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EFFICIENCY AND LEGALITY IN THE PERFORMANCE OF THE PUBLIC ADMINISTRATION

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EFFICIENCY AND LEGALITY IN THE PERFORMANCE OF THE PUBLIC ADMINISTRATION

Legality and efficiency: generating tension

1. The promotion of efficiency and the respect for legality are two of the most important principles for those engaged in the study of public administration, those in charge of policies related to its reform, those who have responsibilities in the management of public services, and those employed in these services.
2. These principles concern political leaders, administrative managers and numerous social stakeholders and, more or less directly, those responsible for institutions of control, notably judicial institutions. They therefore affect all those who, from various perspectives and with various responsibilities, are in more or less direct contact with the public administration. These principles raise issues that increasingly concern us all as citizens.
3. Nevertheless, the traditional approach of lawyers to the administrative phenomenon tends to overestimate legality issues, which is natural. It is almost assumed that, regarding the rule of law principle – which has been widely accepted – law compliance plays a higher role in the structuring and functioning of the public administration and in its relationship with citizens.
4. In contrast, the approach of managers (i.e. management) traditionally tends to highlight the importance of efficiency and to consider legality issues with indifference, and even distrust, with the perspective that compliance with the law is an obstacle to benefitting from resources and attaining outcomes in a better way.
5. There is therefore a tension between legality and efficiency in the public administration, which arises from the fact that the object of several scientific disciplines is the administrative phenomenon. This tension is also the result of the evolution of the public administration.
6. Nevertheless, as we shall examine in greater detail, this is a generating tension, because the law leads to challenges and to needs for the promotion of efficiency, which raise questions with respect to the law as the “alpha” and “omega” of administrative life.

Legality and efficiency versus public sector and private sector

7. The traditional approach – either in the science of law or in management – historically tends to establish a relationship between legality and efficiency in the public sector and in the private sector or, in other words, in public and private administrations.
8. The public administration pursues the general interest, as defined by law or on the basis of law. The public administration does not act in its own self-interest; it exists to meet general needs. Also, because it only acts under the law, it has developed according to the principle of competency: its action depends on the powers that the law confers on it rather than on spontaneous and free reasons. In addition, it acts according to the principle of accountability: the public administration cannot give up its responsibilities and is accountable for the way in which its actions are carried out. Finally, the public administration is increasingly and fundamentally governed by the principles of openness and transparency.

9. On the other hand, private administrations act according to their own interests, depending on free options, in competition with each other and, on important matters, maintaining secrecy with regard to their internal activities. The issues associated with trade and industrial secrets and with the organisation and internal processes of private companies should be kept in mind.

10. This comparison can be summarised by focusing on a few aspects: the public administration is engaged in the pursuit of public interest and according to the principles of competency, accountability and transparency, while private administrations are engaged in the pursuit of private interests, according to the principles of freedom, competition and secrecy.

11. Thus, the public administration has traditionally and simplistically been associated with the idea of legality and private administrations with the idea of efficiency and productivity.

12. There was a time when this dichotomy was, in essence, marked and true, but these days are over. In fact, as we will see, the public administration opened up to the principle of efficiency, in particular with the transition from the liberal state to the welfare state became dominant in the second half of the 20th century, with the emergence of numerous services. More recently, private administrations opened up to principles related to the public interest and the law when issues such as social, cultural and environmental responsibilities of companies and ethics in business became more important and the law strengthened its presence in all areas of social and economic life.

13. These frontiers, which were rigid in the past, have started to dissipate. Dichotomies, which were once clear, are now ambiguous.

14. Let us examine the most recent developments in the public administration and the great challenges that have meanwhile arisen.

