JUDICIAL RESOLUTION OF ADMINISTRATIVE DISPUTES (ADMINISTRATIVE PROCEDURE IN PORTUGAL)

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§ 1
THE MEANING OF ADMINISTRATIVE DISPUTES

1. Article 212.3 of the Portuguese Constitution identifies disputes deriving from legal administrative relations as the scope of the jurisdiction of the administrative courts. *Legal administrative relations* should be understood as reciprocal legal positions between subjects of law which are governed by administrative law. In Portugal, in accordance with the Continental conception, administrative law relates not only to administrative powers, their exercise and the respective remedies but also to the organization and operation of administrative agencies, the exercise of and limitations on

regulatory power, the law on public procurement and administrative contracts, administrative liability, public property and public works, the police and the civil service law[1]. This list of areas governed by administrative law is not exhaustive. In the Portuguese legal system, administrative law encompasses all principles and rules designed specifically to steer public administration in its triple structural, substantive and procedural essence.

We may therefore understand *administrative disputes* as any dispute between two or more parties in a legal relationship governed by administrative law and relating to some aspect of that legal relationship. Given the broader scope of administrative law in Portugal than in the USA, the judicial resolution of administrative disputes is not confined to judicial review of administrative adjudication or rulemaking. This concept encompasses, amongst other questions, disputes deriving from the implementation of contracts with public bodies and from the administrative authorities' liability for damages, and also those where the claimant seeks a judicial declaration on disputed rights or a judicial injunction of *facere* or *non facere* against the administrative authorities, not only when the public conduct sought or opposed consists of rulemaking or adjudication, but also when the applicant seeks other types of administrative, legal or material acts.

Administrative disputes are governed by two important constitutional principles.

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1 See SCHWARTZ, Bernard, *Administrative Law*, Third ed., Boston: LB, 1991, p. 2.

The first principle states that administrative disputes form the scope of the jurisdiction of the administrative courts. This principle admits of exceptions (Constitution, article 212, 2).

The second principle grants effective judicial protection for every physical or legal person whose rights or legitimate interests may be or have been offended by any administrative agencies or bodies. No exceptions are permitted to this principle, which corresponds to a fundamental right (Constitution, article 268, 4 and 5).

§ 2
THE ADMINISTRATIVE COURTS: A DUALISTIC JUDICIARY

2. In 1832, the first liberal reform of Portuguese public administration, which sought to convert traditional administrative powers into executive power within the framework of the constitutional State, established the first bodies especially devoted to the jurisdictional solution of administrative disputes. Gradually, over the course of the 19th century and the early decades of the 20th century, these bodies took on the nature of courts, and came to be known as such, as may be seen in the status of their judges, the type of adversarial procedure and the *res judicata* status of their decisions.

However, only in 1974 did a constitutional law finally make the break with the French model of *contentieux administratif*, transferring these courts to the realm of judicial power. And only in 1977 did a further law establish enforcement proceedings for securing obedience to orders of the

administrative courts by any administrative authorities. For several years, the choice between the existence of separate administrative courts or the institution of a unified judiciary remained within the scope of legislative discretion. Only with the constitutional review of 1982 did the Constitution not only permit, but actually impose the separate existence of a system of administrative and tax law courts headed by a Supreme Administrative Court.

3. The current system of specialized courts for administrative and fiscal disputes consists of three tiers. At the base, we have the *circuit administrative courts*, in sixteen different locations around the country. In most cases, the circuit administrative courts and the tax courts are combined, and known as the *administrative and tax courts*.

The middle tier consists of the *central administrative courts*, located in Lisbon and Porto.

At the top of the pyramid is the *Supreme Administrative Court*, created in 1870.

The Supreme Administrative Court and the administrative central courts each have an administrative law section and a tax law section, formed by different judges. The Supreme Administrative Court also has a plenary, formed by the Presiding Judge and the longest-serving judges in each section, which decides on conflicts of jurisdiction between the sections of

the court or between the sections of the central administrative courts, or else between the circuit administrative courts and the tax courts.

