ADMINISTRATIVE SILENCE AND THE GENERAL RULES OF ADMINISTRATIVE PROCEDURE IN VENEZUELA*

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1. THE GENERAL PRINCIPLE OF ADMINISTRATIVE PROCEDURE: EXPRESS ISSUANCE OF ADMINISTRATIVE ACTS

The basic purpose of the administrative procedure as regulated in the Organic Law on Administrative Procedure of 1981,[1] is for the competent public administration to perform or adopt an administrative act or decision. Those administrative acts must be issued in an express and written form, following the conditions of validity for the issuance of administrative acts established therein. In the same Law are also provided the different effects that these acts can produce according to their scope or addressees; and the modalities for their review within the same public administration.

For administrative acts to be considered valid, as a guarantee of the rights of the individuals, they must always be issued by the competent organ of public administration, after following the relevant administrative procedure, which can be commenced at the initiative of the same public administration, or at the request of an interested person exercising his/her right to petition.

In both cases, the administration is competent to follow the procedure established in the Organic Law, and to conclude it, by issuing the corresponding pronouncement, by which, pursuant to Article 2 of the Organic Law on Administrative Procedures, the competent administrative authority

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* National Report, International Congress of Comparative Law, Asunción, Pataguay, July 2022.

1 See in *Official Gazette* N° 2.818 Extra. of 1 July 1981. See Allan R. Brewer-Carías et al., *Ley Orgánica de Procedimientos Administrativos*, Editorial Jurídica Venezolana, 12th Ed., Caracas 2001; Allan R. Brewer-Carías, *El Derecho Administrativo y la Ley Orgánica de Procedimientos Administrativos. Principios del Procedimiento Administrativo*, Editorial Jurídica Venezolana, Caracas 2002. See the Administrative Procedure Law of Venezuela in Allan R. Brewer-Carías, *Código de Leyes de procedimiento Administrativo en Iberoamérica. Estudio de derecho comparado*, Tercera edición, Editorial Jurídica Venezolana, Caracas 2021. The text of the Second edition is available at: http://allanbrewercarias.com/wp-content/uploads/2021/07/Brewer.-2ed-CODIGO-DE-LEYES-DE-PROCEDIMIENTO-ADMINISTRATIVO-IBEROAMERICA-CON-PORTADA.pdf.

"must resolve the petitions filed before them." Alternatively, it must "express the reasons for not resolving the matter" (Article 2).

Regarding administrative procedures initiated by an interested party, Article 51 of the 1999 Constitution provides for everyone to have the right to make petitions or file requests before any authority or public official concerning matters within their jurisdiction, and to obtain a timely and adequate response; adding the provision that whoever violates such right shall be punished in accordance with the law, including the possibility of dismissal from office.[2]

This constitutional right to petition has been developed by Article 9 of the Organic Law of Public Administration[3] and Article 2 of Organic Law on Administrative Procedures,[4] and also in an indirect way, in Article 32 of the Organic Law on the Administrative Contentious Jurisdiction.[5]

These provisions are meant to secure the people's right to file petitions before administrative authorities, and to obtain a prompt and due response, the public officers being obligated to make a determination and give a response; that is, they are "compelled to come to a decision on the matters submitted to them on the terms established",[6] and incur liability when they do not accomplish it.

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2 See Allan Brewer Carías, *La Constitución de 1999. Derecho Constitucional Venezolano, Tomo I*, Editorial Jurídica Venezolana, Caracas 2004, p. 565.

3 *Official Gazette* Nº 6.147 Extra. of 17 November 2014, p. 8 Article 9: "Public Officials have the obligation of receiving and attending, without exception, to petitions or requests filed by persons, through any written, oral, telephonic, electronic or informatics means; as well as responding to them in a timely and adequate manner, independently of the right that they have in order to file the corresponding administrative and judicial recourses, according to the law. Any public official who abstains from receiving petitions of requests from persons, or does not respond to them in an adequate and timely way, shall be sanctioned in conformity with the law."

4 *Official Gazette* Nº 2.818 Extra. of 1 July 1981, Article 2: "Every interested person, directly or through a representative, may file requests or petitions before any organ, entity or authority. The latter must resolve the requests or petitions received, or declare, as the case may be, the reasons for not responding."

5 Article 32.1: "The legal term for the action for nullity shall expire: In case of administrative acts with specific effects, 180 continuous days alter their notification to the interested person, or when the Administration has not resolved the corresponding administrative appeal within the term of 90 working days from the date of its filing. The illegality of an administrative act can always be raised as an exception, unless a special provision is provided." See Organic Law of the Administrative Contentious Jurisdiction, *Official Gazette* Nº 39.451 of 22 June 2010.

