PA Persona e Amministrazione
Ricerche Giuridiche sull'Amministrazione e l'Economia

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An Interim Report on "Subjectivization" and "Objectivization" of Administrative Law: Book Review of Luis Medina Alcoz, Libertad y autoridad en el Derecho administrativo. Derecho subjetivo e interés legítimo: una revisión, Madrid, Marcial Pons, 2016

Abstract

The interplay between rights and the public interest is a crucial issue in administrative law. Recent developments in Germany and France regarding the "objectivization" or "subjectivization" of administrative litigation have brought this issue to the forefront. In his book, "Libertad y autoridad en el Derecho administrativo," Luis Medina Alcoz offers an invaluable perspective on administrative law in France, Italy, Germany, and Spain, tracing its evolution from the 19th century to the present and emphasizing the importance of the concepts of rights within the administrative law system. Its sharp insights and broad scope make it a significant contribution to the field. However, this paper explores the book's significance from a different angle. By examining the arguments that the book does not fully address and the underlying assumptions it makes about key concepts, this paper will demonstrate that the book not only describes a possible conception of administrative law, but also raises numerous important issues for further academic inquiry.

Keywords: Subjectivization and Objectivization - Rights - Legitimate Interests - Maurice Hauriou - Santi Romano – German New Science of Administrative Law

1. Introduction

In 2000[1], a proposal was made to systematize administrative law based on the concept of jural relation (*Rechtsverhältnis*) between administration and citizens in East Asia.[2] In contrast, another proposal was made to systematize administrative law based on the concept of "cohesive interest," a concept rooted in objective law, which compounds various interests into the public interest[3]. The increasing significance of indivisible interests that cannot belong exclusively to individual subjects (e.g., environmental or consumer interests) is one of the factors driving this debate.[4] The fundamental question is whether to uphold the existing administrative law based on the concept of rights by interpreting these interests in terms of individual rights by refining this concept (subjective construction) or to embrace an alternative administrative law based on the concept of interests (objective construction).

This phenomenon is not limited to Japan and is also observed in continental European countries. For example, the *objectivization* of administrative law in Germany, the birthplace of *subjective* public rights (*subjektive öffentliche Rechte*) theory[5], and the *subjectivization* of *recours pour excès de pouvoir* in France, the origin

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2 See R. Yamamoto, *Gyoseijo no Shukanhou to Houkankei* [*Rights and Jural Relations in Administrative Law*], Tokyo, Yuhikaku, 2000, pp. 443ff.
3 See T. Nakano, *Koukenryoku no Koushi Gainen no Kenkyu* [*Imperium, Substantive Law, Iurisdictio*], Tokyo, Yuhikaku, 2007, pp. 271ff.
4 See T. Tatsumi, *Daisanshakou no Kenkyu* [*On Third-party Effect of Judgments*], Tokyo, Yuhikaku, 2017 pp. 367-368.
5 Vgl. *Ch. Marxsen*, Der subjektive Rechtsschutz nach klassischem Konzept und Tendenzen seiner Objektivierung, Die Verwaltung 53 (2020), S. 215.

of *objective* administrative jurisdiction[6], suggest that the administrative laws of these countries are transforming. However, no comprehensive study of this phenomenon has been recently conducted in France and Germany. In this situation, the book under review, "*Libertad y autoridad en el Derecho administrativo. Derecho subjetivo e interés legítimo: una revisión*" (hereinafter referred to as 'the book')[7] by Luis Medina Alcoz (hereinafter referred to as "the author") presents a thorough examination of the fundamental issue of rights and legitimate interests in administrative law in four continental European countries: France, Germany, Italy, and Spain. The book is an invaluable contribution to the scholarship.

After reviewing the book's outline, we will examine the significance of the diagram depicted, which shows the transition from an administrative law based on the authoritative concept of interests to one based on the liberal concept of rights. This paper aims to clarify the book's contribution and future challenges for administrative law. Note that we focus on the significance of the book as a comparative legal study and do not evaluate its aspects as a study of Spanish law. In the following discussion, the page numbers in parentheses refer to the corresponding pages in the book.

2. Summary

The book comprises three parts, totaling nine chapters. The first chapter provides an overview of the book's purpose and methodology. Part 1 (Chapters 2 and 3) explores the general concepts of rights and legitimate interests. Part 2 (Chapters 4-7) delves into the theories of rights and legitimate interests in France, Italy, Germany, and Spain. Finally, in Part 3 (Chapters 8 and 9), the

6 V. J. Sirinelli, « La subjectivisation du recours pour excès de pouvoir », *RFDA* 2016, p. 529.
7 Several reviews already exist. V. D.U. Fernández-Bermejo, *Revista de Administración Pública*, núm. 202, 2017, p. 491; A. Travi, *Diritto pubblico*, 2017, p. 954; L.R. Perfetti, *Diritto processuale amministrativo*, 2018, p. 1187.
This review challenges the conclusion of a previous review that the book presents a "meticulous analysis" of the laws of each country and offers "solid reasons" in favor of the subjective construction of administrative law (Fernández-Bermejo, *cit.*, p. 495).

book presents a conception of rights and legitimate interests under the Spanish Constitution.

2.1. Chapter 1: "Approach to the Study"

The main question explored throughout the book is presented in Chapter 1(23): whether and to what extent can a private person invoke objective law as a right that deserves full judicial protection when the administration violates the law? To answer this question, the book sets two objectives (26). First, we clarify how Spanish law has shaped the concept of legitimate interests. The objective is achieved through historical analysis of the concepts of rights and legitimate interests in France, Italy, Germany, and Spain. Second, based on historical research, the book develops a conception of rights and legitimate interests.

2.2. Part 1: "Concepts of Subjective Rights and Legitimate Interests in General"

Chapter 2, "Individuals and Liberty: Concept of Subjective Right," explores the development of the concept of rights until the early 19th century. It focuses on Immanuel Kant as a significant contributor to continental European legal philosophy. Although Kant's conception faced opposition in the early 19th century, it, in fact, laid the foundation for the general theory of law (53).

Kant thought that concepts such as liberty, equality, categorical imperatives of non-instrumentalization, the state, the separation of powers, and rights are rooted in human nature and reason. Reason leads to the autonomy of individuals' will, liberty in a broad sense as "independence from the arbitrariness of others." This liberty grants equality to all humans and presents the categorical imperative of not treating others as instruments. However, since humans tend to instrumentalize others for their benefit, a state must be established and

enforce this categorical imperative. Therefore, the state's sole purpose is to protect liberty, and to achieve this, state power must be divided (36-39).

Legislative power is responsible for enacting laws that regulate conflicting liberties by defining their boundary: it assigns rights to those whose liberty should be protected and obligations to those whose liberty should not be enforceable. In this sense, rights and obligations must correspond to each other. Thus, the legislator should not impose obligations for a purpose other than resolving mutual conflict of liberties: objective law is always the "sum of rights" (39-54).

The judicial power is responsible for interpreting the law and enforcing the rights. The inherent nature of all substantive rights is their enforceability. Without this, the state could arbitrarily choose whether to protect an individual from harm by others. On the other hand, the right to sue that is not backed by a substantive right is not acceptable because the use of proceedings to protect not proper interests but social interests, that is, the observance of objective law, cannot be justified by the state's sole purpose of protecting individuals' liberty. Furthermore, judicial power must be independent of executive power and not be support biased, non-adversarial procedures that compromise the protection of rights as such actions would infringe on natural liberty and go against the concept of rights, which implies guaranteed full judicial protection (40-42; 57-59).

