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Effectiveness of the principle of transparency of administrative procedures in Ecuador

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Abstract

The principle of transparency in administrative procedures is not only effectively limited to access and dissemination of information by governmental organizations to ensure accountability and strengthen public confidence in public institutions, therefore, implies that the various acts, decisions and administrative procedures should be clear, open and understandable to all citizens, thus allowing to ensure the other principles established by the Organic Administrative Code, the Organic Law of Transparency and Access to Public Information, concomitant rules to the Constitution.
Key words: Constitution of the Republic of Ecuador, administrative law, efficiency, principle of transparency, administrative procedures.

Eficacia del principio de transparencia de los procedimientos administrativos en Ecuador

Resumen

El principio de transparencia en los procedimientos administrativos, no solo se limita en forma eficaz al acceso y la difusión de

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información por parte de las organizaciones gubernamentales para garantizar la rendición de cuentas y fortalecer la confianza de la población en las instituciones públicas, por lo antes expuesto, implica a que los diversos actos, decisiones y procedimientos administrativos deben ser claros, abiertos y comprensibles para todos los ciudadanos, permitiendo de esta manera se garanticen los otros principios que establece el Código Orgánico Administrativo, la Ley Orgánica de Transparencia y Acceso a la Información Pública, normas concomitantes a la Constitución.
Palabras Clave: Constitución de la República del Ecuador, derecho administrativo, eficacia, principio de transparencia, procedimientos administrativos.

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INTRODUCTION

The administrative procedure is an institution of Administrative Law that, through the principle of transparency, manages to provide legal certainty and other fundamental guarantees of Due Process to the Public Administration; likewise, it pursues the creation of the administrative act as the ideal means for the exercise of the administrative public function, through a constitutional and normative support according to the legal system.

The principle of transparency in the public administration determines the impossibility of decisions or actions that impact the subjects of an administrative activity in an unexpected manner or that are not part of the general conscience, in spite of the above, the rule is sometimes violated. Transparency as a principle within the administrative procedure has as its main reason not only the compliance with the law, but also the confidentiality of information; in this sense, in the Constitution of the Republic of Ecuador, the

Organic Administrative Code, the Organic Law of Transparency and Access to Public Information, and the Organic Criminal Code, it is possible that certain exceptional situations may have confidential information or documents, under very strict rules that contemplate them as confidential information.

Public administration constitutes a service to the community as stipulated in Article 227 of the CRE, highlighting the principles of efficiency and transparency, in accordance with Article 173 of the same law, which categorically determines that the administrative acts of any jurisdiction of the State may be expressly challenged, both in administrative proceedings and in the Judiciary. Therefore, it is pertinent to specify that, for the administrative process, the COA; and for the contentious-administrative process, the COGEG.

Regarding the guarantee of due process and the right to access information within the proceedings, Article 76 paragraph 7 (d) of the CRE states that the parties shall have the possibility to access all documents and actions of the public authority; In this sense, Article 91 of the same law ensures the right to access sources of information, which seeks to make the development of the public administration's activities more transparent, in order to achieve democratic participation in the management of public affairs and the obligation of accountability on the part of all public servants and State institutions, in accordance with the provisions of the CRE.

The foregoing shows that effective compliance with the principle of transparency allows for compliance with the principle of publicity of acts, contracts and management of State agencies.

Ecuador is a signatory of international human rights treaties and conventions, which enjoy supranationality according to articles 417, 424 and 426 of the CRE, ratifying the American Convention on Human Rights, article 8 of which states that every person has the fundamental right to be heard in a fair process, where his dignity and respect are guaranteed. This implies that, in the face of any

accusation of an administrative or criminal nature or in the definition of their rights and responsibilities in civil, labor, fiscal or other areas, they must have access to a competent, impartial and independent judge or court, established by law. In addition, this process must be carried out within a reasonable time, ensuring that justice is accessible and equitable for all, which implies compliance with judicial guarantees, a scenario in which the process is governed by the principles of publicity and transparency.
The OAS with respect to "Judicial Guarantees", is not limited to judicial remedies in the strict sense, it obliges the process to be developed in a technical manner, which implies making all its actions transparent; furthermore, these guarantees seek to determine, case by case, the requirements that must be followed, so that people are in a position to adequately protect their rights against any type of state action that may affect them.
The principle of transparency is a basic pillar for the Public Administration, especially for administrative processes, which allows to face corruption in the State; in this sense, the COA in its Article 12 states that every person has the right to access public information and information of general relevance, as well as files, documentation and records.

