



Fundamental Legal Bases of the Administrative Contract: A Legal Institution in Cuba and Mexico

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Article History

Received: 17 September, 2020

Revised: 29 October, 2020

Accepted: 26 November, 2020

Published: 30 November, 2020

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Abstract

This article aims to find the foundations of the administrative contract. Its similarities and differences, where it would be an institution of similar functions, in essence, pursuing the same goals. Specifically, it discusses the bases of the administrative management contract in Cuba and Mexico, taking into account both countries have initiated the process of the legal system development in the same way, however, at present, the administrative contract in each country is lead differently. The study shows that the administrative contract in Cuba is considered to be derived from the Spanish colony, while, in the Mexican law, there is a greater deepening and study of the French classic doctrine. However, in both cases, there is a strong influence of tradition brought by the colonization.

Keywords: Administrative law; Administrative contracts; Administrative litigation; Cuba; Mexico.

1. Introduction

Clearly, the first steps taken by Dr. Andy Matilla Correa (Mantilla, 2011) in Cuba on the research of the science of Administrative Law have been effective.

This researcher studies the subject with a chronological and interesting approach, mentioning the birth of the administrative contract within this science. Certainly, it is considered that this theme is very important within the science, since it is the core theme as some authors have called it from the doctrine. Its study and proclaiming are of great interest to begin to arrange the issues discussed in many countries and in different literature.

The contract occupies a prominent place in the science of Law, having a especial importance the dimension of the administrative contract. The study of this subject in the science of administrative law is considered relevant, despite being controversial.

Throughout history this institution of contract has been a technique used by the holder of power, however, at present it is being unknown or denied in different public systems by inconsistent legal regimes of a substantive or jurisdictional nature.

Clearly, in Cuba the study of the administrative contract is not attractive to many researchers, so there is little research on this subject. However, it is considered to be one of the most important branches of the science of Administrative Law, which could raise the quality of relationship established by the public administration and its link with the private sector. Given its importance, this topic deserves to be investigated and its concept should be defined as a category, which will undoubtedly lead to a result in applicability to practice and efficient economic results in public administration and for the community.

Unlike Cuba, the scholars of public law in the ibero-american world, including Mexico and other countries of the region, have devoted a certain amount of studies to refer to the administrative contracts, as well as to its legal nature, the ways of adjudication of contracts and the implications that it has for the State, outlining the difference in what happens in the hiring of private law. The dividing line between one contract and another, of public law and private law, has historically been identified in the autonomy of the will of the parties.

Experts of the administrative law have studied the determination of doctrinal positions. Their work has revealed the importance of the administrative contract as a science, both for the law and for the development of the state. After analyzing several studies carried out on the subject, we take into account a fundamental element from which this research is nourished:

the conceptual approach by the different jurists from the colonization up to the current period, where different aspects of the subject are addressed in law. This is the set of diverse opinions that guide the researching exercise, which is very valuable for researchers in Cuba and Mexico with a common base in the subject of the administrative contract. Where Cuba has lagged behind.

2. Material and Method

This research responds to a qualitative design, using historical analysis content as the main technique to understand the relationship of the object of study with its surrounding. The historical-analytical method of research and the interpretative method are used. Both helped to understand and interpret the dimensions of the historical process surrounding the phenomenon of study: the administrative contract.

The documentary literature review was the main technique used to analyze the discourse on the subject of study. In addition, various bibliography were consulted about the development of the administrative contract from its beginning to the present day in Latin America, but specifically in Cuba and Mexico.

2.1. Historical Overview and Doctrinal Positions of the Administrative Contract

In Cuba, the law and its theories, and even the language were established by the Spanish colonizers. Since their arrival on the island on October 27, 1492 - the beginning of the Spanish colonization period – the Spaniards established the legal conceptualization through the jurisdiction in Cuba. Subsequently, administrative law was taught as a subject matter at the University of Havana.