How was the concept of rights received in administrative law? By the mid-19th century, public administration was seen as a mechanism to protect individual liberties. Within administrative activities, police activities were central to legislation and scholarship. The law governing police was equivalent to private law as it regulated the relationships between individual liberties (59-63). The concept of rights could order administrative activities, but there was no way to achieve an entirely lawful administration while maintaining individual

protection. Consequently, administrative law deviated from the liberal conception described above (68-69).

Chapter 3, "Society and Authority: Concept of Legitimate Interests," examines the shifts in legal thinking that have paralleled societal changes since the late 19th century. This chapter highlights Rudolf von Ihering, who saw the law as a social tool and placed the concept of interests at the center of his conception of rights. The chapter also demonstrates how the concept of the general interest and functionalist approaches to law gained prominence due to the growing state intervention in society (72-74).

Ihering defined rights as legally protected interests. This definition allowed the state to identify interests or purposes to be protected by the parliamentary act and to allocate rights based on their contribution to these interests or purposes. Thus, protection of collective interests became reasons for the existence of the state, objective law, and rights. Personality was seen as a means to serve the general interest (72-78). Ihering's theory had two impacts on procedural law. First, a right to sue not backed by substantive right is now acceptable. Second, duties that cannot be enforced in court appeared because he abandoned the principle of correspondence: objective law can protect overall welfare but not individual liberty, and such laws do not grant rights to individuals. While they may still benefit from such laws, this phenomenon is referred to as the "reflexive effect (*Reflexwirkung*)" and is differentiated from a right (79-84).

As state intervention increased in the late 19th century, academics focused on explaining how the law was used to promote the general interest and protect society. To this end, administrative law scholarship followed Ihering's theory and viewed substantive administrative law as a system that advanced the public interest and administrative litigation as a particular type of litigation distinct from civil litigation (87-90). The focus of academic debate centered around whether an individual could claim the violation of law by the administration as their right and receive full judicial protection when the violation

harmed him or her. Scholars generally agreed that such an individual could not claim rights when the law in the case aimed at protecting the general interest. This trend reflected authoritarianism and challenged liberalism (92-95). However, after WWII, constitutions reevaluated the concept of rights and relativized the particularity of administrative law. Despite this, its underlying conceptual structure traces back to the traditional authoritative framework (96-97).

2.3. Part 2: "The Development of the Concepts of Subjective Rights and Legitimate Interests in Administrative Law"

In Part 2, the book's central thesis regarding the conflict between the concepts of rights and interests in administrative law is analyzed in depth.

Chapter 4, "France," focuses on the situation in France. The *recours pour excès de pouvoir* is a legal remedy against administrative acts (*actes administratifs*). To receive a remedy, a plaintiff must show personal prejudice from the contested act. However, the concept of interest (not the concept of right) was used to explain this "personal prejudice" requirement, leading to a substantive law prioritizing the public interest over private rights. Nevertheless, the *Conseil d'État*'s precedents have effectively balanced the demands for the protection of individuals and administrative obedience to the law (103-109). Currently, French jurisprudence has shifted toward a rights-based system. First, the denial of substantive rights is no longer explicitly stated. Second, the subjectivization of administrative law is emphasized. The recent legislative reforms, such as the reinforcement of *référé,* denote this shift (111-113).

Chapter 5, "Italy," focuses on the situation in Italy, where individuals could not have rights against the public administration responsible for the general interest. The administrative jurisdiction created by the Law of 1889 was less independent and protective of citizens than civil tribunals. To justify this situation, scholars developed the concept of "legitimate interests (*interessi legittimi*)" as a subjective legal status alongside rights. Such a system was consistent with fascism. Despite this, the current Constitution did not change the fra-

mework (116-123). However, postwar academics aimed to increase judicial protection while staying within the framework. In recent years, case laws and legislation have favored the protection of rights, and the concept of legitimate interests has lost much of its relevance, now mainly serving as a criterion for determining jurisdiction (124-128).

Chapter 6, "Germany," focuses on the situation in Germany. Ihering's theory was the foundation for public law theory, according to which objective law aimed at the general interest could provide factual interests but not rights. Thethe Nazi regime took these ideas to the extreme without changing the legal system and theory in the Weimar Republic (130-141). The Bonn Basic Law placed human dignity as the foundation of the legal order and guaranteed the right to sue, making objective administrative law subjective. However, the subjectivization of administrative law is not complete due to "protective norm theory (*Schutznormtheorie*)," which makes the right to sue dependent on whether a provision aims to protect individual interests from illegal administrative activities. This theory contradicts the Basic Law, and thus, there is a strong movement to criticize it (142-150).

Chapter 7, "Spain," focuses on the situation in Spain. Throughout the 19th century, the term "rights" dominated Spanish administrative law. The Law of 1888 conceived administrative litigation as a proceeding to protect the "rights of an administrative character." The term "interest" did not have authoritative connotations (155-163). However, this seemingly rights-oriented construction was, in practice, oppressive: the "rights of an administrative character" were considered as rights inferior to "rights of a civil character" and did not provide citizens with full judicial protection (164-168). After 1900, Spanish doctrine started to use the expression "interest" in the same sense as in other countries. Interestingly, some scholars substituted the concept of rights with the concept of interests to expand judicial protection within the regime of

1888. The legislature under the 1931 Constitution also expanded judicial protection, albeit with limitations (170-177).

The Administrative Litigation Jurisdiction Act (LJCA 1956) marked a significant milestone in relegating administrative justice to ordinary courts. However, individuals who suffered damages from the unjust exercise of administrative powers could only claim "direct interests" instead of rights, and their legal remedies were limited. Eduardo García de Enterría tried to change this situation by interpreting LJCA 1956 by seeing these "direct interests" or "legitimate interests" as a type of right deserving full judicial protection. Unfortunately, the success of this theory led Spanish case law and scholarship to overlook the true meaning of the concept of legitimate interests, claiming that it would provide stronger protection to individuals than the concept of rights (185-197).

According to the prevailing opinion, individuals affected by illegal administrative activity are granted rights, those whose interests are not impacted have only a factual interest, and those in between are considered to have a legitimate interest. This legitimate interest is viewed as a status in substantive law, but in reality, it is standing to sue in other countries. This prevailing view emphasizes legitimate interests (not rights) to enlarge access to courts under LJCA 1956 because the administrative jurisdiction of 1888, which was based on the concept of rights, provided only limited protection. Thus, the prevailing view is not based on legal logic but on historical circumstances (197-214).

2.4. Part 3: "Subjective Rights and Legitimate Interests in Contemporary Administrative Law"

In Part 3, the concepts of rights and legitimate interests to be adopted in contemporary administrative law are laid out.

Chapter 8, "Subjectivization and Objectivization of Administrative Law," focuses on conflicting motivations in contemporary administrative law. The rule of law subjectivizes administrative law: an objective law is considered a

right when the administration's violation of the law affects the individual (217-220). In contrast, the social state objectivizes administrative law and even permits the government to limit fundamental rights to benefit society as a whole. However, while general interests were used to deny judicial protection, today, these general interests can only provide broad legislative discretion. This discretion compromises individualism and collectivism (229-234).