Administrative Procedures
It is a form of public government, in which the power of decision is determined, the same that has an administrative seat, as opposed to the process that has a jurisdictional seat; in this regard Roberto Dromi states that it is "the conduit through which the administrative action transits in terms of law, as it is integrated with the set of rules for the preparation, formation, control, and challenge of the administrative will".
Maurer expresses that, the procedure is any action of the Administration directed towards the taking of a decision, thus

obliging the application of measures of another type or the conclusion of an agreement, and all this through manifestations emanating from the public administration, declarations of will of private law, material activity of the Administration, agreements, orders of the internal regime, etc., which also requires that a great number of different administrative procedures arise through their own specialty, as well as a different regulation.

To the above mentioned Méndez analyzes that, the administrative procedure highlights the imperious need of the public authority to submit to the phases and stages of the procedure established by the norm, for this effect it comes to require an unrestricted fulfillment of the diverse requirements, times, actions, etc., that is to say, the administrative procedure becomes the legal mechanism through which the actions of the Administration are facilitated

From a technical point of view, it is important to consider that this process represents a series of constitutive acts arranged in order; which for Cassagne, become an instrument of control of legitimacy, which involves the presence of legality and reasonability, in addition to the fact that the actions must be directed to the public interest or the common good, which is the goal pursued by the Administration.

The public administration through the administrative procedure complies with the various formalities and rules established during the development of the same; it is necessary to indicate that it is in practice the action of the powers of the State through the institutions contemplated in the CRE, therefore, it is necessary to ensure adequate protection of citizens before the administration, considering that the principle of legal certainty seeks to prevent arbitrariness and ensure due process.

It is evident that the administrative procedure becomes a concatenated set of rules and principles, which pursue a certain decision, which will change depending on its procedure and

specialty, being this the ideal way to proceed with the different claims of the administrated parties; This procedure entails the express compliance of the law, that is to say, it is a continuous and sequential set of certain acts, which are processed before the administrative authority, destined to the creation or challenge of a decisional act, either in the administrative or judicial sphere. The administrative procedure, which is regulated by the COA, contains the following phases: initiation, evidence, termination and execution; there are specific cases in which prior acts are required. The procedure has an adjective function of application of the law, oriented to achieve a result previously established in the norm, it does not necessarily seek agreement between the parties involved, nor does it effectively promote cooperation between the public-private sector, nor participation, although these are principles that are established in the law; It ends with the forced execution, without foreseeing supervision or control mechanisms over the decisions adopted, which represents an important limitation, since, in the context of modern administration, a control is required before, during and after to guarantee an adequate management, based on the presumption of legality and legitimacy that validates the administrative act.

The COA in its Art. 134 expresses and regulates the rules contained, which apply to special, administrative procedures, and, the provision of public goods and services, as long as it does not affect the special rules that govern their provision, likewise, in the second clause it indicates the different administrative claims, the disputes that individuals may present before the public administrations and the actions of the public administration that do not have an established procedure, will be substantiated in administrative procedure.

Art. 137 of the COA, determines that the public administration has the capacity to summon the necessary hearings to ensure the

proximity in the administrative process, in accordance with Art. 139 of the same code, establishes that the public administrations must promote the administrative procedure, correcting errors that do not affect the claim, except in the sanctioning area.
Art. 149 of the COA states that, apart from the persons to whom the public administration has addressed the administrative act, a person interested in the administrative procedure shall be considered as a person who initiates the procedure as a holder of rights, alleges subjective rights or shows legitimate interests, and proves to be a holder of rights.
Art. 152 of the COA , determines that the interested party has the option to address public agencies and institutions in its own name or through a delegate who has the capacity to exercise and is legally authorized, likewise, Article 158 of the same Code expresses that, deadlines and terms are considered as maximum and mandatory, understanding that deadlines can only be established in months or years, and terms in days; Furthermore, they are counted from the business day following the date of the notification of the administrative act, the performance of the diligence or action related to the term or deadline, the presentation of the petition or document referred to, or the estimation or rejection due to administrative silence.
Art. 164 of the COA states that, the notification shall be carried out personally, by means of a ballot or by means of the means of communication, which these provide, as well as, that it is carried out through any means, whether physical or digital, that ensures the registration of the transmission and reception of its content; likewise, Art. 175 of the same Code establishes that every administrative procedure may begin with a prior action, either at the request of the interested person or ex officio, for the purpose of understanding the circumstances of the specific case and determining whether it is appropriate to initiate the procedure.