In 1898 Spain ceded Cuba to the United States, which remained in power until 1902 (with the Platt Amendment). No significant change in the administrative contract was observed during this period. After analyzing the historical process it was possible to appreciate that Cuba lived for more than four centuries under the influence of Spanish laws. Subsequently, with the arrival of the Cuban Revolution in 1959, positions emanating from the socialist countries on these issues were established.

Throughout history the public administration was functioning as a merely repressive system and the service of the absolute monarch, without submitting to the legal policy in its functioning, being marked by the influence of Spain as a colonizing country. From the French Revolution (1789), the sovereignty of a country ceases to reside in the monarch so it was held by the people, and this, with a fundamental consequence: the administration is due to service the citizen and its administration functioning is subject to legal rules.

In the material studied was analyzed the Royal Ordinance, February 27, 1852, published by Bravo Murillo, which began as follows:

Madam (referring to Queen Elizabeth II): authorized competently by V. M.¹, on December 29, 1850, previous the pact of the Cabinet of Ministers, the Treasury submitted to the court a law draft on public service contracts, in order to establish certain necessary obstacles, avoiding easy misuse of authority committed in a matter of dangerous stimuli, and to guarantee the administration against the blows of curses... (Delgado De Arriaga, 1899).

It can be appraised that in Spain the first reviews of this type of contract are found in the legislation through which the Contentious-Administrative Jurisdiction was established in the country, even before there was a substantive regulation on contracts to which the administration was a party. In this case, it was R. Parada who made this observation, which has been assumed by the doctrine over the years. In our opinion, the legislation reflected, from the previous century, that administrative Contracting had specific rules that differentiated it from contracting between individuals (Muñoz Machado, 2018).

The Spanish background is important for Cuba and for the other colonized countries. The attempt to create a general procurement standard was made on several occasions during the nineteenth century, without being reflected in any adopted final texts or documents. Some notable projects can be distinguished as the one presented by the chairman of the Council of Ministers, Marcelo de Azcárraga, November 20, 1900, “reforming the administrative legislation for the procurement of public work and services, established by Royal Ordinance February 27, 1852”. In this 64 articles draft, there is really the first definition of administrative contracts that can be found in pre-legislative headquarters in the entire history of Spain. The text is quoted below:

article 2: Administrative contracts are those in which intervening of a part of the General State Administration, provinces or municipalities, have as their object the acquisition of effects or materials and supplies, the execution of work, the lease of buildings, the administration and collection of contributions, taxes, monopolies or excise taxes or any other service of a personal nature and in general all that is held to satisfy a need or perform a purpose of general public interest or provincial (...).

After the failed attempt of the project presented by Minister Gamazo in 1893, the chapter on contracts was shaped to be included in the law of Administration and accounting of public finances, July 1, 1911. Like the 1900 draft, the regulation was completed with the invocation as a supplementary of the Civil Code (Muñoz Machado, 2018).

Coincidentally, for many scholars of the institution of the administrative contract as, Muñoz Machado, defined it as the circumstance that one of the parties is the administration. This same presence determines the necessary inequality in recruitment, since the latter must be able to exercise, as the preamble said, “the discretionary power at all times accorded to the executive branch to ensure the safeguarding of public interests”. This power included “the right in favour of the administration to terminate contracts, the exercise of which applied prudently and by exception may never complain to the one who contracted with such condition, and must accept it as a *fait accompli*”.

After analyzing the presentation of the draft law on administrative contracts at its beginning, concrete results are shown in relation to Cuba and Mexico.

¹ V.M, custom of the time to remember one's own authority of nobility, means Your Majesty.

3. Results and Discussion

In Cuba, there are not profuse research on the topic and on the concept as such, it only appears on the Cuban colonial legal standards like in “Brief Treaty of Administrative Law, The Spanish General of the Kingdom, and Especially of the Island of Cuba, 1847” [hereinafter: Brief treatise] (María Morilla, 1847), printed in Havana, where a reference is made to some important issues related to the administrative law, because of its newness, exclusivity and legal significance. These legal norms or rules contained the name of administrative contracting, for the first time in the history of law in Cuba, and it says so:

the power of the Provincial Councils, its organization., its power- knowledge of the contentious—administrative.

