

# El derecho a la buena administración. Un derecho en desarrollo en el Derecho de la Unión Europea y en el derecho español\*

## The right to good administration. A developing right in the European Union and Spanish Law

---

JOSÉ ZAPATA SEVILLA

Universidad de Málaga

jose.zapata7675@gmail.com

ORCID: 0000-0002-1328-1118

Recibido: 10/09/2023 Aceptado: 10/12/2023

Cómo citar: Zapata Sevilla, José, “El derecho a la buena administración. Un derecho en desarrollo en el derecho de la Unión Europea y en el derecho español”, *Revista de Estudios Europeos* 83 (2024): 395-427.



Este artículo está sujeto a una [licencia “Creative Commons Reconocimiento-No Comercial” \(CC-BY-NC\)](#).

DOI: <https://doi.org/10.24197/ree.83.2024.395-427>

**Resumen:** La pérdida de confianza en las autoridades públicas conlleva la necesidad de promover un mayor control de calidad de la actuación administrativa. El derecho a la buena administración responde a esta demanda legítima. Este derecho, que es fundamental en el sistema jurídico de la Unión Europea según el artículo 41 de la Carta de Derechos Fundamentales de la Unión Europea, debe entenderse como la obligación de la Administración Pública de actuar con un cierto nivel de diligencia. La actuación administrativa diligente requiere resolver el caso en un tiempo razonable y valorar equitativa e imparcialmente sus circunstancias. En caso de incumplimiento, el acto administrativo podría devenir inválido o declararse responsabilidad de la Administración por los daños causados en el ejercicio de sus funciones. Asimismo, su fundamento ético justifica la creación de una acción colectiva para la defensa de una adecuada actividad administrativa

**Palabras clave:** Legitimación; Buena administración; Diligencia; Jurisprudencia; Ponderación.

**Abstract:** The loss of confidence in the public authorities calls for greater control of the quality of administrative action. The right to good administration responds to this legitimate demand. This right, which is fundamental in the European Union legal system according to article 41 of the Charter of the Fundamentals Rights of the European Union, should be understood as the public administration’s obligation to act with a certain level of diligence. Administrative diligent activity

---

\* Este trabajo se ha realizado en el marco del Proyecto de Investigación: “Judicial harmonization of European public law through the technique of the autonomous concepts (EULOGOS)”, coordinated by Alejandro Sánchez Frías and financed by the University of Málaga.

requires resolving the case in due time, fairly and impartially weighing the circumstances of the case. Otherwise, the administration will see its act invalidated or be held liable for damages caused by the exercise of its duties. Likewise, its ethical basis justifies the creation of a collective action for the defence of adequate administrative matters.

**Keywords:** Legitimation; Good administration; Diligence; Case law; Balancing

---

## INTRODUCTION

The legitimation of public administration has traditionally relied on applying the law approved by the legislative power since the parliament embodies the democratic principle. However, nowadays, public powers wield many discretionary powers because of the complexity of society and the number of functions they carry out. Therefore, public administrations need new sources of legitimation<sup>1</sup>.

On the other hand, social issues arising from lousy administration cases have prompted consciousness of the need for public servants' ethics. In this regard, codes of conduct and other instruments have emerged to assert the probity of public administrations. However, the impact of these measures is controversial, as some authors claim that introducing these instruments may produce distortions and confusion for law operators<sup>2</sup>. Others argue for administrative law to adapt to circumstances such as globalisation, privatisation and increasing participation through a

---

<sup>1</sup> Barnes Vazquez claims that public participation in administrative procedures compensates the public administrations' rising discretionary powers and endows them with democratic legitimation. It is undoubtful the importance of this proposal. However, this paper will adopt a broader approach regarding good administration as a source of legitimation for public administrations. See Barnes Vazquez, J., (2019) "Buena administración, principio democrático y procedimiento administrativo", *Revista Digital de Derecho Administrativo* 21, p. 81.

<sup>2</sup> From a positivist standpoint, Darnaculleta Gardella defends the need to differentiate between the tools and techniques of ethics and administrative law. See Darnaculleta Gardella, M., M., (2020), "Ética pública y derecho administrativo en la era de la posverdad", *Revista de Derecho Público: Teoría y Método* 1, p. 44.

paradigm change and approach<sup>3</sup>. On this account, we should acknowledge that many legal principles already have relevant ethical implications<sup>4</sup>.

However, in the last years, lawmakers have passed several laws introducing terms that belonged to non-legal disciplines, such as political and public administration sciences. The Spanish act on transparency, access to public information, and good government, among other things<sup>5</sup>, exemplifies this tendency. Therefore, this paper assumes a need to improve public administration, as citizens demand. Ethics may play a relevant part, but a legal tool is compulsory to enforce the citizens' expectations regarding public administration. We put forward that the principle and right to good administration fulfil this goal, i.e., it means a step ahead of citizens' guarantees in relationships with the public administration and the quality of public action in general.

The following pages will delve into the principle and right of good administration to provide a general characterisation of *lege lata*. Both positive law and jurisprudence from the Court of Justice of the European Union (CJEU, thereafter) and Spanish Courts will be treated, as the courts' doctrine is indispensable to tackling the legal concept of good administration. Furthermore, as the right to good administration constantly evolves, the paper will focus on some *lege ferenda* proposals to improve citizens' guarantees and the quality of administrative action.

---

<sup>3</sup> In this sense, the state ceases to be the centre of decision-making power because it assumes or is sensitive to the proposals of supra- and infra-state actors, experts, the private sector, etc. On the other hand, the paradigm shift is not limited to reducing the public administration's role as the protagonist of administrative law, but to integrating the methodology of other social sciences to achieve public interest goals. See Cassese, S., (2012) "New paths for administrative law: A manifesto", *International Journal of Constitutional Law* 10 (3), pp. 603-606 and 612-613.

<sup>4</sup> Art. 103 of the Spanish Constitution prescribes that public administration objectively serves the public interest and follows the effectiveness, hierarchy, decentralisation, deconcentrating and coordination principles and acts subjected to law and the legal system. As Rodríguez-Arana puts it, ethics in public administration involves objectively serving general interests. See Rodríguez-Arana, J., "La buena administración como principio y como derecho fundamental en Europa", *Misión Jurídica, Revista de Derecho y Ciencias Sociales* 6, p. 25 and Spanish Constitution ("BOE" 311, of 29 December 1978).

<sup>5</sup> Law 19/2013, of 9 December, on transparency, access to public information and good government ("BOE" 295, of 10 December 2013). The act introduces the concept of "good government", although the norm does not define it.

Following this brief introduction, Section II tackles the right to good administration from a legal theory standpoint. Section III adopts a more specific administrative law perspective by reviewing jurisprudence from the CJEU and the Spanish Supreme and Constitutional Courts. Section IV explores the benefits of developing good administration right for the European Union and Spanish law. Section V concludes by stressing the main results of this work.

## LEGAL NATURE

### 1. DELIMITATION

Firstly, it should be noted that good administration is absent in the Spanish Act on transparency, access to public information, and good government. A first question arises regarding the difference between good government and good administration<sup>6</sup>. The distinction lies in the scope of judicial control, i.e., the good administration assigns rights to contest administrative action, whereas the good government is subject to a lesser extent to judicial review<sup>7</sup>. Indeed, we should recall that some government functions are not administrative but political, which means that courts cannot overrule them<sup>8</sup>. However, when the government executes administrative functions, regardless of whether they have discretionary powers, they are subject to court review.

On the other hand, governance refers to the participation of a broad set of public and private subjects in the government decision-making

---

<sup>6</sup> These concepts are closely related. According to Castillo Blanco, all of them are elements of a qualified democracy where there is an alignment between the government action and the citizens' will. Castillo Blanco, F.A., (2015) "Garantías del derecho ciudadano al buen gobierno y a la buena administración", *Revista Española de Derecho Administrativo* 172, p. 6 (from the version available in Aranzadi Instituciones).

<sup>7</sup> Castillo Blanco, cit., pp. 18-19.