Articles 183 and 184 of the COA establish the initiatives and own initiatives of the administrative procedure, which may begin ex officio through a decision of the competent body or by virtue of a superior order, at the substantiated request of other administrative bodies or through a complaint. The own initiative is the action arising from the direct or indirect knowledge of the conducts or facts related to the administrative procedure by the competent body to initiate it.
Article 189 of the COA , establishes that the agency in charge, whenever the regulations allow it, ex officio or at the request of the interested party, may issue precautionary measures, such as seizure, retention, prohibition of alienation, closure of establishments, suspension of activity, eviction of persons and others stipulated in the law; likewise, the measures described in numerals 14, 19 and 22 of Article 66 of the CRE that require judicial authorization, may only be issued by the competent authority. Likewise, Art. 196 of the COA states that the evidence provided by the public administration will only be valid if the interested party has been able to refute it during the administrative procedure; and finally, Art. 201 of the same code refers to the termination of the administrative procedure.

Principle of Transparency in the Public Sector
This principle is the right that citizens have to know about the management of public affairs, in addition to being an obligation of governments and authorities to inform citizens, and to be accountable for their management; Therefore, transparency on the part of public officials in the public administration, implies the full exercise of their functions, in order to comply with the provision of services and protect society with respect to their constitutional and human rights, as well as the real possibility that citizens can access the Judiciary in order to punish public officials in the event that they

are found to be responsible.
From the above, it can be deduced that the principle of transparency develops preventive actions and facts supported by deep moral and ethical values aimed at the fulfillment of the due management of public affairs and goods, in the integrity and obligation to render accounts, which implies economic expenditures of public resources, becoming fundamental to strengthen the so-called transparency processes.
The principle of transparency in the public sector implies the manifest need to adhere to the administrative mechanism established in the Law, which is based on the results of efficiency and effectiveness that are essential in the task of control, these become evident through the legal and timely performance of the public administrator; which implies an unrestricted compliance with the legal standard by an organ or entity whose mission is to watch over the state interests.
It is evident that this principle, both in procedural and procedural terms, aims to provide all information in a clear and timely manner. This not only refers to the procedure to be followed to restrict or deprive a right, but also to the reasons or motives that justify such action, as well as the factual grounds mentioned and the allegations presented to support them.
Likewise, this principle within the administrative procedure comes to guarantee the right of the persons to be judged by an independent, impartial and competent judge, as established in Article 76, numeral 7, paragraph k of the C.R.E., in accordance with the principle of impartiality of the judge, which is contemplated in Article 9 of the C.O.F.J.

Principle of transparency as a guarantee of the administrative procedure.
The CRE in its Article 1 determines that it is a constitutional State of

rights and justice, which presupposes the compliance and protection of the rights and duties enshrined in its text, this implies being able to guarantee the compliance with the Due Process, which requires the compliance with the principle of legality, as well as the regulated activity and the guarantee of legal certainty in the administrative field, being these fundamental pillars of the administrative procedure; which is identified through its generality, simplicity and celerity.

In order to guarantee the due process, Mendéz expresses that the legal norms that govern the administrative procedures of the public administration require a technical accuracy in their language to avoid confusion, both for the public official, the public administration, as well as for the administered, in order to avoid legal insecurity and confusion in the substantive and adjective rules; as well as, the lack of specific and well established administrative procedures, generates the need to unify, in order to provide greater clarity; It also considers that the importance of the principle of transparency lies in that it becomes an effective guarantee to carry out the administrative procedure, achieving the State to strengthen its institutionality and providing stability to the recipient of the administrative decision, especially when they are ex officio actions; it also strengthens the protection of the rights of individuals, through the inclusion of the principles of speed, effectiveness, efficiency and legality.