4. All administrative court judges enjoy the same constitutional guarantees of immunity and independence as the judges in civil and criminal courts.

Powers for the appointment, promotion, transfer and dismissal of administrative and tax court judges lie with the *Higher Council for the Administrative and Tax Courts*. This Council, provided for in the Constitution, is chaired by the Presiding Judge of the Supreme Administrative Court (who is elected by and from the judges of this court) and also comprises two members appointed by the President of the Republic, four members elected by Parliament and four judges elected by and from the entire administrative and fiscal judiciary.

The composition of the Higher Council reflects the intention of combining representatives of State bodies endowed with democratic legitimacy deriving from direct and universal suffrage with representatives of the judges themselves in the delicate task of managing the careers of members of the administrative and fiscal judiciary. We should recall that, in the manner of Continental European systems, the judiciary is made up of career judges who are first appointed to the circuit courts and only gradually rise through the ranks on the basis of technical assessment of their performance by the Higher Council and of length of service. Only exceptionally may a very small number of jurists of proven experience in the field of public law, obtained through public office, legal practice,

university teaching or service in the administrative authorities, be admitted through a competitive procedure to the Supreme Administrative Court.

5. Procedural law defines the competent court for every case falling within the scope of jurisdiction of the administrative courts. For this purpose, the *Code of Procedure in the Administrative Courts* (referred to below as *Code of Procedure*) sets out criteria of competence on the grounds of subject matter, territory and hierarchy. Multiple venues are not therefore available for the same case. The Portuguese system for judicial resolution of administrative (and tax) law disputes does not allow any kind of forum shopping. There is no possibility of lotteries for claims filed in more than one court[2]. Portuguese procedural law does not provide for *lis pendens*[3]. If the forum where the claim is filed does not meet the venue requirements, it has the authority to transfer the case to the court deemed competent. And there are no venue provisions for alternative possible locations: a suit can be legally brought only in the competent court. And for each case (conceived in terms of its objective and subjective elements), only one specific court has jurisdiction.

   Only for disputes deriving from contracts (between the public administration and private entities or between two different public

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2 About the opportunity for forum shopping created by the availability of multiple forums in the USA venue system, see: PIERCE/SHAPIRO/VERKUIL, *Administrative Law and Process*, 3rd edition, New York: Foundation Press, 1999, §§ 5.6.1. and 5.6.2.

3 In accordance with articles 497 and 498 of the Code of Civil Procedure, *lis pendens* exists when a previous cause is still in progress, and a new action is brought which is identical in terms of parties, the statements of the relevant facts and of the law, and of submissions.

entities) may the parties agree which circuit administrative court they wish to judge the case. In the absence of agreement between the parties as to venue, the circuit administrative court with territorial jurisdiction over the place of contractual performance is competent (Code of Procedure, article 19).

6. The injunctive nature of the rules on the competence of the administrative courts does not prevent the parties from agreeing on arbitration for certain types of administrative dispute. This is the case of disputes relating to contracts, the liability of the administrative authorities and the legality of adjudicative decisions that the competent administrative bodies can still revoke (Code of Procedure, article 180).

7. The circuit administrative courts are, in accordance with the general rule, the first instance reviewing courts. Exceptionally, cases are heard directly by the Supreme Administrative Court (for instance, in the judicial review of decisions taken by the Council of Ministers or by the Prime-Minister). As for the number of instances, the principle is a two-step review. For this reason, when the Supreme Administrative Court pronounces a first instance judgment, an appeal can be brought before a larger bench of the court's judges.

Examples of higher courts having first instance jurisdiction for certain types of cases are not rare in comparative law. Suffice it to recall the example of exclusive circuit court review in the United States. Normally,

the purpose of legislation permitting direct access to review by a higher court is not to ensure a personal forum for certain higher administrative authorities. These legislative solutions are instead based on the presumption that the decision-making powers of higher administrative authorities relate to situations where higher level public and private interests are involved.