6 See Allan R. Brewer-Carías, *El Derecho Administrativo y la Ley Orgánica de Procedimientos Administrativos. Principios del Procedimiento Administrativo*, Editorial Jurídica Venezolana, Caracas, 2002, p. 93. See also José Martínez Lema, "El derecho de petición, el silencio administrativo y la acción de abstención o negativa a través de la jurisprudencia de la Corte Primera de lo Contencioso Administrativo", in *Revista de Derecho Público*, Nº 45, January–March 1991, p. 185.

2. THE POSSIBLE EFFECTS OF THE PUBLIC ADMINISTRATION'S OMMISSION TO RESPOND TO PETITIONS

But is a fact that the public administration does not always respond to the petitions filed or issue the administrative acts it is obligated to enact. That is why, to protect the citizen's right to obtain a prompt and adequate response to petitions filed before administrative authorities, among the specific legal remedies provided in cases of omission to respond within the legally set term, has been to legally assign specific effects to the absence of the expected pronouncement, that is, to the silence of the administration.[7]

This has been called, in administrative procedural law, the *administrative silence principle*, which has been included in various statutes, either assigning negative (*negative administrative silence*) or positive (*positive administrative silence*) effects to the administrative abstention.[8] This is because the right to have a due and prompt response to petitions would not be really secured by punishing the public officers that violate it, since what the petitioner ultimately needs to know is what the determination of the public administration in charge would be, when considering the petition.

That is why, to secure the accomplishment of the duty of administration to respond to individuals' petitions and issue a decision, and in order to protect their right to a response, legislation has expressly given some effects to the absence of a public administration pronouncement, giving to the administration's inaction – that is, to its silence – specific legal effects, whether negative or positive regarding what has been petitioned.[9]

In other words, the law has assigned to the public officer's silence a specific effect, it being legally understood that once the term for the administration to issue its determination ends, without the expected pronouncement being issued, a tacit administrative act is deemed to exist, either with positive or negative effects, according to the specific case,[10] providing the petitioner with a determination on the matter under

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7 See in general: Allan R. Brewer-Carías, *La inactividad administrativa y el silencio de la administración. efectos y control. Estudios*, Ediciones Olejnik, Buenos Aires–Santiago de Chile–Madrid 2019, p. 128.

8 See Armando Rodríguez García, "El silencio administrativo como garantía de los administrados y los actos administrativos tácitos o presuntos", in Allan R. Brewer-Carías (ed.), *IV Jornadas Internacionales de Derecho Administrativo*, FUNEDA, Caracas 1998, p. 205.

9 See Allan R. Brewer-Carías, *Principios del Procedimiento Administrativo en América Latina*, Lexis, Bogotá 2003, pp. 171–176.

10 See on the regime of administrative silence in comparative law, Allan R. Brewer-Carías, *Principios del Procedimiento Administrativo*, Civitas, Madrid 1990, pp. 159–169.

consideration, either in an affirmative way, granting what was requested, or in a negative way, rejecting the petition.[11]

As was explained by Daniela Urosa and José Ignacio Hernández:

> "The mechanism of the administrative silence is justified to alleviate, although partially, the absence of response and the legal uncertainty that such an omission implies, beyond being just a safeguard of the right to petition and the possibility to file the subsequent appeals. Notwithstanding this, silence does not fully satisfy such right to petition and to obtain a prompt and proper answer, but only succeeds as a temporary remedy for the lack of an express pronouncement."[12]

In this way, as the Constitutional Chamber of the Supreme Tribunal of Justice set out in its ruling dated 6 April 2004 (case: *Ana Beatriz Madrid Agelvis*):

> "administrative silence is, we insist, a safeguard of the constitutional right of due process, since it prevents the petitioner from having his subsequent means of defence – administrative and judicial – obstructed when facing the formal passiveness of the Administration, but does not secure the fundamental right to petition, since the implied pronouncement does not comply, absolutely, with the requirements of a prompt and proper answer in the terms of the precedents of this Chamber that have been previously referred to, and thus the Administration retains the duty to expressly make a decision even if administrative silence has operated and thus, as well, this Chamber has deemed in previous occasions that, in the absence of a prompt and express answer it is possible to seek an injunction for the protection of the fundamental right to petition."[13]

The tacit administrative act produced as a consequence of administrative silence is to be considered a real administrative act, in the same sense as has been expressed in the Spanish Law 30/1992, dated 26 November 1992 on the Legal Regime of Public Administrations and Common Administrative Procedure, reformed in 1999 (Law 4/1999), whose Article 43.5 sets forth that "Administrative acts produced by means of administrative silence can be

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11 See Humberto Romero-Muci, "El efecto positivo del silencio administrativo en el Derecho Urbanístico venezolano", in Allan R. Brewer-Carías et al., *Ley Orgánica de Ordenación Urbanística*, Editorial Jurídica Venezolana, Caracas 1988, p. 141.