The COA in its article 12 expressed in previous lines, determines that transparency is a substantial part in the Due Process for its imperative execution, precisely the effective and timely application of the principle of transparency in the public sector, tries to prevent the excess of laws in its creation and approval, as well as in the subsequent reforms, which results in an incoherent set of dispersed laws, a labyrinth of contradictory provisions among them. Regarding the principle of transparency, the LOTAIP in its Art. 4

numeral 8, 9, 10 and 11 specifies the definitions of Active Transparency, Collaborative Transparency, Focused Transparency and Passive Transparency, also Article 5 numeral m of the same Law provides that transparency is the unrestricted access to information of general and public interest, which is ratified in the CRE in the following articles: 3 numeral 1, 18 numeral 2, 61 numeral 5, 83 numeral 17, 215 numeral 1, and 227; also supported by the following international treaties such as, the Universal Declaration of Human Rights in its Art. 19, the International Covenant on Civil and Political Rights in its Art. 19 numeral 2, the American Convention on Human Rights in Art. 13, American Declaration of the Rights and Duties of Man in Art. 4, Declaration of Principles on Freedom of Expression in its principle 4, Inter-American Democratic Charter in its Art. 4; and, Declaration of Santiago on Transparency and Integrity in Parliaments and Political Parties of 2012 which aims to promote transparency in government and in the parliamentary sphere, and ensure that this openness results in greater citizen participation, more representative institutions and, ultimately, a more democratic society.

Art. 9 of the LOTAIP establishes as a duty the implementation of the principle of transparency in the agencies and entities that are subject to this obligation, with the objective of ensuring its administration; therefore, they must respond to requests for information related to the supervisory power of the National Assembly.

For Moreta this principle "is a transversal axis of public power, it allows citizens to control it in order to strengthen democracy (Art. 100.4 CRE), reducing corruption, and as we have reiterated, contributing to forge an effective and efficient public administration." This is a normative and jurisdictional guarantee. It also refers that, as indicated in the C.O.A, it seeks to make the publicity of administrative records effective.

MATERIALS AND METHODS

In the present work, the analytical method was used, which made it possible to divide the object of analysis into its parts and attributes in order to examine them individually, and then to assemble how these components are connected with the whole, thus making it possible to appreciate sentence 21-23-IN/24 in its entirety and to delve into the decomposition of its various elements, in order to be able to assess compliance with the principle of transparency; The deductive method was also used, which is the one that goes from the universal to the representative, aiming to standardize the existing knowledge, to conclude from it in concepts, principles and the COA, as well as in the LOTAIP with a strong emphasis on the judgment 21-23-IN/24.

The systemic method was also used to analyze the legal phenomenon as a rule, within the framework of the law as a normative system that encompasses various subsystems linked to the different branches of law, for which it was necessary to incorporate various doctrinal approaches consistent with the COA and the LOTAIP, also used the General Principles of Comparative Law, in order to identify similarities and discrepancies that allow establishing categorizations based on criteria obtained from the comparison between the COA and the LOTAIP and the CRE, in relation to other legal trends in Administrative Law. Likewise, the hermeneutic method was applied to define the literal meaning of the normative propositions, based on the express observance of the principle of legality and the normative hierarchy contemplated in Art. 425 of the CRE; and finally, the Jurisprudential Method was applied when reviewing judgment 21-23-IN/24.

RESULTS

The administrative procedure is a key formal component of the administrative act, since it represents the formal path or channel that the law requires for the conformation of the will of the administration, which must be complied with. In other words, Marcheco analyzes that the elaboration of the administrative act must result from the execution of a series of essential formal and material actions, which are prior, successive and interrelated, as established by the legal system, and which are included in the general idea of administrative procedure. The total lack of the procedure or the infringement of any of its fundamental requirements will give rise to a defect of illegality of the administrative act that, depending on the nature or seriousness of the fault, could lead to its nullity.

