# Abstracts

## Observaciones sobre las antinomias y el criterio de ponderación

Luis Prieto Sanchís

As a result of the so-called «dimension of weight» of legal principles, Courts face a new form of legal reasoning that requires a new method for the application of Law (weighing, *Abwägung, ponderación*). The application of constitutional principles and fundamental rights are usually applied like this, for their contradictions are not ordinary contradictions, but a special kind of antinomies, which cannot be solved in an «all-or-nothing fashion». This paper deals with this kind of normative contradictions and the main distinctive features of the balancing activity, considered to be a form of argumentation specifically confered to judges, not to legislators. The weighing of principles implies not only a claim for rational justification but also an exercise of discretion by the judges, that is why the power of judges may harm the legislative competences in the name of the principle of the constitutional supremacy.

## Los servicios atinentes a la persona en el Estado social

Marcos Vaquer Caballería

The financial crisis affecting today's developed countries has triggered a concomitant crisis in the Social State. In Spain, the effects of economic conditions generated by the European Unions's domestic market are compounded by burgeoning doubts about the traditional meaning of public service. This article explores this perplexing context and proposes a model to help clarify

where and how the term «public service» should be used. The methodology used is designed to establish a distinction between citizen-oriented and territorial-based services and their characteristics and principles.

The article begins with a definition of the classification of public services and describes how this conforms with legal-public dogma. It then analyzes the major characteristics of citizen-oriented services including their peculiar constitutional status derived directly from the recognition of the supreme value of human dignity and the principle of solidarity. Several other features are also discussed including the interconnection among citizen-oriented services due to their object; the difficulty in organizing them as markets and the logical consequence of the subsistence of public service in this context; the types of management systems used; the legal consequences derived from the opinion that citizen-oriented services are empathy based; and the distribution of functions, in many cases, among more than one administration.

## ¿A qué llamamos, en Derecho, hechos diferenciales?

Javier García Roca

This article sets out to demonstrate the ambiguity of so-called «differential realities» (*hechos diferenciales*) and the difficulty with including them in the framework of decentralisation or limited Spanish federalism. The doctrine refuted here has its historical origins in the Catalanism of the Restoration period, which is a context that cannot be compared with the current one. The doctrine was recovered in the political debate of the 1990s for reasons of contingency, but has not managed to establish itself as a true juridic category or even as a convention, since the various authors who have used the term do not coincide in its meaning or purpose. Neither is there doctrinal unanimity regarding the ingredients that make up the differential reality of an Autonomous Community and even less so in the Communities where such a reality exists. We are faced with a stylistic phrase, an arguable contribution to political jargon with excessively unclear juridic geometry. The study does not deny the clearly differentiated political realities and historical formations of certain long-standing nations that have their own languages and cultures, particularly in the Basque Country and Catalonia. This is something that was fundamental in the very decision of Congress to establish self-government with asymmetric features in the structure of Spanish federalism. However, the study affirms that these complex realities can hardly be dealt with from a single legal posture. A rigorous approach necessarily involves the use of differentiated tools to cut through the tangle. As juridic objects, the following have little in common: the heterogeneous

powers of each Autonomous Community, financing systems other than the common one (such as the *Concierto* and the *Convenio*), different official languages and different regional cultures, regional police forces, groups of islands and regions with other geographical singularities, regional civil rights codes, territories with historic rights, etc. All of these simple «facts», «juridic facts» and «juridic relationships», powers and institutions are of such a varied nature that they cannot be thrown all together into the same sack.

Regarding the organisation of the Senate, the article demonstrates the risks of uncontrolled bilateralism or the attempt to formalise a privileged constitutional status for only certain *nations*. The language of any unitary constitutionalism or federalism, by definition, attempts to encourage processes of integration rather than adding to historical differences, which must be respected but which already are generously accommodated within our constitutional framework. Intense differentiation among Autonomous Communities would not solve any problems and probably could not be assimilated by the system without generating difficulties in maintaining the unity and governability of the system itself.

## Asimetría y Constitución. Algunas reflexiones en torno al «hecho diferencial canario»

Pedro Carballo Armas

The aim of this article is just to introduce, analyse and to put some aspects about the «differentiation» of Canary Islands in order. It means, basically, to emphasize a plan with two essential aspects.

So, first of all, we try to look for a suitable criterion to explain the «Canarian differential fact», in the constitutional context which is in force.

Secondly, the plan we have suggested, contains also a revision of the main characteristics of the Canarian differential model.

It is reflected in three levels: the spanish Constitution, the autonomous Statute and the European Union rules, where we can find out an explanation of every elements of the «Canarian differential fact».

