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## Legal Nature of Administrative Competence and its Transfer to Administrative Bodies

## Naturaleza Jurídica De La Competencia Administrativa Y Su Transferencia A Los Órganos Administrativos

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### Abstract

*This article deals with administrative competence as established in Ecuadorian legal regulations and the ways of transferring such competence. It also covers the requirements outlined in the legislation and how to apply them when transferring competence. Competence transfer is understood as the transfer of functions from one administrative body to another, provided that it is previously permitted by a legal norm, with a doctrinal and analytical foundation. Consequently, this research establishes the existing paradigms when transferring competence within administrative bodies. Depending on the state's circumstances, several methods are applied, including delegation, avocation, replacement, substitution, decentralization, and deconcentration. To conclude, this research conducts a doctrinal study and applies a qualitative method, as it allows for a documentary analysis of the topic at hand.*

**Keywords:** Competence, Public Sector, Transfer.

### Resumen

*El presente artículo trata de la competencia administrativa que se establece en el ordenamiento jurídico ecuatoriano y sobre las formas de transferir la competencia, así como también los requisitos establecidos en la normativa y como aplicar cada uno en el momento de transferir una competencia. Ya que esta es comprendida como el traspaso de funciones de órgano administrativo a otro órgano administrativo siempre que una norma legal lo permita previamente, con un fundamento doctrinario y analítico. Por ello en la investigación se establecen los paradigmas existentes al momento de transferir una competencia en los órganos administrativos y dependiendo de las circunstancias estatales se aplique algunas de las maneras las cuales son: delegación, avocación, suplencia, subrogación, descentralización y desconcentración. Para finalizar en la presente investigación se realiza un estudio doctrinal y se aplica el método cualitativo porque permite el análisis documental del tema planteado.*

**Palabras Claves:** competencia, sector público, transferencia.

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## Introduction

The study of this research is conducted in relation to the administrative competence held by state bodies for the exercise of their functions, as stipulated in the Constitution and the law, and subsequently, to establish the ways of transferring competence to another body as per the current regulations.

It begins by analyzing administrative competence, which is understood as the assignment of functions granted to a specific administrative body, as prescribed by a legal norm. As Pérez (2020) asserts, competence is the set of functions that an administrative body can legitimately exercise. Therefore, the concept of competence provides the measure of activities that correspond to each administrative body in accordance with the legal framework. Consequently, it can be concluded that competence is the legal ability of an administrative body to act and thereby carry out the assigned functions based on various classifications, such as subject matter, rationale, degree, and established time.

In the Organic Administrative Code (National Assembly of Ecuador, 2017), in Article 65, competence is defined as the extent to which the Constitution and the law empower an administrative body to act and fulfill its purposes in terms of subject matter, territory, time, and degree. Competence establishes the legal scope that enables a public body to fulfill the purposes outlined in the law, making its actions legitimate.

The Organic Administrative Code (National Assembly of Ecuador, 2017) considers, in Article 67, that the exercise of competencies assigned to administrative bodies or entities includes not only what is expressly defined in the law but also everything necessary for the proper fulfillment of their functions.

Both doctrine and Ecuadorian legal regulations classify competence based on subject matter, territory, degree, and time. The following analysis delves into each classification with reference to various authors:

Regarding subject matter, which pertains to a specific administrative issue, Pérez (2020) defines it as the activities and tasks that an administrative body can legitimately perform. In terms of territory, it refers to the delineation within each territorial jurisdiction and encompasses the spatial scope within which functions should be carried out. Degree pertains to the differentiation of various administrative bodies, and Pérez (2020) determines that it is the hierarchical level at which the bodies are established, indicating the place or position of the body within the hierarchical pyramid. Lastly, concerning time, it is defined as the duration for which competence is attributed. In this aspect, Pérez (2020) mentions that it is the period during which the body can act, in cases where deadlines are established for this purpose, which must be defined in a legal norm.

