense, art. 20, § 3, of the German Basic Law of 08.05.1949 states that "Legislative Power is bound by the constitutional order; the executive and judicial powers obey the law. Similar ideas were inserted into the Spanish and Portuguese Constitutions. In Brazil, although rule is not repeated with the same content, there is no doubt that it has adopted the same design already from Constitution preamble, rich in references to values such as safety, well-being, development, equality and justice. In addition, the arts. 1 to 4 and other sparse devices include numerous principles and values such as dignity of the human dignity, the social values of work and free enterprise, the eradication of poverty, the prevalence of human rights, the morality, publicity, impersonality, economy, among others. All of these principles and values are directed to the power of State: the law that contradicts them will be unconstitutional;

conformating values of human dignity, according to intersubjective interaction determinations, in a given space and time, in a given society and its State protection under law. In this universe, it is extracted the idea of substantial legality.

This study refers to the principle of substantial legality as a mandatory substantial need for adequacy and conformation of the administrative decision/determination to the legislative due process product and to values which comply with law. It is worth highlighting also the necessary care of legal validity of administrative decision/determination with the idea of legislative hierarchy, so that Administration is acting in full compliance with its own legal order which, in turn, should be fully in line with the corresponding law which underlines it.

Thus, consequently, the exercise of administrative power needs to be in accordance with the constitutional dictates, for primary obviousness of structuring and maintenance of a sustainable system. That is, for legality of the administrative decision/determination control, it is necessary to assess its legal conformation under Constitution (supremacy of Constitution), infra-constitucional laws and administrative regulatory system to which it is confined.

As some authors argue that the limitation of Public Administration under the statute law goes beyond simple administrative legality, reaching an administrative legal rules. For example, Ernest Forsthoff, asserts that "the administrative legal rules reflect a more challenging legality, revealing that the government is not only limited by its own specific rules; it is also conditioned by rules and principles whose existence and its binding force are not available in the same power. " For the author, "In this sense, the administrative linkage to rule has become a real linkage to law, registering here the abandonment of a positivist-legalistic configurative conception of administrative legality (...)." (FORSTHOFF, 1959, p. 41 e ss. apud OTERO, 2007, p. 15)

The values that structure, justify and present as incubators of normative positivated expressions, equally, are likely to regularly verification of their application by Public Administration, when in the exercise of judicial review. The principle of legality is determining that not only the Public Administration acts as the legal

administrative discretion is limited by the same, which means the expansion of judicial control, which should cover the validity of administrative decisions/determinations not only before legal rules but also before the whole law in the indicated direction. It is worth mentioning that today the principle of legality has a much broader scope because it requires submission to law ". (DI PIETRO, 2011, p. 29-30).

expression, but also, in particular, in accordance with law values - the basis and foundation of State legal order.

For Caio Tacitus, "Public Administration´s legality control is not, after all, monopoly or privilege of anyone. Anyone of the people injured in its right or legitimate interest may make use of it ". The author points out that "the defense of legal order is above all a duty of citizenship: the mystique of law and fidelity to public interest are the very essence of a free and moralized society. The cult of freedom is not consistent with the will of tolerance or nod to violence. " Thus, he concludes that "the legality is not a simple creation of lawyers, measured in technical formulas and Latin symbols. It is the community's survival instinct itself. All have the elementary duty of vigilance, so that the social peace, translated in rule and in law, is not depreciated in handling of public programs. (TÁCITO, 1975, p. 11)

In other words, the legality to be treated in this study is that which is founding and justifiable of an organizational system of conducts oriented to commonwealth and development, without which one would apparently not understand life in society structured to perform solidarity among citizens who live in it.

Namely, one thinks in legality as minimally secure way for subjective interactions eventually regulated by the State that may bring proportionally isonomic and equitable benefits for those involved in this intersubjective development mission preached by the Federal Constitution of 1988.

The judicial control of legality, including the legality of administrative discretion, through the verification of reasoning applied to the production of the administrative decision/determination to be controlled, has a special structuring desideratum of paths that allow the State, and their participants to promote intersubjective development and the common good of individuals who make up the nation.

Therefore, it is inescapable State mission the operationalization of skilled legal instruments enough to achieve constitutional values of restraint of power and respect for the material and formal aspect of administrative legality, when checking the constitutional adequacy of its reasoning drawn up by the syndicated administrative decision/determination according to necessary constitutional interpretation and application geared towards the common good.