<sup>8</sup> The art. 97 of the Spanish Constitution states that the government leads the domestic and foreign policy, civil and military administration and the state's defence and carries out the executive function and the regulatory power according to the Constitution and laws. The abovementioned article refers to both political, not judicially reviewable, and administrative functions.

process<sup>9</sup>. Therefore, although the concept is closely interwoven with good government and good administration, it has a different focus.

It is undoubtful that good administration has a dual nature, as a right and principle<sup>10</sup>. Indeed, its acknowledgement in the Charter of Fundamental Rights of the European Union (The Charter, thereafter)<sup>11</sup> was grounded in the fact that the CJEU had already recognised it in its jurisprudence as a general principle of the European Union<sup>12</sup>.

Nevertheless, when considering good administration as a principle of administrative action, this paper does not use the term principle as a mere guideline. It is a legal norm that summarises a set of rules<sup>13</sup>. In this regard, there is no difference between the principle and the right to good administration since the right recognised in the Charter also comprises a set of rules and guarantees, as we shall see. Therefore, although the principle of good administration could have been mere guidance regarding administrative action at his jurisprudential inception<sup>14</sup>, the Charter made it an enforceable fundamental right.

---

<sup>9</sup> Porras Nadales, A., *La acción de gobierno: gobernabilidad, gobernanza, gobermedia*, (2014), Editorial Trotta, Madrid, p. 31.

<sup>10</sup> In this regard, Rodríguez-Arana reviews good administration as a principle and fundamental right. See Rodríguez-Arana, cit.

<sup>11</sup> Charter of Fundamental Rights of the European Union (Official Journal of the European Communities, C 364/1 of 18 December 2000).

<sup>12</sup> According to Fuentetaja Pastor, good administration was a well-established principle in the CJEU jurisprudence. However, the court did not acknowledge it as a fundamental right; the decision is entirely attributable to the EU's "constitutional" lawmakers. Fuentetaja Pastor, J.A., (2008), "El derecho a la buena administración en la carta de los derechos fundamentales de la unión europea", *Revista de Derecho de la Unión Europea* 15, p. 137.

<sup>13</sup> According to Atienza Rodríguez and Ruiz Manero, a principle could be understood as a guideline. However, the term principle can also comprise legal norms that may fulfil several functions. As it has been observed, it can summarise a sector of the legal system. It also could affect legal reasoning if legal operators use them as decision-making parameters. When principles constitute legal norms and apply in a concrete case, they must be entirely accomplished in contrast to the guidelines. Atienza Rodríguez, M., Ruiz Manero, J., (1991) "Sobre principios y reglas", *Doxa: Cuadernos de Filosofía del Derecho* 10, pp. 103-119.

<sup>14</sup> Fuentetaja Pastor pointed out this idea. Fuentetaja Pastor, cit., p. 137.

Concerning its nature as a right, it is worth considering whether it belongs to a third-generation or collective right or consists of an individual right. The division is pertinent because, when considering the good administration in the Spanish national law, third-generation rights<sup>15</sup> are mostly classified as “The governing principles of social and economic policy”, meaning they lack the protection of fundamental rights<sup>16</sup>. The Charter acknowledges an individual right, as it exclusively refers to guarantees for individuals against the EU public administration<sup>17</sup>. This characterisation could ease the acknowledgement of good administration as a fundamental right in national legal systems. However, since my *lege ferenda* proposal regarding the development of the right to administration in the EU and Spanish Law features characteristics of third-generation rights, I conclude it should be regarded as an individual and collective right in the national law.

Another question arising from the Charter’s acknowledgement is its applicability in the national law of EU member states. The Charter specifies its scope in the following terms:

“The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.” (art. 51.1 of the Charter).

---

<sup>15</sup> Pérez Luño proposes three criteria to identify third-generation human rights. Firstly, their justification lies in solidarity since they protect universal interests and require global protection. Secondly, the protection mechanisms involve open participation in administrative procedures to protect these shared interests. Thirdly, there is no private entitlement to third-generation human rights but collective. Ruiz Miguel, C., (1991) "La tercera generación de los derechos fundamentales", *Revista de Estudios Políticos (Nueva Época)* 72, pp. 301-303.

<sup>16</sup> Art. 53.3 of the Spanish Constitution prescribes that the governing principles of social and economic policy will inspire law, courts’ decisions, and public powers’ action. They can only be alleged before courts following the existing legal provisions. The right to an adequate environment fits this category.

<sup>17</sup> Art. 41. Right to Good Administration: 1. "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union (...)"

The EU bodies have made efforts to clarify when national authorities should consider these fundamental rights<sup>18</sup>. However, the Charter did not impose constitutional amendments to assert the new fundamental rights in the national realm. National law must have inner mechanisms to incorporate the new fundamental rights beyond the charts' art. 51.1. In this regard, a solution could be to consider that the expansion of the catalogue of fundamental rights is allowed in the Spanish constitution<sup>19</sup>.

Nevertheless, only recently, the good administration principle has gained momentum in Spanish jurisprudence since there was much uncertainty about the effectiveness of the new right<sup>20</sup>. The outlook for developing the right to good administration is much more conducive<sup>21</sup>.

## **2. GOOD ADMINISTRATION. PRINCIPLE, RULE, OR UNDETERMINED CONCEPT?**

Art. 41 of the Charter forecasted the right to good administration in the following terms:

---

<sup>18</sup> There are two prominent cases when the chart applies to national authorities. Firstly, the scenario where national public powers transpose or execute legal EU acts. Secondly, a bunch of situations where national authorities apply EU law even if they are not transposing directives and operating inside their national competencies. Therefore, the following guideline indicates when each case takes place. See European Union Agency for fundamental rights (2020), *Aplicación de la Carta de los Derechos Fundamentales de la Unión Europea en la elaboración de normas y políticas de ámbito nacional*, Publications Office of the European Union, 2020, Luxembourg, pp. 52-73.

<sup>19</sup> The Spanish Constitutional Court has acknowledged data protection as a new fundamental right because of the incompleteness of the catalogue of fundamental rights considering social development. Art. 10 of the Spanish Constitution allows interpreting the constitutional text to create new fundamental rights from the original text. Moreover, Seoane Rodríguez upholds that the Spanish Constitutional Court can create new fundamental rights without a direct basis on the constitutional text. See Seoane Rodríguez, J., (2006) "La ampliación del catálogo de derechos fundamentales", *Persona y Derecho: Revista de Fundamentación de las Instituciones Jurídicas y de Derechos Humanos* 54, pp. 457-458.

<sup>20</sup> Again, Fuentetaja Pastor, cit., p. 139.

<sup>21</sup> Chaves García, J.R., (2020) "La fortaleza jurídica creciente del principio de buena administración", en: <https://delajusticia.com/2020/01/17/la-fortaleza-juridica-creciente-del-principio-de-buena-administracion/> (fecha de consulta, el 03.10.2022).

“1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

- the right to every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

- the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language”.

The first clause constitutes an open prescription that would match Atienza Rodríguez and Ruiz Manero’s definition of principle<sup>22</sup>. The paragraph also includes terms that qualify as indeterminate legal concepts<sup>23</sup>. In this sentence, “impartially”, “fairly”, and “reasonably” constitute indeterminate legal concepts. Fernández Rodríguez stresses the importance of the term “fairly” because it implies that public administration must consider favourable and unfavourable facts regarding

---

<sup>22</sup> The cases where the principle applies are formulated in open terms. At the same time, the rule comprises specific or close cases. Indeed, Atienza Rodríguez and Ruiz Manero provide many definitions of principles. This one is focused on the structural distinction between principles and rules. Atienza Rodríguez, Ruiz Manero, cit., p. 108.