For an administrative body to legitimately and validly exercise its competence, all the components of subject matter, territory, degree, and time must align, in addition to the requirement that competence must be specified in the Constitution and the law. Competence is characterized as non-delegable and irrevocable. However, the legal framework allows and authorizes the transfer of competence exclusive to an administrative body under certain circumstances specified in the norm.

Hence, in the Ecuadorian legal framework, the Organic Administrative Code, in Article 68, first determines that competence is irrevocable and is exercised by the bodies or entities indicated in the legal framework. Subsequently, it details the cases in which the transfer of competence is permitted, namely, delegation, avocation, substitution, subrogation, decentralization, and deconcentration when carried out in accordance with the terms provided by the law.

The transfer of competence is the transfer of functions from one administrative body to another administrative body, provided that a legal norm permits it beforehand. Therefore, as Mora & Rivera (2019) declare, "competence is non-delegable and non-transferable. It must be exercised directly and exclusively by the body to which it is attributed as its own, except as provided by the relevant normative provisions."

Thus, the objective of this research is to analyze, both legally and doctrinally, administrative competence and the necessary parameters for its transfer.

## Methodology

This research allowed for an analysis of administrative competence and transfer in the field of public administration. In this sense, the research has a qualitative modality due to the interpretation and study of the subject raised. The structure has a documentary review and analysis approach in a deductive way because it is developed from a general to a particular way with the understanding of the administrative competence and the transfer complying with the requirements established in the normative bodies. Information was collected from scientific articles and certified digital texts, which allowed acquiring scientific knowledge, and research action because it was established based on what was referred to by Sampieri (2018).

In relation to the research design, variables are not manipulated because they have their foundation in doctrinal and legal theory, guided by the analysis of the norms regarding the developed topic. The scope is analytical and explanatory because it responds to questions that arise in the development of the research.

## Results and Discussion

To be able to legally exercise its administrative functions, the public administration must have competence because it is considered to be the legal authorization to be able to carry out a specific activity within the public sector. Several authors define it as follows:

According to Gordillo, (2017) quoting Sayagués Laso expresses that: competence is the set of functions that an agent can legitimately exercise. The concept of "competence" thus gives the measure of the activities that according to the legal system correspond to each administrative body. In addition, it is also the legal aptitude to act and therefore it has been said that it would even form an essential and integral part of the concept of body itself.

For Jéze (2017), the competence of a public agent is never an individual legal situation. It is often said that such a ruler or such a public agent has the right and the duty to perform a certain act, concerning the organization and operation of a public service. These expressions should not delude anyone; competence is always a general and impersonal situation.

For Cassagne (2018), competence can be considered from many points of view and its meaning has given rise to great doctrinal disagreements. It can be analyzed in its condition of fundamental legal principle of any public organization of the state and also in its dynamic and concrete phase, as one of the essential elements of the administrative act.

But for the aforementioned author, competence cannot be defined as the set or circle of attributions that correspond to state organs and public subjects. But with a more precise legal scope, as the attitude of acting or legal of an organ or entity of the State (Cassagne, 2018).

For Mora & Rivera (2019), competence is the sphere of attributions of entities and organs, determined by objective law or the positive legal system. In other words, it is the set of powers and obligations that a body can and should legitimately exercise. In other words, the competence of administrative bodies is the set of powers expressly or reasonably implicitly conferred by the national Constitution, treaties, laws, and regulations, as the case may be.

The concept of competence, proper to public law, is analogous to that of capacity in private law, but not

identical. It differs in that, while in private law capacity is the rule and incapacity the exception, in public law competence is the exception and incompetence the rule. (Mora & Rivera, 2019).

To conclude, according to Perez, (2020), competence is the set of functions that a legal body can legitimately exercise. Thus, the concept of competence provides the measure of the activities that correspond to each administrative body in accordance with the legal system. Competence is the legal capacity to act on the administrative body.