The so-called "new science of administrative law" in Germany suggests that the norms governing administration do not necessarily align with those that serve as the basis for individuals' rights. However, if the former norm is a legal norm, then it must be considered the basis for rights, and conversely, if it does not serve as the basis for rights, then it is not a legal norm. This approach assumes the *Schutznormtheorie*, which must be challenged (236-238). Law & Economics shows that many rights granted by legislators serve a social purpose and can be analyzed to maximize society's overall utility. However, the Constitution grants some rights solely due to being human. Therefore, it is questionable whether such an analysis is entirely compatible with the Constitution (238-242).

Chapter 9, "Subjective Right as a Real Problem and Legitimate Interests as a Verbal Problem," concludes the book. The concept of rights provides a standard that determines if an objective law permits the citizen to request a particular administrative act and to seek full judicial protection. Spanish law has made its procedural law subjective but substantive administrative law has not yet been subjectivized as not all administrative duties correspond to the rights of citizens. The criteria for whether a substantive norm functions as a right is whether its nonfulfillment results in harm that can be considered a special impact on citizens. Article 24 of the Spanish Constitution adopts this criterion, and the procedural system's design must align with this article (243-262).

If the Constitution subjectivizes substantive administrative law, then administrative discretion also becomes a matter of a right. When administrative

discretion is granted, citizens do not have the right to demand a specific decision. However, the administration is bound by obligations, such as the prohibition against arbitrary decision, that grant corresponding rights, which serve as an instrument for the final decision (262-266). The distinctive feature of discretionary decisions is that in addition to applying the norm, they set some content where the norm is exhausted. In contrast, the distinctive feature of court decisions is that they only apply norms (266-271).

What is crucial in contemporary administrative law is to analyze the concept of rights as the autonomy of will and to explain the constitutional requirement that a violation of an administrative law norm results in full judicial protection regardless of the purpose of the norm. Of course, because legitimate interests are a constitutional concept, academics must still address this concept, but this is merely a matter of terminology, and the substantive issues surrounding the concept of rights are far more important (272-275).

3. Critique

3.1. General Comments

The book addresses one of the most important issues in contemporary administrative law, namely, its subjectivization and objectivization, and covers major continental European administrative law. Moreover, the book provides a broad overview of the complicated situation of laws in various countries: administrative law built on an iusnaturalistic, liberal, and individualistic concept of rights was reformulated by an authoritative and collectivistic concept of interests however, after WWII, the concept of rights came back. This overview helps readers grasp the book's construction.

Of course, there is no academic literature without its problems. In what follows, we point out two shortcomings. First, the treatment of the individual authors is somewhat lacking in subtlety, and thus some of the suggestions that could have been made are left out. Second, the concepts that form the core of

the book's arguments, or the arguments themselves, are unclear. By examining these issues, we can examine the book's contribution more clearly and provide a nuanced perspective.

3.2. Potential of Objective Construction

The book presents administrative law based on the concept of interest as an object to be overcome, connecting it to "authoritarianism," "collectivism," and "society as a whole," which are opposed to "liberalism," "individualism," and "individual." However, using these modifiers to describe individual theories may oversimplify complex conceptions.

The following examples from France, Italy, and Germany illustrate nuances the book overlooks by qualifying these as "authoritative." The examination may seem technical, but "nuance is important" (227): it will highlight some points in the subjectivization or objectivization of administrative law.

3.2.1. Two Layers of Law: Maurice Hauriou

The book critically refers to Maurice Hauriou's[8] concept of *recours pour excès de pouvoir* as an action other than an action for rights protection, *recours de plein contentieux* (107-108) by framing Hauriou's argument as an "anti-individualistic" conception (107, 177, 245) that "alienates" the will of the individual (111). His theory of institution depicts the legal status of the individual against *puissance publique* as "subject [*sujet*]," who only has the liberty to submit and adhere to the common ideals embodied in the state and objective law and does

8 The book refers to Hauriou's three books: M. HAURIOU, «La gestion administrativa», en Obra escogida, Madrid, Instituto de Estudios Administrativos, 1976; *id.*, *Précis de droit administratif*, 8e éd., Paris, Sirey, 1914 and *id.*, *Principes du droit public*, 2e éd., Paris, Sirey, 1916. It simply lists them without accounting for the fact that *La gestion administrative* was published in 1899, before Hauriou consolidated his theory of institution, that is first formulated in *Précis de draoit administratif*, 6e éd., Paris, Sirey, 1907 (The well-known expression "*institution des institutions*," which the book reproduces with quotation marks, also comes from *ibid.*, p. IX). Therefore, it should have demonstrated that such an arrangement was theoretically justifiable.

not allow individuals to assert their own rights. Individuals can only pretend to the violation of objective law in the public interest.

3.2.1.1. Implication of the concept "subject"

Two points[9] can be raised regarding this explanation.[10] First, this explanation fails to grasp the implications of Hauriou's theory, which denies rights to the subject. Hauriou describes individuals as "subjects" because the administration can change the jural relations with them without their agreement. In other words, private individuals are subjects without rights, as they can be subjected to the unilateral discipline of jural relations.[11] In short, the absence of rights for the subject against administrative acts (*actes administratifs*) is inextricably linked to recognizing the prerogative of priority (*privilège du préalable*) of public authority.

Explaining the status of subjects through the theory of institution is significant in understanding the public and *erga omnes* nature of administrative acts. If administrative acts concern public matters, then the discipline of jural relations through administrative acts must be respected not only between the

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9 Other questions can be posed. For instance, although somewhat unclearly, the book may suggest a strong influence of Ihering to Léon Duguit and Hauriou (106). However, Hauriou is critical of Ihering based on Jean Domat (M. HAURIOU, *Principes de droit public*, 2e éd., Paris, Sirey, 1916, p. 256-257; *id.*, *Précis de droit administratif*, 6e éd., Paris, Sirey, 1907, p. 6-7); Although Hauriou uses the term 'legitimate interests (*intérêts légitimes*),' it might not have been borrowed from Ihering but from Dante Majorana (cfr. *Ibid.*, p. 33 n.1 ; D. MAJORANA, « La notion du droit public subjectif », *Recueil législation de Toulouse*, 1906, p. 1).

The book emphasizes Ihering's influence throughout, and this is an important contribution. However, as it appears here, the existence of such influence is not adequately supported by quotations and references or comparison of textual wording.

10 For a more detailed interpretation of Hauriou's texts, see T. Doi, *Naatenin naki Gyoseikoui no Houtekikouzou* [*A Transformation of Administrative Action*], Tokyo, Yuhikaku, 2021, pp. 207-236.

Hauriou's theory has traditionally been distinguished three phases: early, middle, and late (v. par exemple, Julien BONNECASE, « Une nouvelle mystique », *Rev. gén. dr.* 1931, p. 241). We examine Hauriou's mid-period theory, for instance, one presented in M. HAURIOU, *Principes de droit public*, Paris, Sirey, 1910, because the book presumably regards this as Hauriou's theory.