12 See in Daniela Maggi Urosa and José Ignacio Hernández, "Vicisitudes del Silencio Administrativo y los efectos negativos en la Legislación venezolana", in *Temas de Derecho Administrativo, Libro Homenaje a Josefina Calcaño de Temeltas*, FUNEDA, Caracas 2010, p. 731.

13 Constitutional Chamber of Supreme Tribunal of Justice, *Ana Beatriz Madrid Agelvis*, judgment of 6 April 2004. See the reference in Daniela Maggi Urosa and José Ignacio Hernández, "Vicisitudes del Silencio Administrativo y los efectos negativos en la Legislación venezolana", in *Temas de Derecho Administrativo, Libro Homenaje a Josefina Calcaño de Temeltas*, FUNEDA, Caracas 2010, p. 731.

used before the Administration and against any natural or artificial, public or private person". Article 43.3 of the same Law states: "The effects of administrative silence must be considered to all purposes as an administrative act that puts the procedure to an end."[14]

In such cases, as Eduardo García de Enterría and Tomás-Ramón Fernández mention, particularly regarding its positive effects,

> "administrative silence is a presumed authentic administrative act, in all equivalent to the express act, so once the term in which to make a decision provided by a legal provision has elapsed, the 'subsequent resolution after the issuing of the act can only be adopted if it is confirmatory of the same'."[15]

An example of the general trend on this matter when the effect given to administrative silence are positive, was summarised in the Law on Administrative Procedure of Peru, which establishes that in these cases of administrative procedures subject to positive administrative silence, the petitions are considered automatically approved in the terms in which they were filed, once the term established for the decision to be taken has elapsed without the petitioner receiving notification of the decision (Article 188.1). In these cases, administrative silence has for all purposes the character of a resolution that brings the procedure to an end, without prejudice to the possibility of the presumed act being declaring null and void (Article 188.2).

In cases in which administrative procedures are subject to the formula of negative effect, according to the same Law of Peru, it has the purpose of producing a presumed negative decision in order to grant the petitioner the possibility of challenging it, by means of the relevant administrative or judicial means (Article 188.3). Nonetheless, the presumed negative act cannot be considered *to be* the decision that the administration is obligated to issue. Consequently, in these cases, and in spite of the effect of negative administrative silence, the administration retains the obligation to decide, until the matter has been submitted to judicial or administrative review by means of the corresponding appeals (Article 188.4). [16]

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[14] See the Administrative Procedure Law of Spain in Allan R. Brewer-Carías, *Código de Leyes de procedimiento Administrativo en Iberoamérica. Estudio de derecho comparado*, Tercera edición, Editorial Jurídica Venezolana, Caracas 2021. The text of the second edition is available at: http://allanbrewercarias.com/wp-content/uploads/2021/07/Brewer.-2ed-CODIGO-DE-LEYES-DE-PROCEDIMIENTO-ADMINISTRATIVO-IBEROAMERICA-CON-PORTADA.pdf.

[15] See Eduardo García de Enterría and Tomás-Ramón Fernández, *Curso de Derecho Administrativo*, Vol. I, Décima Tercera edición, Thomson Civitas, Madrid 2006, p. 607.

[16] See the Administrative Procedure Law of Perú in Allan R. Brewer-Carías, *Código de Leyes de procedimiento Administrativo en Iberoamérica. Estudio de derecho comparado*, Tercera edición, Editorial Jurídica Venezolana, Caracas 2021. The text of the Second edition

3. THE GENERAL REGIME ON ADMINISTRATIVE SILENCE IN VENEZUELA: NEGATIVE SILENCE

The general rule established in the Organic Law on Administrative Procedures of Venezuela of 1982 follows the principle of *negative* administrative silence, in the sense that if the administration does not make a decision and respond to the petitioner within the legally established term to do so, it is understood that it has decided to reject the petition, namely it has made a negative determination regarding the claim made. This rule is expressly provided by Article 4 of the Organic Law on Administrative Procedures, as follows:[17]

> "Article 4. When an entity of the Administration does not make a decision on a matter or appeal within the corresponding terms, it is understood that it has made a decision in a negative way, and the interested party may file the subsequent immediate appeal, except when an express provision establishes the contrary. This provision does not exempt the administrative entities and their officials from the liabilities that could result because of their omission or delay.
>
> Single Paragraph
> The repeated negligence by the officers responsible for resolving the matters or appeals that results in them being deemed decided in a negative way as established in this article, will cause written warnings according to the *Estatuto del Funcionario Público* (Civil Service Law), without prejudice to the fines that can be applied to them pursuant to article 100 of this Law."