In conclusion, competence refers to the set of activities or functions that a given body can legitimately exercise, enabling it to perform certain actions, because the legal system grants it the power to act.

According to the Constitution of the Republic of Ecuador (National Assembly of Ecuador, 2008) in Article 226, the institutions of the State, its agencies, dependencies, public servants, and persons acting under a state power shall exercise only the competencies and powers attributed to them in the Constitution and the law. They shall have the duty to coordinate actions for the fulfillment of their purposes and to enforce the enjoyment and exercise of the rights recognized in the Constitution.

The legal body that determines the competence in the Ecuadorian state, is the Administrative Organic Code (National Assembly of Ecuador, 2017), which in articles: 65, considers that competence is the extent to which the Constitution and the law enable an organ to act and fulfill its purposes, by reason of the matter, territory, time and degree; and article 67 that the exercise of the competences assigned to the administrative organs or entities includes, not only what is expressly defined in the law, but everything necessary for the fulfillment of their functions.

Therefore, the Ecuadorian state has a legal normative body in force that establishes the parameters of competence, which is finally understood as the legal empowerment of a body that can fulfill its purposes, expressly what is attributed to it by the Constitution and the law.

Regarding the classification of competence, as already mentioned, it can be based on four important aspects, which are detailed below:

The first aspect by reason of the subject matter, understanding that specific matter in the administrative subject, which according to Gordillo, (2017) is about the content or object of the act, depending on whether it refers to one or another administrative matter. They are the tasks or activities that the organ can legitimately perform. Mora & Rivera, (2019) state that it refers to the activities or tasks that the organ can legitimately perform, according to the nature of the activity, and can only act for the fulfillment of the purposes that motivated its creation. While for Perez (2020), establishes the activities and tasks that the organ can legitimately perform.

In a second aspect by reason of the territory refers to the delimitation in each territorial subscription, to the geographic determination in a specific way. For Gordillo, (2017) it would be according to the political organization of each country's national, provincial, and municipal competencies. When a body has its competence delimited to a certain territorial circumscription, it cannot exceed it. Mora & Rivera, (2019) mention that it is the scope in which the exercise of the function is legitimate. It is linked to the administrative divisions or circumscriptions of the territory of the State, within which the administrative bodies must exercise their attributions. For Pérez, (2020) it comprises the spatial scope within which the entrusted functions should be exercised.

In a third aspect, the differentiation of administrative bodies and their hierarchy is determined by the degree they hold. According to Gordillo (2017), it is essential to distinguish whether competence has been assigned to the highest authorities or distributed among various specialized lower-level bodies. Additionally, as mentioned by Mora & Rivera (2019), the administrative organization is vertically

integrated and culminates in a supreme body to which the lower-level bodies are subordinate. The degree represents the position or situation of the body within the hierarchical pyramid.

It can be inferred that, according to Mora & Rivera (2019), a lower-level body is subordinate to a higher-level body. The administrative organization can be graphically represented like family trees: from the supreme body, as many hierarchical lines extend as there are directly dependent bodies. Likewise, from each of these bodies, as many lines extend as bodies depending on each of them, and so forth, through the various degrees, until reaching the last hierarchical level.

According to Pérez (2020), the hierarchical scale on which bodies are established refers to the place or position occupied by the body within the hierarchical pyramid. Furthermore, competence in terms of degree refers to the position held by a body within the hierarchical arrangement of the administration. Since competence is non-transferable, the lower-level body cannot make decisions that are within the purview of the higher-level body, and vice versa (Mora & Rivera, 2019).

Lastly, in the fourth aspect related to time, which is the duration for which competence is assigned, according to Gordillo (2017), it is also possible to distinguish whether competence is permanent, temporary, or accidental. In the case of permanent and temporary competence, which are both characterized by being regularly attributed to a specific body, there may be instances where competence is purely accidental or even fleeting in terms of its duration.