I. Provincial Council is a corporation established in the capital of each province, chaired by the political chief, and composed from three to five individuals of royal appointment, to consult that Chief, taking part in the different branches of the administration and resolve contentious-administrative affairs.

The government appoints a vice-president from among the directors, at least, two of these directors must be lawyers, and to replace the owners in their absences, illnesses, challenges or separations, up to an equal number of supernumeraries may be appointed to each province with the power to attend the sessions, but without a voice or vote, except when they enter office.

The provincial Council, as an advisory body, gives its opinion, provided that the political leader or at the request of the government or when the laws, royal orders and regulations so prescribe, and have in the different branches of the administration the participation that these same provisions indicate to the Council. It also served as court for administrative disputes. Such matters arise from the execution of administrative provisions or measures, or from acts or contracts of the administration concluded for public supplies, objects or services, as well as in all other matters in which the individual or particular interest is in opposition to those of the state, or with those of the provinces or municipalities, and do not arise from the exercise of actions or claims of purely private rights, to be regulated only by civil law, without regard to public convenience. Ordinary judges would not be able to deal with such disputes without submitting the administrative action to the judicial authority, which would confuse power, and would produce serious inconveniences. For this reason, special courts have been established, where the hearing of the parties determine these cases in Justice. The first instance is the Provincial Council, and it is incumbent upon it to act and render its judgment when claims relating to the:

- 1. The use and distribution of provincial and communal goods and uses.*
- 2. The distribution and taxes of all kinds of provincial and municipal charges, the collection of which is not linked to that of state contributions.*
- 3. Compliance, intelligence, termination and effects of contracts and awards concluded with the civil Administration, or with the provinces and municipalities for all kinds of services and public works.*
- 4. Compensation for damages caused by the execution of public works.*
- 5. To the discomfort or unhealthiness of factories, establishments, workshops or trades, and their removal to other areas.*
- 6. Demarcation corresponding to towns and municipalities where these matters arise from an administrative provision.*
- 7. Mountains demarcation belonging to the state, to the villages or to the public establishments, reserving property matters to the competent courts.*
- 8. Navigation and buoy in rivers and canals, works made on their channels and margins, and the first distribution of the water for irrigation and other uses (Organic law of the Provincial Councils: 1845).*
- 9. Also aware of all business of a civil nature, administrative disputes relating to the branches of post, roads, canals and ports, including cases of forced expropriation because of public works and matters that may give rise to contracts of any kind concluded with individuals by the provincial or municipal administration for services of their respective districts; but if the race is born of contract that has been signed by the Government or the directorates-general referred to it directly by the Royal Council: questions on domain or property of the administration of these branches shall have to sustain, or when have to proceed by auction or sale against their debtors, it corresponds to the knowledge to the ordinary courts, according to rule sitting, or to the special who is competent by its nature (Royal Ordinance, September 23, 1846).*
- 10. And last. The provincial Councils, in all disputes of the various branches of the civil administration, for which there have been established special courts; corresponding to the Royal Council in the first instance, the knowledge of the claims arising, out of acts or contracts of the supreme administration, and in other cases expressed, in chapter 49 of the preceding section. Sentences must always be reasoned, and councils cannot reform them once they have been given; but it does interpret them or clarify them at the request of the party when doubts are raised about their intelligence. The same judgments may be appealed to the Royal Council, and the appropriate appeals for annulment may be brought; moreover, for the appeal to be admissible, it is necessary*

that the interest of the dispute capable of being subject to a material assessment, reaches two thousand reales Vellon, that in future the jurisdiction of these corporations will be extended; but in no case it is lawful for them to determine anything by way of a general rule, limiting the power to adjudicating on the particular matters submitted to their decision; nor to raise or support any petition of any kind to the government, or to the courts, or to publish their agreements, without the permission of the political leader or the government.