11 V. M. HAURIOU et G. DE BEZIN, « La déclaration de volonté dans le droit administratif français », *RTD civ.* 1903, p. 554 et s. As the year of publication shows, the concept of subject is not a consequence of the theory of institution. Hauriou maintained this concept before and after the formation of the theory (v. aussi, M. HAURIOU, *Précis de droit administratif*, Paris, Sirey, 11e éd., 1927, p. 362).

parties, i.e., the administration and private individuals but also by everyone.[12] Then, the *erga omnes* effect of the judgment of *recours pour excès de pouvoir* can be interpreted as a procedural manifestation of this principle. If we re-project this consideration on the issue of the addressee of an administrative act, then the distinction between the direct addressee and third parties becomes less important. Therefore, Hauriou endorses the *Conseil d'État*'s case law, which classifies not only individual acts but also rule-establishing acts as administrative acts. "Executive administrative decisions, even the most particular ones, appear as a small legislative act or a small administrative regulation, which are threatening, even before they are really applied because they modify the state of the law. "[13] Hauriou's theory of institution addresses this issue by arguing that the statuses of individuals are inextricably linked to each other and to the institution they are a part of.[14]

If we suppose that administrative acts are valid until annulled, then providing a theoretical framework for this principle is necessary. This was the issue that Hauriou was trying to confront with concepts such as subject, the prerogative of priority, and the theory of institution.

The judicial protection that the book focuses on is a problem that arises after these concepts have been granted. Therefore, it is pointless to criticize Hauriou by arguing that he does not give full judicial protection because he denies rights to the subject and thus presents an authoritative theory. Even if Hauriou does not admit "full judicialprotection,"[15] it does not support the

12 While this is not a logical necessity, when Hauriou abandoned the authoritative-act/management-act dualism that he initially adopted (Comparez M. HAURIOU, supra note 8, *Précis*, p. 412-413 et *id.*, *Précis de droit administratif*, Paris, Sirey, 7e éd., 1911, p. 418), such recognition exists in the background (v. *ibid.*, p. 424-425).
13 M. HAURIOU, Note sous C.É., 8 mars 1912 *Lafage* et *Schlemmer*, in A. HAURIOU (dir.), *Notes d'arrêts sur décisions du conseil d 'État et du tribunal des conflits publiées au Recueil Sirey de 1892 à 1928*, t. 2, Paris, Sirey, 1929, p. 140-141.
14 V. M. HAURIOU, supra note 7, p. 170-172. The concept of the law of discipline (*droit disciplinaire*), mentioned below, also concerns here (v. *Ibid.*, p. 139-143; M. HAURIOU, supra note 8, p. 130-135).
15 We will point out later that the content of this concept is unclear.

book's critique because of the different situations in which the book and Hauriou pose the term 'rights.'

3.2.1.2. Two Layers of Law

While the first point of inquiry pertains to substantive law, the second pertains to procedural law. Hauriou questions the book's assumption that administrative jurisdiction should always provide full judicial protection of rights by giving a novel but traditional interpretation of the distinction between *recours pour excès de pouvoir* and *recours de plein contentieux*.

As mentioned, Hauriou's concept of the subject was based on the prerogative of priority; he expanded this notion in his dispute with Duguit, arguing that there are "two layers" of law.[16] On the one hand, substantive law (*droit du fond*), the law of legal transactions, governs the balance of assets (*patrimoine*) for commutative justice. When substantive law is prejudiced, petitory action (*action pétitoire*) protects substantive rights. On the other hand, the law of discipline protects public order and factual situations. When the law of discipline is violated, police measures are taken quickly and decisively to restore the factual situation. Administrative acts belong to this layer: the prerogative of priority enables the administration to act and enforce this action before substantive law functions. Furthermore, there is a relationship between the two: the factual situation should first be quickly restored by the measure of discipline, and then the issue of rights should be resolved by substantive law.[17]

According to Hauriou, the distinction between an action in merits and an action in possession in civil litigation can be better understood using this distinction.[18] The protection of possession is a police measure that maintains so-

16 V. M. Hauriou, supra note 8, p. 799 et s.
17 Cfr. M. Hauriou, supra note 7, p. 46.
18 Hauriou affirms that the protection of possession has a meaning independent of the protection of property rights; he refers to the debate between Rudolf von Ihering and Friedrich Karl von Savigny over this issue (v. M. Hauriou, Note sous C.É., 3 juin 1906, *Carteron*, in A. Hauriou (dir.), supra note 12, p. 125 et s.).

cial order or peace while also protecting the interests of the individual possessor.[19] For example, various restrictions imposed on the action in possession, such as a short time limit for filing an action and not allowing a hearing on the merits (*régle de non cumul*), embody these ideas. Then, Hauriou projects this distinction between actions in possession and actions on merits onto the distinction between *recours pour excès de pouvoir* and *recours de plein contentieux*:[20] The former is a kind of *réintégrande*.[21]

Regardless of the validity of Hauriou's argument, which is important here is that Hauriou provides a rationale for actions other than those for rights protection, in keeping with the tradition of Roman law, which distinguishes between possession and ownership.[22] The book emphasizes natural law theory and its application to civil law; however, it does not consider the perspective of possession. Hauriou's argument suggests that the book's emphasis on the "tradition" of rights may be a contentious choice, even in private law.

3.2.2. Collectivist Objective Construction: Santi Romano

The book critically refers to Santi Romano's[23] concept of duties (120-121): Romano presents an "authoritative" conception (177, 245) because he denies the correspondence between duties and rights, and concerning such duties, citizens may be deprived of any legal measures.

3.2.2.1. Structure of Collectivist Substantive Administrative Law

19 This conception is not unique to Hauriou: vgl. z.B., *L. Raiser*, Rechtsschutz und Institutionenschutz im Privatrecht, in: Summum ius summa iniuria, Tübingen 1963, S. 154.
20 V. M. HAURIOU, supra note 17, p. 125 et s.
21 V. M. HAURIOU, supra note 17, p. 125 ; *id.*, Note sous C.É., 21 nov. 1913, *Larose*, in A. HAURIOU (dir.), supra note 12, p. 69.
22 On the concept of possession in Roman law, see, Akira Koba, *Roma Hou Annai* [*Introduction to the Roman Law*], 2nd ed., Tokyo, Keisou-Shobou, pp. 47-57; *id.*, *Preliminary Soundings on the Roman Origins of the Juristic Concept "Possession"*, 2(1) Specula Iuris 1 (2022).
23 The only work by Romano that the book cites is S. ROMANO, *Fragmentos de un diccionario jurídico*, Buenos Aires, 1964, pp. 89-95.

This explanation can be questioned on two points. First, it is doubtful that sufficient attention has been given to Romano's attempt at a genuine collectivist conceptualization. The book calls into question that subjectivization in Spanish administrative law does not extend to substantive law (249).[24] If so, from the standpoint of the book[25], to evaluate a theory, it is necessary to understand not only its consequences in procedural law but also its conceptual structure in substantive law. Then, in Romano's conception, the category of duties was not presented in isolation: the late[26] Romano composed substantive administrative law of three pairs of concepts, and the duties are one of the components.[27] Therefore, the significance of the concept of duties in Romano cannot be accurately understood without grasping its position within the entire framework.

The first opposing concepts are statuses (*situazioni)* and relations (*rapporti*). A legal status "is to be understood […] as a stable and permanent condition, which may be the source or cause of an indefinite series of relationships.

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24 The concept of subjectivization or objectivization of substantive administrative law is not as widely discussed as that of administrative litigation. Moreover, the book does not offer a clear definition of what constitutes subjectivization of substantive law or what kind of changes in substantive law qualify as subjectivization. However, the book's insight that subjectivization and objectivization can also occur in substantive law is valuable. As noted in the context of Hauriou's work, the existence of different types of actions, such as *recours pour excès de pouvoir* and *recours de plein contentieux*, suggests that the corresponding substantive law*s* may have distinct reasons for existence: "the conditions of action serve as a bridge between substantive law and process" (Ch. Cudia, *Legittimazione a ricorrere, concezione soggettivistica della tutela e principio di atipicità delle azioni nel processo amministrativo*, in *P.A. Persona e Amministrazione*, 2019(2), p. 101). Therefore, the book's focus on the subjectivization of substantive administrative law is crucial in highlighting the need for scholars to pay attention to the structural changes in substantive administrative law that correspond to the changes in administrative litigation.