Evolution of the public administration in recent decades and the current economic and financial crisis

15. We cannot ignore the important trends in the public administration in recent decades, namely in the regions in which we are most interested and where doctrinal influence has been widespread. Europe is one of these areas. In recent decades – mainly since the 1980s – administrative evolution has been strongly marked by the principles of “New Public Management” and “Reinventing Government”. It is not important to make an in-depth analysis of either of these doctrines now or to point out their differences. Instead, it is important to highlight some aspects that, due to their influence, have become distinctive features of the administrative evolution in numerous countries. Thus, despite the risk of simplification, in recent decades the emphasis has been on the notion of “client” (“customer” or even “public service user”), with less attention given to the “citizen”. In particular, the “outcome attainment” concern has been highlighted and not only the concern for “norm compliance”. “Management by objectives” has guided the “administration of the means”. Above all, concerns related to “autonomy” and “flexibility” and “devolution and decentralisation” have replaced those related to “centralisation” and “hierarchy”.

16. Within the scope of the public administration we started to hear about “business”, “competition”, “improving productivity” and “customer orientation”. New concepts emerged in the public sector: privatisation of public services, introduction of market-type mechanisms, “project finance”, “acquisition finance”, public-private partnerships, public service management agreements, “contracting-out” and “outsourcing”.

17. The well known “consistency and predictability” of the traditional administration was replaced by the so-called “diversity and complexity” of the new administration.

18. With regard to the public domain, there was in summary an “escape into private law”. This movement called for the reduction of costs of public activities, reduction of the state’s functions and a

change in values. In addition, along with these changes, the positions that upheld the “minimum state” appeared (or reappeared).

19. Going back to the previously mentioned distinctions between public and private administrations, the traditional frontiers seem to have faded away because the values of the private sector emerged in the public administration.

20. Nevertheless, suddenly, the economic and financial crisis arose at the end of 2007. With its development and the need for intervention by public powers and for co-operation and co-ordination between states, we started to hear about older values, such as:

- the reappearance of public intervention;
- the need for reinforcing the states’ normative functions and the regulatory power of administrations;
- the affirmation that we cannot exclusively trust in market self-regulation and in the ethical judgment of economic agents;
- the reaffirmation of the need for the law (national and international) to intervene or strengthen its presence in domains where it was not yet present or had been debilitated.

21. Now, those frontiers that once distinguished public and private administrations seem to fade because of the emergence of the values of the public sector within the private sector.

22. In another perspective, we could talk about going “back to the fundamental values”. It seems, however, to be more cautious and prudent to talk about a new balance between traditional values and the positive experiences of recent decades, which have aimed to respond to current common needs.

23. This was a perspective on the tension between “legality” and “efficiency” in the course of “our times”.

Let us now see how these issues and this “tension” are addressed in our “space”, i.e. Europe.

Legality and efficiency in the European area

24. Despite the different administrative traditions existing in Europe, the countries in Europe have common values and, among these values, as previously mentioned, there is the legal introduction of the “rule of law” principle, the subordination of the administration to the law, or administration through law. The law appears as a tool to create and protect citizens’ rights and legitimate interests and as the basis and framework for administrative action. That principle is in the constitutions – written or non-written – of the states of the European area and is one of the foundations and objectives of the supranational and international agreements and institutions that have been established in Europe.

25. Thus, since 1949, EU Member States reaffirmed in the Statutes of the European Council “their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy”.

26. In addition, in the European Union Treaty, “confirming its adherence to the principles of freedom, democracy, respect for the human rights and fundamental freedoms and the ‘Rule of Law’”, the Member States established in article 6 that the Union was based on those common principles. All the more, with a view to preventing any deviation from those principles, article 7 authorises the Council of the European Union to check if there is a serious risk of violation of any of the previously

mentioned principles by any Member State, and to suspend some of the rights arising from the application of the Treaty, including the right to vote.

27. The Treaty of Lisbon – which is under ratification – reaffirms the determination to protect those principles by introducing a “recital”, which claims that the Member States are inspired by the “cultural, religious and humanist heritage of Europe from which the universal values stemmed, which are the inviolable and inalienable human rights, as well as freedom, democracy, equality and the Rule of Law”.

28. The functioning of the European Union is entirely submitted to the principle of legality: the organisation and activities of its institutions and inter-institutional relationships, the definition of Community competencies, the relationships among Member States and of Member States with the Community, and the position of individuals with respect to the Member States and the Community – these relationships develop under the scope of the legal order established by the Treaties.