As per Mora & Rivera (2019), the temporal dimension of competence refers to the legitimate time frame within which a function can be exercised. Competence is generally permanent, meaning that a body can exercise its conferred powers at any time. However, in certain cases, a body may only have authority for a specified period. In such instances, competence is considered temporary. Both permanent and temporary competence are typically assigned to a specific body. Pérez (2020) adds that it is the period during which the body can act, in cases where deadlines are established for this purpose.

From the information provided, it can be deduced that competence allows a specific body to exercise all the functions detailed in the corresponding legal framework, thereby validating the administrative acts it generates. It is crucial to take into account the four aspects of competence: subject matter, territory, degree, and time.

### **The Transfer of Competence**

The transfer of competence is the transfer of functions from one administrative body to another administrative body, provided that a legal norm permits it beforehand. As such, Mora & Rivera (2019) argue that "competence is non-transferable and non-extendable. It must be exercised directly and exclusively by the body to which it is attributed as its own, except as provided by the relevant normative provisions."

According to the Organic Administrative Code, Article 68 - Transfer of Competence, competence is non-transferable and is exercised by the bodies or entities indicated in the legal framework, except in cases of delegation, avocation, substitution, subrogation, decentralization, and deconcentration when carried out in accordance with the terms provided by the law (National Assembly of Ecuador, 2017).

### **Delegation**

Delegation is a method of transferring competence in which administrative authorities can transfer the exercise of their functions from one authority to another. It involves a change in the ownership of the body when the owner of these functions is unable to exercise them. It is important to note that this possibility must be provided for in the law.

According to Gordillo (2017), delegation is "a decision by the competent administrative body by which

it transfers the exercise of all or part of its competence to a hierarchically lower body or one subject to administrative supervision." In other words, it transfers the powers, but not permanently, rather for a specified period or under certain circumstances as prescribed by the regulations.

According to Cassagne (2018), delegation is essentially a technique that allows the detachment of power by a body, which transfers its exercise to another. It involves a transfer of powers from the higher body to the lower body, which falls within the competence of the former.

For Mora & Rivera (2019), delegation is a transfer of competence and an exception to the principle and likelihood of competence. Consequently, delegation occurs when a higher authority transfers competence to a lower one regarding a specific matter as prescribed by the law, with the understanding that the higher authority must be legally authorized to delegate when necessary. Through a delegation act, they can transfer the exercise of functions to their collaborators or other authorities with related or complementary functions. (Mora & Rivera, 2019)

According to Pérez (2020), delegation is the transfer of competencies that a higher authority makes to its lower hierarchical authorities. It is clear that the doctrine unanimously affirms that delegation is only possible if there is a legislative or regulatory text that establishes it. The delegate cannot in turn delegate to a third party, and delegation must be expressly stated.

The delegation, being the transfer of the exercise of administrative powers from one body, referred to as the delegating authority, to another body, referred to as the delegate, who assumes these powers for a specified period, does not entail the delegating authority losing ownership of its competencies under any circumstances.

Doctrine establishes requirements for delegation, as per Mora & Rivera (2019): "In the act of delegation, which must always be in writing, the delegating authority and the specific functions or matters whose attention and decision are transferred shall be determined." In this way, the delegated authority can issue administrative acts for which it has been empowered, and these acts will have the same validity and will be subject to any applicable appeals.

Article 69 of the Organic Administrative Code (Ecuador. National Assembly of Ecuador, 2017) establishes that "Administrative bodies can delegate the exercise of their competencies."

The Organic Administrative Code (National Assembly of Ecuador, 2017) considers in Article 71 the effects of delegation: "The effects of delegation are: 1. Delegated decisions are considered to be adopted by the delegating authority. 2. Responsibility for decisions made by the delegate or the delegating authority, as appropriate."