25 Whether to assume in administrative law "a category of 'substantive law' as distinct from procedural law and to be realized through litigation" (M. Kobayakawa, *Gyoseisosyou no Kouzoubunseki* [*Structural Analysis of Administrative Litigation*], Tokyo, University of Tokyo Press, 1983, p. 5) can itself be controversial (vgl. z.B., *J. Buchheim*, Actio, Anspruch, subjektives Recht, Tübingen 2017, insb., S. 23ff).

26 S. Romano, *Principii di diritto amministrativo italiano*, 3ª ed., Milano, Società editrice libraria, 1912, presents a different conception, but here we deal only with his later view, which the book regards as the Romano's theory.

27 S. Romano, *Corso di diritto amministrativo*, 3ª ed., Padova, CEDAM, 1937, pp. 137-157.

"[28] Romano supposes that the entities that possess a legal status in substantive administrative law are not necessarily divisible individuals: they can be various entities, groups, or categories, and there is no guarantee that they are mutually equal.[29] In contrast, jural relations are more or less contingent, occurring between organs within the same personality, between multiple personalities, or between subject-objects in individual concrete situations.[30]

The second opposing concepts are powers (*potestà*) and rights (*diritti*). Romano opposes the prevailing view of labeling all *potere giuridico* as rights and distinguishes it between rights and powers, which are *potere* in a narrow sense. Powers "are the *poteri* by which legal capacity [*capacità giuridica*] takes place and is qualified in a generic direction or aspect of it," whereas "rights are the *poteri* that take place in a particular and concrete jural relation. "[31] Alternatively, it is the passive subject (*soggetti passivi*) who confronts the power, whereas the right is always a component of a specific relation and takes the obligor as its counterparty. The subject of duty does not assume the obligation, a component of the jural relation, but is placed in a state of subjection (*stato di assoggettamento*). This submission (*soggezione*) is "not a moment of a jural relationship but is a 'status.'"[32]

In the area of administrative law, two types of powers exist: (1) the state or administrative power, which can be divided into specific powers; and (2) powers, which may also be vested in private individuals and are correlated with the state's administrative powers, such as the power to appeal against an admi-

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28 S. Romano, *Corso di diritto amministrativo*, *cit.*, p. 137. The classifications of legal status according to their mutual superiority, subordination, or independence (v. *ibid.*, p. 138) immediately reminds us of S. Romano, *L'ordinamento giuridico*, 2ª ed., Firenze, Sansoni, 1946, p. 145 ss., which classifies the relationships between legal orders by the concept of legal relevance (*rilevanza giuridica*). However, Romano does not go as far as to classify the relationship between legal statuses with the concept of legal relevance.
29 V. S. Romano, *Corso di diritto amministrativo*, *cit.*, p. 134-135, 138.
30 V. S. Romano, *Corso di diritto amministrativo*, *cit.*, p. 138-139.
31 V. S. Romano, *Corso di diritto amministrativo*, *cit.*, p. 139-140.
32 V. S. Romano, voce: Poteri, Potestà, in: *Frammenti di un dizionario giuridico*, Milano, Giuffrè, 1947, p. 187.

nistrative act[33] that causes the exercise of the power to decide disputes.[34] The legal nature of state power and the private power of action are identical, as both arise from their status in the legal order.[35] The most important power is functions (*funzioni*), exercised not for one's own benefit but for the benefit of others or objective interest. State power is typically described as a function because it should consider the interests of the collectivity rather than individuals.[36]

The last opposing concepts are duties (*doveri*) and obligations (*obblighi*). Romano says that even in private law, on the one hand, there are rights that do not correspond to obligations, such as property rights[37][38], and on the other hand, there are obligations that do not correspond to rights, such as natural obligations[39] and heirs' obligations. Moreover, there are many duties in public law that protect the interests exercising the functions above. These facts show, according to Romano, that the conventional notion that rights and duties always correspond to each other is erroneous. Then, Romano holds that such duties do not naturally correspond to the right to demand compliance with

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33 When a private individual appeals against an administrative act, they do not assert a right, but a legitimate interest, which can be seen as a type of power or status. Romano drew a parallel between legitimate interest and possession (see S. ROMANO, voce: Diritti assoluti, in: *Frammenti di un dizionario giuridico*, *cit.*, p. 53). This conceptual framework is intriguing because it can imply that, like Hauriou, Romano saw administrative jurisdiction as resembling possessory action.

34 V. S. ROMANO, *Corso di diritto amministrativo*, *cit.*, p. 142.

35 Cfr. ROMANO, voce: Poteri, Potestà, in: *Frammenti di un dizionario giuridico*, *cit.*, p. 183.

36 V. ROMANO, *Corso di diritto amministrativo*, *cit.*, p. 142-143.

37 The view according to which property rights is understood as a bundle of individual rights and obligations (cfr. M. PLANIOL, *Traité élémentaire de droit civil*, 4e éd., t. I, Paris, LGDJ, nº 2160; *O. Mayer*, Deutsches Verwaltungsrecht, Bd. 2, 2. Aufl., München 1914, S. 73) has consistently been a minority view (v. par exemple, M. HAURIOU, supra note 7, p. 169-170). The book emphasizes the "tradition" of always recognizing the correspondence between rights and obligations, but the role of property rights in this book is unclear.

38 We can contrast two theoretical models of administrative law: one that constructs administrative law through an analogy with the relations of rights and obligations under private law (possibly named as the taxation model) and one other that constructs administrative law through an analogy with property rights (possibly named as the *Widmung* model). Although a minority position, the latter model has always proposed in Germany, France, and Japan (see T. Doi, supra note 11).

39 Natural obligations are also referred to in the book as "exceptional" (57).

them but only that there are cases in which legitimate interests correspond to them.[40]

What is important in relation to Romano's conception of substantive administrative law as described above is his recognition that the subject who can occupy a status in administrative law is not limited to the individual as a human being.[41] Of course, one could raise an objection based on the value judgment that even if such a fact exists as a sociological fact, the legal order must be based on the individual. However, it is important to note that even if the Constitution declares individualism by placing the dignity of the individual as a core principle, there is a considerable gap between that and the rejection of the legal reality of groups. Although the book consistently characterizes as "authoritative" a theory that recognizes society as an entity or the interests of groups as distinct from individuals as such, we cannot deduce from the characterization that such an "authoritative" theory should be rejected. To support the book's concept, it should have to confront and refute Romano's theory, which presented an administrative law based on a collectivist conception.

3.2.2.2. Correspondence of Duties and Powers

The second point of questioning overlaps with our point in relation to Hauriou. The book criticizes Romano for recognizing the duties that do not correspond to rights. However, as we saw above, Romano distinguishes between powers and rights, and it is powers, not rights, that correspond to duties. Indeed, Romano formulated the status of a private person appealing against an administrative act as a power. Or, Romano, from the beginning, "recognized the right to legal protection […] The substantive legal status to which this right

40 V. S. ROMANO, *Corso di diritto amministrativo*, *cit.*, p. 155.
41 This reflects Romano's pluralistic view of society, which became especially evident in the era following the publication of S. ROMANO, *Lo Stato moderno e la sua crisi*, ora in G. ZANOBINI (a cura di), *Scritti minori*, vol. I, Milano, Giuffrè, 1950, p. 311ff.

of action is generally granted is [in early Romano's terminology] legitimate interest and occasionally protected interest. "[42]

The book overlooks this complex structure in Romano's conception by focusing exclusively on the non-correspondence between rights and duties. This is also not a minor problem from the perspective of understanding Romano's theory and his conception of substantive administrative law based on the concept of interests.

