The Application of the Positive Administrative Silence in the Ecuadorian Legislation

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Abstract

The purpose of this article is to analyze the application of administrative silence as it has been the subject of many controversies in the field of law, in our legislation there is no clear, detailed and pre-established procedure for the implementation of this institution, then to resort to Administrative Litigation Law to fill the legal gaps within the institution of Administrative Silence is very significant, because that source of law contributes with important elements to respond consistently and apply it. There is silence when the administration assumes an attitude of inertia regarding a behavior that requires a concrete pronouncement. Administrative silence is an institution that protects certain fundamental rights that are violated when the administration fails to comply with its obligation to respond to claims filed by individuals in due time and in due form. This research will not cover a gap in knowledge or attempt to formulate a new theory or interpretation, its value will revolve around the practical applications of the subject. The method applied in this research is the scientific method, as is the revision of secondary sources of valuable writers referring to the subject. Finally, with all the data that is collected, it will be verified if the legal institution of Administrative Silence is effective in its generation and application, taking into account the concepts and elements of each one of the topics that will be detailed in the present work.

Keywords: Application, Administrative, Silence.

Introduction

Positive administrative silence was introduced in Ecuadorian legislation following the issuance of the Law on Modernization of the State, Privatizations and Provision of Public Services by the Private Initiative, published in Official Gazette No. 349 of December 31, 1993. With this law included the inclusion of positive administrative silence as a new administrative legal institution, until that date non-existent in our system¹. According to the Law of Modernization of the State, the Administrative Silence is configured after 15 days term (business days), without having resolved the request made to the institutions of the public sector, however, leaves open the possibility that the laws of different matters, can determine a different time.

That is to say, since the enactment of the Modernization Law of the State, the legislator incorporated in other norms the institution of positive administrative silence: Internal Tax Regime Law²; (II) Organic Law of Customs; and, (III) Statute of the Legal Regime Administrative of the Executive Function. These rules contain provisions for the application of positive administrative silence. Thus, Article 28 of the Law of Modernization, referring to the right of petition³, establishes a term of 15 days to receive a response from the Administration, otherwise, it will be understood that the request, order or claim has been approved.

Articles 69 and 127 of the Statute of the Legal Regime of Executive Function establish that the maximum period to resolve petitions and proceedings submitted to the entities subject to the Statute shall be 60 days, after which the request shall be deemed accepted.

Administrative silence is a tool for facilitating procedures and overcoming inefficiency, it is necessary to note that there are some limitations that, despite being obvious, have not been taken into account [...]⁴ "since it has some legal gaps in relation to its implementation, which fortunately have been covered thanks to the legislation issued under the figure of resolutions or acquittals of consultations of some organs of the State. Recall that Jurisprudence is, after the law, the most important source of Administrative Law, and according to our legislation in some cases is a primary source and mandatory, while in others it is only secondary and referential.

¹The tax code and the law of the administrative litigation jurisdiction exclusively recognized the existence of negative administrative silence. For the effect must be taken into account that negative administrative silence does not produce an administrative act with all its effects, but it simply is a legal fiction with procedural effects, allowing the development of the procedure impugnatorio.
²Tax Act has undergone several reformed. [Which have referred to the administrative silence positive are mainly the following: the Law 51 RO 349 2\-XII. 93; Decree Law 05, RO 396 10-111-94; Law 99-24, RO 81-5-30-IV-99.
³On article 23 article 15 of the Constitution establishes the right of petition. However, does it in general sense to establish the right to "direct complaints and petitions to the authorities and to receive care or the relevant responses in the proper term." It should be understood that this constitutional rule recognizes the right of petition, and as a manifestation of this, the right to receive an answer. However, the Constitution does not establish whether such a response will be negative or positive. Therefore, would understand that the constitutional standard recognizes and not bicker with the application of positive or negative administrative silence.
⁴http://www.derechoecuador.com/index.php?option=com_content & task = view & id = 2376 & Itemid = 426
Positive administrative silence plays a very important role in the Administration. Since it may or may not exercise a right, as it is, to veto the requests of the administered, it can be said therefore, the positive administrative silence is a true administrative act, equivalent to that authorization or approval that replaces. In this way, positive administrative silence constitutes an administrative act that has taken place by force of law. This administrative act bears all localities of an express act.

The method applied in this research is the scientific method, since it was used to different sources of valuable writers referring to the subject, laws that speak of administrative silence: as is the Law of Modernization of the State, Statute of the Legal Regime of the Executive Function Finally, with all the data collected, it will be verified if the legal institution of Administrative Silence is effective in its generation and application, taking into account the concepts and elements of each one of the topics that will be detailed in the paper.