### **Forms of Delegation**

Additionally, the mentioned legal framework, the Organic Administrative Code (National Assembly of Ecuador, 2017), considers in Article 69 that administrative bodies can delegate the exercise of their competencies to:

1. **Other bodies or entities within the same public administration, hierarchically dependent.** According to Moreta (2019), this is the common and ordinary delegation that we know, such as a minister (one body) delegating to a deputy secretary (another body hierarchically dependent on the same public administration).
2. **Other bodies or entities from different administrations.** According to Moreta (2019), this delegation requires prior coordination of the affected bodies or entities, its implementation, and compliance with other legal requirements, if any. This delegation is not granted in a hierarchical



dependent situation but as a means of coordination and collaboration.

3. **The heads of other dependent bodies for the signing of their administrative acts.** According to Moreta (2019), this delegation implies that, for signing administrative acts on behalf of a superior, this authority can only delegate this power to an official who is the head of a dependent body.
4. **Private law entities, in accordance with the relevant law.** According to Moreta (2019), this delegation refers to the application of new public business models, such as concessions and public-private partnerships, as specified by their respective laws.

### Avocation

Agustín Gordillo states that avocation is the reverse process of delegation, where the superior exercises competence that belongs to the inferior (Gordillo, 2017). On the other hand, Pérez points out that avocation does not require authorization by a norm, but if there is a prohibition, it must be respected (Pérez, 2020).

The Organic Administrative Code (National Assembly of Ecuador, 2017) considers in Article 69, Article 78 - Scope, that higher authorities assume jurisdiction over a matter whose resolution normally or by delegation belongs to their dependent administrative bodies when technical, economic, social, legal, or territorial circumstances make it convenient or necessary. Avocation shall be notified to the interested parties in the procedure prior to the issuance of the administrative act.

### Substitution

As the name suggests, "Substitution" refers to designating a substitute in the case of the temporary absence of the competent authority. Substitution should be regulated through the internal organizational instruments of the entity.

The Organic Administrative Code (Ecuador. National Assembly of Ecuador, 2017), Article 81 - Substitution, states: "The competencies of administrative bodies can be substituted in case of temporary absence. Substitution is regulated through the organizational, functional, and procedural instruments of the respective public administration."

Typically, a lower-level body substitutes for a higher-level body or someone of the same hierarchy, and only the physical person is temporarily changed to exercise the competencies. Common examples include cases of maternity leave or illness or when an employee is suspended from their duties as part of a disciplinary process.

### Subrogation

Subrogation is also a method of transferring competence, but it has the particularity that it always involves the transfer of authority from a lower-level body to a higher-level one. It is the act by which a public servant must fulfill the functions and responsibilities of a position of higher hierarchical rank because the titular authority is temporarily absent. "It occurs when the law establishes that one body exercises the functions of another body, either temporarily or definitively. It requires an express legal provision authorizing it" (Pérez, 2020).

The Organic Administrative Code (National Assembly of Ecuador, 2017) considers in Article 82 that subrogation involves "the competencies of an administrative body being exercised by the lower hierarchical level in the absence of the higher hierarchical level. Subrogation is only applied in cases provided for by the law."

In the Organic Law of the Public Sector, Article 126 states that subrogation occurs when, by the

provision of the law or by written order of a competent authority, a public servant must substitute for a position at a higher hierarchical level, the titular of which is legally absent. The substitute will receive the difference in the unified monthly remuneration corresponding to the one being substituted for, for the duration of the replacement, from the date of substitution, without prejudice to the rights of the titular (National Constituent Assembly, 2005).

### **Decentralization**

According to Mora & Rivera (2019), in decentralization, the competence of the central body is transferred to new bodies that are not hierarchically subordinate, and they acquire legal personality, along with administrative and financial autonomy.

From a social sciences perspective, Baca (2000) notes that decentralization is the process during which certain parts and/or sectors of governmental power, as well as responsibility for their operation, are transferred from the national central level to municipal and/or provincial state levels.

On the other hand, Moreta (2019) defines decentralization as the mandatory transfer of competencies along with the corresponding economic, human, and technical resources from the central government to autonomous decentralized governments. Its implementation is regulated by the Constitution of the Republic and the COOTAD.