The provincial councils held such meetings as the political leader considered necessary for the dispatch of business. These sessions took place behind closed doors; but when the Council acted as a court of law, the hearing of the trial was public, and the defenses of both parties were heard. In order to reach an agreement on non-contentious matters, most of the members and at least one lawyer had to be present. In the event of a tie, the president's vote was decisive. The gratuity of the members who owned the council, received half when they enter office, the salaries of other employees, and any expenses incurred by these corporations, are met from the provincial funds (Organic Law of the Provincial Councils 1845).

For Mexico the first significant works of administrative law were those of Teodosio Lares (lessons of administrative law, 1852), José María del Castillo Velasco (essay on Mexican administrative law, 1874) and Manuel Cruzado (elements of administrative law, 1895). However, in Cuba it was already known Administrative Law as a discipline and science of Law, a decade before, the administrative contract, which was a reference to the countries of the region according to the legislation that was established in Spain and for Latin America in the Contentious-Administrative Jurisdiction. Thus, for the doctrine since those years, it was already defined that administrative Contracting had many specific rules that differentiated it from contracting between individuals.

As Dr. Matilla Correa had mentioned, we consider that the brief treatise - by José María Morilla-is a text that introduces the need to teach for the first time the subject of Administrative Law, in the former faculty of jurisprudence of the University of Havana, where teaching fixed basic ideas of Administrative Law were taught as a teaching discipline in the second quarter of the nineteenth century.

Undoubtedly, the book: treatise on Spanish administrative law of 1865, baptized Morilla as the most important figure in a doctrinal perspective of Cuban administration in the nineteenth century.

During almost a century – period of the 1840s and mid – 1880s-few works of Administrative Law appeared (Govín and Torres, 1882). This conclusion is reached since, as Mantilla (2011), proposed between 1847 and 1886 (almost 40 years) the only books in this matter were due to the authorship of María Morilla (1847), Morilla (1865). Moreover, the few texts at this stage were not as transcendental as the Treaty of 1865. Until today the Treaty of 1865 has been the best known, even more so than the short Treaty of 1847 (author “Dr. D. José María Morilla).

José María Morilla is known that in 1847 he acted as a Lawyer of the Royal hearings of the island and the illustrious College of Port-au-Prince and as Professor owner of Spanish and Indian Public Law and Administrative at the Royal Literary University of Havana Mantilla (2011). He was a professor at the University of Havana until 1861, when he was appointed to a position at the Royal audience of Santo Domingo; for this reason he moved to his homeland and closed his term at the chair of the Faculty of Havana jurisprudence. In this case, Max Enríquez Ureña, notes that: “when the annexation to Spain occurred in 1861, Morillas left his chair and returned to Santo Domingo with the post of auditor of the then reinstated Royal audience”.

Spanish treatises refer to a concept of an administrative contract with which they accept the doctrine and the proper substantivity of the figure. Such doctrinal pacification was predicted by Álvarez Gendín in 1934 (the controversy still lasted), who exposes different criteria, for example: France recognized the institution of the administrative contract especially Jèze Gaston, and less explicitly Duguit and Hauriou; in relation to the Spanish doctrine Santamaria, Slim and Arriaga, Fernández de Velasco y Royo Villanova, who believed that the expertise of the administrative contracts only lies in the object, and highlights Garcia Oviedo as one who leans more to the public consideration of the administrative contract, whose specialty was given not by the subject, but by the formality.

García de Enterría (1983), states that in Spain, France, Belgium and some other jurisdictions the doctrine was not to clarify the existence of administrative contracts, but to clarify whether or not those administrative contracts were materially different from civil contracts. Garcia de Enterría says that it was the Bordeaux school that was the great driving force behind the substantive theory of the administrative contract and also quotes Jèze Gaston, who considers that the contracts of the administration had close relation with the provision of public services, the contentious issues had to be resolved by the administrative courts, as an indication that it would be facing a special regime (García de Enterría, 1965). Jèze himself argues that civil contracts place contractors on an equal footing, while administrative contracts produce a situation of inequality since one of the parties, the administration, represents the general interest.