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Development

History of Administrative Silence

The institution of administrative silence has its immediate precedent in French law and, in this sense, it is indisputable that the emergence of the aforementioned institution in the Gallic Country is closely justified by the configuration of the 'French administrative dispute' under the requirement the French authors of the 'preable decision' (Guillén Pérez, 1997).

According to article 3 of the French Law of July 17, 1900⁵, where the origin of the institution of Administrative Silence is found, according to it, after a certain period of time passed without the express pronouncement of the Administration, that Law presumed that has been denied in order to give it an opportunity to continue through the judicial process.

In this historical context, there was the citizen’s need, within the rule of law, to go to the administrative contentious jurisdiction to defend certain rights, for which it was necessary to configure a previous administrative act. However, the administrative system maintained a structural crack, since “the administration could circumvent judicial control by simply remaining inactive.” (Enterría, 1998) in this way. Article 3 of the French Law of July 17, 1900, "in contentious cases which can not be brought before the Council of State, but in the form of an appeal against an administrative decision, when a period of more than four months elapses without a decision being taken, the interested party may consider his appeal dismissed. petition and appeal to the Council of State. "In the absence of a prior administrative act (resolution), the administrator was left defenseless.

The citizen, faced with the inactivity of the public administration, considered that his claim was dismissed, which enabled him only to appeal to the administrative contentious jurisdiction, in order that his claim might somehow be satisfied. The objective of the administrative silence of the time was not to guarantee the right of petition to the administered ones, simply avoided the administrative inertia.

The Administrative Silence in Ecuador

The administrative silence was born in our legislation a little late in comparison to other countries, as a result of the validity of the Law of Modernization of the State, dictated in the Government of Six Durán Ballén, which gives importance and preferential application to the basic right known as the "Right of Petition and immediate attention of public powers", which has been in force since time immemorial and is part of the Declaration of Human Rights, contemplated in the UN Charter, the OAS and almost all Constitutions In Ecuador, including in Art. 66 numeral 23 of the Constitution of the Republic known as the Constitution of the Rights (2008), as well as in Secondary Laws such as Art. 28 of said Law of Modernization of the State that establishes that if 15 days after exercising the Constitutional Law of Petition, requesting a Public Authority, in writing to a pronouncement or administrative act on a particular subject, and the administrator has not obtained a timely, legal and adequate response in accordance with law, administrative silence shall be deemed to exist and, consequently, a petition favorable to the petitioner has been accepted.

But as the dialectical discussion exists if the Administrative Silence favors the administered or the public administration, it is thought that the effects of this can be for or against the pretensions of the administered or the public administration, so there are two doctrines legal primordial in the world that feed and serve as a source for these legal theories:

A) Administrative Silence Positive, when this occurs it is considered that the request (favorable to the administered) has been accepted; and, b) Negative Administrative Silence, when this happens the request is considered denied (favorable to the public administration).

In the case of Ecuador, there is a positive administrative silence, that is, if 15 days have elapsed since the filing of an application challenging an administrative act and asking to leave it unreserved (ie a fine), and there is no response or pronouncement by the competent public authority, the request is considered accepted.

But in order for positive administrative silence to have legal effects, to be born and recognized by the legal system, it requires a pre-requisite in administrative legislation, which is that the respective judicial authority, in this case, the District Administrative Litigation favorably and declare by means of a judgment and previous legal procedure, that legal certainty is respected, especially observing the legitimate right to the defense of actors and defendants, that effective administrative silence has been established.

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"The process towards the conclusion of the administrative procedure may well proceed in a normal "manner when it concludes in an express administrative act through a substantive resolution; and comes from an abnormal or irregular termination when the conclusion of the procedure does not come from an express - resolutive act of the question" but from cases legally assimilated (administrative silence) or acts or acts of the intervening party (expiration, withdrawal, etc.) The administrative silence occurs as a result of the inactivity and passivity of the Administration, which "with its inertia does not issue in time and form the requests formulated, so that, by legal and presumptive means, the omission is attributed to the tacit denial resolution "Positive silence is a means of legal protection against delay, delay or inactivity or silence of the Administration." 

A. Positive Administrative Silence

Administrative silence results in the expiration of the authority of the Administration, which implies the loss of that competence over the course of time, and consequently, the Administration's inability to review or revise its own act.

Administrative silence, or administration, has been defined as a form of manifestation or tacit declaration of the will of the Public Administration. "Dromi affirms that the will of the Administration is tacit when administrative silence, by express provision of the legal order, is considered as administrative act".

