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**THE REFORM OF PORTUGUESE ADMINISTRATIVE JUSTICE AND ITS
IMPLICATIONS FOR THE PRACTICE OF PUBLIC ADMINISTRATION**

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“MULTILEVEL GOVERNANCE AND ADMINISTRATIVE REFORM IN THE 21ST CENTURY”
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*“The evolution of the Portuguese system of administrative justice will be less and less a self-governing process. It never truly was. But, whilst in the past the strongest influences came from two national systems – the French and the German systems – it will from now on evolve more and more within the multilateral framework of the European Union and the Council of Europe”.*¹

JOSÉ MANUEL SÉRVULO CORREIA

¹ JOSÉ MANUEL SÉRVULO CORREIA, *Direito do Contencioso Administrativo I*, 2005, Lex, p. 782.

I

INTRODUCTION AND CONSTITUTIONAL FRAMEWORK

This report seeks to analyse the latest stage in the evolution of the Portuguese administrative justice, namely the changes introduced by the Government's 2004 Reform.

These changes had two key objectives: on one hand, the strengthening of the principle of equality of the parties; on the other, the strengthening of the effectiveness of the judicial protection. In relation to the latter, the changes introduced to ensure full compliance with the principle of effective judicial protection have given rise to three different and crucial innovations: (i) a change in the paradigm regarding the possibility of applying for judicial review, (ii) the strengthening of the ruling powers of the administrative judges, and (iii) the guarantee that jurisdictional decisions will be rendered in reasonable time.

The following pages will provide a brief overview of the innovations and implications of the main Reform changes, but begin with some introductory remarks about the Portuguese administrative system. A practical example will then be given of one of the most significant new proceedings – the injunction for the protection of civil liberties - the case study "*Borndiep*".

The influence of current European jurisprudence on the recent Portuguese reform is quite strong, as will easily be understood. The promotion of principles such as the principle of effective judicial protection and others such as equality, legality, even democracy, were among the objectives of this reform and will be referred to in this article.

1.1. GENERAL CONSIDERATIONS

The main goal of administrative justice is to protect fundamental rights of private parties in their relationships with public bodies, and, simultaneously, to protect the public interest, which constitutes the expression of the state's sovereignty.

The proportional weight of each of these elements has changed over time in the Portuguese administrative justice. Whilst the system used to be predominantly "objectivist", in other words, a system in which the protection of the public interest clearly prevailed, nowadays there is a balance between the "objectivist" and the "subjectivist" elements.

This means that the focus of the new administrative judicial model lies more than before on the protection of fundamental rights².

This change of the focus was the result of a long process of evolution that involved historic circumstances, succession of different laws and, in particular, a change of mentality regarding public administration. Administrative authorities used to be seen as placed on a higher level, associated with secrecy and privilege, and never as an equal by the private partners. Now, administrative authorities are placed in a position of *near equality*, both by the Constitution and by ordinary law³. The old privileges of public administration have been abolished (only a very few - when justified - still remain), and the decision-making powers of administrative judges are now stronger.

Another cornerstone of this “revolution in administrative justice” has been the increased effectiveness of judicial protection through the administrative courts, regarded as a long-held ambition doomed never to be achieved without a complete overhaul of the legal system, which finally came about through the Reform analysed in this article.

1.2. CONSTITUTIONAL FRAMEWORK

In the Constitution of 1976, the first democratic constitution following the Portuguese Revolution of 1974, administrative courts were considered as sovereign bodies belonging to the judicial powers (although it was only with the second Constitutional review of 1989 that they were required to be set up as a parallel jurisdiction).

In 1977, administrative courts were given powers to enforce judicial decisions, which therefore became binding on the administrative authorities (although a first opportunity was given to authorities to comply with the judicial decision, and only following failure to comply with the decision could the private party request the court’s intervention).

Administrative courts only attained full independence in 1984, with the *Statute of the Administrative and Tax Courts*, and, in 1989, the Constitution recognized the hierarchical structure of this jurisdiction. At the top of this hierarchy is the Administrative Supreme Court, now fully subject to constitutional principles regarding the judiciary organization, namely the principle of independence and impartiality.