Interesting is the figure of the French treatise Jèze Gaston, who deserves to be considered the father of the theory of administrative contracts. In addition, he is named the author of the law of balance in analysis of financial issues, since it gave the solution to the adoption of a state policy: “to govern is not to sleep, it is to foresee, it is to make a program of action, it is to act” (Jèze, 1923). He considered the need for technical reasoning between the social and the political environment in order to reach consensus on what should be politics and administration. This was the first perspective on finance, largely indebted to the traditions of liberal orthodoxy: a good policy translated into balance. This was a difficult task that fell on the shoulders of the Minister of Finance: “to act on expenditure and resources” (Jèze, 1923). In the case of Mexico, it is similar as in Cuba and the other colonized countries, induced to a main administrative direction: Indian Administrative Organization. This organization distinguished between the

authorities of the Metropolis (The King of Spain, the contracting House of Indias, the Royal and Supreme Council of Indias) and the American authorities (the Viceroy, The Cabildo and the Governor). Source of Indian law:

The municipal law: it is the law created for the indies, and was composed of the ordinances of the Viceroys, the agreed orders of the cabildos and Royal hearings, the custom in matters of private law as of Public Law, the jurisprudence of the courts (especially that of the Council of indies) and the political doctrine of the Indian publicists (e.g. Juan de Solórzano);

Indigenous law: the Spanish Crown accepted it when it was not contrary to the Catholic religion or the King's rights (i.e., almost never);

Castilian law: applied in matters of private law (Oes Capdequi, 1941).

As a legal background of Spain in Latin America applied the laws of Indias. This legislation was enacted by the Spanish monarchs to regulate social, political and economic life among the inhabitants of the American part of the Hispanic monarchy.

After the analysis of the historical process, it can be seen that during the 80s and 90s, nineteenth century there was no Theory of the Administrative contract in Cuba. For these years in Spain appeared the first indications that defined the competence to know the conflicts of administrative contracts in Cuba, being null research and doctrine at this stage in Latin America (Acosta, 2016).

It is transcendental for the history of Latin America the foundation of the Royal Court of Mexico which was the highest court of the Spanish crown in the Viceroyalty of New Spain. It was created by the Royal ballot on December 9, 1528 and had its headquarters in Mexico City.

During these years, the administrative contract was mentioned in the specific laws and there was a connection in the laws that made uniform the application of the now Latin American countries, for example, a legal regulation concerning the mines of Mexico and the island of Cuba (Samora and Coronado, 1840). Worded as follows:

... *Chapter Thirty-seventh. Mejico² mines, and the island of Cuba.*

... *Ancient and modern ordinances, which govern the bouquet.*

... *ARTICLE CXLIV. The recommended mining guild has deserved in all times the greatest relief and attention, lessen the tenth percent and the Real right of the fifth that paid in silver, and the three per cent gold, with other graces in the price of quicksilver, on the gunpowder and foodstuffs have been dispensed, it was erected at the end in body formal, such as the consulate, under the ordinances approved for New-Spain on May 22, 1783, and that by Royal order of December 8, 1785 was sent to adapt to Peru; and the hope that these measures will produce the favorable effects that have been addressed, Administrators enforced with accuracy, and apply their main care to promote and protect the expressed body, taking care that the same thing running the subdelegation and ministers of the Royal Treasury House, severely punishing, if in the sale of quicksilver or gunpowder got or will receive from the miners more than fair price that will be pointed out, and even with the title of bonus or rights of officers and clerks it will restore without delay, the same is understood with the ministers of the Royal branch of Potosi, whose charge runs and must continue the sale ingredients of this.*

In 1783 Charles III issued the Royal ordinances for the direction, regime and government of the important body of mining, considered within the Administrative Law and its royal General Court in New Spain (now Mexico).

Charles IV, in 1792 –after a series of oscillating rules– declares that all types of mine belong to The Crown, thus restoring the system of royalty - typical of Spain - although there was also free exploitation. This regulation remained unchanged until the entry into force of the decree July 4, 1825 which would mark a new stage in the exploitation of the Spanish subsoil by declaring, in general terms, that all the mines of the kingdom were owned by the crown regardless who belonged the soil in which they were located (Puyuelo, 1954; Sánchez Román, 1911). Besides, as the crown colonized America, it owned all the mines.