29. All of the legal relationships established within the framework of Community law fall under the control of independent judicial bodies, either the European Court of Justice or national jurisdictions as common law courts of the Community’s legal order.

30. Bearing in mind that the Community observes the democratic principle, we can therefore say that it observes the similar “Rule of Law” principle.

31. Consequently, the “European administrative space”, which is progressively being built and converging, is based on the principle of the primacy of the law. On the basis of this principle, this space has acquired some fundamental characteristics:

- Legal security, which becomes visible in the reliability and predictability when applying the law and in the implementation of administrative decisions, according to the principles of non-discrimination, equality and proportionality;
- Administrative transparency, arising from the need to explain administrative decisions and the possibility of citizens to have general access to administrative documentation;
- Accountability of administrative authorities before political authorities, other administrative and legal authorities, arising from mechanisms to contest administrative decisions;
- Effectiveness and efficiency, which requires, under the provisions of the law, that public needs be satisfied and a good relationship maintained between resources used and outcomes attained.

32. The construction and convergence of the “European administrative space” have resulted from the requirements of Community law – treaties, regulations, transposition of directives, reception of the *acquis communautaire* by new Member States, and actions developed by national jurisdictions and by the European Court of Justice – and from the relationships established among national administrations and between these administrations and the Community administration.

33. It must be noted that the “European administrative space” has led to compliance with the principles of effectiveness and efficiency, even in strictly legal domains. Thus:

- The administrations of EU Member States must ensure effective and efficient capacity to implement Community law already in force and to be approved; and
- The administrations of EU candidate countries must ensure the effective and efficient capacity of reception of the *acquis communautaire*.

34. With a view to a “European administrative space”, the Lisbon Treaty introduced a new chapter entitled “Administrative Cooperation”, which will be established in the European Community Treaty, in which article 176-D provides that:

1. “Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.
2. The Union may support the efforts of Member States to improve their administrative capacity to implement the “*acquis communautaire*” (...)

35. With regard to the Community administration, article 254-A of the future European Community Treaty provides: “In the performance of its duties, the Union institutions, bodies and organisms are based on an open, effective and independent European administration”.

A false question and questions that are (perhaps) pertinent

36. In light of what has been previously said about “our times” and “our space”, it does not make sense to question ourselves about what comes first: legality or efficiency? Such a question serves exclusively to encourage debate.

37. It is taken for granted that the value of efficiency must be developed in the framework of the administrative action in compliance with the law. The public administration, under the primacy of the law, therefore pursues the public interest as defined by the public or under its terms, takes its decisions and acts in compliance with the law according to legally fixed procedures and in keeping with the legitimate rights and interests of citizens. Moreover, its action must be inspired by the principles of “good administration” in which the values of effectiveness and efficiency are integrated.

38. However, if that is a false question, there are others that may be asked rather pertinently and that translate the “generating tension” that was mentioned above:

- To what extent may the law and its prevalence contribute to the promotion of efficiency?
- To what extent may efficiency contribute to better compliance with the law?

39. The fact is that by taking this approach, the law may be put in perspective as not only a “framework” in which the administrative action develops but also as a “tool” of this action.

40. The function of the law as a framework of the administrative action is essential: public institutions are created by law, their competencies are defined by law, the rules that govern their actions and their decisions are established by law, their duties regarding respect for the legitimate rights and interests of citizens are prescribed by law. The law is therefore the fundamental framework in which the administration is organised and functions.

41. Nevertheless, as already mentioned, the law can also be put in perspective as a tool used by the administration to ensure that the public interest prevails and that common needs are satisfied. The instrumental function of the law is relevant in all domains of the administrative action, either in those that may be regarded as “law-intensive domains”, namely under the scope of labour market regulation, border control and security services, or in other domains, which may be qualified as “finance-intensive domains”, notably in social security and in direct support to social, economic and cultural activities, or even in domains that may be characterised as “finance and labour-intensive domains”, such as health care and education systems.