Under article 214, no 3, of the Constitution, the purpose of the administrative judicial system is to resolve conflicts arising from administrative

² Some authors, like JOSÉ CARLOS VIEIRA DE ANDRADE, even consider the current system predominantly subjectivist (*A Justiça Administrativa (Lições)*, 7.^a ed., Almedina, p. 51 e 52).

³ Vide JOSÉ MANUEL SÉRVULO CORREIA, *op. cit.*, p. 717.

relationships. This is, of course, a wide and abstract formulation of this purpose, which needs to be filled out and given more concrete form by case law and legal scholarship⁴⁻⁵.

In 1997, with the fourth Constitutional review, a number of fundamental principles were reinforced or introduced⁶. This was the case of the principle of effective judicial protection, now enshrined in article 268 of the Constitution, dealing with administrative justice⁷.

This principle has always existed at a European level. It is imposed by the European Convention on Human Rights and by the Charter of Fundamental Rights of the European Union. It is also recognized by the case law of both the European Court of Human Rights and the European Court of Justice.

⁴ To this effect *vide, inter alia*, JOSÉ CARLOS VIEIRA DE ANDRADE, *op.cit.*, p. 53 *et seq.*, and for the development of this material scope in the recent Reform, JOSÉ MANUEL SÉRVULO CORREIA, *op.cit.*, p. 708.

⁵ For example, MÁRIO ESTEVES DE OLIVEIRA and RODRIGO ESTEVES DE OLIVEIRA, define this sort of juridical relationships as (i) relations that connect two public bodies or organs (as long as they are not clearly submitted to the private law); (ii) relations in which at least one of the parties acts with authority (*ius imperium*), pursuing a public interest (legally defined), (iii) relations in which at least one of the parties acts in compliance with administrative duties, associated with public authority and imposed by public interest motives (*Código de Processo nos Tribunais Administrativos, Volume I, e Estatuto dos Tribunais Administrativos e Fiscais anotados*, Almedina, 2004, p. 26).

⁶ As VASCO PEREIRA DA SILVA suggests, one can regard the post 1977 constitutional formulation as a true *Copernician Revolution* in Administrative Justice. Instead of having rights revolving around the remedies, remedies started revolving around the rights (*O Contencioso Administrativo no Divã da Psicanálise – Ensaio sobre as Acções do Novo Processo Administrativo*, Almedina, 2005, p. 221).

⁷ The principle of effective judicial protection was already enshrined, in general terms, in Article 20 of the Constitution.

II

THE REFORM OF THE PORTUGUESE SYSTEM OF ADMINISTRATIVE JUSTICE

2.1. BRIEF OVERVIEW

Reform of Portuguese Administrative Justice became an absolute necessity after the fourth constitutional review (1997). The terms in which the Constitution then described the protection of the rights of private parties when dealing with public bodies failed to be matched in the procedure established by the main legislation in this field⁸.

As a result, the system, in the year 2000, was still considered insufficient, in the light of European standards, to meet the challenges of the 21st Century.

The main shortcomings in the system were the following:

- The privileged position detained by the administrative authorities;
- The ineffective protection offered by administrative justice, which could be unfolded into three other limitations:
 - The limited possibilities of requesting judicial review;
 - The limitation of the ruling powers of the administrative judges;
 - The excessive length of judicial proceedings;
- The small number of administrative courts and judges.

In 2000, the Ministry of Justice promoted a broad-ranging public debate on three legislative proposals: (i) a statute of administrative and tax courts, (ii) a code of procedure in the administrative courts and (iii) a law on commissions for administrative conciliation. This discussion took place in various *fora*, involving not only academic debates in universities, but also discussions between other actors of the judicial process, such as lawyers and judges⁹. There was even an on-line debate, on a specially created website.

In 2001, the new legislation, introducing the Reform, was approved by the Parliament:

- Law 13/2002, of 19th February 2002, which approved a new *Statute of Administrative and Tax Courts* –establishes a new model for territorial organization of the administrative jurisdiction, as well as a proper appeal court other than the Supreme Court;

⁸ VASCO PEREIRA DA SILVA named this discrepancy between the constitution and the procedural law a phenomenon of *juridical schizophrenia* (*op.cit.*, Almedina, 2005, p. 200).