Two general rules follow from this legal provision: first, the understanding that the administration has adopted a decision in a negative sense with regard to what has been petitioned; and second, the interested party can exercise his right to defence through the subsequent appeal against such presumed decision of rejection, either before a superior level in the

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17 See on the presumption inserted in Article 4 of the Organic on Administrative Procedures, Allan R. Brewer-Carías, *El Derecho Administrativo y la Ley Orgánica de Procedimientos Administrativos. Principios del Procedimiento Administrativo*, Editorial Jurídica Venezolana, Caracas 2002, pp. 225–227. See also Armando Rodríguez García, "El silencio administrativo como garantía de los administrados y los actos administrativos tácitos o presuntos", in Allan Brewer-Carías, *IV Jornadas Internacionales de Derecho Administrativo*, FUNEDA, Caracas 1998, pp. 207–208; Juan de Stefano, "El silencio administrativo", in *Revista de la Facultad de Ciencias Jurídicas y Políticas de la Universidad Central de Venezuela*, Nº 70, 1988, p. 76, p. 81; José Antonio Muci Borjas, "El recurso jerárquico por motivos de mérito y la figura del silencio administrativo (Estudio comparativo con el derecho venezolano)", in *Revista de Derecho Público*, Nº 30, April–June 1987, pp. 11 ff.

hierarchy of public administration, or before the Courts of the Administrative Contentious Jurisdiction. It also makes the public servant responsible for his omission and failure to act, and if this behaviour is repeated, he incurs an administrative liability.[18]

Consequently, as this author affirmed in other work:

> "regarding the defenseless position which citizens are in when no prompt decision is adopted by the Administration regarding their petitions and appeals, the only purpose that the provision of administrative silence in the Organic Law has by presuming the rejection of the corresponding request or appeal, is no other than to establish a benefit for them, precisely in order to overcome such defenselessness. Consequently, the provision of Article 4 of the Organic Law on Administrative Procedures has been drafted in support of the petitioners and not of the Administration."[19]

This suggests that challenging the implied administrative act resulting from the administrative silence is a right of the petitioner, and never a burden. The petitioner is free to either challenge the tacit act resulting from the administrative silence or to wait for the administration to issue an express determination.[20]

On the other hand, administrative silence can never be understood as a firm administrative act with respect to the existence of an time limit for challenging it.[21]

The aforementioned has been highlighted in judgment Nº 767 of the Political-Administrative Chamber of the Supreme Tribunal of Justice dated 3 June 2009, reaffirming principles that the Tribunal established back in the 1980s. In such decision, the Supreme Tribunal basically referred to Article 20.21 of the former 2004 Organic Law of the Supreme Tribunal of Justice

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18 This is the consequence of the rule imposed by the provision upon the administration, implying that as a consequence of the expiry of the term established for the decision to be taken, if no decision is issued, it must be presumed that a tacit administrative act exists rejecting the petition or the appeal that has been filed. See Allan R. Brewer-Carías, *El Derecho Administrativo y la Ley Orgánica de Procedimientos Administrativos. Principios del procedimiento administrativo*, Editorial Jurídica Venezolana, Caracas 2002, pp. 97–101. See also María Amparo Grau, "Comentario jurisprudencial sobre el tratamiento del silencio administrativo y la procedencia del la acción de amparo contra éste", in *Revista de Derecho Público*, Nº 47, July–September 1991, p. 197

19 Allan R. Brewer-Carías, "El sentido del silencio administrativo negativo en la Ley Orgánica de Procedimientos Administrativos", in *Revista de Derecho Público*, Nº 8, October–December 1981, p. 28. See also Luis A. Ortiz-Álvarez, *El silencio administrativo en el derecho venezolano*, Editorial Sherwood, Caracas 2000, pp. 13–14 and 18–41.

20 See José Araujo-Juárez, *Derecho Administrativo. Parte General*, Ediciones Paredes, Caracas 2008, p. 982.

21 See Allan R. Brewer-Carías, "El sentido del silencio administrativo negativo en la Ley Orgánica de Procedimientos Administrativos", in *Revista de Derecho Público*, Nº 8, October–December 1981, pp. 29–30.