<sup>23</sup> The semantic meaning of an indeterminate legal concept cannot be determined *ex-ante*, i.e., with no reference to a particular case. Therefore, on many occasions, their meaning will be clear with no need for a complex interpretation, but when difficult cases arise, the legal operator has some margin of appreciation. However, the interpreter’s discretionary powers are not unlimited, as they must abide by law ends. See Ara Pinilla, I. (2004), “Presupuestos y posibilidades de la doctrina de los conceptos jurídicos indeterminados”, *Anuario de Filosofía del Derecho* 24, pp. 113-116.



the citizens' interests<sup>24</sup>. On the other hand, "impartiality" impedes public servants from favouring some citizens at the expense of others<sup>25</sup>. The "reasonability" of time refers to a point when the eventual administrative resolution is no longer effective<sup>26</sup> and prevents any other unjustified and disproportionate delay<sup>27</sup>. In any case, their nature as indeterminate legal concepts lead to legal operators specifying them in every case.

The remaining article comprises some citizens' guarantees. Contrary to the first paragraph, the rights are defined and apply in every relationship between the EU's "Public Administration"<sup>28</sup> and its citizens. As their application does not require any weighing process, which is compulsory regarding principles and indeterminate legal concepts, these provisions must be considered rules.

Except for the provision regarding the language, the Spanish law had already foreseen the rest of the guarantees before EU Institutions passed the Chart. In this regard, Carlos Saura Fructuoso has pointed out that its importance lies in the fact that, given the absence of a complete EU administrative law, it is the primary tool to subject the EU public administration powers to the law<sup>29</sup>. Conversely, in Spanish administrative law, the principle of good administration would not play the same role since many of the guarantees acknowledged in article 41 of the Charter are already in force without the need to rule the right to good administration<sup>30</sup>. Accordingly, there would be a basis to sustain that the right to good administration will only be significant in the EU administrative law. Still,

---

<sup>24</sup> Fernández Rodríguez, T.R., "El derecho a una buena administración en la sentencia del TJUE de 16 de enero de 2019", *Revista de Administración Pública* 209, (2019), p. 250.

<sup>25</sup> Rodríguez-Arana, cit., p. 45.

<sup>26</sup> Rodríguez-Arana, cit., p. 40.

<sup>27</sup> Judgment of the Supreme Court (Chamber of contentious-administrative, section 2) 4115/2019 of 18 December. ECLI:ES:TS:2019:4115

<sup>28</sup> We can only speak about an EU public administration from a functional or inner standpoint since the treaties do not regulate it but the different institutions and organisms. Fuentetaja Pastor, cit, pp. 141-142.

<sup>29</sup> Saura Fructuoso, C., (2012) "El derecho de buena administración y el 'due process' administrativo europeo" in J.E. Soriano García (Dir.) *Procedimiento administrativo europeo*. Civitas. Madrid, p. 354.

<sup>30</sup> Rubio Hernández-Sampelayo, G., (2022) "La buena administración en la tradición jurídica española". *Diálogos Jurídicos* 7, p. 153.

the right to good administration is not limited to well-known fixed guarantees.

### 3. SCOPE

Generally, the right to good administration is foreseen to apply to all administrative action. Therefore, we may find the implications of the right to good administration in areas of public interest like public procurement governance<sup>31</sup>.

Moreover, the dual nature of the right to good administration, as an individual right and a collective interest, implies that good administration may overturn an administrative decision even when no personal right is involved. With this objective in mind, although its collective dimension is well established in the European doctrine<sup>32</sup>, it would be necessary to have new mechanisms to enforce it, like broadening the right to standing<sup>33</sup>.

The doctrine also deducts guarantees from the right to good administration, which art. 41 of the Charter does not mention. Rodríguez-Arana, for instance, draws twenty-four principles and thirty-one rights from the proclaimed right to good administration<sup>34</sup>. In this regard, the European Ombudsman's Code of Good Administrative Behaviour may help to delimitate the right to good administration<sup>35</sup>.

<sup>31</sup> Garrido Mayol relates the right to good administration with governance to fight corruption in the public procurement realm. The good practices implemented through several legal amendments would reinforce the good administration in this area. Garrido Mayol, V., (2020) "El principio de buena administración y la gobernanza en la contratación pública". *Estudios de Deusto* 69 (2), pp. 10-12.

<sup>32</sup> In the ambit of the Council of Europe, it has been concluded that good administration is a third-generation right of general scope which can be broken down into individual rights. KOPRIĆ, I., MUSA, A., LALIĆ, G., (2011) "Good administration as a ticket to the European administrative space". *Zbornik Pravnog Fakulteta u Zagrebu* 61 (5), p. 1538.

<sup>33</sup> Ponce Soler, J., (2017) "Los jueces, el derecho a una buena administración y las leyes de transparencia y buen gobierno", en: <https://laadministracionaldia.inap.es/noticia.asp?id=1507021> (fecha de consulta: 6 October 2022).

<sup>34</sup> Rodríguez-Arana, cit., pp. 49-55.

<sup>35</sup> However, Joana Mendes argues that the Code does not specify the content of the right to good administration as it also comprises non-legal aspects. However, as a soft law instrument, it may prompt lawmakers to acknowledge the best practices of public administration as new enforceable guarantees. Mendes, J., (2009) "Good administration

The problem of delimiting the scope of the right to good administration can be resolved using the doctrine of Ponce Soler<sup>36</sup>. This overcomes the issues arising from the junction of law and ethics by specifying the right to good administration into a legal concept with a sound ethical background; it consists of a due diligence standard that public administration must respect. Therefore, the right to good administration encompasses all administrative actions fulfilling the standard; its breaching means the executive action can be overridden. On the other hand, I intend to expand the implications of this interpretation through a *lege ferenda* proposal according to which good administration constitutes sufficient standing to challenge the administrative action.

## THE RIGHT TO GOOD ADMINISTRATION IN JURISPRUDENCE

### 1. THE CJUE ON THE RIGHT TO GOOD ADMINISTRATION AS A DUE DILIGENCE STANDARD

Understanding the right to good administration as a due diligence standard can be founded on the CJUE case law. Furthermore, the jurisprudence of the CJUE covers many manifestations of the right to good administration with this meaning<sup>37</sup>.

Mendes has pointed out that although good administration involves a sort of due diligence beyond legal requirements, the CJEU has denied that the infringement of this standard could have legal effects on an

---

in EU law and the European code of good administrative behaviour", *EUI Working Papers. Law*, 9, p. 13.

<sup>36</sup> Ponce Soler, J., (2019) La lucha por el buen gobierno y el derecho a una buena administración mediante el estándar jurídico de la diligencia debida, Universidad de Alcalá, Alcalá de Henares, p. 38.

<sup>37</sup> In this sense, Mendes presents good administration as a right composed of different layers. The first consists of procedural guarantees, while the second refers to a prescription for administrative action that must pursue public interest. Finally, the third facet of the right is about non-legal aspects. However, only in the last layer the standard of conduct as an ethical control technique, which is not binding, will take place. Mendes, cit., p. 5.

annulment<sup>38</sup>. In this regard, the Judgment of the Court of First Instance (Third Chamber) of 10 September 2008<sup>39</sup> did not annul the commission's decision after acknowledging it had broken its duty of due diligence and good administration.

Nevertheless, the CJEU stance has dramatically evolved since then. In the Judgment of the Court of Justice (First Chamber) on 16 January 2019<sup>40</sup>, the court held that the principle of good administration enshrined in art. 41 of the Charter ensures that the procedure is fair. Accordingly, although the commission pledged it was not required by the regulation governing the process to disclose the final version of an econometric model that found its decision, the court finds it is contrary to the right of defence to amend the model without notifying the defendants. Indeed, "The Commission is required to reconcile this need for speed with observance of the rights of the defence"<sup>41</sup>. Therefore, weighing the need for speed and rights of defence requires assessing whether the commission infringed upon its duty of due diligence.

Indeed, the right to good administration is a standard of conduct concerning procedural guarantees and administrative action. As was seen in the Judgment of the Court of Justice (First Chamber) on 16 January 2019, the CJEU relates good administration with citizens' guarantees. The resort to good administration is not redundant; it contributes to the rights of defence. In this regard, Fernández Rodríguez<sup>42</sup> has stressed that the annulment of the decision by the CJEU takes place due to the detriment of the right of defence, although the infringement may not have contributed to the final decision<sup>43</sup>. This jurisprudence has no legal founding other than the due diligence imposed by the good administration. In contrast, Spanish

---

<sup>38</sup> Mendes, cit., p. 5.