8. The Portuguese system for judicial resolution of administrative disputes combines the principle of two-step review with a three-tier hierarchy of courts and with the principle of reserving first instance jurisdiction for the circuit administrative courts. Accordingly, the legislation had to create procedural mechanisms to allow the Supreme Administrative Court to exercise its jurisdiction over more important cases. The focus therefore fell on the effects of resolving certain cases on the unity and quality of the jurisdictional application of administrative law, and on the postulate that a Supreme Court should be able to judge in the final instance cases of greater social or economic relevance.

These procedural mechanisms consist of:

(i) A second instance decision by the Supreme Administrative Court, due to *per saltum* appeal against administrative circuit courts decisions;
(ii) Exceptional third level review by the Supreme Administrative Court;
(iii) Appeal for the uniformity of the case-law;

(iv) Referral for a preliminary ruling.

Per saltum appeal applies when the value of the cause judged by a circuit administrative court exceeds three million Euros, or is undeterminable, and the parties, in their arguments, only raise questions of law (Code of Procedure, article 151).

Exceptional third level review applies to decisions handed down in the second instance by central administrative courts, when the question at issue is of fundamental importance, in view of its legal or social importance, or when an appeal clearly needs to be admitted for better application of the law (Code of Procedure, article 150).

The *appeal for the uniformity of the case-law* applies when there is a contradiction on the same fundamental question of law between two decisions of the Supreme Administrative Court, or between a decision of a central administrative court and a pervious decision handed down by the same court or the Supreme Administrative Court (Code of Procedure, article 152).

Referral for a preliminary ruling applies when a circuit administrative court is faced with a new question of law which raises serious difficulties and may be raised again in other disputes. In these cases, the preliminary ruling of the Supreme Administrative Court is binding, but only for the purposes of the final decision on the case in which it is handed down.

In admitting appeals for third level review and referrals for a preliminary ruling, the Supreme Administrative Court exercises a considerable margin of discretionary leave[4].

In the Supreme Administrative Court and the central administrative courts, decisions are always taken by panels of judges. In the circuit administrative courts, a single judge is the general rule. But panels of three judges hear cases of greater economic value or relating to immaterial interests.

§ 3
THE SCOPE OF JURISDICTION OF THE ADMINISTRATIVE COURTS

9. The material scope of jurisdiction of the administrative courts coincides as a general rule with that of *administrative disputes*[5]. But the case law and legal scholarship have considered that article 212.3 of the Constitution, which reserves the judgment of actions relating to disputes deriving from legal administrative relations for the administrative courts, has the nature of a general clause without thereby seeking to prohibit the exceptional adoption of other criteria for jurisdiction. The exceptional rules consist both of assigning jurisdiction over certain administrative disputes to the civil and criminal courts, and of assigning to the administrative courts jurisdiction over certain civil law disputes to which the administrative

4 *See* SÉRVULO CORREIA, *Direito do Contencioso Administrativo*, I, Lisbon: Lex, 2005, pp. 695-708.

5 See the concept of *administrative disputes*, in section 1 above.

authorities are party[6]. These include cases relating to the civil wrongs of public bodies and to private law contracts with the administrative authorities when negotiated through a public procurement procedure.

10. The range of the jurisdiction of the administrative courts is not determined merely by substantive or material factors. Equally important are functional factors, relating to the difference between the roles of the administrative courts and of the administrative authorities: constitutional principles such as the separation of powers and the democratic legitimacy of executive power do not allow the courts to transform review into the final exercise of administration. This constitutional guideline is applied in two specific areas: that of respect for the initial decision-making power of the Administration and that of the limits on the judicial control of administrative discretion. These questions arise from the circumstance that review covers the exercise of public powers that belong primarily to the Government and not to the courts.

11. We may extract from the Constitution the implicit existence of a *principle of respect by the courts for the initial decision-making powers of the administrative authorities*. Indeed, the Constitution assigns a specific role to the administration and sees the role of the courts as generally that of correcting and not substituting that of the administrative authorities.

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6 *See* VIEIRA DE ANDRADE, *A Justiça Administrativa*, 7th edition, Coimbra: Almedina, 2005, pp. 110-111.

Each time a law gives an administrative authority a certain decision-making power (either of an adjudicative or rulemaking nature) there will be no case ripe for judicial review as long as such authority, having had the opportunity to exercise its primary jurisdiction, has declined or abstained from adjudication.