This tacit manifestation of the will of the administration, when conceived in a positive sense, means that what has been requested from the Administration has been granted. In this case, it is called positive administrative silence. "Positive administrative silence gives a practical effect to guarantee or right of petition and timely response, as enshrined in the Constitution of the Republic. Therefore, the positive effect of administrative silence is not a presumption of fact that admits evidence to the contrary, but a presumption of law that gives rise to an autonomous procedural action." 

B. Negative Administrative Silence

"The administrative silence is a privilege of the administration to the Administration, to protect it before the possible delay of this in the resolution of his request. It is a simple fiction of strictly procedural effects, limited, in addition, to open the way of recourse, replacing the express act; but for the benefit of the individual only, so access to the judicial process once the deadlines have been met [remains] open indefinitely until the Administration does (dictate) the express resolution."

In the case of negative administrative silence, the case-law understands that the petition is denied, it is actually a procedural fiction, which allows access to the next administrative instance, or where appropriate, the contentious-administrative process.

The very nature of negative administrative silence; establishes that "the administrator, after having challenged an act administered and after the deadline to resolve it, may be granted administrative silence or wait for the express pronouncement of the Administration, without the option for the latter alternative to generate the lapse in the exercise of the right of action." 

In conclusion, the negative administrative silence or also called dismissal is not to pronounce within a certain period about something requested, reason why the law gives effect dismissal to the request. If the administration does not resolve a request of the administered its abstention or silence is equivalent by mandate of the law to a denial or refusal.

Our Legislation does not exist any normative on the negative administrative silence, reason why, it will take as reference the law of the Administrative Silence of the Chilean legislation, dated Saturday, 07 of July of 2007, denominated Law No. 29060. says negative administrative silence involves the following rules:

- "Operates by the mere decision of the individual. It is an optional right that arises in favor of the individual: or wait for the Administration to decide or decide to challenge administrative inactivity, before a higher administrative body, or before the Judicial Branch, through a contentious administrative process. It does not operate automatically.

- It is a fiction of procedural effects, does not generate an administrative act. It has the effect of enabling the administration to file administrative appeals and relevant judicial actions.

- Even when Negative Administrative Silence operates, the administration maintains the obligation to resolve, under responsibility, until notified that the matter has been submitted to a judicial authority or the administrator has made use of the respective administrative resources.

- "Negative Administrative Silence, does not start the computation of deadlines and terms for its challenge".

The Law of Modernization of the Ecuadorian State Shows:

In the art. 28.- "RIGHT OF REQUEST.- Any claim, request or request to a public authority shall be resolved within a term not greater than fifteen days, counted from the date of its submission, unless one legal rule expressly indicates a different one. In no administrative body will suspend the tradition or refuse the issuance of a decision on the petitions or claims submitted by the administrators. In all cases, when the respective term has expired, administrative silence shall mean that the request or request has been approved or that the claim has been resolved in favor of the claimant. " Administrative silence is a weapon to enforce the constitutional right of petition and against neglect, neglect, inoperability and corruption, which, unfortunately, can not yet be enforced by the tenacious resistance of public officials and officials.

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8Resolution of the Constitutional Court. Second room. Res. NRD. No. 0568-2009-RA
12Eduardo García de Enterría and Tomas-ramon Fernandez. Ibid. P. 579.
13http://webcache.googleusercontent.com/search?q=cache:K0I2XinYDQI:www.vivienda.gob.pe/inicio/eventointranet/LeyDelSilencioAdministrativo.pdf+"silencioadministrativo"&cd=1458&hl=es&gl=es&prev=/search#q=silencioadministrativo
Estimation and Effects

The foundation of the administrative silence is to ensure that in cases where the administration does not decide to issue a resolution, or is not at the service of the administered or the issuance of the resolution is not within the maximum deadlines established by law, that silence, that inactivity will be valued as a decision to avoid the breakdown of the administrative legal system. That is to say, its foundation is to achieve that even in inactivity the Administration fulfills its duty to put an end to the administrative procedures to achieve thus the terminal act.

In this case, two concepts of administrative silence are given, establishing discrepancies between one and the other, since one says that administrative silence is a legal fact and the other concept establishes that the legal fact is not administrative silence but the lack of activity of the Administration; on the basis that in inactivity because there is no will (which is one of the elements of administrative acts) on the part of the Administration we would be faced with a legal fact.

Let us not forget that the administration is obliged to dictate express resolution, and notify it, within the maximum period stipulated by the regulatory standard of each type of procedure.

It must be pointed out that, in order to ensure compliance with the obligation to resolve and notify in a timely manner, - in order to avoid silence, a faulty notification or attempted notification is sufficient. Finally, the obligation to resolve and notify persists even though silence has arisen, albeit with meaning and limitations.