42. Now, without wanting to simplify, and always preserving the leading function of the law, it seems that “efficiency” may challenge the “law” in its framework function of the administrative action, and the “law”, in its instrumental function, may promote the development of “efficiency” in the action of the public administration.

Legality and efficiency: mutual challenges

43. As we have seen, the principle of legality appears in European public administrations as an imposition of a long legal tradition, a bastion for the protection of citizens' rights, a fundamental framework for the administrative action and its tool, and finally a source of legitimacy. The issue of legitimacy has always been a core issue in the organisation of states, which have had numerous and various sources. The legitimacy of the public administration is founded on the law. It is in the law.

44. As we have also seen, the principle of efficiency appeared afterwards, but its importance stems from the social pressure to strengthen state intervention and public services and to intensify the quality of these services, simultaneously calling for the maintenance or even the reduction of fiscal pressures. Societies want more and improved public services, but with a lesser allocation of resources. Furthermore, with the current economic and financial crisis these requirements will be reinforced. What can be done? How can the law promote efficiency? How can efficiency contribute to better compliance with the law?

45. Before trying to find answers in some domains, it is worth revisiting the issue of the discretionary powers of the public administration. This issue has become extremely important due to the emergency intervention of the state in numerous aspects of social and economic life. With the development of the welfare state, discretionary powers have increased and as a result the conflict between legality and efficiency has had a greater influence on the public administration. As we know, discretionary powers do not have the same meaning as free will. When exercising discretionary powers, public authorities are bound to pursue the public interest but once this requirement has been met, they must look for the best solution to each case. This brings us to a situation where efficiency concerns may have a wide scope. Nevertheless, it should be added that, as the scope of discretionary powers increases, so must control mechanisms also increase in order to prevent the exercise of free will. This issue will be addressed later on.

46. It should also be borne in mind that it is the law that establishes citizens' rights. The public administration is one of the most relevant means by which citizens may exercise their rights. For instance, in numerous states, the right to protection in old age, the right to health care services, the right to basic schooling, are ensured by public systems of social security, health care and education. In fact, such rights may be fully exercised if the administration follows the principles of effectiveness and efficiency. It is not sufficient for the law to establish these rights; the necessary conditions for the exercise of these rights must exist. This is therefore a domain in which efficiency contributes in an effective manner to better compliance with the law.

47. In many domains of administrative life, these mutual challenges between law and efficiency can also be addressed. For example:

- when establishing the state's administrative functions;
- when providing for the duty of "good administration";
- when establishing the rules of administrative procedure;
- when managing public money;
- in the rules concerning public procurement;
- in civil service legal structures;
- in control mechanisms.

48. An adequate balance between legality and efficiency aims to avoid the creation of an environment of overestimated norms and rules to the detriment of outcome attainment and citizens' satisfaction.

Determining the state's administrative functions

49. Although this issue is strictly political and frequently constitutional, we must discuss it because it is the law that determines which functions the administration is entrusted with, which collective needs it must satisfy, and which public interests must prevail. When there is pressure to intensify efficiency and new types of intervention, or to reinforce existing ones, an evaluation of the state's administrative functions must be made. In addition, we should examine each of those functions to determine whether we should keep them, abolish them, or transfer them to non-public entities. The quest for more efficient solutions justifies, for example, the privatisation of public services, establishment of partnerships with the private sector, enactment of corporations, outsourcing, and adoption of solutions that are typical of private law or business management. With one exception: if we consider that a particular function must somehow continue to be public, follow-up, control and evaluation mechanisms by public institutions must be introduced.

50. One rule may be used in this evaluation: if an administrative function of the state requires a particular concern for the respect of legality, it may be assumed that such a function should remain in the public administration. On the other hand, if an administrative function does not require a concern for legality and instead it is more important for the development of that function to pay particular attention to efficiency, alternative solutions should be sought outside the administrative sector.