(equivalent to Article 32 of the current Organic Law on the Administrative Contentious Jurisdiction, *Official Gazette* Nº 39.451 of 22 June 2010), stating the following:

> "Specifically the Chamber in decision Nº 827 of July 17, 2008, ratified the opinion issued in decision of June 22, 1982 (Case of *Ford Motors de Venezuela*, in which the scope of the administrative silence established in Article 134 of the Organic Law of the Supreme Court of Justice then in force, equivalent to paragraph 20 of Article 21 of the Organic Law of the Supreme Tribunal of Justice, was interpreted. In that decision, which is once again ratified, the Chamber concluded as follows:
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> '1° That the provision included in the first part of Article 134 of the Organic Law of the Supreme Court of Justice (today paragraph 20 of Article 21 of the Organic Law of the Supreme Tribunal of Justice) establishes a legal guarantee which signifies a benefit for individuals.
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> 2° That as such guarantee, it must be interpreted in an extended and non-restrictive sense, because on the contrary, instead of being favourable to the individual, as it was established, what could result is encouraging arbitrariness and reinforcing the privileges of the Administration.
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> 3° That such guarantee consists in allowing, in the absence of an express administrative act concluding the administrative procedure, access to judicial review.
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> 4° That the expiry of the term for the administrative silence, without the interested party filing the judicial review appeal, does not mean that he will lose the possibility to file the appeal against the act that could eventually be issued.
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> 5° That the silence is not in itself an act, but an omission to decide, and consequently it cannot be understood that it converts itself into a firm act because of the simple expiry of the term within which to impugn it.
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> 6° That the silence does not excuse the Administration from its duty to issue an express decision, duly reasoned.
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> 7° That the petitioner is the one that must take the opportunity to file an appeal under the judicial review of administrative action jurisdiction, within the term established in Article 134 (today, paragraph 20 of Article 21), or later, when the Administration decides the administrative appeal.
>
> 8° That when the Administration expressly decides the administrative appeal, after the time limits established in Article 134 (today paragraph 20 of Article 21) have expired, the petitioner can file the application for judicial review against such particular act.
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> 9° That from the moment in which an express decision of the administrative appeal is notified to the interested party, the general term of six months established to file the corresponding application for judicial review begins; and
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> 10° That if an express administrative decision is never issued, the interested party would not be able to file the application for judicial review of

administrative action after the time limits established in Article 134 of the LOCSJ (today paragraph 20 of Article 21 of the LOTSJ) have expired'."[22]

4. SPECIAL PROVISIONS REFERRING TO THE NEGATIVE EFFECTS OF ADMINISTRATIVE SILENCE

Besides the general provisions in the Law on Administrative Procedures, in other special laws the same principle of the negative effects of administrative silence is provided.

For example, the 1999 Mining Law[23] expressly provides in two cases the negative effects of administrative silence once the term given to the administration to make a decision is expired, it being understood that the petition has been rejected. This is the case of Article 30, regarding petitions for authorisations concerning negotiations on mining concessions, where the statute provides that once the term established for the pronouncement to be issued (45 days) has elapsed, without an express determination, the absence of response is equivalent to a tacit administrative act rejecting the request.

Another case refers to the admission of petitions for mining concessions. Pursuant to Article 41, once such a petition has been formally filed and the conditions established in the Mining Law have been met, the Ministry must expressly admit or reject the petition and start the substantiation of the corresponding procedure, which must be notified to the interested party no later than 40 continuous days after the date of its filing (with a possible extension of ten additional working days). If the petitioner is not notified of either an admission or rejection of his request, according to such provision of the Law, the petition "would be considered as rejected by operation of law (*de pleno derecho*)", meaning that the silence of the administration stands for a rejection of the petition.

5. THE PROVISIONS GRANTING POSITIVE EFFECTS TO ADMINISTRATIVE SILENCE

As mentioned above, in many countries, in contrast to the general rule established in Venezuela regarding the effects of the omission of the Public Administration to rule on petitions, the principle of *positive silence* has been

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22 See Decision Nº 827 of the Political-Administrative Chamber of the Supreme Tribunal of 17 July 2008 (Case of *Roque's Air & Sea C.A.*), available at: http://www.tsj.gov.ve/decisiones/spa/Julio/00827-17708-2008-2006-1505.html.

23 Organic Law on Urban Land Use Planning, *Official Gazette* Nº 33.868 of 16 December 1987.

adopted as the general rule. This principle of *positive administrative silence* has also been adopted in Venezuela but only in specific cases pursuant to express provisions of statutes, as an exception to the general rule set forth in by the Organic Law on Administrative Procedures already referred to.

In Spain, for instance, the general principle is to give positive effects to administrative silence, as is provided by Article 43.2 of Law 30/1992, of 26 November 1992 on the Legal Regime of Public Administrations and Common Administrative Procedure (modified by 4/1999 of 13 January 1999) which establishes that:

> "in any sort of petition, the interested parties can assume by virtue of administrative silence, that their requests have been granted, except when the contrary is established in any provision with legal rank or in a provision of Communitarian [European] Law." [24]

There is only one exception to this general rule: the Legislator has excluded from these positive effects silence in response to petitions whose favourable acceptance would result in transferring to the petitioner or third parties rights regarding the public domain or public service, in which case the principle of negative silence applies (Article 43).

