ADMINISTRATIVE SILENCE

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ADMINISTRATIVE SILENCE

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PREFACE

The International Academy of Comparative Law has chosen the topic of administrative silence as the subject for a general report. This decision was grounded on the relevance that administrative silence deserves in comparative administrative law. Therefore, its study is a way to improve the knowledge of this legal device and highlight the transcendence that it has within the framework of comparative administrative law.

Since administrative silence is a necessary tool for the protection of individual rights before the administration, it has deserved, in the present century, express recognition in most of the analysed legal systems.

I have benefited from the valuable assistance of Professor Oscar Aguilar Valdez and, of course, I thank the professors of the 21 countries who have contributed as special national rapporteurs. Without their collaboration this book would not have been possible. This collaborative work has resulted in an important comparative administrative law study of this relevant institution.

The special national rapporteurs who contributed to this task, ordered by country, were the following: Argentina, Héctor M. Pozo Gowland; Brazil, Ricardo Perlingeiro, with the collaboration of Luciana F. Portal Gadelha and Patrícia Fernandes Marques; Canada, Suzanne Comtois; Chile, Jorge A. Femenías S. and Gustavo Alarcón del Pino; Colombia, Libardo Rodríguez Rodríguez and Jorge Enrique Santos Rodríguez; Croatia, Dario Đerđa; France, Armand Desprairies; Germany, Hermann Pünder and Jens Gerlach; Hungary, Krisztina F. Rozsnyai and Gyula Koi; Italy, Roberto Caranta; Mexico, Carla Huerta, with the collaboration of Rogelio Robles López; the Netherlands, Tom Barkhuysen, with the collaboration of Michiel L. van Emmerik; Peru, Jorge Danós Ordoñez; Poland, Zbigniew Kmieciak, with the collaboration of Joanna Wegner; Portugal, Dulce Lopes; Romania, Violeta Stratan; Spain, Vicenç Aguado i Cudolà; Sweden, Torvald Larsson; Switzerland, Myriam Senn; Turkey, Nilay Arat and Venezuela, Allan R. Brewer-Carías.

Administrative silence is regarded under the majority of the special national reports as a constitutional guarantee, a weapon of defence of the citizen's rights vis-à-vis the powers of the administration.

Most of the more relevant international human rights treaties provide for the administration's duty to respond to citizens' petitions. However, from the infringement of this duty follows the necessity to determine how it happens and what are the consequences of that infringement. On the other hand, in our analysis, review by the judgments rendered by international courts on the matter is noteworthy because they should be observed by national courts and by the

doctrine in order to determine what the reasons have been that have led to the adoption of a certain solution to a conflict in matters of rights and freedoms.

Comparative law allows us to know what the different solutions that have been adopted in different legal regimes are; also what the reasons were that led to the incorporation of administrative silence in the legislation of the countries that formerly did not contain it, which will be the subject of study. Thus, a comparative law study allows us to examine the circulation of legal models from one system to another, and their assimilation within their particular legal structures. This is so because a certain institution in a certain epoch serves a particular interest, but its comparative exposition allows us to discover what its function has been so that the interpreter reveals the reason for its creation.[1]

The comparative law methodology, which the work of the Academy highlights, allows an understanding of what happens or has happened in a certain place, country or environment, even within different constitutional systems and also reveals the common denominators that lead to a certain referential legal framework. This is what happens to administrative silence.

We will see that most of the countries where administrative silence has been adopted refer to it within the framework of administrative procedure, as a tool to ensure the obligation of the administration to issue a response to a certain request made by a citizen.

This silence as inactivity may also refer to the omission of the State to enact a norm and/or to regulate a constitutionally recognised right. Also, it refers to the State's liability that arises when the State – through its officials – fails to comply with a certain petition.

Recalling the words of René David, "comparative law is nothing more than the comparison of rights with different objectives".[2] Likewise, it has also been taught by Professor David that comparative law methodology allows us to understand others' points of view and, within the study of national law, it allows us to perceive the lines of study that differentiate accidental norms or institutions from those that can be considered permanent.[3]

If "Administrative law is constitutional law made concrete", as was stated by the President of the German Constitutional Court, Dr. Fritz Werner, administrative silence – like any other public law institute – must be analysed and explained on the basis of the constitutional system that governs the country in question, including, within this system, the human rights treaties that said country has ratified.