In Portuguese constitutional and administrative law, statutory administrative jurisdiction implies primary jurisdiction: in the face of a statutory power belonging to an administrative authority, a claimant cannot seek judicial resolution without having prior recourse to the agency charged with responsibility to implement the statute.

Subsequently, if such power is exercised by the administrative authority in an illegal way, an action can be filed asking for judicial review for reversal and remand.

If, on the contrary, instead of exercising its statutory power in order to confer new contents to the legal administrative relationship, the administrative authority refuses to comply with the application and to issue the individual determination thereby requested, or remains idle for a period defined by law (in principle, ninety days), the claimant can ask the court for an injunction ordering the agency to act. If the content of the administrative power is precisely defined by the law, the court will state in its decision what content the decision it orders the administration to take must have. If there is discretion, the court will merely order that the decision be taken without prescribing its contents, simply stating which

legal requirements must be respected in the discretionary decision-making process.

In both situations, the court fixes the time limit for issuing the administrative decision (Code of Procedure, article 66.1).

12. One of the situations where the administrative authorities may be substituted by the administrative court in the exercise of their decision-making powers relates to disputes between private parties arising out of situations governed by administrative law.

In principle, the administrative courts decide on disputes between agencies and private parties and not disputes between private parties only. But, when a private party defaults on duties to another private party that arise out of administrative law rules, administrative adjudication or administrative law contracts, and the relevant administrative authority fails to take the appropriate measures requested of it in order to put an end to such infringement, the injured party can sue the offending private party in an administrative court, asking for an injunction *de facere* or *de non facere* against this offending private party (Code of Procedure, article 37.3).

This provision has introduced a new dimension to the subjective structure of the administrative courts' jurisdiction: the administrative courts' activity was traditionally confined to cases where a private party files suit against a public agency. But this recent procedural device still conforms to the principle of allowing public authorities the possibility of exercising

their primary jurisdiction first. Accordingly, a private entity whose rights have been infringed by the conduct of another private entity which has breached administrative law duties can not enter into litigation in an administrative court before an agency has had the opportunity to resolve the issue using its primary jurisdiction to compel the other private entity to stop or not to initiate the illegal conduct. Situations such as these may arise in fields as diverse as the regulation of competition, environmental protection or curbs on the construction of new buildings, amongst others.

13. The main principle on the *limits on control of administrative discretion* is enunciated in article 3.1 of the Code of Procedure: the administrative courts conduct their judicial review of the conformity of the actions of the administrative authorities on the basis of legal rules and principles and not on that of (extra-legal) policy considerations or criteria. This rule excludes from the scope of judicial review questions of whether an administrative authority's decision is "appropriate" or "opportune". The Portuguese legislation uses these expressions to refer to those reasons for a discretionary decision which are not dictated by legal principles, but rather by administrative policy. Even though the end is specified by the rules investing discretionary power in the administrative authority, a choice exists to how that end should be achieved[7]. There is discretion whenever the legislative power left it to an administrative authority to choose among several policy options. And the administrative courts are not to substitute their judgment for that of an agency every time the agency exercises its own discretion. If the courts do this, they will be

[7] *See* PAUL CRAIG, *Administrative Law*, 5th edition, London: Sweet & Maxwell, 2003, p. 521.

violating the constitutional principle of separation of powers as well as the law itself that has granted the specific discretionary power[8].

In the Portuguese legal system, there is no administrative discretion to interpret terms used in law. Interpretation is a kind of legal reasoning in accordance with methodological maxims. For this reason, a judge can always correct the interpretation made by an administrative authority when, using a legal form of reasoning, he considers that the administrative interpretation of a statute was erroneous. But, by way of compensation, we cannot consider as real interpretation a value judgment or prognostic reasoning made by an agency within the framework of an open concept, that is to say, words having an indeterminate meaning that can not be resolved through legal reasoning. In concepts such as "danger" or «architectural homogeneity», the reasoning used to apply them in a concrete case may not be of a juridical nature unless the statute enunciates the precise terms to be subsumed in these concepts. When the legal system does not provide the agency with more specific instructions, the decision on the existence of "danger" or "architectural homogeneity" will have to be based on a political or extralegal technical evaluation. If, through the open textured nature of some concepts used in it, the statute delegates a value judgment or prognostic reasoning to the administrative authority entrusted with applying the legal rule to the factual situation, the role of the court will be merely that of determining whether the agency's action is based on reasoning which is not blatantly inadequate