It must be understood that from the administrative procedure it is necessary to verify if there is a total absence of the procedure or the violation of any of its essential requirements, which could give rise to a defect of illegality and illegitimacy of the administrative act and therefore will constitute a violation of the legal order of the State, and, depending on the nature or seriousness of the fault, could determine its nullity, due to questions of form; To all of the above, Agustín Gordillo adds that "the cardinal principle of the administrative procedure, as of any other procedure through which power is to be exercised over an individual or group of individuals, is that of due process, or a fair and just procedure. [...]" . This principle is obvious in any proceeding before a court of law; it should be equally obvious in an administrative proceeding, but in fact it is not always so in reality.
In order to understand the administrative procedure as a guarantee of the right to legal certainty, it is necessary to contextualize it within the Due Process; in this context it is expressed that it is derived from the guarantee of defense, and must be translated into the validity of three fundamental guarantees for the administered party in the

course of the procedure:
"a) the right to be heard before the issuance of the act that may affect his rights; b) the right to offer and produce evidence; c) the right to a founded decision, which makes merit of the main arguments raised in the file".
It is important to emphasize that the administrative procedure constitutes a guarantee, as it is the full mechanism through which the recognized rights of the people are respected, being transformed through the implementation of previous principles and norms of the legal system, which must be considered when judging a conduct, establishing responsibilities or applying sanctions for possible infractions, respecting the Due Process, as well as the hierarchical normative structure that emanates from the Constitution in its Art. 425.
Formal compliance with the administrative procedure implies that the resolutions of the public body must be based on the arguments and evidence presented by the administered party and evaluated by the administration. Therefore, the decision of any administrative procedure must be consistent with the requests made by the interested parties, considering that their allegations must be addressed by the agency as legally appropriate.
The Constitutional Court of Ecuador regarding Ruling 21-23-IN/24, which established the partial acceptance of the public action of unconstitutionality, in which they concluded that paragraphs 14 and 15 of Article 13, are not incompatible with the functions of the Ombudsman's Office, since they address the sanctions and corrective measures applicable to the subjects bound by the Organic Law of Transparency and Access to Public Information. Likewise, the ninth transitory general provision of the same sentence is considered unconstitutional for opposing the right of access to public information, since it imposes conditions such as the delivery of personal data of the applicant to provide the information

in order to prevent its misuse, despite the fact that such information, by legal mandate, should be public and easily accessible to citizens.

In view of the above, the Constitutional Court, in order to be able to analyze the grounds for the public action of unconstitutionality, correctly reviews paragraphs 14 and 15 of Article 13 of the LOTAIP, therefore, the plaintiff's argument is correct in stating: that the contested norms turn the Ombudsman's Office into an agency in charge of issues of access to public information and transparency, because it must prepare binding reports for the Comptroller General of the State regarding non-compliance with the regulations in order to establish the corresponding sanctions and determine the corrective measures that must be mandatorily applied to the information that is communicated.

Continuing, the plaintiff indicates that sentence 003-12-SAN-CC examined the opinion-resolution produced by the Ombudsman's Office and mentioned that, although the institution has the capacity to dictate measures of mandatory compliance, this was not observed by the Permanent Specialized Commission of Transparency, Citizen Participation and Social Control of the National Assembly.

Rightly in paragraph 42 of Ruling 21-23-IN/24, the Judge Rapporteur of the Constitutional Court points out that the Ombudsman's Office is a public law institution that integrates the Transparency and Social Control Function, which has two main functions: "to protect and protect the rights of Ecuadorian citizens, and to defend the rights of Ecuadorians who are abroad" as stated in Art. 215 of the CRE.

The judge's resolution states that the Law, which is being considered in this case, clearly indicates that regarding active transparency, access to information does not require prior request by the competent authority or citizens.

CONCLUSIONES

After a review of the principles, regulations, doctrine and jurisprudence, it is concluded that, within the sphere of Administrative Law, there is still confusion in a technical-legal sense on the part of lawyers when exercising this procedural route, since they confuse the process with the procedure when information is required to be transparent; being necessary to bear in mind that the process is concomitant to the judicial activity, while the procedures are the form established by the administrative activity for the exercise and fulfillment of the rights of the people in their relationship with the Public Administration.

Also, it should be noted that many officials and judges do not adequately value the general principles of the Organic Administrative Code; a clear example of this is the non-application of the principle of transparency at the time when the administrative or judicial resolutions are issued, and finally, the principle of transparency and its application is based on constitutional precepts, through the provisions inherent to the Public Administration, constituting a guarantee, which seeks that the administered may require or demand complete information or access to documents that he/she considers necessary; Otherwise, he/she may activate the administrative or judicial channels that allow him/her to make this right effective, such as the administrative silence or the action of access to public information.

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