3.2.3. Relationship between Constitutional Principles and Administrative Law: Eberhard Schmidt-Aßmann and the New Science of Administrative Law

The book critically refers to the New Science of Administrative Law (*Neue Verwaltungsrechtswissenschaft*) led by Eberhard Schmidt-Aßmann[43] and others: Schmidt-Aßmann upholds the "authoritative matrix" (151) of the protective norm theory (*Schutznormtheorie*) and advocates for "a science of administrative law focused on administrative efficiency rather than on individual guarantees" (150 n. 59).

First, the protective norm theory does not permit individuals to insist on an objective law in the courts unless the law that imposes duties on the administration is also intended to protect the plaintiff's interests. However, the Basic Law (*Grundgesetz*) posits self-determination as a fundamental principle. Therefore, the obligations of the administration should be interpreted as areas of individual sovereignty, regardless of their purpose. Those who suffer not factual but legal damages due to noncompliance must always be able to assert their rights. Therefore, the protective norm theory must be overcome (149).

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42 T. Nakano, supra note 2, pp. 217-218; V. S. Romano, *Principii di diritto amministrativo italiano, cit.*, p. 201. 234-235.

43 The works of Schmidt-Aßmann that the book cites are *La teoría general del Derecho administrativo como sistema*, Madrid, Marcial Pons, 2003: «Cuestiones fundamentales sobre la reforma de la Teoría General del Derecho Administrativo», en J. Barnes Vázquez (ed.), *Innovación en el Derecho administrativo*, Sevilla, Global Law Press, 2006, p. 15: «El método en la ciencia del Derecho administrativo», en *ibid.*, p. 133.

Second, the New Science of Administrative Law highlights the asymmetry between norms of conduct for the administration (*Handlungsnormen*) and norms of control for the court (*Kontrollnormen*). However, this asymmetry also originates from the premise of protective norm theory. Any norm violation can be asserted in court, and a norm that cannot be asserted in court is not a legal norm (236-238). Thus, the distinction between administrative decision-making and court control should not be based on the nature of the applied norm but on the fact that the former encompasses more than the mere application of a norm (268-269).

3.2.3.1. Protective Norm Theory

For each of these two assessments, the following questions arise. First, regarding protective norm theory, it is questionable whether Schmidt-Aßmann can be defined as a mere defender of protective norm theory.[44] Setting this point aside, the argument for why the protective norm theory should not be adopted is insufficient, although all criticism of the German science of administrative law in the book depends on it.[45]

The book argues that the fundamental decision of the Basic Law, which places human dignity at the foundation of all public authority, can be interpreted as always imparting rights to those who suffer damage from administrative obligations, even if there is no explicit provision granting "right to have the administration comply with the law" (149). If the "right to have the administration comply with the law" means the right to legality (*Gesetzesvollziehungsanspru-*

44 Vgl. *E. Schmidt-Aßmann,* in: G. Dürig/R. Herzog/R. Scholz, GG, Art. 19 Abs. 4 Rn. 144. An article of the recent handbook also counts Schmidt-Aßmann among the critics of the theory (vgl. *A. Edenharter*, in: W. Kahl/M. Ludwigs (Hrsg.), Handbuch des Verwaltungsrechts, IV, Heidelberg 2022, § 95 Rn. 12).

45 However, given that there are few references to the literature written in German, the book may not argue that the protective norm theory cannot be adopted as an interpretation of German law, but only that the protective norm theory is not useful in the interpretation of Spanish law.

ch)[46], then to present such an interpretation of the Basic Law, the book should have to individually examine the previous case law and doctrines[47] that have denied the right to legality.[4849]

More specifically, the book should have appreciated the suggestions from the following precedents it critically refers to. It repeatedly refers to a decision of the *Bundesverfassungsgericht*[50], according to which a defect in the procedure for a public contract below a certain threshold does not give the party who failed to conclude the contract a right to attack the defect[51]. It qualifies the decision as an example of the problems with the protective norm theory (147-148, 205, 228, 249). However, the decision is based on a different conception of rights than the book, and it could have been possible to deepen an analysis of the conflicts of constitutional principles based on this decision. To differentiate procedural guarantees between contracts, in examining whether it would

46 It is difficult to decide from the description of the book whether this is the case because the right to legality is independent of the occurrence of damage to its titular (vgl. z.B., *BVerfGE* 132, 195 Rn. 95); the book considers the occurrence of damage to be a requirement for the occurrence of the right.

47 Vgl. *Ch. Waldhoff*, Staat und Zwang, Paderborn 2008, S. 61f. m.w.N. The right to legality is said to date back to F. Fleiner, who described it as "comprehensive subjective right [*umfassendes subjektives Recht*]" as distinct from rights in the narrow sense (vgl. *J. Masing,* Die Mobilisierung des Bürgers für die Durchsetzung des Rechts, Berlin 1997, S. 69).

48 For example, a series of works by Hartmut Bauer (vgl. jetzt, *H. Bauer*, in: W. Kahl/M. Ludwigs (Hrsg.), Handbuch des Verwaltungsrechts, IV, Heidelberg 2022, §98 Rn. 63; *ders.*, Lehre vom Verwaltungsrechtsverhältnis, Tübingen 2022, S. 143ff.) and *P. M. Huber*, Konkurrenzschutz im Verwaltungsrecht, Tübingen 1991, S. 172ff., who criticize the protective norm theory, arguing that the existence of rights should essentially be determined by fundamental rights, should have been consulted. However, these professors also do not recognize the right to legality; a representative argument for recognizing such a right under the Basic Law is *H. H. Rupp*, Grundfragen der heutigen Verwaltungsrechtslehre, 1. Aufl., Tübingen 1965, S. 262ff.

49 To defend the right to judicial realization of objective law, it would have been more adequate to refer to the so-called procuratorial rights (*prokuratorische Rechte*). Vgl. *J. Masing,* a.a.O. (Fn. 46); *J. Krüper*, Gemeinwohl im Prozess, Berlin 2009; auch *W.-R. Schenke*, in: W. Kahl/M. Ludwigs (Hrsg.), Handbuch des Verwaltungsrechts, IV, Heidelberg 2022, § 92 Rn. 76ff. m.w.N. See O. Nishigami, *"Houritujou no Rieki" to Koukennronn* (2) [*Legitimate Interests and Public Rights Theory*], 155(2) Minshouhou Zasshi [Journal of Civil and Commercial Law] 213-226 (2019).