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1 Roca Sastre, Ramón Maria, Prologue to the work of José Puig Brutau, *Estudios de Derecho Comparado – La doctrina de los actos propios*, Ed. Ariel, Barcelona, 1951, p. 14.

2 Vallarta Plata, Jose G. *Introducción al Estudio del Derecho Constitucional Comparado*, Ed. Porrua, Mexico, 1998, p. 2.

3 David, René, *Les grands systémes de Droit contemporains*, 7° edition, Dalloz, Paris, 1978, pp. 5–14.

Based on a comparative law methodology, it has been requested that the special national reports should cover the content of questionnaire provided to them in order to facilitate a comparative analysis of its application within different legal systems.

Finally, it shall be noted that we are dealing with a general report that analyses a particular institution of administrative law. Therefore, the methodology used in this report cannot be the same as that which can be used to carry out a comparative law analysis in private or in criminal law, since, even without presuming full autonomy of administrative comparative law, administrative law has its own set of principles that governs its institutions – in this case, administrative silence.

Buenos Aires, July 2022
Pedro Aberastury

PRÉFACE

L'Académie Internationale de Droit Comparé a choisi le silence administratif, comme objet pour son Rapport Général. Cette décision fut fondée sur l'importance dont relève le silence administratif en droit administratif Comparé. Par conséquent, son étude est un moyen pour améliorer la connaissance et la transcendance qu'il a dans le contexte du droit administratif comparé.

Puisque le silence administratif est un outil necessaire a la protection des droits individuels vis à vis de l'administration, il a le mérite au siècle actuel de sa reconnaissance explicite dans la plupart des systèmes légaux analysés.

J'ai bénéficié de la précieuse assistance du Professeur Oscar Aguilar Valdez et bien entendu, je remercie les professeurs de le 21 pays qui ont contribué en tant que rapporteurs nationaux spéciaux. Sans leur collaboration, ce livre n'aurait pas existé. Ce travail collaboratif a culminé en une importante étude de droit administratif comparé, relevant de cette institution.

Les rapporteurs nationaux spéciaux qui ont contribué à cette tâche, par ordre de pays, furent les suivants : Allemagne, Hermann Pünder et Jens Gerlach ; Argentine, Héctor M. Pozo Gowland ; Brésil, Ricardo Perlingeiro, avec la collaboration de Luciana F. Portal Gadelha et Patrícia Fernandes Marques ; Canada, Suzanne Comtois ; Chili, Jorge A. Femenías S. et Gustavo Alarcón del Pino; Colombie, Libardo Rodríguez Rodríguez et Jorge Enrique Santos Rodríguez ; Croatie, Dario Đerđa ; France, Armand Desprairies ; Hongrie, Krisztina F. Rozsnyai et Gyula Koi ; Italie, Roberto Caranta ; Mexique, Carla Huerta, avec la collaboration de Rogelio Robles López ; Pays-Bas, Tom Barkhuysen, avec la collaboration de Michiel L. van Emmerik ; Pérou, Jorge Danós Ordoñez ; Pologne, Zbigniew Kmieciak, avec la collaboration de Joanna Wegner ; Portugal, Dulce Lopes ; Roumanie, Violeta Stratan ; Espagne, Vicenç Aguado i Cudolà ; Suède, Torvald Larsson ; Suisse, Myriam Senn ; Turquie, Nilay Arat et Venezuela, Allan R. Brewer-Carías.

Le silence administratif est considéré dans la majorité des rapports nationaux spéciaux comme une garantie constitutionnelle, une arme de défense des droits citoyens vis-à-vis des pouvoirs de l'administration.