<sup>39</sup> Case T-59/05, ECLI:EU:T:2008:326.

<sup>40</sup> Case C-265/17, ECLI:EU:C:2019:23.

<sup>41</sup> Case C-265/17, paragraph 38.

<sup>42</sup> Fernández Rodríguez, cit., p. 255.

<sup>43</sup> "It follows from the above that the General Court did not err in law when it held, in paragraph 210 of the judgment under appeal, that 'the applicant's rights of defence were infringed, with the result that the [decision at issue] should be annulled, provided that it has been sufficiently demonstrated by the applicant not that, in the absence of that procedural irregularity, the [decision at issue] would have been different in content, but that there was even a slight chance that it would have been better able to defend itself'. Case C-265/17, paragraph 56.

jurisprudence has traditionally required that the infringement of defence rights was decisive in annulling the administrative decision<sup>44</sup>.

On the other hand, the duty of due diligence also applies when public administration adopts general acts, even when they are discretionary. In the Judgment of the General Court (Third Chamber) on 13 December 2018<sup>45</sup>, the court acknowledged that due diligence applies concerning general acts and confers rights to concerned individuals to challenge the administrative decision in the following terms:

“According to the Court of Justice, this duty of diligence is inherent in the principle of good administration and applies generally to the action of the Union’s administration in its relations with the public (judgment of 16 December 2008, *M. (UK) v Commission*, C-47/07 P, EU: C:2008:726, paragraph 92)”<sup>46</sup>.

Furthermore, regarding the adoption of discretionary acts, due diligence is only breached when the EU public administration exceeds the limits of its margin of appreciation. It follows that the margin of appreciation must be determined on a case-by-case basis. Finally, the court also points out that due diligence is an indeterminate legal concept that lacks specific normative content but refers to a rule of good behaviour and prudence<sup>47</sup>. This rule of good conduct and prudence compels the court “to examine carefully and impartially all the relevant elements of the individual case and to give an adequate statement of the reasons for its decision” as art. 41.1 of the Charter states regarding the right to good administration<sup>48</sup>. This obligation is a prerequisite to exercising the margin of appreciation<sup>49</sup>.

---

<sup>44</sup> Fernández Rodríguez, cit., pp. 256-257 and Rubio Hernández-Sampelayo, cit., pp. 162-165.

<sup>45</sup> Case T-290/16, ECLI:EU:T:2018:934.

<sup>46</sup> Case T-290/16, paragraph 47.

<sup>47</sup> Case T-290/16, paragraph 57.

<sup>48</sup> Judgment of the General Court (First Chamber) of 16 September 2013. Case T-333/10, paragraph 84. ECLI:EU:T:2013:451.

<sup>49</sup> Case T-333/10, paragraph 84.

Considering this jurisprudence, although good administration can be identified with a due diligence standard for the action of public administration, further development about the boundaries of due diligence is needed. Our proposal tackles this issue.

Therefore, the standard of conduct refers to non-legal effects and becomes a benchmark to assess whether the administrative action is legal. The reference is the standard of due diligence that applies to the case.

## 2. SPANISH SUPREME AND CONSTITUTIONAL COURTS

Ponce Soler finds that the Supreme Court has founded its decisions with the right to good administration when it judges cases involving transparency, motivation of acts, better regulation, and the duty of due diligence when public bodies need to weigh to exercise their margin of appreciation<sup>50</sup>.

In particular, the Judgment of the Supreme Court (Chamber of contentious-administrative, section 2) 1309/2020 of 15 October<sup>51</sup> states that:

“It is well known that the principle of good administration is implicit in our Constitution (Articles 9.3, 103 and 106), has been positivised in the Charter of Fundamental Rights of the European Union (Articles 41 and 42), constitutes, according to the best doctrine, a new paradigm of 21<sup>st</sup>-century law referring to a mode of public action that excludes negligent management and -as this same Chamber has pointed out on previous occasions- does not consist of a pure formula empty of content. Instead, it is imposed on the Public Administrations so that the set of rights derived from that principle (hearing, timely resolution, motivation, efficient and fair treatment of

<sup>50</sup> Ponce Soler, J., *Los jueces, el buen gobierno y el derecho a una buena administración y las leyes de transparencia y buen gobierno*, Documento para su presentación en el VII Congreso Internacional en Gobierno, Administración y Políticas Públicas GIGAPP. (Madrid, España) del 3 al 5 de octubre de 2016, pp. 6-12.

<sup>51</sup> ECLI:ES:TS:2020:3279

matters, good faith) has -must have- effective embodiment and therefore entails a correlative set of duties fully enforceable by the citizen on public bodies<sup>52</sup>.

The excerpt shows the current effectiveness of the right to good administration; the Spanish Supreme Court has fully acknowledged it. Significant is that the annulment of administrative decisions may happen even if there is not a direct breach of a rule but negligence that impairs the principles of executive action. The Supreme Court expresses it in the following terms:

“In short, *in the absence of express regulation of the situation*, we understand that these principles require a solution such as the one indicated, to which it should be added that the opposite criterion could lead to results that do not respect the principles of equality and proportionality<sup>53</sup>” (italics are mine).

Therefore, the case study of the Spanish Supreme Court applying the right to good administration has significantly enlarged citizens’ rights before public administration beyond the letter of the law. In this regard, we may find several judge-made rules in the case law of the Spanish Supreme Court, like the impossibility of carrying out enforcement procedures before answering an application for deferment or payment in instalments of tax debts when the applicant has met the legal requirements<sup>54</sup> or the need to include delays non-attributable to the public administration on the derivation of liability agreement to verify that the administrative procedure has not expired<sup>55</sup>.

In other cases, the Spanish courts have applied the idea of the right to good administration, albeit they did not mention it. Instead, the courts

---

<sup>52</sup> Judgment of the Supreme Court (Chamber of contentious-administrative, section 2) 1309/2020 of 15 October. ECLI:ES: TS: 2020:1309. Third Legal foundation. Point 1.

<sup>53</sup> Judgment of the Supreme Court (Chamber of contentious-administrative, section 2) 1309/2020 of 15 October. Third Legal foundation. Point 5.

<sup>54</sup> Judgment of the Supreme Court (Chamber of contentious-administrative, section 2) 1309/2020 of 15 October. Third Legal foundation. Point 6.

<sup>55</sup> Judgment of the Supreme Court (Chamber of contentious-administrative, section 2) 361/2021 of 15 March. ECLI:ES:TS:2021:1149.

resorted to other principles to avoid a draconian law application. For instance, the Spanish Supreme Court Judgment 1342/2018 of 19 July<sup>56</sup> addresses the possibility of applying the regulation on correction requirement referred to acts that take place during the instruction of an administrative procedure to a faulty application to allow the citizen to fix it and avoid being excluded from the administrative process. Therefore, according to the right to effective judicial protection and the anti-formalism principle, there was no obstacle to temper the strict consequences of non-compliance with the letter of the law if no public interest was endangered<sup>57</sup>. Good administration should also encompass flexibility in applying the law because the goal of public administration is not to follow a stiff application of the law but to serve the general interest.

The Spanish Supreme Court Judgement 1421/2020 rules that public administrations cannot execute administrative acts before deciding on the appeals filed<sup>58</sup>. The ruling points out that the right to good administration opposes public administrations obtaining benefits from their failure to resolve appeals.

Nevertheless, among the decisions that could have been assessed from the right to good administration parameter, the Constitutional Court Judgment 54/2014 of 10 April on the effects of administrative silence highlights<sup>59</sup>. Although it does not cover the right to good administration, the Constitutional Court finds that the deadline of six months to appeal a presumed (or alleged) act is unconstitutional since, as was said before, it implies that the Public Administration cannot benefit from its infringement of the obligation to produce an express act; in other words, the public administration cannot profit from an action that breaks its duty of due

---

<sup>56</sup> Judgment of the Supreme Court (Chamber of contentious-administrative, section 3) 1342/2018 of 19 July. ECLI:ES:TS:2018:3419.