In this perspective, the principle of legality, as demarcation line of State administrative action, is put into effect with the concrete materialization of law in the reality to which it is submitted. It means, then, that while there is no completion of legal axiological filtering of applied administrative decision/determination , accompanied by a statement of reason providing its impact in the real world, the principle of legality is not useful to delimit the Public Administration, as required by the Constitution.

The mere rhetoric of acting under the borders of law, as expression of the caput of art. 37 CF / 88 not suit the administrative tasks of the State to the fundamental objectives of the Republic established in art. 3 of the Constitution.

To act in accordance with legality is to act in accordance with the legal system established to protect, promote and fulfill the State shall be equally and isonomically.

In this sense, the principle of legality is limiting instrument of Public Administration so that, when applied to individual situations, enable the constant development of inter-subjective state citizens, without distinction. And because it limits and often restricts, necessary is the presentation of a corresponding strong reason to establish the causal link between production of the administrative decision/determination and the concrete public interest being promoted by such state´s action.

Thus, beyond mere strict legality, as well as legal rule which links the administrative activity in accordance with rules and law, the principle of legality substantiates, structures and establishes developmental interconnections around the state system.

So, thinking about legality is to idealize law enforcement as an objective and subjective development promoter system of all involved, directly and indirectly, when State´s administrative activity.

4 REASON OF ADMINISTRATIVE DECISION/DETERMINATION

From the perspective of state administrative activities, to state reason is to explain the factual and legal reasons of Public Administration for the practice of administrative decision/determination to ensure sufficiently substantially legal legitimacy of such a public activity.

While a statement of reason is to determine viable reasons of Public Administration to perform the act, via connection between the act and the relevant legal and factual dictate, indicating which led to the case and an analysis of the law used to the case.

That is, while the former it is the 'why' Public Administration acts in a certain way, the second indicates 'how' Public Administration acts to achieve its fundamental desideratum.

One could say, then, that the statement of reason of the administrative decision/determination stems from the resulting duty of reason/opinion of its production. Adequate reason, thus, presupposes a robust and sufficient exposure - and consistent connection - the factual and legal reasons for an administrative decision/determination, as well as the demonstration of how such activity connects with the essential constitutional legitimacy of the act.

In this diapason, it is important to emphasize the need for congruence between reasoning and conclusion of the act for the formation of proper underlined reasoning of administrative decision/determination. In Marcello Caetano´s lessons (2003, p. 124-125), "reasoning must appear as premises from which the conclusion was logically drawn, which is the decision". That is, "if there is contradiction between opinion and decision, this incongruity can not fail to influence act's validity."

The "statement of reason may be understood as an enunciating statement of reasons and reasoning of the decision, or as the renewal of what it was decided on an evaluative parameter that justifies it: in the first sense, one emphasis the operation´s formal aspect, associating it with the transparency of decision-making perspective; in second, one stresses the substantial idoneity of practiced act, integrating it into a reference system in which legitimacy bases are found. " (VIEIRA DE ANDRADE, 1982)

Thus, the statement of reason consists of expressly deducing the resolution taken from the premises on which it is based, as well as to express the reasons why it is resolved in a way, and not in another. The statement of reason demonstrates how the facts proposed by the Administration justify the application of certain norms and the deduction of certain conclusion, clarifying the object of the act. However, in the event of power exercised by discretionary administrative activity, the importance of reason and opinion of the administrative decision/determination increases, as it comes

to reveal the causes that leads the administration to choose one solution over another initially admissible.

Manoel de Oliveira Franco Sobrinho (1980) argues that "in legal [administrative] relationships, reason and opinion bring consequences on the merit of the act, implications for the certainty and the legality of the act, explaining the effectiveness and effects, the exaction regarding the nature of action taken by Public Administration". In the author's words, "the reasoning thus belongs to the instrumentation of administrative decision/determination, it may be deduced from the normative creative process, because the act to execute public service should be consistent in the formation of external manifestations caused."

Through Oliveira Franco Sobrinho´s (1980) lessons, it is understood that "through reason and opinion, the decision brings legal repercussions and operates in the world of law in order to create or achieve situations, but always subject to the principle of legality."