51. In parallel with, or as a consequence of, the re-evaluation of the state's administrative functions, the review of solutions for administrative organisation must be carried out through:

- the evaluation of the usefulness of existing services;
- the structural reinforcement of normative functions and of programming, budgeting, assessment and control;
- the reduction of hierarchical levels, with a view to increasing the efficiency of administrative functioning;
- the adoption of shared services, notably in the functions of finance, human resources management, and public procurement;
- the development of e-government programmes.

The duty of "good administration".

52. As the administration is entrusted with the duty of compliance with the principle of pursuing the public interest, there is consequently a duty of "good administration", which is the duty of the administration to pursue the common good as efficiently as possible. This duty may be legally established, although in general it may be considered to be an imperfect legal duty, since its violation may not be subject to legal sanctions but only to political and administrative evaluation sanctions. However, it is possible to put in perspective the progressive emergence of true sanctions, as mentioned below regarding control mechanisms.

Legality and efficiency in administrative procedures

53. The establishment of rules on how administrative procedures must be conducted, with a view to strengthening decision-making processes, is often regarded as an obstacle in the public administration. Again, we should bear in mind that the public nature of the administration and the resources it manages, the pursuit of public interests, the respect for citizens' rights and for the principles of equality, proportionality and transparency, the impartial application of the law, and the good and efficient management of resources require the existence of such rules.

54. While in some countries these rules are disseminated by various laws, in other countries they are codified. The latter solution allows citizens and civil servants to have a better perception of the mechanisms that are within their reach or that they must use.

55. In addition, the establishment of norms for the conduct of administrative procedures is still essential for an adequate formulation of the administration's will and it may contribute to increasing efficiency in that, notably:

- it must foresee the participation of citizens in decisions affecting them, subsequently allowing the administrative action to be quicker;
- it must require the justification of decisions and the notification of interested parties so that they may be more clearly and quickly aware of decisions and either accept them or contest them;
- it must fix flexible procedures that lead to quick decisions and actions and exempt unjustified or excessive demands, striking a balance between public interest, procedure costs and benefits, and respect for citizens' rights;
- it must determine a position of good faith on the part of the administration.

56. On these matters, the law must therefore be conceived with concerns for fairness and efficiency. In addition, on these matters, the law may actively contribute to ensuring a more efficient administration, as it becomes a "framework" and a "tool".

Legality and efficiency in public financial management

57. The financial resources of the public administration are public. They are the outcome of citizens' efforts. As we know, financial issues – particularly fiscal ones – are historically linked to the genesis of the state that is subject to the law. Therefore, financial issues must abide by the law. The legal framework may establish advanced solutions as long as the resources are managed in the framework of public purposes and criteria. Expenditures must be authorised in accordance with the provisions of the law. It would be useful here to provide a short summary of the meaning of a fundamental norm that exists in Portuguese law: no expenditure may be authorised or paid without simultaneously respecting the legal applicable norms, placed within the framework of an approved budget or satisfying the principle of "economy, efficiency and effectiveness".

58. Thus it is possible to introduce the classical "three e's" into the heart of the legality of financial management. This solution is related to what was mentioned above with regard to the duty of "good administration" and to what will be indicated below in relation to control mechanisms.

59. In this domain, the law that is inspired by efficiency values can therefore contribute to its promotion, as shown in the progressive adoption in many countries of budgeting models by programmes associated to the development of management by objectives. Within such models, in parallel with concerns for the regularity of public expenditures, these expenditures start to be related to the objectives of public policies. These objectives must be determined, scheduled and quantified and, therefore, they are likely to be evaluated according to their effectiveness and efficiency.

Legality and efficiency in public procurement

60. Public procurement is one of the fields where the convergence of the European administrative system has gone a step further. We can even talk about a European public procurement law, consisting of directives, national legislation produced in compliance with such directives, interpretative guidelines of the Commission, and vast Community jurisprudence and jurisprudence of national courts. Public procurement norms, which govern in this field the principle of legality, must also ensure the predominance of the principles of equality, competition, impartiality, transparency,

publicity and good faith. However, the real solutions may be inspired by efficiency concerns, aimed at the promptness of procedures and the acquisition of the best proposals to meet public needs, in the area of public works, acquisition of goods and services, financing, or award of public services. In these solutions, aimed at increasing efficiency, we can include:

- electronic participation mechanisms for bidders;
- organisation of state trading centres;
- electronic auctions;
- framework agreements established by one or several institutions, according to which acquisitions may be made over a specified period of time;
- dynamic, electronic-based, standardised and current-use acquisition systems for the purchase of goods and services.