In those cases where positive effects are given to administrative silence, the law recognises that for all purposes the result is that "an administrative act bringing to an end the administrative procedure exists", clarifying – however – that the presumed act, when contrary to the legal order, as a matter of law (*de pleno derecho*) is to be deemed null and void when lacking the essential conditions set forth for the acquisition of rights (Article 62.1.f).

Thus, in cases of positive silence the existence of a tacit administrative act granting the petition is presumed, being normally applied in cases of authorisations and permits. In regard to this matter, Eduardo García de Enterría and Tomás Ramón Fernández have pointed out that:

> "since the beginning, as administrative silence mainly referred to authorisations and approvals, the silence has been deemed a real administrative act, equivalent to the express authorisation or approval it substitutes; and the precedents have assumed, also from the beginning, that once [the act] has been produced, it is not

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[24] See the Administrative Procedure Law of Spain in Allan R. Brewer-Carías, *Código de Leyes de procedimiento Administrativo en Iberoamérica. Estudio de derecho comparado*, Tercera edición, Editorial Jurídica Venezolana, Caracas 2021. The text of the Second edition is available at: http://allanbrewercarias.com/wp-content/uploads/2021/07/Brewer.-2ed-CODIGO-DE-LEYES-DE-PROCEDIMIENTO-ADMINISTRATIVO-IBEROAMERICA-CON-PORTADA.pdf.

possible for the Administration to decide in an express way in a sense contrary to the presumed granting of the authorisation or approval."[25]

The principle of positive administrative silence has also been established as the generally applicable one in statutes in Chile (Article 64 of the Law of 1980 on Administrative Procedure), Peru (Article 33 of the Law on Administrative Procedure), and Ecuador (Article 207 of the Administrative Organic Law). In other countries the principle of positive effects of administrative silence is specifically established in all administrative procedures referring to authorisations, as is the case in Costa Rica (Article 330, General Law on Public Administration).[26]

6. SPECIFIC PROVISIONS IN VENEZUELA LAW GRANTINGPOSITIVE EFFECTS TO ADMINISTRATIVE SILENCE

In other counties like Colombia (Article 41 of the Contentious Administrative Code), Argentina (Article 10 of the National Law on Administrative Procedure),[27] and Venezuela, also regarding authorisations,[28] the positive effects of administrative silence have been provided through special statutes.

In the case of Venezuela various statutes provide for administrative positive silence, as is the case, for instance, on matters of land use and planning and for the extension of concessions on mining activities.[29]

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25 See Eduardo García de Enterría and Tomás R. Fernández, *Curso de Derecho Administrativo*, Vol. I, 6th ed., Editorial Civitas, Madrid 1993, pp. 572–573.

26 See the Administrative Procedure Law of Chile, Perú, Ecuador and Costa Rica in Allan R. Brewer-Carías, *Código de Leyes de procedimiento Administrativo en Iberoamérica. Estudio de derecho comparado*, Tercera edición Editorial Jurídica Venezolana, , Caracas 2021. The text of the Second edition is available at: http://allanbrewercarias.com/wp-content/uploads/2021/07/Brewer.-2ed-CODIGO-DE-LEYES-DE-PROCEDIMIENTO-ADMINISTRATIVO-IBEROAMERICA-CON-PORTADA.pdf.

27 See the Administratrive Procedure Law of Colombia and Argentina, in Allan R. Brewer-Carías, *Código de Leyes de procedimiento Administrativo en Iberoamérica. Estudio de derecho comparado*, Tercera edición, Editorial Jurídica Venezolana, Caracas 2021. The text of the Second edition is available at: http://allanbrewercarias.com/wp-content/uploads/2021/07/Brewer.-2ed-CODIGO-DE-LEYES-DE-PROCEDIMIENTO-ADMINISTRATIVO-IBEROAMERICA-CON-PORTADA.pdf.

28 See, for instance, a remote antecedent in the case of the 1979 Law on Quality Control and Technical Norms, in Allan R. Brewer-Carías, "Comentarios a la Ley sobre normas técnicas y control de calidad de 30 de diciembre de 1979", in *Revista de Derecho Público*, Nº 1, p. 78.