In that order, it is inferred that "the essential thing is that reasoning in order to produce conviction find yourself well determined to speak the administrative will, by expressing the intention of Public Administration or to give command responsible for state affairs. " And so concludes the author, stating that "the question on reason and opinion is not simple explanation or even justification, but of statement of reason published, qualified as possible through reporters for reliable interpretation of administrative provisions."

Juarez Freitas points out that "all discretion remains linked to the reasons which must mandatorily be given, consistently, whenever rights are affected. The constitutional provision is in the article 93 of the Constitution and the intersubjective reasoning requirement is one of the most outstanding in the transition to dialogic administrative law - as opposed to autocratic, avoiding, whenever possible, any unilateral decision, unmotivated and instabilizing of rights." (FREITAS, 2012, p. 62)

For the author, then, "administrative decisions will be reasoned, and better than that, based, that is, supported by objective and consistent reasons (a combined reading, especially in items IX and X of art. 93 of the Brazilian Federal Constitution and several state constitutions, expressly, as well as infra-constitutional laws, notably art. 50 of Law 9.784 / 99). " Thus, "the statement of reason, beyond the old version of the

theory of opinion of a decision, is to be present in every act [...]. In other words, it is essential to state the reasons, ie provide the law that can be applied to the facts"

The reason of administrative decision/determination s is presented as a key activity of its constitutional conformation, having Public Administration total binding to law and factual reasons indicated. This situation is understood dogmatically as 'theory of the facts and determining reasons of administrative decisions/determinations.

Celso Antonio Bandeira de Mello summarizes the theory quoted as follows: "according to the theory of the determining facts, reasons that determine the public civil servant´s will, that is, the facts that supported his decision, integrate the validity of decisions/determinations. Thus, "the invocation of false fact reasons, void or improperly qualified vitiates the action taken by the Public Administration even when the law hasn´t established it in advance, the reasons that justify the administrative decision made.

Thus, through the author's doctrine, "as stated by the civil servant the reasons on which it put on, while not expressly stated, the obligation of listing them, the act will only be valid if they actually occurred and justified".

About deformities the reasons of the administrative decision/determination, Caio Tácito (1975, p. 133) highlights the following lessons: "The diagnosis of violation of the goal imposes examination of reasons given by the civil servant, through which one externalizes his/her will. Abuse of power has a close correlation with other illegal situation - the lack or falsity of the reasons. "

For the author, "it is through a careful analysis of the reasoning of the administrative decision /determination, of vehement evidences that derive from accountability of reasons given and results achieved or intended that the abuse of powers will surface." He stresses that "far from being a gross and ostensive error, it is distinguished by subtlety with which seeks to hide under the cover of regularity, trying the civil agent to hide the substance of administrative decision/ determination."

So, one concludes that "it is necessary thus that the interpreter is not content with expressly decisive reasons, but immerse himself in his spirit, to watch omissions and contradictions, consider the veracity and a substantive due process preferring, all in all, verify under the guise of action taken by Public Administration, the true contours of its bone structure"

Thus established, it cites an important position of STJ[5] on the subject, by stating that "the margin of freedom of choice of convenience and opportunity, provided to Public Administration, in the practice of discretionary actions taken by Public Administration, does not exempt from the duty of reasoning. The action taken by Public Administration, that denies, restricts or affects the rights or interests of the subordinates must indicate explicitly, clearly and consistently, the legal and factual reasons on which it is based (art. 50, I, and § 1 of Law No 9784 / 99). It does not meet this requirement, simple invocation of commonwealth clause or generic indication of the action´s cause"[6].

Teori Albino Zavascki says that "in fact, on the issue of discretionary administrative decision/determination powers, Brazilian administrative jurisprudence shows unanimity by stating that Public Administration´s discretion of decision is not absolute and is subject to satisfaction of the principle of legality - to say that choice about convenience and opportunity of administrative decision/determination´s practice is subject to the limits imposed by law, deprived of any content of subjectivity in choosing the right time to commit a particular administrative decision/determination [...]. "Follow his guidance stating that," in reality, any and all discretionary decision/determination taken by Public Administration will necessarily be submitted to supremacy of commonwealth - when then due to what law authorizes Public Administration to evaluate the statement of reasons concerning convenience and opportunity of administrative decision/determination´s practice in question. "

Similarly, the judge considers that "even in the case of discretionary decision/determination, Public Administration is obliged not only to evaluate the statement of reason concerning opinions for a specific administrative decision/determination´s practice, but also to clarify the adequacy of such a practice in face of the commonwealth - from what it can be concluded that the mere reference to the aforementioned public interest does not appear sufficient to meet the requirement of reasoning, being also necessary to demonstrate precisely how the action taken by Public Administration serves, or not, its social goals and policies.