In the case of positive silence, there is a real presumptive act that can not be ignored by the administration. In the case of negative silence, a fictitious act arises with the sole effects of enabling access to administrative or jurisdictional resources, as appropriate. "The estimate for administrative silence has to all effects the consideration of administrative act finalizing the procedure, while the dismissal by administrative silence has only the effects of allowing the interested parties to lodge the administrative or contentious-administrative appeal that is appropriate." Moreover, their different nature also determines the possibilities of action of the administration once the two types of acts arise, since in cases of estimation by administrative silence the express resolution subsequent to the production of the presumed presumptive act can only be dictated by being confirming it, while in cases of dismissal due to administrative silence, the express resolution after the expiration of the term will be adopted by the Administration without any connection to the sense of silence.

Consequences of Administrative Silence

Administrative acts produced by administrative silence may be enforced both before the Administration and before any natural or legal person, public or private, and its existence can be proven by any means of proof admitted in law.

The problem of administrative silence has been the subject of lively controversy in the field of law and doctrine. There is silence when the administration assumes an attitude of inertia regarding a behavior that requires a concrete pronouncement. Canon law and popular philosophy have established the aphorism that "who says, concedes" but such axiom has no value of a legal principle in the field of law.

Silence is not the decision of the administrative will, necessarily wanted, but a negative fact. Silence supplies the decision. In view of the material impossibility of the administration to decide positively or negatively, claims, petitions, complaints, appeals, appeals, and appeals made by individuals, and to the need to ensure legal certainty and certainty of their rights, arising from relations with organs of administration, doctrine and some legislation have provided for the remedy of "administrative silence."

Under this doctrine, and in order to solve a claim or an order, it is understood that the petition has been considered favorably. When the "silence" takes place, neglect, neglect, neglect and administrative deficiency are revealed. In view of the uncertainty and inactivity of the administration, it is presumed in favor of the administration that the petition has been approved or resolved.

Administered That Can Not Welcome Positive Administrative Silence

We can also see that the Administrators who can not benefit from administrative silence Positive, are in the contractual matter so this matter is governed by what is agreed by the parties, the contract being the legal norm of mandatory compliance. "For which it is strange to pretend that by means of a lack of timely answer the contractual normativity established is modified." In the same way, the Attorney General’s Office has stated in statement contained in official letter No. 13521 of April 19, 2010, in which concluded that "it is not appropriate to refer to the positive effect of administrative silence provided for in Article 28 of the modernization law ... since it is an administrative contract in which the relations are governed by the stipulations of the contract, without it being necessary to consider the contractor as administered for these purposes.

Although the approach of the two institutions is consistent, in our opinion it has not been considered that the contractors are not on an equal footing, since the State is invested with exorbitant faculties that put it in superiority of circumstances over the particular, in addition that there is no possibility of negotiation or this is very limited, since in essence the public contracts are of adhesion.

The National Court of Justice raises an exception that would allow the application of the institution of administrative silence in matters of public procurement: in the event that "appears matters or matters that have not been object of the agreement signed between the parties nor contemplated or considered in the law of the subject governing public procurement."
Conclusions

The birth of the Administrative Silence gives rise to an autonomous right of the administered, constitutes a lack of pronouncement of the public powers with respect to the requests or claims formulated by the administered ones and composes an absence of pronouncement of the administration that is constricted or has positive or negative effects. The Ecuadorian administrative silence has its basis in the Right of Petition and arises with the promulgation of the Law of Modernization of the State, Privatizations and Provision of Public Services and is enshrined in Article 28.

The timely, but not motivated, response generates a null administrative act, consequently has no effect and it must be understood that the request has been approved. Therefore the right is born but also a process of execution is born and not of knowledge that has to be processed by the Contentious Administrative Court.

Under the current Constitution, public officials are responsible for the acts they commit in the exercise of their function. The administration, although it has the right to its favor, continues to be unequal with the administration and is forced to initiate a judicial process for the fulfillment of the right that assists it.

Therefore, in Ecuador, Art. 28 of the State Modernization Law must be amended and the final part of Art. 28 of the Modernization of the State Law, which speaks that the administrator must obtain certification by part of the Administration that your application has not been addressed, since as we have seen such certification in practice, the administration never grants it.

In addition, it must be included in Art 28. That once the term of fifteen days has expired, immediately the right of the administration must be enforced, born of positive administrative silence, without recourse to the judicial process and under civil and criminal liability of the official which allowed such silence.

In turn, the Integral Administrative Organic Code must be promulgated, which also contains the Administrative Procedure, which does not exist since the administrative contentious proceedings are processed using as a supplementary rule the Code of Civil Procedure and the current general code of processes since it is imperative to have an Organic Integrated Administrative Code.

References

- Codes and laws:
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  3. Law of Modernization of the State
  4. Legal Administrative of Executive Function
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