La plupart des traités des droits humains internationaux prévoit le devoir de l'administration de répondre aux pétitions des citoyens. Cependant, de l'infraction dans l'application de ce devoir, il s'en suit la nécessité de déterminer comment il se produit et quelles sont les conséquences de ladite infraction. En outre, il est transcendantal dans notre analyse d'examiner les arrêts rendus par les cours internationales en la matière, car ils sont à considérer par les cours

nationales et par la doctrine qui détermine quelles raisons ont mené à adopter une certaine solution a un conflit en matière de droits et libertés.

Le droit compararatif nous permet de savoir quelles sont les différentes solutions qui ont été adoptées par différents régimes juridiques, aussi quelles ont été les raisons qui ont mené à l'incorporation du silence administratif dans les régulations des pays qui ne le contenaient pas formellement, ce qui sera l'objet d'étude. Cela étant dit, le droit comparatif nous permet d'examiner la circulation de modèles juridiques d'un système à l'autre, et leur assimilation dans leurs structures juridiques particulières. Et ce, en raison de qu'une certaine institution a une certaine époque précise un intérêt particulier, mais c'est l'exposition comparée qui permet de découvrir quelle est sa fonction, et ainsi l'interprète révèle la raison de sa création.[1]

La méthodologie de droit comparé, qui souligne le travail de l'Académie, permet de comprendre ce qui se passe, ou c'est passé dans un certain endroit, pays ou environnement, y compris parmi des systèmes constitutionnels différents, et aussi révéler les dénominateurs communs qui ont mené à un certain schéma juridique référentiel. C'est qui arrive au silence administratif.

Nous verrons que la plupart des pays où le silence administratif a été adopté, se référer a celui-ci dans le cadre de la procédure administrative comme un outil afin de s'assurer l'obligation de l'administration à apporter une reponse a une certaine requête faite par le citoyen.

Le silence comme inactivité, peut ainsi se référer à l'omission de l'état à appliquer une loi et/ou à réguler un droit constitutionnel reconnu. Il se réfère ainsi a la responsabilité de l'état qui survient quand l'Etat – ou ses officiers – faillit à accomplir une certaine requête.

Rappelant les mots de René David « le droit comparatif ce n'est rien de plus que la comparaison des droits avec différents objectifs ».[2] De la même manière, il a aussi été enseigné par le Professeur David, que la méthodologie de droit comparé permet de comprendre le point de vue des autres, qui différencie des normes ou institutions accidentelles de ceux qui peuvent être considérés permanents.[3]

Si « Le Droit Administratif est le droit constitutionnel concrétisé » tel qu'il a été statué par le Président de la Cour Constitutionnelle Allemande, Dr Fritz Werner, le silence administratif comme tout autre institut de droit public –, doit être analysé et expliqué sur la base du système constitutionnel qui gouverne le pays en question, en incluant les traités de droits de l'homme ratifiés par le dit pays.

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1 Roca Sastre, Ramón Maria, Prologue to the work of José Puig Brutau, *Estudios de Derecho Comparado -La doctrina de los actos propios*, Ed. Ariel, Barcelona, 1951, p. 14.

2 Vallarta Plata, Jose G. *Introducción al Estudio del Derecho Constitucional Comparado,* Ed. Porrua, Mexico, 1998, p. 2.

3 David, René, *Les grands systémes de Droit contemporains,* 7° edition, Dalloz, Paris, 1978, pp. 5–14.

Basé sur la méthodologie de droit comparé, il a été demandé que les rapports nationaux spéciaux couvrent le content du questionnaire qui leur a été pourvu, de manière à faciliter une analyse comparée de son application à l'intérieur des différents systèmes juridiques.

Finalement, il sera noté que nous sommes avant le rapport général qui analyse en particulier une institution de droit administratif. En conséquence, la méthodologie utilisée dans ce rapport ne peut pas être la même que celle utilisée pour implémenter une analyse de droit comparatif en privé ou pénal même en ne proposant pas la complète autonomie du droit administratif comparé. Le droit administratif a ses propres principes, son propre ensemble qui gouverne ses institutions, dans ce cas le silence administratif.

Buenos Aires, Juillet 2022
Pedro Aberastury

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