---

5 Superior Tribunal de Justiça. **MS 9.944/DF 2004/0122.461-0**, Rel. Min. Teori Albino Zavascki, j. 25/05/2005, DJ 13/06/2005, p. 157.

6 Superior Tribunal de Justiça. **MS 9.944/DF 2004/0122.461-0**, Rel. Min. Teori Albino Zavascki, j. 25/05/2005, DJ 13/06/2005, p.157.

Finally, he concludes: "well, the existence of proper reason when essential to validity of the administrative decision/determination is subject to judicial review. Following this line of understanding, the court's decisions emphasize that 'in our present stage, the administrative decisions/determinations must be substantiated and are linked to purposes for which they were practiced (V. art. 2 of Law 4,717 / 65). There are no, in this circumstance, discretionary administrative decisions/determinations absolutely immune to judicial review."

In this same track, "[...] the authority respondent did not provide detailed exposition of concrete and objective facts in which he/she relied to reach that conclusion. The mere reference to the lack of public interest is not in itself sufficient reasoning to draw a decisive conclusion about the reasons for the denial of authorization [...]. Thus, the administrative decision/determination is delivered, without sufficient and proper reasoning, hinders the interested person of exercising his/her right to citizenship of assessing compliance with the constitutional principles of impersonality and reasonableness, guiding administrative decision/determination."[7]

As shown, the strong correlation between action taken by Public Administration and its necessary judicial review occurs by way of proper statement of reasons of the administrative decision/determination. Only with objective demonstration of what it has been done, how it has been done and what objectives to be achieved, in clear expression of reasons that substantiate the administrative decision/determination, and the corresponding justification, there will be opportunity to comply with their constitutional principles that determine harmonic action taken by Public Administration and fully evaluable even by the judicial power of State.

Such a conclusion is reached, it should be noted, by verifying the constitutional compliance of reasoning of the legal aspect of administrative decision/determination, as an instrument of enforcement of the rule to the real citizen of the world affected by state administrative decisions/determinations.

It is to consider, as the desideratum of the present study that the extent of real legality, or the one that conforms with reality, when applied, can be carried out with the the very overcoming of strict legality. Therefore, without a doubt, the role of consistent reasoning is crucial. Without a proper reason to point out, eventually, a necessary

[7] Superior Court of Justice. **MS 9.944/DF 2004/0122.461-0**, Rel. Min. Teori Albino Zavascki, j. 25/05/2005, DJ 13/06/2005, p.157.

overcoming of strict legality, such efforts represent a new unlawfulness that will surely violate legality of administrative decision/determination and, therefore, must be invalidated.[8]

5 ADMINISTRATIVE LAW CONSEQUENTIALISM

Administrative choices are decisions whose consequences are linked to the future of those involved with the entity in which those decisions were defined. Therefore, it is emphasized: one can not rule out any action taken by Public Administration of the possibility of a broad internal and external control, as exalted in the court decisionl in evidence.

Administration choice is to set priority and hierarchy. Thus, it is not enough simply acting efficiently as mere standards of compliance with functional goals. It will be essential to establish the recognition of consequences applied to administrative decision/determination to assessment of good governance focused on fulfillment of constitutional values.

Therefore, when the legal exercise requires the search for better ways of execution of an attainable public interest, legal system - to a greater or lesser extent, depending on the case - in the economic reason, the way to meet this relevant demand, from a consequentialist impression of law.

Therefore, in achieving best response in actions taken by Public Administration, necessarily, consequentialist constructions will always accompany it. In this context of legal consequentialism, thus, one must consider the effects and consequences of disciplinary decisions in individuals´life and how they will define or influence in the future of the social environment in which they were taken.