<sup>57</sup> Judgment of the Supreme Court (Chamber of contentious-administrative, section 3) 1342/2018 of 19 July. Fourth legal foundation. Last paragraph.

<sup>58</sup> Judgment of the Supreme Court (Chamber of contentious-administrative, section 2) 1421/2020 of 28 May. Third legal foundation.

<sup>59</sup> Judgment of the Constitutional Court (Plenary Session) 52/2014 of 10 April. "BOE" 111, of 7 May 2014.



diligence<sup>60</sup>. Notably, the Spanish lawmakers incorporated this criterion in the law of common administrative procedure of public administrations<sup>61</sup>.

### **3. THE CONSOLIDATION OF THE RIGHT TO GOOD ADMINISTRATION IN THE CASE LAW AND ITS CONSEQUENCES**

Therefore, since the right to good administration has ended up consolidated in the jurisprudence CJEU and Spanish courts in these terms, the general rules of administrative law should be amended to include good administration as a right to a standard of due diligence whose infringement leads to the annulment of administrative acts. Otherwise, the broad content of this right could result in legal uncertainty. In addition, the *lege ferenda* proposal suggested in this work should also be incorporated into this reform.

---

<sup>60</sup> Judgment of the Constitutional Court (Plenary Session) 52/2014 of 10 April. Third legal foundation.

<sup>61</sup> Art. 46 of the assessed law, Law 29/1998 of 13 July 1998, regulating the Contentious-Administrative Jurisdiction (“BOE” 167, of 14 July 1998), has not received a formal amending, although the deadline of six months to appeal presumed acts is repealed ever since the Judgment of the Constitutional Court 52/2014 of 10 April. However, Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations (“BOE” 236, of 2 October 2015) has included this doctrine, as it does not foresee any deadline to appeal against presumed acts.

## **THE RIGHT TO GOOD ADMINISTRATION IN EUROPEAN AND SPANISH LAW. A NEED FOR FURTHER DEVELOPMENT**

### **1. A BRIEF COMMENT ON THE CURRENT SITUATION**

Following the example of art. 41 of the Charter, the right to good administration has been acknowledged in some statutes of autonomy, like the Andalusian and the Catalan<sup>62</sup>. However, their regional scope and the lack of development and effectiveness of the charters of statutes of autonomy<sup>63</sup> impede good administration from becoming a cornerstone of administrative law.

On the other hand, regarding the EU law, the complex nature of the right to good administration hinders its application and spread into member states' legal systems. Indeed, the Opinion of advocate general TRSTENJAK on Case C-308/07 reveals the legal insecurity surrounding this right in the following terms:

“However, which principles may actually be subsumed under the notion ‘principle of sound administration’ varies and cannot always be defined precisely. In addition, it is difficult to establish whether it encompasses principles which the administration merely has to take into account or in fact rights which accord the individual a subjective right

---

<sup>62</sup> Art. 31 of Organic Law 2/2007, of 19 March, on the reform of the Statute of Autonomy for Andalusia (“BOE” 68, of 19 March 2007). Art. 30. of Organic Law 6/2006, of 19 July, on the reform of the Statute of Autonomy of Catalonia (“BOE” 172, of 20 July 2006).

<sup>63</sup> The Spanish Constitutional Court avoided declaring the charter of rights, including the right to good administration, null for breaching the Spanish Constitution. In counterpart, the court denied their effectiveness as rights of citizens. Citizens could only dispose of those rights if the regional lawmakers developed them in their legislation. The contradiction consists of the impossibility that the basic norm of autonomous communities acknowledges the rights of citizens. At the same time, regional developing laws can confer subjective rights because the Spanish Constitutional Court wanted to prevent the creation of new fundamental rights unforeseen in the Spanish Constitution on a regional basis. Expósito Gómez, E., (2011) "Declaraciones estatutarias ¿de derechos? Un análisis a la luz de las SSTC 247/2007 y 31/2010" *Teoría y Realidad Constitucional* 27, p. 496.

to demand a specific action or omission from the administration”<sup>64</sup>.

Therefore, although its complex nature has already been stated, a narrower concept is needed to ease its application. At the same time, the proposal presented is coherent with the current case law of the CJEU. As it has been seen, the existing jurisprudence on the right to good administration establishes a close link between the right to good administration and due diligence, as the advocate general states:

“The principle of sound administration requires that the authorities repair faults or omissions, that proceedings are conducted impartially and objectively and that a decision is taken within a reasonable period. In addition, it implies a comprehensive duty of care and regard for welfare on the part of the authorities”<sup>65</sup>.

## **2. GOOD ADMINISTRATION AS A STANDARD OF CONDUCT TO CONTROL THE VALIDITY OF ADMINISTRATIVE ACTION**

As has already been said, Ponce Soler proposes understanding the right to good administration as a standard of conduct<sup>66</sup>, which requires public administration agents to act with due diligence. The required level of diligence will ultimately be defined on a sectorial basis, although a general standard can also be crafted from scratch to guarantee good administration. The instruments that define the sectorial standard or required due diligence would constitute what Ponce Soler denominates the public administration’s ethics infrastructure<sup>67</sup>. This infrastructure would be composed of a set of different elements. Among them, codes of conduct and service letters stand out, as they should specify the duties of public servants on a sectorial basis, i.e., the standard of conduct that the public

---

<sup>64</sup> Opinion of advocate general Trstenjak delivered on 11 September 2008. Case C-308/07 P. ECLI:EU: C: 2008:498. Paragraph 90. The opinion has been reviewed in Slabu, E., (2017) "The right to good administration in the Court of Justice of the European Union Case Law", *The USV Annals of Economic and Public Administrations* 17 (1), p. 211.

<sup>65</sup> Opinion of advocate general TRSTENJAK delivered on 11 September 2008. Case C-308/07 P. Paragraph 89. See Slabu, cit., p. 211.

<sup>66</sup> Ponce Soler, "la lucha por el buen gobierno..." cit., pp. 38-39.

<sup>67</sup> Ponce Soler, "la lucha por el buen gobierno..." cit., p. 148.

administration must fulfil<sup>68</sup>. The general standard of conduct, particularly when the public administration uses discretionary powers, is the need to weigh (emphatically) the facts, interests, and rights involved in a case to produce the best motivated and coherent decision<sup>69</sup>. It should also be specified how the decision must be taken impartially and within a reasonable time, following art. 41 of the Charter.

Indeed, the notions of the standard of conduct, guilt, and negligence are currently present in Spanish administrative law. The patrimonial liability of public administration is objective, meaning it does not require a negligent act or omission from the public administration to be declared. However, Domenech Pascual points out that the judicial practice does not act accordingly, as they use some legal clauses to introduce the criterion of negligence (and, therefore, the standard of conduct to determine if the breach occurred)<sup>70</sup>. In the EU law, in contrast, the CJEU has clearly stated that the patrimonial liability of the EU institutions follows a subjective legal regime in the form of the requirement of a “sufficiently flagrant” violation of a superior rule of law for the protection of the individual<sup>71</sup>, in the case of discretionary acts. However, an essential insight from Domenech Pascual consists of the inadequacy of a single legal regime for the patrimonial liability of the public administration: the subjective criterion will be appropriate when public organisms wield powers of protection and to restore public order, whereas an objective legal regime would suit to powers perilous, such as sanctioning, taxation, and expropriation<sup>72</sup>.

---

<sup>68</sup> Ponce Soler, "la lucha por el buen gobierno..." cit., pp. 150-151.

<sup>69</sup> Ponce Soler, "la lucha por el buen gobierno..." cit., pp. 44-45.