Decentralization, as described in the Organic Administrative Code in Article 83, consists of the obligatory, progressive, and definitive transfer of competencies, along with the respective human resources and financial, material, and technological resources from the central public administration to Autonomous Decentralized Governments, through the procedure provided for by law (National Assembly of Ecuador, 2017).

The transfer of competencies is obligatory from the central administration to a distinct body, which is the autonomous decentralized governments, so they can exercise competencies within their specific scope, along with the corresponding economic and technical resources.

According to Costa, Blacio, & Maldonado (2021), the transfer of competencies from the central government to Autonomous Decentralized Governments as part of the territorial organization model in Ecuador implies, in addition to the allocation of resources, functions, and obligations, a rethinking of the traditional vision of public administration, its organization, functioning, and articulation, breaking away from the ideological foundations of centralism and the fragmented management of territorial policies.

The governing legal framework is the Organic Code of Territorial Organization, Autonomy, and Decentralization, which in Article 1 prescribes: the scope: "This Code establishes the political-administrative organization of the Ecuadorian State in the territory: the regime of different levels of autonomous decentralized governments and special regimes, to guarantee their political, administrative, and financial autonomy. It also develops a model of obligatory and progressive decentralization through the national competence system, the institution responsible for its administration, sources of financing, and the definition of policies and mechanisms to offset imbalances in territorial development" (National Assembly of Ecuador, 2010).

### **Deconcentration**

According to Mora & Rivera (2019), deconcentration is the allocation of competence and functions to offices located outside the main headquarters of the administrative organization or entity. This is done without prejudice to the powers and duties of guidance and instruction that must be exercised by the higher authorities of the administration. It does not imply delegation and can be carried out by territory or by functions.



For Mora (2006), the elements of deconcentration include a) Legal mandate ordering the transfer of competencies; b) Transfer of competencies related only to some functions; c) Transfer of competencies from a legal entity to a subordinate body; and d) Subordination of that subordinate body to the hierarchy of the decentralized entity. The functions transferred are national (those of the decentralized body).

According to Benavides (2019), deconcentration requires a. Transfer of competence, resulting in the transfer of its ownership from a superior body to an inferior one. b. This competence must be exclusive from that moment, with the superior not being able to exercise that attribute. Otherwise, it would only be granting the exercise, and therefore, what would exist is only a more or less extensive delegation. c. It takes place between bodies of the same institution. d. It would require a law to deconcentrate the powers conferred by law.

To conclude, according to Moreta (2019), unlike decentralization, deconcentration is not a definitive transfer of competencies but rather a non-definitive transfer of functions. It can be understood as a delegation that is carried out in the internal organization instruments between the central level of an administration and the hierarchically dependent levels.

Deconcentration, as described in the Organic Administrative Code in Article 84, is the transfer of functions from the central level of a public administration to other levels that are hierarchically dependent on the same, while the responsibility for their exercise remains with the central level (National Assembly of Ecuador, 2017).

Decentralization is the transfer of competencies from the central state to administrative bodies that are hierarchically subordinate, and it does not completely relinquish competence. Instead, it is used as a technique to operationalize centralization, i.e., to ensure the fulfillment of functions from the central administration.

## Conclusions

Administrative competence refers to the set of activities or functions that a specific body can legitimately exercise, as they are authorized to carry out specific actions by the legal system.

The transfer of competencies is the transfer of functions from one body to another, provided that a legal norm establishes it.

The results show that in the transfer of competencies through delegation, substitution, subrogation, and deconcentration, there is no transfer of the ownership of the competence. While it involves granting the authority to act in various administrative acts, this action is temporary and lasts until the original administrative body can efficiently perform its functions.

In the case of decentralization, which is a form of transferring competence, it involves the transfer of competencies from the central body to other bodies that are not subordinate, often with the corresponding human and financial resources.

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