---

[8] See, as expressed, for example, the following judgment from the Supreme Court: REMEDY FOR a peculiar institute of the Brazilian judicial system, which shares some elements with the Common Law petition for a writ of mandamus; it seeks relief from a violation of a “liquid and certain” right which is threatened by action or inaction of a public entity and can be filed as a stand alone proceeding No. 36,653 - SC (2011/0283828-4) - ADMINISTRATIVE AND CIVIL PROCEDURE. ORDINARY APPEAL. PUBLIC TENDER. OFFICIAL TRAINING COURSE OF THE FIRE DEPARTMENT. CANDIDATE FOR ACCOUNT DELETED CERTAME OF THE ADMINISTRATIVE providing resources OTHER PARTICIPANTS, WHICH HAD BEEN CONSIDERED IN EVALUATION unfit PHYSICAL AND GOT RIGHT TO SUBMIT NEW EVIDENCE. Granting ACT WITHOUT DUE reason. BREACH OF THE PRINCIPLES IMPERSONALITY AND NONINFRINGEMENT.

The main challenge to overcome of this legal aspect is the application of pure economic consequentialist reasoning without going through the axiological filter of the law - especially the values of justice and freedom that interact with law.

Thus, for proper management of public goods, it is imperative to remember that the effects of their decisions are as important as their causes and statement of reasons. Therefore, respect for some basic principles, among others, proportionality, legal certainty and juridicity need to establish improved mechanisms for actions taken by Public Administration.

Also, they bring a minimum shielding so that a possible subsequent control of the administrative decision/determination can transform entire energy used in potential damages for Public Administration, if such administrative action comes to be null from the beginning.

From a practical point of view, a good example of the relevance of responsible consequentialist interpretation of law is the concrete application of principle of proportionality (from verification of necessity, fairness and reasonableness of an administrative choice).

Likewise, not know what can be expected from actions taken by Public Administration, deprived of a minimal predictability of its consequences, it creates a justifiable concern about the definition of what is "fair" or about "adequate and legitimate reasonableness of administrative efficiency "? Certainly.

6 CONCLUSIONS (IT DEPENDS ON A SPATIAL AND TEMPORAL CLIPPING)

Adequacy basically depends on two elements: i) reality check; and ii) procedure for achieving a particular purpose. With legality, it is not different.

The principle of substantial legality of administrative decision/determination can only make sense when faced with possible, viable and available elements of real world in order to establish thus the meaning and scope of this legal principle and, consequently, of the administrative decision/determination itself which accompanies it.

In this context, an adequate feasibility of the broad legality control of the administrative decision/determination , with emphasis on the reasons that determine

their fate, grant an end to time that does not elapse by any system break, when one notes, in conclusion of that suggested functional test, a non- adaptation of the principle of legality to the established constitutional order.

Therefore, the principle of substantial legality must be consistently interpreted applied and executed in order to promote inter-subjective development of state authority involved that enable the legitimate state development, as it represents a key mechanism of verification of failures of administrative decision/determination,through information-finding actions and overcoming of administrative choices. This fact indicates the opening of the content and merits of the administrative decision/determination for an extensive judicial review by Judicial Power, an instrument that protects and promotes the Brazilian legal system.

In this context, one can not ignore the error when the application of legality, or just irrationally punish the administrative mistake. One must respect the time of eventual administrative failure, recording the past and projecting the future for the system development. It is an essential scenario in order that the present eventually deformed to the system is not repeated.

Otherwise, it would be facing a deep and difficult reversal, the universe of an unconstitutional shielding of administrative decision/determination, namely, the removal of a substantial legal review, from its conformation with the values of law under the formal and material perspective. To accept administrative manifestations without any substantial legal review of state executive actions, represents an unforgivable affront to the banal republican principle that sustains the current Brazilian State under the rule of law.

Thus established, some conclusions drawn from the indicated above analysis turned to be relevant:

a) What´s is done is as important as how it is done.

b) Any exercise of administrative management is subject to accountability from its respective reasoning (or the lack of it).

c) It is an obligation to take into consideration consequences of the administrative decisions/determinations over time and the control´s viability of such consequences.

d) The consequences of poor administrative management go beyond the personal universe of public manager and reach negatively, indistinctly, other persons, rights and assets.

e) The compliance check of structural reasons with the corresponding reality on which these reflect; it is an essential fact to determine the legality and legitimacy of administrative decisions/determinations.

Thus, as stated, one verifies that despite the frequent occurrence of state administrative actions/decisions out of reach of substantial principle of legality, there are some legal effectively mechanisms capable of restoring the rail legality of such state administrative assessments deformed the right.