29 See Luis A. Ortiz-Álvarez, *El silencio administrativo en el derecho venezolano*, Editorial Sherwood, Caracas 2000, pp. 41–73; Daniela Maggi Urosa and José Ignacio Hernández, "Vicisitudes del Silencio Administrativo y los efectos negativos en la Legislación

This rule of administrative silence has generally been established in statutes regarding administrative authorisations that individuals must obtain from the public administration in order to perform a lawful activity.[30] In this respect, the Supreme Tribunal of Justice in Politico Administrative Chamber has said that:

> "Administrative silence with positive effects has been established in order to give speediness and flexibility to control (*policía*) activity on matters related to the Administration and constitutes a guarantee for the individual, not only of a procedural administrative character, but allowing the effective possibility to perform activities that must be inspected by the Administration, provided that a legal provision exists for such purpose."[31]

6.1. POSITIVE ADMINISTRATIVE SILENCE ON MATTERS OF LAND USE AND URBAN PLANNING

The traditional provision in this regard was established in the Organic Law on Land Use Planning (*Ley Orgánica para la Ordenación del Territorio*) of 1983,[32] which also applies to certain approvals regarding actions by persons or enterprises that could affect the environment or imply occupation of territory, e.g. activities related to mining activities. Those activities must be previously approved to ensure their conformity with the guidelines and provisions of the applicable Land Plan. In such cases, the relevant petitions for authorisations and approvals having been filed, the result of administrative silence regarding such petitions is the presumption of a real administrative act granting them.[33]

Pursuant to Articles 49 and 55 of the Organic Law on Land Use Planning, administrative silence and the resulting tacit administrative act is understood to be produced once the period of 60 days within which the Administration must make a decision on matters of authorisations and approvals has elapsed.

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venezolana", in *Temas de Derecho Administrativo, Libro Homenaje a Josefina Calcaño de Temeltas*, FUNEDA, Caracas 2010, p. 731.

30 See Humberto Romero-Muci, "El efecto positivo del silencio administrativo en el Derecho Urbanístico venezolano", in Allan R. Brewer-Carías et al., *Ley Orgánica de Ordenación Urbanística*, Editorial Jurídica Venezolana, Caracas 1988, p. 147.

31 See Decision Nº 1414 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of 1 June 2006, available at: http://www.tsj.gov.ve/decisiones/spa/Junio/01414-010606-2003-1547.htm.

32 See Allan R. Brewer-Carías, *Ley Orgánica para la Ordenación del Territorio*, Colección Textos Legislativos, N° 3, Editorial Jurídica Venezolana, Caracas 1984.

33 See Margarita Escudero León, "El requisito procesal del acto previo a la luz de la jurisprudencia venezolana", in *Revista de Derecho Público*, Nº 57–58, January–June, 1994, pp. 479–481.

In such cases, in addition, the administration is compelled to issue "proof or evidence" of said authorisation or approval when requested to do so, to certify that the period provided by the Law has elapsed without a pronouncement being issued.[34]

This was the principle applied for many years, for instance, on matters of urban land use and planning pursuant to Article 85 of the Organic Law on Urban Land Use Planning (*Ley Orgánica de Ordenación Urbanistica*) of 1987,[35] whereas in cases of silence of the public administration, the requested urban development authorisations were tacitly granted.[36]

The general characteristic of the application positive effects to administrative silence according to these statutes is that once the administrative act is understood as existing and granting the petition, it creates rights for the petitioner that subsequently cannot be ignored or revoked by the administration, the only exception being when such tacit administrative act is considered null and void (affected by absolute nullity) according to Article 19 of the Organic Law on Administrative Procedures.

If the petitioner has complied with all the formal and substantive conditions legally prescribed for his petition,[37] once the term granted to the

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[34] See Allan R. Brewer-Carías, "Introducción al régimen jurídico de la ordenación del territorio", in *Ley Orgánica de la Ordenación del Territorio*, Editorial Jurídica Venezolana, Caracas, 1984, pp. 64–68. See also Humberto Romero-Muci, "El efecto positivo del silencio administrativo en el Derecho Urbanístico venezolano", in Allan R. Brewer-Carías et al., *Ley Orgánica de Ordenación Urbanística*, Editorial Jurídica Venezolana, Caracas 1988, pp. 152–157; Román J. Duque Corredor, "La Ley Orgánica para la Ordenación del Territorio y el Urbanismo Municipal", in *Revista de Derecho Público*, Nº 18, April–June 1984, p. 107.

[35] Organic Law on Urban Land Use Planning, *Official Gazette* Nº 33.868 of 16 December 1987.