8 *See* SÉRVULO CORREIA, *Separation of Powers and Judicial Review of Administrative Decisions in Portugal*, in: ZOETHOUT/VAN DER TANG/AKKERMANS, *Control in Constitutional Law*, Dordrecht/Boston/London: Nijhoff, 1993, pp. 165-166.

or, in other words, whether a manifest error of assessment has not been committed.

This inappropriateness (in a broad sense), consisting of the misuse of power by acting irrationally, is subjected to judicial review in accordance with different techniques or standards:

- Lack of administrative jurisdiction, procedural error or error in the finding of facts;
- General principles of administrative conduct such as proportionality, equal treatment, impartiality and good faith (legitimate expectations);
- Legal purpose.

Judicial review of the observance of general principles of administrative conduct is in principle a form of merely negative control.

§ 4
REMEDIES IN ADMINISTRATIVE COURTS

14. The catalog of remedies in the judicial review of administrative acts is founded on articles 20, para. 5 and 268, paras. 4 and 5, of the Constitution. According to para. 5 of article 20, the law should assure citizens rapid judicial procedures assigning priority as appropriate, so that they may obtain effective timely protection from threats or breaches of individual

civil and political rights guaranteed by the Constitution. But the guarantee of judicial protection by administrative courts is extended by article 268, paras. 4 and 5 to any other legal rights and not just to fundamental rights. These paragraphs lay down that judicial protection must be effective and include certiorari against illegal administrative decisions, declarations of any disputed rights or legal interests, injunctions ordering that certain administrative decisions be issued, judicial control of agency-made rules and appropriate interim relief. In addition, para. 3 of article 205 of the Constitution lays down that the law should regulate the terms of enforcement of judicial decisions against any other authorities.

These constitutional guarantees mean that there is a constitutional right to judicial review: any statutory provision establishing immunity from judicial review would be unconstitutional. But this right does not consist only of access to the administrative courts: the Constitution requires that the legislator provide a range of remedies able to restore any infringed right.

15. The catalog of remedies contains principal actions (or procedures), urgent actions, interim relief and procedure for the enforcement of judgments.

Principal actions (or *procedures*) are divided into common procedure and special procedures.

Common procedure in the administrative courts is the appropriate form of action for any claim not relating to administrative adjudication or

rulemaking. It may be used to settle any administrative dispute for which no specific remedy exists. It is therefore used to settle administrative disputes relating to contracts, the liability of the administrative authorities (civil liability and liability for legal administrative conduct which may cause specific and abnormal damages), negative or positive injunctions prohibiting certain actions or requiring others, when such action does not consist of administrative adjudication or rulemaking.

Special procedures can be used for three different purposes.

Special procedures can, in the first place, be brought against an individual unconstitutional or unlawful determination resulting from adjudication by an administrative authority or agency. If the court finds in favor of the grounds, it quashes the administrative decision.

Special procedures can also be brought to request a judicial injunction against an administrative authority or agency ordering it to make a particular determination that the authority or agency has refused to decree or failed to decree, even though the decision in questions falls within its jurisdiction.

Finally, special procedures can be used to obtain a judicial decision quashing an unlawful administrative rule or declaring it not applicable to a particular person. The same special procedure for judicial control of administrative rulemaking can be used to obtain a judicial declaration of the illegality of an administrative omission of rulemaking necessary to ensure the applicability of a certain statute. If the court finds in favor of

the applicant it fixes a time limit of no less than six months for the administrative rule to be issued.