This is because, activities divorced from indicated substantial legality, or deformed to law values, must be reincorporated into the constitutional legal structure , in respect to its required systemic sustainability, including, aiming at objectification, to the maximum possible, of possibility of investigating administrative decision/determination, with emphasis on administrative content that bring relevant national systemic shock.

So, it is attested that any public decision/determination needs to be under the aegis of the liability and accountability of State action, in accordance with rigid public values in relation to care of what belongs to all and to each one.

One verifies that, in same public vector,the legality of administrative legal review means must observe- in the fullness of its possibilities - what is the best way for the most part of human fundamental and social values may be fulfilled with minimal economic impact on citizen.

That is, it imposes the use of existing legal instruments for human protection and promotion in order to meet the primary sense of the established order from the principle of substantial legality, always in a given space and time frame, in order to take place:

a) the maintenance of legal environmental conditions so that human can be inserted into State;

b) the work for the progress of this and for its personal and intersubjective development;

c) propulsion, organization and State action for a constant service to meet sufficiently renewable wishes of the people.

Thus, it becomes clear that, one must take necessary measures so that State fulfills its fundamental duties, through State action truly focused on the removal of barriers which impede wide state control, as an agent who acts on behalf of the people and for the people.

Otherwise, accepting the increased restrictions on constitutionally protected fundamental rights, it is certain that in the near time, one will no longer be able even to claim that the future is a setback of historic democratic and republican achievements expressed in Citizen Constitution.

Thus, the aim was to demonstrate that there are state instruments to do good - for good - there are, or may be created specifically from realization of substantial legality. Desideratum as desired and justifier of existence, of maintenance, of legitimation and especially of popular belief in a State intervention- a fact that keeps it with management capacity of what is public, essential for proper state administrative actions.

Thus, it is expected that the pleas suggested in this study may be added to public will to develop and facilitate the development of all those who compose concatenated and harmonious system of people and ideas oriented to renewal of the commonwealth and achievement of public interest, as a product of aspirations of different nation's wills, in the communion of fairness and proportionate State.

In this context, it is expected that man-citizen receives sufficient state intervention in his life - not too much, either insufficient, but necessary for his promotion as main character of the Republic - in which the state figure proportionally responsible and accountable is inserted, through materialization of substantial legality which brings constantly a better tomorrow for its participants.

7 REFERENCES

BAPTISTA, Patrícia. **Transformações do direito administrativo**. Rio de Janeiro: Renovar, 2003.

BOSSELMANN, Klaus. **O Princípio da Sustentabilidade:** transformando direito e governança. (trad.) Phillip Gil França. São Paulo: RT-Thomson Reuters, 2015.

CAETANO, Marcello. **Princípios fundamentais do direito administrativo**. Coimbra: Almedina, 2003.

DI PIETRO, Maria Sylvia Zanella. **Direito Administrativo**. 24. ed. São Paulo: Atlas, 2011.

ENTERRÍA, Eduardo García de, FERNÁNDEZ, Tomas-Ramón. **Curso de Direito Administrativo.** Vol. I. São Paulo: RT, 2014.

FORSTHOFF, Ernest. Die Bindung an Esetz und Recht (art. 20 abs GG). Strukuranalystiche Bemekungen zum Uebergang vom Rechtsstaat zum Justizstaat, DÖV, 1959. p. 41 e ss. apud OTERO, Paulo. **Legalidade e administração pública, o sentido da vinculação administrativa à juridicidade.** Coimbra: Almedina, 2007. p. 15.

FRANÇA, R. Limongi. **Princípios Gerais do Direito**. 3. ed. São Paulo: RT, 2010.

FREITAS, Juarez. **O controle dos atos administrativos e os princípios fundamentais**. 4. ed. São Paulo: Saraiva, 2012.

OLIVEIRA FRANCO SOBRINHO, Manoel de. Atos administrativos. **Revista de Direito Administrativo**, vol. 139, p. 22-30. Rio de Janeiro: jan./mar., 1980.

OTERO, Paulo. **Legalidade e administração pública, o sentido da vinculação administrativa à juridicidade**. Coimbra: Almedina, 2007.

TÁCITO, Caio. **Direito administrativo**. São Paulo: Saraiva, 1975.

VIEIRA DE ANDRADE, José Carlos. **O dever de fundamentação expressa de actos administrativos**. Coimbra: Almedina, 1992.