⁹ The debate was so productive that the initial projects of law were abandoned and others were elaborated in 2001, including the inputs of the discussion.

- Law 15/2002, of 22nd February 2002, which approved the new *Code of Procedure in the Administrative Courts*, which will be further referred to below.

Both laws came into force on 1st January, 2004.

The *Statute* significantly extended the territorial scope of administrative jurisdiction. It established a new territorial organization, increasing the number of administrative courts from five to sixteen courts of first instance and from one to two courts of second instance. The number of administrative judges also increased substantially.

The broadening of the substantive scope of administrative justice and the changes to the fundamental model adopted by the system were, however, even more significant achievements of the Reform, and will be further analysed.

2.2. PRINCIPAL ACHIEVEMENTS AND THEIR IMPLICATIONS

As mentioned above, the Reform came into force in 2004. It is, therefore, still too soon to have a clear and complete picture of all its consequences. Some of the remedies have yet to be tested or are still awaiting a final decision on the first specific case. Nevertheless, it is possible to reach some general conclusions, based on the new rules established in the Code of Procedure in the Administrative Courts (“CPAC”), and in the case-law which already exists.

The main innovations in the new system, in comparison with its predecessor, may be identified as follows:

- Equality of parties;
- Effective judicial protection.

2.2.1. EQUALITY OF PARTIES

The principle of equality of parties (public bodies and private parties), is enshrined in article 6 CPAC, and finds expression in several of the Code’s rules.

Basically, it means that the new system has removed the administrative authorities’ remaining privileges, e.g. exemption from court costs, immunity from a finding of “*mala fide* litigation” (abuse of process) and exemption from enforcement of judicial decisions in many cases on public interest grounds.

Administrative authorities were previously exempted from court costs. It was considered that, as both courts and public administration were “state” bodies, the payment of costs by the State to the State would make little sense. However, the change of attitude towards administrative authorities in the new

system, along with the concerns about equality of parties, made it necessary to abolish this traditional privilege.

Also, under article 8, no 2, CPCA "*parties shall refrain from requesting diligences that are not useful or from using means intended only to delay the judicial process*". This means that it is now possible to condemn administrative authorities on the grounds of abuse of process, and not only private parties (as was the case under the old system). The presumption that administrative authorities would always behave in full cooperation with the courts and justice has now been set aside as a result of the change of attitude towards public bodies, referred to above.

Under the old system, administrative authorities were primarily in charge of enforcing judicial decisions, which could constitute a problem when judicial decisions were not in their favour. If they failed to enforce the decision spontaneously, the claimant could then apply for enforcement against administrative body and a judicial process would then follow. This solution was justified by the principle of separation of powers. Now, with the enlargement of the ruling powers of administrative judges, administrative courts finally fully play this role.

In addition, under the previous system, administrative authorities had the possibility of defending themselves on the grounds of the public interest, which covered a wide range of situations. The tendency now is to restrict the application of public interest defence. Under the terms of article 163 CPAC, the administrative authorities can invoke and (above all) clearly demonstrate either absolute impossibility of enforcing a judicial decision or serious damage to the public interest caused by this enforcement. The way administrative courts are able, nowadays, to control the application of public interest defence will most certainly narrow the field of application of this sort of defence.

Other changes, such as elimination of the restrictions on admissible evidence, which favoured the public administration (for example, administrative authorities, e.g. the holders of administrative office, could not be called to stand in trial), have contributed to achieving formal equality between parties.

However, concerns with formal equality were outstripped by the changes made to seek material equality. This explains the introduction in CPAC of a special duty (on the part of the authorities) to cooperate and inform the Administrative court. The principle of equality, in a formal approach, means treating equally what is equal but also, in a material approach, treating differently what is different. There can be no doubt that the administrative

authorities are placed in a different or special position. This “special” position has therefore been counterbalanced by the introduction of this “special” duty to cooperate and inform. Accordingly, article 8, no 3, CPAC establishes the duty of sending the “administrative file” and all documents related to the act whose legality is being analysed. And no 4 of the same article obliges the public administration to inform the administrative court of all the acts issued as a consequence of or in relation to the act under analysis.