<sup>70</sup> Art. 32.1 of Law 40/2015, of 1 October, on the Legal Regime of the Public Sector ("BOE" 236, of 2 October 2015) excepts the liability of the public administration if the individual has a legal duty to bear the damage. In this regard, the Judgment of the Supreme Court (Chamber of contentious-administrative, section 1) 3320/1986 of 10 June, ECLI:ES:TS:1986:3220, first legal foundation, declared that the individual must bear the damage if there is no negligence attributable to the public administration. See Domenech Pascual, G., (2010) "Responsabilidad patrimonial de la administración por actos jurídicos ilegales ¿Responsabilidad objetiva o por culpa?", *Revista de Administración Pública* 183, p. 205.

<sup>71</sup> Judgment of the Court of Justice of 2 December 1971. Case 5-71. ECLI:EU:C:1971:116. Paragraph 11.

<sup>72</sup> Domenech Pascual, cit., p. 231.

Ponce Soler highlights that the right to good administration includes the duty to weigh the facts, interests, and rights involved in a case<sup>73</sup>. Therefore, the right to good administration would imply a balancing exercise by the public administration before deciding on the procedure or taking a material action. This duty is a consequence of the term “fairly”, mentioned in art. 41 of the Charter. However, the weighing analysis should also take place in a second phase, when the administrative or judicial control reviews whether the negligence of the public administration is enough to consider a “sufficiently flagrant” infringement of the required standard of conduct<sup>74</sup>. In this regard, the legal operator must weigh the protection of the underlying public interest against the right to good administration. According to this, infringements of the rights of defence and other fundamental rights always need to be punished with nullity, even though the breach did not contribute to the final decision<sup>75</sup>, as a deterrent for further infringements.

In this regard, Arroyo Jiménez states that administrative law solves conflicts between constitutional principles through the balancing method and that lawmakers and public administration also apply it. However, the ordinary courts will review the resulting decision in the latter<sup>76</sup>. Administrative law is based more on rules at the expense of using principles<sup>77</sup>. However, by introducing general and specific due diligence duties, the right to good administration may change this situation. Indeed, Arroyo Jiménez does not mention in the quoted work the right to good administration but foresees an administrative law where both rules and principles, the latter requiring a balancing exercise, guide the public administration action<sup>78</sup>.

---

<sup>73</sup> Footnote 66.

<sup>74</sup> In this case, I am only considering the validity of administrative action. However, once the material action or formalized act has been declared illegal, the breach of the standard could also lead to the declaration of patrimonial liability of public administration if damages occurred.

<sup>75</sup> Footnote 41.

<sup>76</sup> Arroyo Jiménez, L., (2009), "Ponderación, proporcionalidad y Derecho administrativo", *InDret. Revista para el Análisis del Derecho* 2, (2009), p. 26.

<sup>77</sup> Arroyo Jiménez, cit., p. 27.

<sup>78</sup> Arroyo Jiménez, cit., p. 27.

Balancing is inherent to principles because it is the method to solve a conflict between opposing principles which makes one prevail according to the circumstances at stake; the resulting decision creates a new rule if the same conditions occur<sup>79</sup>. Accordingly, as we have seen in III.2, courts will deal with conflicts between the protection of the public interest by the action of public administration and the right to good administration, determining different cases where the infringement of the standard of diligence is enough to nullify the act or material action.

Finally, the growing interest in the ethics of public administration should be translated into a broadening of citizens' legitimacy to control the executive power's action. As is well known, in Spain, the Law on the Common Administrative Procedure of Public Administrations and the Law regulating the Contentious-Administrative Jurisdiction limit standing to those with subjective rights or legitimate interests<sup>80</sup>. Good administration could give individuals reactionary rights to challenge acts subject to administrative law that could be contrary to the general interest, although no personal right was concerned<sup>81</sup>. In this regard, administrative actions that do not comply with the due diligence standard fail to serve the general interest objectively<sup>82</sup>. Therefore, it is a matter of general interest to punish the negligence of public administration by broadening standing.

To sum up, concerning *lege lata*, i.e., the current law, we propose understanding the right to good administration according to art. 41 of the Charter, as a general and specific duty of due diligence, whose infringement requires weighing its severity with the public interest

---

<sup>79</sup> Contrary to principles, conflicts between rules always mean that one rule prevails, with no possibility of the other rule prevailing in other circumstances. Moreover, these normative disputes are resolved by criteria that do not involve weighing different reasons. See Arroyo Jiménez, cit., p. 8.

<sup>80</sup> See art. 4 Law 39/2015 and art. 19.1, letter a), Law 29/1998.

On the concept of "legitimate interest", the Spanish Supreme Court has established that it consists of a relationship between the subject and object of the claim so that "the annulment of the contested act or provision automatically produces a positive (benefit) or negative (detriment) effect, present or future, but certain". See Judgment of the Supreme Court (Chamber of contentious-administrative, section 4) 744/2015 of 23 February. ECLI:ES:TS:2015:744. Second legal foundation.

<sup>81</sup> Judgment of the Supreme Court (Chamber of contentious-administrative, section 4) 744/2015 of 23 February. Second legal foundation.

<sup>82</sup> Rodríguez-Arana, cit., p. 24.

protected by the public administration to determine the validity and effects of the act or material administrative action. However, any infringement of rights of defence, other fundamental rights, and the obligation to motivate certain acts will always imply the nullity of the administrative action<sup>83</sup>. Moving on to our proposal of *lege ferenda*, the right could be broadened to grant an effective good government and administration: the appropriateness of the executive's action to the general interest as defined in the law is sufficient to confer standing to appeal, without the need to prove a qualified connection with the subject matter of the case. In addition, consolidating the right to good administration in the Spanish legal system requires express recognition of it in the basic administrative laws.

#### **A GOVERNMENT OF JUDGES OR THE NEW ADMINISTRATIVE LAW OF THE EUROPEAN UNION? THE FUTURE OF THE RIGHT TO GOOD ADMINISTRATION**

A judicial review of the public administrations' weighing decisions, especially when exercising discretionary powers, could raise suspicions about the possible development of a "government of judges"<sup>84</sup>. In this regard, judges could annul administrative acts for merely having a different assessment of the circumstances of the case and substitute the decision with their criteria. Indeed, judicial review of the facts and their judgment is fully recognised. However, it is true that in some instances, the judiciary must either respect the margin of the administration's decision or limit to annul the unreasonable decision<sup>85</sup>. What is new, i.e.,

---

<sup>83</sup> The general standard of conduct and the clause establishing "the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union" will constitute provisions requiring a weighing exercise or an ex-post application. However, the following paragraphs of the article lay down defined rules, the non-observance of which leads to a breach of the right to good administration.

<sup>84</sup> As noted by Davis, the concept has several meanings as it is loosely defined. However, the author who coined the term, Edouard Lambert, referred to an unconstrained power, not even subjected to constitutional norms. Therefore, judges would be able to freeze constitutional amendments, although this circumstance has never actually happened. Davis, M.H., (1987) "A Government of Judges: An historical Re-view", *The American Journal of Comparative Law* 35 (3), pp. 559-563.

<sup>85</sup> Thus, the margin of decision arises, concerning indeterminate legal concepts, if the administration deals with a case in the so-called "zone of uncertainty". Likewise, when

what the right to good administration provides, is the possibility of reviewing if the public administration broke a general or specific duty of due diligence, the general one implying an obligation to weigh fairly and impartially the circumstances of the case.

However, given the need for more development of the EU administrative law, judicial activism is critical to complete this branch of law<sup>86</sup>. Indeed, since the case law of the CJUE has been fundamental to establishing the rule of law in the community, i.e., the CJUE has developed the legal principles of a constitutional nature<sup>87</sup>, it should also be the beacon of the EU administrative law in the making. However, the EU lawmakers must establish the regulatory basis of EU administrative law to allow its necessary theoretical development, passing general laws of public sector legal regime and common administrative procedure.

Regarding administrative procedures, the influence of EU administrative law on the national administrative law is twofold. On the one hand, concerning “simple procedures”, Europeanization occurs through the right to good administration, which guarantees the defendant's rights. On the other hand, in the “complex procedures”, the EU law has implemented brand new procedures, particularly in the environmental realm<sup>88</sup>. However, there are also relevant connections between the right to good administration and governance principles<sup>89</sup>.