In each of the *special procedures*, the applicant can submit multiple claims. He or she can, for instance, request simultaneously the quashing of a particular illegal administrative determination and an injunction of remand (i.e. a judicial order for a new but different adjudication by the administrative authority on the same subject-matter). An application for the quashing of an individual illegal administrative determination can also be combined with another to have the public entity ordered to pay compensation for damages caused by the contested decision. And an application for the quashing of an individual illegal administrative determination may be combined with another for an injunction for material action by the administrative entity or legal action not consisting of adjudication as may prove necessary to re-establish the situation of the plaintiff as it should have been had the illegal administrative adjudication not been made.

These are just examples of possibilities of accumulation of demands arising from the same legal administrative relationship. The purpose of the general principle that claims may be accumulated is to guarantee that the specific features of the different judicial remedies do not prevent a decision being obtained on all aspects of the administrative dispute.

16. In addition to *principal actions*, the Code of Procedure also provides for various types of *urgent actions*. We may refer to the most important of these:

a) Injunction for disclosure of administrative information;
b) Injunction for urgent administrative adjudication by an agency when such adjudication is required in order to ensure the opportune exercise of constitutional rights;
c) Judicial intervention in ongoing public procurement procedures in order to ensure immediate correction of procedural errors before a final decision is to be taken in favor of one of the bidders.

17. The general procedural principle for *interim relief* in litigation in the administrative courts is the principle of non-typicality of the claims. It means that there is no restricted or fixed list of judicial decisions granting interim relief. Depending on the particular features of the concrete case, the court can grant any injunctions necessary to ensure the usefulness of the final judicial decision.

The most frequent of these interim injunctions are the suspension of the effects of an individual determination or of an administrative rule and the judicial granting of a provisional permission to a private entity to which an administrative authority has refused authorization to commence or continue an activity.

The administrative courts enjoy discretion in ordering measures other than those requested by the claimant for the sake of balancing the conflicting interests.

When there is an urgent need to obtain a final decision on the principal action and the court considers it has already a sufficient knowledge of the necessary factual and legal elements , it can pronounce immediately a verdict in that action instead of granting interim relief.

Article 120 of the Code of Procedure sets out the criteria for decisions on interim relief. If it appears immediately obvious that the claim presented in the principal action is well-founded, interim relief must be granted. In other cases, the court must assess jointly *fumus boni iuris* and *periculum in mora* and balance the inconvenience for the public and private interests concerned in granting or not granting interim relief.

18. The Code of Procedure contains detailed provisions on the *enforcement of decisions of the administrative court*. When the administrative authority or agency concerned fails to comply spontaneously with these decisions, an enforcement procedure can be filed by the interested party. The court can fix time limits for the necessary legal or material conduct to be taken by the administrative entity and set a daily fine for the persons responsible for implementation while non-compliance subsists.

In the last resort, when the overdue conduct of the administrative authority or agency consists of issuing an individual administrative

determination necessary for enforcement of the judgment, the court can substitute the authority or agency in the exercise of its jurisdiction. However, this is only possible in cases not involving the exercise of discretionary administrative powers.

§ 5
FINAL REMARKS

19. We believe that it is no expression of national chauvinism to conclude that the current system of procedure in the administrative courts, in force in Portugal since 1 January 2004, is one of the most advanced systems for the judicial protection of citizens from the powers of the administrative authorities.

We should stress that although it is clearly designed to provide guarantees, the system has still retained the parallel functions previously characteristic of procedure in the Portuguese administrative courts. On the one hand, it may be activated merely with a view to preserving legality. To this end, public attorneys and, within certain limits, citizens in the exercise of *actio popularis* enjoy standing in administrative procedure.

The experience gained over the coming years will allow us to conclude whether the system is based on solutions which balance the need to guarantee individual rights and to preserve objective legality, on the one hand, with the need, on the other hand, not to hold up the satisfaction of

public needs by the administrative agencies and authorities. As it is up to the courts themselves to the define the functional limits of their jurisdiction, much will depend on the care taken by judges to perform the functions of jurisdiction over administrative disputes in a manner which does not cause paralysis and despondency in the public administration where the highest officers are politically accountable to the electorate for the effectiveness of administrative policies.