Civil service legal structures

61. Let us now briefly examine some aspects in the perspective of the promotion of efficiency. It is assumed in public administrations of the “European administrative space” that there must be a body of civil servants with a legally established statute – even though part of this statute may be, or even must be, the object of individual contracting or collective bargaining – that allows all citizens to have access in equal circumstances to the performance of public functions and that continually creates conditions to serve the public interest. However, in view of the rigidity of past statutes, which strictly followed the provisions of the law, it is possible to find new solutions that respect the primacy of the law and stimulate efficiency in the performance of public functions. We refer to, namely:

- the performance of functions aimed at the attainment of objectives and outcomes;
- the individual performance evaluation, which has an impact on a civil servant’s career;
- “pay systems” that provide adequate salary provisions to reflect the merit shown in the performance of duties.

62. If such concepts are important with regard to the general statute of officials performing public duties, they are even more important to those with management responsibilities.

63. Besides legal statutes, the respect for the law and the promotion of efficiency also depend on the establishment of ethical charters in general, and for certain professions in particular, which reaffirm not only the traditional values of public service but also new challenges arising from the requirements of good resource management.

Legality and efficiency and control mechanisms

64. Control mechanisms are essential in terms of both legality and efficiency, mainly in public administrations where broad discretionary powers are exercised. These mechanisms examine compliance with norms and evaluate outcomes. Public institutions must be held accountable, and their actions must be subject to evaluation and control.

65. The control mechanisms must be manifold:

- political: in addition to the exercise of the management and tutelage powers of governments, in many states there is a tradition of parliamentary intervention in the control of the administration;
- administrative: ensured by other bodies of the administration, notably inspectorates;

- judicial: in addition to the creation of broad mechanisms of legal review of administrative decisions to be vested with citizens, in some states there are judicial bodies with control power over the legality of administrative acts and over the economy, efficiency and effectiveness of public management.

66. Such control mechanisms may therefore be internal or external to the administration. They may be of strict legality or at the will of the management. They may be public or private. Not only are citizens allowed to review decisions that affect them, but there are also control mechanisms for protecting individuals' legitimate interests and unclear interests and for providing access to administrative documentation, which includes the regulation of access to information by the media.

67. Finally, control mechanisms may be set up prior to the enforcement of administrative acts or subsequent to their full effectiveness.

68. In the control systems that states must set up and the types of which were listed above, the supreme audit institutions – either judicial institutions such as the Court of Accounts or those following the common auditor model – play a meaningful role due to their independence in relation to political powers and the administration and due to the fact that they exclusively follow legal conformity and good management criteria.

69. In the Portuguese case, the High Court of Accounts is established in the constitution and its role in the control system is strengthened to the extent that it has competencies to enforce financial responsibilities. In other words, the law sets forth the possibility to apply sanctions in the case of financial violations. Such violations correspond to illegalities in the management of public money.

70. It should be noted, however, that, as the Court is also entrusted with auditing competencies, it may therefore make recommendations regarding the management of public institutions, in accordance with the criteria of economy, efficiency and effectiveness.

71. The law has recently established that if such recommendations are not adopted and if the refusal to adopt them is reiterated and not justified, the Court may apply sanctions.

72. In view of this role of the Court, the duty of “good administration” that we mentioned above and characterised as an “imperfect” legal duty starts to show an improvement and becomes more “perfect”.

73. The principle of legality therefore keeps its primacy, but the principle of efficiency has been gaining ground.

74. In this movement, however, we shall never forget a fundamental principle in democracy: the law transmits the will of the people.