---

the rule refers to evaluative criteria or grants a margin of appreciation to the public administration, the decision will only be annulled if it is manifestly erroneous or unreasonable. Nor may the judiciary issue an act that replaces the repealed act, except in cases where the administration has no margin of discretion. See Laguna de Paz, J.C., (2017) "El control judicial de la discrecionalidad administrativa", *Revista Española de Derecho Administrativo* 186, pp. 7-8 (digital version).

<sup>86</sup> Currently, the incipient character of the administrative law of the EU is demonstrated by the fact that the doctrine devotes efforts to its systematisation. This task is complex because the expansion of this normative system needs more theoretical backing. See Arroyo Jiménez, L., (2020) "El Derecho Administrativo Europeo como sistema", *Revista de Derecho Público: Teoría y Método* 1, p. 180.

<sup>87</sup> For a review of critical rulings of the CJUE and the importance of this institution for the Union, see Cienfuegos Mateo, M., (2019) "The current role of the Court of Justice of The European Union in EU governance", *Revista Catalana de Dret Públic* 59, pp. 3-6.

<sup>88</sup> Agudo González, J., (2013) “Sobre la europeización del derecho y la evolución de la teoría del procedimiento administrativo”, *Revista Española De Derecho Europeo* 45, pp. 77-80.

<sup>89</sup> Agudo González, cit., p. 81.



Furthermore, Boix Palop points out how the balancing and the proportionality analysis have been generalised on the Spanish administrative law through the influence of EU administrative law<sup>90</sup>. At the same time, the increasing restriction on administrative discretion leads to a judicial control that, at other times, might have been considered a scenario of judicial activism<sup>91</sup>.

Nevertheless, EU and Spanish administrative law have different needs. The former is still at an early stage of development, as it remains mainly uncodified. The latter requires a regenerative and legitimising impulse since mere compliance with the law is not enough. In both cases, the right to good administration in the terms proposed should play a significant role.

## CONCLUSIONS

- Good administration is a new right to be distinguished from good government and governance. Good administration as a legal concept originated in the case law of the CJEU but is now recognised as a fundamental right in the Charter. It is a complex right because it comprises a set of guarantees for citizens vis-à-vis the EU authorities. And yet the law could protect supra-individual interests if its development allowed any administrative action to be controlled. However, national authorities are only bound by this fundamental right when they apply EU law without prejudice to the fact that they recognise many of the guarantees that good administration implies. Furthermore, national law requires standing to allege these manifestations of the right to good administration. It is then up to national legal operators to promote the adoption of the right of good administration at the domestic level.

- On the legal regime of the right to good administration provided for in the Charter, it should be noted that the first paragraph of the

---

<sup>90</sup> Boix Palop, A., (2017), “La europeización del Derecho administrativo español (The European influence in the evolution of Spanish Administrative Law)”, p. 20, disponible en: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2969048](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2969048)(última consulta, el 25.11.2023)

<sup>91</sup> Boix Palop, cit., p. 23.

provision, concerning the right to have matters handled fairly, impartially, and within a reasonable time, is drafted in general terms so that the guarantee may be applied to any situation not specified by the legislator. In any case, the existence of different indeterminate legal concepts in the provision means that their determination will require an analysis of the specific case by the legal operator.

In addition, art. 41 of the Charter includes some specific guarantees. Many of them were already enshrined in the national law of the Member States.

However, the complex nature of the right to good administration makes interpreting it as an intelligible legal concept necessary. According to Ponce Soler, good administration can be reduced to compliance with a general and specific due diligence standard. However, this understanding of the right to good administration only captures its collective dimension if we add the possibility of extending the standing to appeal administrative action to all citizens.

- Concerning the case law of the CJEU on the right to good administration, understood as the fulfilment of a standard of due diligence, an evolution in the criterion of the Luxembourg court can be seen. Firstly, the right to good administration was not infringed if the extra-legal standard of conduct was breached. However, the court has subsequently affirmed the Commission's need to reconcile the public interest with the guarantees of citizens, a statement that leads us to analyse whether the Commission has acted diligently about the rights of citizens. Regarding the analysis of the validity of discretionary acts, the CJEU concludes that the margin of appreciation is exceeded when the duty of due diligence is breached. In this context, due diligence is equivalent to the right to have matters dealt with fairly and impartially.

The Spanish Supreme Court has delimited the implicit but existing right to good administration as a duty of due diligence in Spanish law. This means that invalidity can occur even if no express rule is breached; it is sufficient that the action goes against administrative principles considering the circumstances of the case. Furthermore, the right to good

administration allows courts to create new rules or safeguards against executive actions that contradict the due diligence standard.

Despite the clarity of the terms in which the Supreme Court expresses itself, the truth is that positive law does not establish a direct link between good administration and the duty of due diligence. In the specific case of Spanish law, state legislation does not even recognise the right to good administration. These omissions make it difficult for the right to good administration to develop its potential as a guarantor of public and private interests at stake.

- Concerning good administration as a duty of due diligence, a distinction should be made between a general and a specific standard. The general standard applies to all administrative action and implies the need for fair, impartial, reasoned, consistent, and timely decisions in the case. The specific standard refers to the level of care the public administration agents must take in an area of action.

Spanish administrative law provisions tend to omit references to fault and due diligence concepts. However, judicial practice shows that the diligence of the authorities is indispensable for analysing administrative action. Consolidating the right of good administration makes resolving these discrepancies between norms and case law possible.

The proposed right to good administration encourages weighting in applying administrative law. Firstly, to act diligently, the executive authority must adequately weigh the elements of the case before deciding. Secondly, in reviewing the decision, the administrative or judicial body must determine whether the infringement of the duty of due diligence is sufficient to annul the decision. Violations of the standard of diligence relating to the right of defence or other fundamental rights must always be punished by annulment.

The *lege ferenda* proposal that the right to good administration should constitute sufficient legal standing to appeal administrative action is justified by the need to ensure that the activities of the public authorities are aimed at satisfying the general interest.

- The fulfilment of the duty of diligence by the public administration in exercising discretionary powers does not imply that the authorities lose the possibility to exercise their margin of discretion. On the contrary, public administrations already must comply with this duty when issuing discretionary acts. The right to good administration only introduces more regulatory clarity.

The right to good administration will have different functions in the EU and national law. Regarding EU law, it will be the pillar from which a comprehensive body of law on the legal regime and performance of the EU administration should be developed. In the different national legal systems, the right introduces the need to analyse the actions of the public administration from the perspective of compliance with the duty of due diligence, as well as the extension of the legal standing to appeal administrative action to guarantee.

## BIBLIOGRAFÍA

Agudo González, J., (2013) "Sobre la europeización del derecho y la evolución de la teoría del procedimiento administrativo", *Revista Española De Derecho Europeo* 45, pp. 61-111.

Ara Pinilla, I., (2004) "Presupuestos y posibilidades de la doctrina de los conceptos jurídicos indeterminados" *Anuario de Filosofía del Derecho* 24, pp. 104-124.

Arroyo Jiménez, L., (2009) "Ponderación, proporcionalidad y Derecho administrativo", *InDret. Revista para el Análisis del Derecho* 2.

Arroyo Jiménez, L., (2020) "El Derecho Administrativo Europeo como sistema", *Revista de Derecho Público: Teoría y Método* 1, pp. 175-206.

Atienza Rodríguez, M., Ruiz Manero, J., (1991) "Sobre principios y reglas", *Doxa: Cuadernos de Filosofía del Derecho* 10, pp. 101-120.