As Muñoz Machado indicates in his book “Treaty of administrative law and general public law” (Muñoz Machado, 2018) it is impossible to separate theory from practice. It is seen as the application of the procedural regulations oblige to define the doctrine of distinctive features in the institution of the administrative contract, as happened in Spain.

Finally, it is estimated that Cuba and Mexico began to transit through the colony with similar laws that subsequently forced them to make doctrinal pronouncements. It would have been important to have had a forum to present the views of those who were born together, and it was up to them to investigate the nuances of achieving development according to the characteristics of states.

Obviously, administrations played an important role in achieving the success of the administrative contract, from its conception to its execution. In the case of Mexico, there is a greater number of research by this institution, even in teaching, there is a program to transmit both theoretical and practical knowledge of the administrative contract. However, in Cuba there is a complete absence of the development of this issue, and practically since the colony there have been no investigations of the administrative contract, despite the level of relevance it represents in the law.

² Mexico written with "j" was the way to write the name of the country at that time since there was no "x" with the sound it currently has.

4. Conclusion

It can be assured that Cuba and Mexico are linked by history and arising from the administrative contract and in the practice of administrative litigation, even applying common legislation.

Practice made theory to express itself, because through practice the administrative contract institution was already named and known, from the early stage of the colonization itself, so for both countries, Cuba and Mexico, it was obliged in theory to continue the research on this subject, having a recession in Cuba with this institution since the year 1959. It is time now more than ever, due to the current economic context that has marked Cuba during the last decade, a need to resume and achieve a contractual institution approach.

References

- Acosta, R. M. (2016). *Teoría General de la Concesión (su estudio en el derecho Mexicano)*. México.
- García de Enterría, E. (1965). *La figura del contrato administrativo, incluido en Studi in memoria di Guido Zanobini*. Milán. España.
- García de Enterría, E. (1983). *Responsabilidad civil de la administración pública [Texto impreso]: su formulación en el derecho italiano y análisis comparativo con los ordenamientos francés y español / Jesús Leguina Villa*. 2nd ednMadrid.
- Govín, Y. and Torres, A. (1882). *Elementos teóricos-prácticos del derecho administrativo vigente en cuba*. Tomo III: Habana.
- Jèze, R. G. (1923). *Principalmente desarrolladas en, Los problemas financieros de la República Argentina y los medios de estudiarlos y resolverlos*. Argentina.
- Mantilla, C. A. (2011). *Los primeros pasos de la ciencia del Derecho Administrativo en Cuba*. Universidad Carlos III, Madrid.
- María Morilla, J. (1847). *Breve Tratado de Derecho Administrativo Español General del Reino y Especial de la Isla de Cuba*. Editora en: Tipografía de Don Vicente de Torres, calle Reina, 3ra cuadra, numero 35, La Habana. Available: https://www.europeana.eu/en/item/9200110/BibliographicResource_1000126543875
- Morilla, J. M. (1865). *Reseña histórica de la Administración de la Isla de Cuba*, en Morilla, José María, *Tratado de Derecho Administrativo español, Tomo II, Sobre la Administración de la Isla de Cuba, aumentada con arreglo a las últimas disposiciones*. 2nd ednMadrid.
- Muñoz Machado, S. (2018). *Tratado de Derecho Administrativo y de Derecho Público General*. De la Agencia estatal boletín oficial del estado madrid.
- Oes Capdequi, J. M. (1941). *El estado español en las indias*. España.
- Puyuelo, C. (1954). *Revistas de derecho privado, derecho minero, doctrina, legislación y jurisprudencia*.
- Samora, Y. and Coronado, D., J. M. (1840). *Contador Mayor Cesante del Tribunal de la Habana, Libro "Registro de Legislación Ultramarina y Ordenanza General de 1803, legislación de ultramar, Tomo II, La Habana, específicamente Minas de México y de la Isla de Cuba, Ordenanzas Antiguas y Modernas que Gobierna el ramo*. Habana.
- Sánchez Román, F. (1911). *Estudios de derecho civil: Parte general*.