## La reforma del Reglamento del Congreso de los Diputados en 1918: la lucha contra la obstrucción

Victoria Fernández Mera

Parliamentary Regulations in the 19th century did not regulate the time for debates or limit the number of speeches. This encouraged filibustering

by minority groups, which came to have a disproportionately large influence for their number of seats.

The need for a more efficient Parliament that would not obstruct the work of an increasingly strong Executive brought a reaction against this situation, and the Regulations were progressively amended so as to counter filibustering.

The crisis in political life in Spain in the later years of the Restoration was plain to see. Time-wasting regulatory mechanisms were used not only by minority groups but also by the various factions of political parties, in an increasingly fragmented Parliament with weak governments that lacked the support enjoyed by the old majority groups.

This was the state of affairs when it was decided to reform the Regulations of the Congress of Deputies in 1918. This reform affected both the organisation of parliamentary business, with the establishment of standing committees, and debating procedures, with the introduction of a series of anti-filibustering measures.

Article 114 of the reform bill dealt with the «guillotine», an instrument allowing a debate to be brought to an end and a vote held on a certain date.

While the government regarded it as a way of restoring Parliament's lost prestige and efficiency, the minority groups saw it as an attack on freedom of speech, on their prerogatives and rights, and objected to the lack of provision for a obligatory sessions, a question vital to the matter of parliamentary efficiency.

The «guillotine» was applied in later legislatures not so much to counter filibustering by minority groups as against private interests within the majority groups.

**Luces y sombras del control jurisdiccional de la potestad sancionadora en la Ley 29/1998, de 13 de julio, de la jurisdicción contencioso-administrativa: ¿garantía o *performance* de la Administración de Justicia (y de la sancionadora)?**

Carlos Alberto Amoedo Souto

This paper analyses the new settings on judicial review of administrative law penalties after the 29/1998 Law, regulating the judicial control of public administration. The main concern is not only to rendering clear the new possibilities, problems and shifts on judicial review in this field: focusing on the policy making process of the new legal text, the author also discusses the links between the taken policies and the neo-conservative mainstream policies in the field of administrative law means of social control.

## Los contratos de la Administración en la Ley de la Jurisdicción Contencioso-administrativa

José M.ª Boquera Oliver

The Public Administration Contracts Act 13/1995, of May 19, stated that Spanish Administrations celebrate administrative and private contracts. The main criterion for the definition of the administrative contract was its object, through the listing of the contracts considered as such. A subsidiary criterion is the contracts that directly establish a public aim from the specific competence of the Administration.

The aforementioned Act solved the question about the nature of administrative contracts. Nevertheless, the Contentious-Administrative Jurisdiction Act, 13 July 1998, only said that this Jurisdiction was capable of solving the questions that contracts arise and also the ones related to the preparation and award of Public Administration private contracts.

In the 13 July 1998 Act there is a regulation about the public service contract. It confers on the Contentious-Administrative Jurisdiction the questions related to the administrative actions of control laid down by the Administration, regarding the grantees contracts which imply exerting administrative jurisdiction.

This work deals with the questions that inform these rules.

## Terrorismo y tipificación penal

Roberto García-Calvo y Montiel

It begins with an introduction in which the legal concept of terrorism is defined based on Spanish and International legislation, as well as the jurisprudence of the Constitutional Court and of the Supreme Court, specially when dealing with the changing practices of terrorist activities. The phenomenon is analysed specially concentrating on the impossibility that the practice of fundamental rights such as freedom of speech or others, legitimise the behaviour of leaders of political entities, which promote or support terrorist organisations.

It then examines the fundamental changes which the Constitutional Law adjusting the Penal Code and the Constitutional Law 5/2000, regulating Minor's Penal Responsibility wants to introduce within the Spanish legislation in relation with terrorist offences (present day Constitutional Law 7/2000 of the 22nd December): urban terrorism, discredit, contempt or humiliation of the victims or their relations; the disruption of the plenary sessions of local corporations; total disqualification for up to 20 years for

those responsible for terrorist crimes as well as prison sentences and the correction of minors.

It analyses the enforcement of the requirements of articles 25.1 and 9.3 of the Spanish Constitutional Law regarding the classification and legality of principles in the light of the jurisprudence of the Constitutional Court. Finally, regarding punitive correction, we are reminded that re-education and social reintegration are not the only legitimate objectives of sentences depriving freedom and that the Constitutional Court has declared that reintegration is not a prisoner's fundamental right concluding that constitutionally, the following would be possible: a) complete enforcement of sentences for the most serious crimes such as drug trafficking, terrorism and murder; b) the suppression of maximum limits in case of accumulated sentences and c) autonomous implementation of security measures in case of enduring criminal danger, once the sentence has been served. All of the above being under strict jurisdictional control.

## Estudios



## Problemas actuales



## Documentos



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