50 The book does not specify the bibliographic information, but it must be *BVerfGE* 116, 135.

51 Strictly speaking, the absence of right here means that the right to seek proceedings guaranteed by primary EU law is not recognized (§97 Abs. 7; §102 ff. GWB), i.e., the proceedings in the ordinary courts are legally recognized. However, in practice, the lack of this right means that there is no guarantee for judicial protection, as a contract is usually concluded during these proceedings (siehe, *BVerfGE* 116, 135 Rn. 85).

violate the principle of equality (§3 para. 1 Basic Law), the decision concluded that giving all participants in public contract procedures a right to claim procedural defects would ruin the purpose of the law itself, which is to make procedures more efficient. Therefore, the legislator can decide whether it grants the right to challenge a procedural defect other than those before the ordinary courts.[52] Regardless of the conclusion's validity[53], this decision differs from the book's understanding of the relationship between the rule of law and the social democratic state principle: the former is applied to the judicial availability of objective law and the latter to the creation of objective law, with the understanding that the rule of law and the social democratic state are incompatible (252). The decision projects the requirements of a social democratic state onto the availability of objective law through the judiciary by regarding the existence or nonexistence of rights as something that the legislator can determine. In this way, the decision could have served as an opportunity to deepen the debate on reconciling these constitutional principles rather than simply dismissing the decision based on its conclusions.

3.2.3.2. New Science of Administrative Law

The second criticism of the New Science of Administrative Law can be understood as consistent with the book's position, which recognizes the right to legality. However, it appears that the New Science of Administrative Law's stance on judicial review could have been useful to the book. Therefore, we offer a brief comment, acknowledging that it is extraneous.

According to the New Science of Administrative Law, administrative activities may be assessed not only as legal or illegal but also according to multiple criteria such as acceptability, effectiveness, efficiency, flexibility, innovativeness, and transparency. Accordingly, based on such evaluation criteria, the New

52 Vgl. *BVerfGE* 116, 135 Rn. 90ff.
53 The German prevailing view is favoring this decision (vgl. *W. Kahl*, in: W. Kahl/M. Ludwigs (Hrsg.), Handbuch des Verwaltungsrechts, IV, Heidelberg 2022, §94 Rn. 37).

Science of Administrative Law differentiates various organizations and procedures to achieve optimal administrative activities.[54] Furthermore, the New Science of Administrative Law asserts that such changes in organizations and procedures necessitate modifications to the density of judicial review and comprehension of the separation of powers between the executive and the judiciary.[55] Put differently, the New Science of Administrative Law challenges the book's conception of the separation of powers as the administration performing tasks beyond norm application, while the courts only apply norms (268). Moreover, the significance of these arguments is especially pertinent in administrative discretion, as it raises questions about the extent to which courts should conduct a review of administrative decisions.[56]

3.3. Issues on Subjectivization and Objectivization of Administrative Law

From the three examples reviewed thus far alone, we can grasp some of the challenges that the book poses to administrative law scholarship, although they are not explicitly formulated. In the following, we will briefly review those issues, limiting ourselves to those at the core of the conceptual framework used in the book.

3.3.1. Constitutional Principles and Administrative Law

According to the book, contemporary constitutions recognize that individual rights can be sacrificed to benefit society as a whole (e.g., 76, 229). The book insists that the rule of law and the social democratic state are incompatible and that the Spanish Constitution validates the former in the judicial availability of objective law and the latter in the creation of objective law (252). This

54 Vgl. *R. Schröder*, Verwaltungsrechtsdogmatik im Wandel, Tübingen 2007, S. 193f.
55 Vgl. *J. Kersten*, in: W. Kahl/M. Ludwigs (Hrsg.), Handbuch des Verwaltungsrechts, I, Heidelberg 2021, §25 Rn. 23.
56 The fact that administrative discretion is an unresolved issue in the book has been pointed out in a prior review (v. L.R. PERFETTI, *Recensione, cit.*, p. 1190 ss.).

interpretation is extremely important for the book's conception of Spanish administrative law. The book's argument that the right to full judicial protection is always inherent in substantive rights and that, therefore, objective administrative law must always be reducible to rights ultimately depends on this interpretation. However, the book does not provide an argument for the validity of this interpretation.

We cannot provide an opinion on how the Spanish Constitution should be interpreted.[57] Nevertheless, as an outsider trying to obtain suggestions from the book, we can obtain the interesting opportunity of providing a concrete argumentation of how the rule of law and the social democratic state should be reconciled. For example, one approach is to formulate this task historically in terms of Santi Romano's collectivist conceptualization or contemporaneously in terms of the relationship between the constitutional principles on which the German protective norm theory is based.

Moreover, as we have seen in relation to the New Science of Administrative Law, by questioning how the theory of administrative discretion relates to the theory of separation of powers, we can also gain from the book the task of connecting rights theory to constitutional principles.

3.3.2. Correspondence of Rights and Obligations

The book rightly points out that the expression "(legitimate) interest" has various meanings in four countries that have undermined meaningful dialogue (e.g., 129). As we discussed earlier in relation to Hauriou and Romano, the same could be valid for the expression "rights. "[58] The question is whether the concept of rights presented in the book (e.g., 57-58) is fully demonstrated. Since the book claims that administrative law is recovering the old concept of rights (220), it is necessary to check the concept of rights in private law since

57 Since no reference is provided to support such an interpretation (252), we were unable to search for additional literature.
58 L.R. PERFETTI, *Recensione, cit.*, p. 1192 also refers to this issue.

natural law theory is justified in the book. In this section, we will review the justification for the principle of correspondence between rights and obligations. The justification for full judicial protection will be discussed in the following section.

In Kantian natural law theory[59], rights are the sphere of action given to one's liberty, which is to be prioritized among the several conflicting liberties (40). There is no major problem interpreting rights and obligations as corresponding one-to-one in these aspects. The issue lies in the logic behind applying this to the relationships between the administration and citizens. The book assumes that police power is the authority to guarantee the *neminem laedere* principle effectively; the basis of police power is the liberty of the person harmed by the exercise of the liberty of the addressee; and the limit of the police power is based on the liberty of the person harmed by the excess of the power, the addressee. For instance, in the case of a permit being granted without fulfilling the legal requirements, the person harmed by the activity enabled by the permit can contest the violation of the law. In the case of a permit being denied despite fulfilling the legal requirements, the person harmed by the denial can contest the violation of the law (62-63).

The consequence concerning the denial is easy to recognize. The state restricts the liberty of citizens by imposing a permit system, and the situation when the state refuses to remove such restoration even if the legal requiremen-

59 The accuracy of Kant's understanding is also questionable. The book summarizes Kant's categorical imperative as "individuals cannot treat others as instruments," which can be read as understanding Kant to have completely prohibited the instrumentalization (36-37). However, precisely, Kant's formulation is that a rational being "must never treat himself and others as *mere* [bloß] means but *also* [zugleich] always as ends in themselves" (vgl. *I. Kant*, Grundlegung zur Metaphysik der Sitten, in: I. Kant/W. Weischedel (Hrsg.), Werkausgabe, Bd. 7, Frankfurt a. M. 1977, S. 66. Emphasis is mine). Of course, the phrases "mere" and "also" can be interpreted in different ways. And the reviewer is not competent to develop an argument based on the Kant studies. However, these phrases may suggest that Kant allows for treating others as a means to an end. In any case, there are reasons to question the arguments presented in the book.

ts are fulfilled can be compared to a conflict of liberties between private individuals.