- Barnes Vazquez, J., (2019) "Buena administración, principio democrático y procedimiento administrativo", *Revista Digital de Derecho Administrativo* 21, pp. 77-123.
- Boix Palop, A., (2017), "La europeización del Derecho administrativo español (The European influence in the evolution of Spanish Administrative Law)", p. 20, en: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2969048](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2969048)(fecha de consulta, el 25.11.2023).
- Cassese, S., (2012) "New paths for administrative law: A manifesto", *International Journal of Constitutional Law* 10 (3), pp. 603-613.
- Castillo Blanco, F.A., (2015) "Garantías del derecho ciudadano al buen gobierno y a la buena administración", *Revista Española de Derecho Administrativo* 172, pp. 123-162.
- Chaves García, J.R., (2020) "La fortaleza jurídica creciente del principio de buena administración", en: <https://delajusticia.com/2020/01/17/la-fortaleza-juridica-creciente-del-principio-de-buena-administracion/> (fecha de consulta, el 03.10.2022).
- Cienfuegos Mateo, M., (2019) "The current role of the Court of Justice of The European Union in EU governance", *Revista Catalana de Dret Públic*, 59.
- Darnaculleta Gardella, M. M., (2020) "Ética pública y derecho administrativo en la era de la posverdad", *Revista de Derecho Público: Teoría y Método* 1, pp. 41-73.
- Davis, M.H., (1987) "A Government of Judges: An historical Review", *The American Journal of Comparative Law* 35 (3), pp. 559-580.
- Domenech Pascual, G., (2010) "Responsabilidad patrimonial de la administración por actos jurídicos ilegales ¿Responsabilidad objetiva o por culpa?", *Revista de Administración Pública*, 183, pp. 179-231.

- European Union Agency for fundamental rights, (2020) *Aplicación de la Carta de los Derechos Fundamentales de la Unión Europea en la elaboración de normas y políticas de ámbito nacional*, Luxembourg Publications Office of the European Union.
- Expósito Gómez, E., (2011) Declaraciones estatutarias ¿de derechos? Un análisis a la luz de las SSTC 247/2007 y 31/2010”, *Teoría y Realidad Constitucional* 27, pp. 481-502.
- Fernández Rodríguez, T.R., (2019) "El derecho a una buena administración en la sentencia del TJUE de 16 de enero de 2019", *Revista de Administración Pública* 209, pp. 247-257.
- Fuentetaja Pastor, J.A., "El derecho a la buena administración en la Carta de los Derechos Fundamentales de la Unión Europea", *Revista de Derecho de la Unión Europea* 15, pp. 137–154.
- Garrido Mayol, V., (2020) “El principio de buena administración y la gobernanza en la contratación pública”, *Estudios de Deusto*, 69 (2), pp. 115-140.
- Koprić, I., Musa, A., Lalić, G., "Good administration as a ticket to the European administrative space", *Zbornik Pravnog Fakulteta u Zagrebu*, 61 (5), pp. 1516-1560.
- Laguna de Paz, J.C., (2017) "El control judicial de la discrecionalidad administrativa", *Revista Española de Derecho Administrativo*, 186, pp. 83-108.
- Mendes, J., (2009) "Good administration in EU law and the European code of good administrative behaviour", *EUI Working Papers. Law* 9, pp. 1-13.
- Opinion of advocate general TRSTENJAK delivered on 11 September 2008. Case C-308/07 P. ECLI:EU:C:2008:498.
- Ponce Soler, J., (2017) "Los jueces, el derecho a una buena administración y las leyes de transparencia y buen gobierno", en:

<https://laadministracionaldia.inap.es/noticia.asp?id=1507021> (fecha de consulta 6 October 2022).

Ponce Soler, J., (2019) *La lucha por el buen gobierno y el derecho a una buena administración mediante el estándar jurídico de la diligencia debida*, Alcalá de Henares Universidad de Alcalá.

Ponce Soler, J., *Los jueces, el buen gobierno y el derecho a una buena administración y las leyes de transparencia y buen gobierno*, Madrid, Documento para su presentación en el VII Congreso Internacional en Gobierno, Administración y Políticas Públicas GIGAPP del 3 al 5 de octubre de 2016.

Porras Nadales, A., (2014) *La acción de gobierno: gobernabilidad, gobernanza, gobermedia*, Madrid, Editorial Trotta.

Rodríguez-Arana, J., (2013) "La buena administración como principio y como derecho fundamental en Europa", *Misión Jurídica, Revista de Derecho y Ciencias Sociales* 6, pp. 23-56.

Rubio Hernández-Sampelayo, G., (2022) "La buena administración en la tradición jurídica española", *Diálogos Jurídicos* 7, pp. 151-165.

Ruiz Miguel, C., (1991) "La tercera generación de los derechos fundamentales", *Revista de Estudios Políticos (Nueva Época)* 72, pp. 301-312.

Saura Fructuoso, C., (2012) "El derecho de buena administración y 'el due process' administrativo europeo" en J.E. Soriano García (Dir.), *Procedimiento administrativo europeo*, Madrid, Civitas, pp. 317-418.

Seoane Rodríguez, J., (2006) "La ampliación del catálogo de derechos fundamentales", *Persona y Derecho: Revista de Fundamentación de las Instituciones Jurídicas y de Derechos Humanos* 54, pp. 441-469.

Slabu, E., (2017) "The right to good administration in the Court of Justice of the European Union Case Law" *The USV Annals of Economic and Public Administrations* 17 (1), pp. 208-215.

## Case law

Judgment of the Constitutional Court (Plenary Session) 148/2021 of 14 July. “BOE” 182, of 31 July 2021. ECLI:ES:TC:2021:148.

Judgment of the Constitutional Court (Plenary Session) 52/2014 of 10 April. “BOE” 111, of 7 May 2014. ECLI:ES:TC:2014:52.

Judgment of the Court of First Instance (Third Chamber) of 10 September 2008. Case T-59/05, ECLI:EU:T:2008:326.

Judgment of the Court of Justice (First Chamber) on 16 January 2019. Case C-265/17, ECLI:EU:C:2019:23.

Judgment of the Court of Justice of 2 December 1971. Case 5-71. ECLI:EU:C:1971:116.

Judgment of the General Court (First Chamber) of 16 September 2013. Case T-333/10. ECLI:EU:T:2013:451.

Judgment of the General Court (Third Chamber) on 13 December 2018. Case T-290/16, ECLI:EU:T:2018:934.

Judgment of the Supreme Court (Chamber of contentious-administrative, section 2) 1309/2020 of 15 October. ECLI:ES:TS:2020:3279.

Judgment of the Supreme Court (Chamber of contentious-administrative, section 2) 1309/2020 of 15 October. ECLI:ES:TS:2020:1309.

Judgment of the Supreme Court (Chamber of contentious-administrative, section 2) 361/2021 of 15 March. ECLI:ES:TS:2021:1149.

Judgment of the Supreme Court (Chamber of contentious-administrative, section 3) 1342/2018 of 19 July. ECLI:ES:TS:2018:3419.

Judgment of the Supreme Court (Chamber of contentious-administrative, section 4) 744/2015 of 23 February. ECLI:ES:TS:2015:744.



Judgment of the Supreme Court (Chamber of contentious-administrative, section 2) 4115/2019 of 18 December. ECLI:ES:TS:2019:41

Judgment of the Supreme Court (Chamber of contentious-administrative, section 2) 1421/2020 of 28 May. ES: TS:2020:1421

Judgment of the Supreme Court (Chamber of contentious-administrative, section 1) 3320/1986 of 10 June, ECLI:ES:TS:1986:3220.

### Regulations

Charter of Fundamental Rights of the European Union (Official Journal of the European Communities, C 364/1 of 18 December 2000).

Spanish Constitution (“BOE” 311, of 29 November 1978).

Law 29/1998 of 13 July 1998, regulating the Contentious-Administrative Jurisdiction (“BOE” 167, of 14 July 1998).

Organic Law 2/2007, of 19 March, on the reform of the Statute of Autonomy for Andalusia (“BOE” 68, of 19 March 2007).

Organic Law 6/2006, of 19 July, on the reform of the Statute of Autonomy of Catalonia (“BOE” 172, of 20 July 2006).

Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations (“BOE” 236, of 2 October 2015).

Law 40/2015, of 1 October, on the Legal Regime of the Public Sector (“BOE” 236, of 2 October 2015).

Law 19/2013, of 9 December, on transparency, access to public information and good government (“BOE” 295, of 10 December 2013).