[36] On positive administrative silence in the Organic Law on Land Use Planning, see Allan R. Brewer-Carías, *Ley Orgánica para la Ordenación del Territorio,* Editorial Jurídica Venezolana, Caracas 1983, pp. 66–67; Allan R. Brewer-Carías, "Comentarios a la Ley Orgánica de Ordenación Urbanística: el control urbanístico previo y la nueva técnica autorizatoria", in *Revista de Derecho Público*, Nº 32, October–December 1987, pp. 53–54. See also Humberto Romero-Muci, "El efecto positivo del silencio administrativo en el Derecho Urbanístico venezolano", in Allan R. Brewer-Carías et al., *Ley Orgánica de Ordenación Urbanística*, Editorial Jurídica Venezolana, Caracas 1988, pp. 158 ff.; Juan Domingo Alfonzo Paradisi, "Aplicabilidad del silencio administrativo positivo en la Ley Orgánica de Ordenación Urbanística", in Fernando Parra Aranguren (ed.), *Temas de Derecho Administrativo. Libro Homenaje a Gonzalo Pérez Luciani*, Vol. I, Tribunal Supremo de Justicia, Caracas 2002, pp. 61 ff.

[37] The tacit administrative act containing an authorisation, due to the application of the principle of administrative silence, cannot be contrary to the provisions of the Law. Otherwise, as ruled by the Political-Administrative Chamber of the Supreme Tribunal of Justice in Decision Nº 1217 of 11 July 2007, the tacit administrative act according to Articles 82 and 83 of the Organic Law on Administrative Procedures can be considered null and void, and as not granted. The court added that "[t]he authorisation granted by virtue of positive silence, could not be contrary to the law, administrative silence not having any derogatory effects regarding statutes." See Decision Nº 1217 of the Political-Administrative Chamber of the Supreme Tribunal of Justice of 11 July 2007 (Case of *Inversiones y Cantera*

administration to decide on the petition goes by, the authorisation requested is deemed granted, and a tacit administrative act declaring rights for its holder is presumed to exist, that cannot be revoked or repealed by the administration. That is to say, when the principle of positive administrative silence is applied, the administration is prevented from issuing another decision to a different effect, which means that once the positive silence has produced its effects, the administration cannot make an express decision rejecting the petition. On the contrary, such a decision would itself be null and void pursuant to Article 19 of the Organic Law on Administrative Procedures.

6.2. POSITIVE ADMINISTRATIVE SILENCE EFFECTS REGARDING PROCEDURES FOR EXTENDING MINING CONCESSIONS

Another special statute where a positive effect has been granted to administrative silence is the Mining Law, in which in cases of a petition for extension of a concession, under Article 25 once the period established for a pronouncement to be adopted elapses, if no express resolution is adopted, it is considered that the absence of a response is equivalent to a tacit administrative act of granting the request.

In such cases of petitions for an extension of existing mining concessions,, the Mining Law, after establishing the obligation of the Ministry to decide such petitions within the term of six months from when the petition is filled,, adopted the principle of *positive* administrative silence, assigning to the silence positive effects. It is in that sense that the aforementioned Article 25 of the Law expressly sets forth that if there is no notice of a determination in answer to a petition requesting an extension of a concession, "it is understood that the extension is granted."

Thus, administrative silence produces a tacit administrative act granting the requested extension, which has the same general effects of non-revocability that all administrative acts have. Consequently, once the extension is granted through the tacit administrative act, the administration cannot issue another subsequent act to the contrary, purporting to deny the extension. On the contrary, if such decision is made, as any other decision repealing the effects of the tacit administrative act, it would be considered null and void pursuant to Article 19 of the Organic Law on Administrative Procedures.

The basic condition to be met by the concessionaire, in order for the Ministry of Mines to grant the extension of a concession, is by the time of its request, the payments of all its debts with the Republic (*solvente con la*

Santa Rita, C.A. v. Ministerio del Poder Popular para el Ambiente), in *Revista de Derecho Público*, Nº 111, July–September 2007, p. 208.

República) according to the Mining Law and its regulations, and also, the compliance with the clauses of the concessions, the Mining Title and mining contracts. Thus, administrative acts deciding to extend a mining concession are administrative acts that create rights in favour of the concessionaire, in general terms subject to the principles and rules regarding the revocability of administrative acts as provided in the administrative procedure legislation. These principles apply, regardless of whether the extension of the concession has been given through an express administrative act, or by means of a tacit administrative act resulting from the legal effects of the positive administrative silence aforementioned. Nonetheless, it must be noted that in the case of the Mining Law, administrative acts granting concessions or extending the term of concessions, as administrative acts creating rights in favour of the concessionaires, although being in principle irrevocable administrative acts, can be declared terminated (*caducidad*) and the mining rights contained in them extinguished, in any of the specific cases listed in Article 98 of the Mining Law, all relating to compliance by the concessionaire with his legal and contractual obligations.