On the other hand, the consequence concerning the permit is not self-evident. The basis for Kant's justification for the principle of correspondence is the law of contradiction (40). In other words, in a situation where two liberties conflict, a contradiction occurs if one side is granted the right to carry out its liberty while the other is not obligated to refrain from carrying out its own. However, the same logic does not apply in the case of permits. Even if we put aside the question of whether the administration can enjoy proper liberty[60], not the administration but the addressee of the permit causes the infringement of liberty protected by the legal requirements. In other words, it is possible to understand that the conflict of liberties is between private persons and that, concerning administration and the person harmed by the permit, no conflict with the law of contradiction will arise in any case. Therefore, it does not necessarily follow from the arguments presented in the book, which rely on Kant, that the principle of correspondence should be recognized in administrative law.[61]

According to the book, there was no "technical obstacle" to using rights terminology in administrative law because the principle of correspondence is a logical consequence of liberal premises of rights, and the rights paradigm existed in the first place to protect individual liberty against public authority (64-65). What is needed, however, is a logical justification of why it is "logical" to speak of rights in situations where an administrative act does not directly affect individual liberties. It is not relevant to mention its history. The book down-

60 To transfer Kant's theory of rights into administrative law, it is necessary to address whether the state can enjoy its own liberty, as the theory presupposes that the subject of rights or obligation are that of liberty. However, the book does not take this point into consideration.
61 To maintain the conclusions of the book, one might, for example, utilize the argument why, in the Kantian theory, a substantive right without a right of action was unacceptable (57): if rights that do not correspond to obligations of the administration are recognized, in effect, the administration can either protect the rights or not, which would be unjust. It is important to note, however, adopting such a conception, we have already departed from the principle of correspondence on which the book relies, which is based on the law of contradiction.

plays the distinction between the addressee and third party, as the so-called third party also exists in private law (e.g., 92, 145, 201, 205). However, as long as the book adopts the premise that the theory of rights is constructed based on individual liberty, the above problem remains unresolved.

3.3.3. Full Judicial Protection

The book asserts that recognizing rights inevitably leads to affirming full judicial protection. However, as we previously mentioned regarding Hauriou, the book does not provide a reason for this assertion. Even leaving that aside, no definition of full judicial protection is provided. Thus, it is still unclear whether and why a specific procedure should be guaranteed, which requires further study.

Of course, some components of full judicial protection can be inferred from individual statements[62]. In summary, the key elements are: (1) the guarantee of the independence of the judges from the executive power, (2) symmetry of the proceedings (equality of arms)[63], and (3) not reducing the protection of rights (cf. 42). The non-full judicial protection envisioned there could also be inferred to some extent. For example, regarding (1), an administrative court exercising reserved jurisdiction would be considered inappropriate (e.g., 102), and regarding (3), the book negatively evaluates lawsuits that grant no remedy other than the annulation of an administrative act (e.g., 121).

However, the book does not present a precise definition beyond the enumeration of extensions. As a result, it is unclear what constitutes an appropriate design of a concrete litigation system. For example, the *Conseil d'État* has re-

62 The book may suggest that equality of arms and equal process are not a component of full judicial protection juxtaposing these three (57). However, there are also passages where the connection between equal process and full judicial protection is emphasized (59). Regardless, the book presents all of these as a conceptually inevitable consequence of the concept of rights (57).

63 Procedural measures such as shifting the burden of proof may be taken to correct the information gap between private parties and the government, but it is unclear whether the book considers such measures to undermine procedural symmetry.

cently limited claims in contractual liability actions to defects involving a sufficiently direct and certain invasion of the plaintiff's interests[64]. This limitation of claims narrows the scope of remedies for private parties, which is perceived in France as a consequence of the subjectivization of administrative law.[65] Does the book allow such a consequence or reject it as reducing the protection of rights?[66] This question is crucial, especially if such claim limitations are introduced in *recours pour excès de pouvoir*.[67]

This book also seems to suggest that full judicial protection requires that the court brings maturity (*Spruchreife*)[68] to the case by *ex officio* detecting facts and renders an obligatory judgment (*Vornahmeurteil*) or decision-obligatory judgment (*Bescheidungsurteil*) (249-250). However, why such an obligation is imposed without a procedural provision such as §113 para. 5 of the German Administrative Court Act is unclear.[69] Furthermore, certain interpretations of the separation of power can provide a reason to prevent the court from fact-finding in a specific case.[70]

In this light, determining what constitutes full judicial protection cannot be answered without a more specific examination of the court's authority re-

64 V. C.É., ass., 4 avr. 2014, *Département de Tarn-et-Garonne*, *L.* p. 70.
65 V. J. Sirinelli, supra note 5, p. 530 ; F. Rolin, « Du recours pour excès de pouvoir de l'État légal à la protection des intérêts subjectifs dans l'État contemporain », *RD publ.* 2014, p. 1198.
66 In the final chapter, the full protection provided by the Spanish Constitution is said to be subject to the condition "as far as possible [*en la medida de lo possible*]" (254). The connection between this statement and the unconditional claims preceding it is unclear.
67 The Administrative Case Litigation Act of Japan prohibits the plaintiffs' raising claims of "breach of law which is irrelevant to their interest" in an action for the revocation of an administrative act (§10, para. 1). In addition, it is generally understood as a consequence of the fact that the action for the revocation is an action for rights protection. Then, the introduction of such a claim limitation may not be inherently ruled out when the *recours pour excès de pouvoir* is subjectivized.
68 Vgl. *G. Marx*, Das Herbeiführen der Spruchreife im Verwaltungsprozeß, Frankfurt a. M. 1996, S. 57.
69 Even in Germany there is no view that generally speaks of a full judicial review. See, T. Tatsumi, *Shokkentanchi-shugi no Shosou* [*Aspects of ex officio Detection*], 86 Seikei Hōgaku [Bullutin of Seikei University] 26 (2017).
70 For an extreme position, see, C.R. Sunstein, The most knowledgeable branch, 164 Univ. of Penn. L.R. 1607 (2016).

garding its subject matter and its constitutional limitations. This is one of the important issues the book raises for scholarship.

4. Conclusion

The book cautions against the experience of French administrative law, which, despite being based on the concept of interests, has achieved a high degree of judicial protection of citizens by emphasizing its potential authoritative character. "It is one thing to evaluate a legal system through its results, without focusing only on the concepts […] and another to hide behind those results to stop evaluating the concepts themselves, without assessing or evaluating their potential" (110). This remark is true. The problem is that the book applies this principle only unilaterally, only insofar as it results in favor of the concept of rights.[71] It is one thing to evaluate an administrative law system based on the concept of interests as "authoritative" by its results that it can reduce judicial protection of citizens, and another to hide behind those results to stop evaluating the concept itself without assessing or evaluating its potential. From the three examples above alone, it is evident that the book fails to adequately evaluate the "potential" of an administrative law system based on the concept of interest.[72]

However, this fact does not detract from the book's value. As mentioned above, the reconstruction of the administrative law system is a real problem in each country.[73] While no monographs have addressed these issues in Germany, France, and Italy, which have led administrative law theory, the book reaches an unprecedented level of achievement with its comprehensive perspective on these countries.

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71 From this passage, we can grasp the following question: under what conditions would an administrative law system based on the concept of interest not lead to "authoritative" consequences? Such conditions may depend ultimately on legal culture (cfr. A. TRAVI, *Recensione, cit.*, p. 963), but it might be useful to take an examination at, for example, the differences in court organization and procedures.

72 L.R. PERFETTI, *Recensione, cit.*, p. 1196 may suggest that the book offers a nominalist critique to the Italian law or its scholarship.

73 Furthermore, a more meaningful comparative study will be possible if EU law, which determines party standing based on the "direct and individual concern" (§263 para. 4 TEFU), a formulation similar to that of *recours pour excès de pouvoir*, are also included.