In addition, in the old system, the case law used to presume the legality of administrative acts. In other words, whenever the administrative judge had doubts concerning the legality of a certain act, his (or hers) decision would take into account a presumption of legality of administrative authorities acts. This presumption was not a legal one, but was the result of the case law interpretation on the legal criteria regarding the conditions to apply for the judicial review of administrative acts. When verifying those conditions, the court would usually rule in favour of the public administration.

The strengthening of the principle of equality of the parties in the administrative judicial system will have consequences in the relations between the administrative authorities and private parties. Administrative authorities were already bound to comply with the principle of legality and respect for the rights of private parties. However, now they have been stripped of an unjustified position of superiority, which in practice have given them a degree of immunity (never recognised). Therefore, the tendency will be to strengthen democracy in the relations between the administrative authorities and private parties.

The loss of privileges and the offsetting of the special position where administrative authorities used to stand, together with increased effectiveness of judicial protection (which shall be explained below), will cause the authorities to be more concerned to avoid arriving at the stage of litigation before the administrative courts. As it is desirable, this will foster a culture of avoiding judicial litigation. This “new culture” will hopefully involve, more than the compliance by administrative authorities with the basic principles of law, the elimination of the remaining resistance to building a truly democratic relationship between public bodies and private parties.

2.2.2. EFFECTIVE JUDICIAL PROTECTION

The Reform of the Portuguese system of administrative justice was guided by a central aim – that of increasing the effectiveness of judicial protection. The administrative justice is, therefore, no longer the “poor relative” of the Portuguese judicial system (regarding effectiveness of judicial protection), and has now been brought fully into line with European law.

Effective judicial protection was achieved as a result of several changes, which will be further analysed.

2.2.2.1 CHANGE OF PARADIGM

The expression “change of paradigm” seeks to describe the complete turnaround in the actual philosophy underlying the administrative justice system. Whilst in the previous system there was a limited number of remedies, which corresponded to a limited number of claims, and consequently a limited number of protected rights, the basic principle in the new system is that all rights are matched by appropriate remedies.

This new philosophy is clearly enshrined in new CPAC, more specifically in article 2, no 2, which states that “*all legally protected rights or interests are matched by adequate protection from the administrative courts*”¹⁰.

Previously, it was conceivable that in certain situations deserving jurisdictional protection no real judicial protection would be forthcoming. This idea has now been completely set aside by the new approach taken by the actual legislation on administrative procedure.

Whereas under the system existing prior to the Reform, the list of remedies was exhaustive, and therefore limiting, the CPAC now enumerates mere examples of possible types of claims. In addition to these, CPAC accepts any others which may be needed to guarantee the rights of private parties and compliance with the principle of legality. Therefore, rather than having rights limited by the available range of remedies, the post 1977 administrative justice system sought to provide remedies for all rights.

Another important change is the possibility of presenting various claims in a single action, now allowed by CPAC. This is an innovation whose importance should not be ignored. As well as the procedural economy gained from the possibility of presenting multiple claims in a single action, the time saved by

¹⁰ Vide JOSÉ MANUEL SÉRVULO CORREIA, *op. cit.*, p. 757.

private parties is extremely significant. For example, previously it was necessary to apply for the annulment of an administrative act, and, only thereafter, to claim for damages. This meant, in practice, that the second action might be brought before the court many years after the act and the harm in question. If we were to add the time taken before it was possible to bring before the court the second action to the time taken to decide this action, the total time spending could be as much as 10 years.

The “tortuous route” which private parties were obliged to follow was clearly contrary to the principle of effective judicial protection.

The change of paradigm and the possibility of multiple remedies in a single action have led to a significant increase in the number and variety of claims. Unlike some others, this is one practical consequence of the Reform to which we can safely point at this moment, i.e. late 2006/early 2007.

2.2.2.2. ENLARGEMENT OF THE RULING POWERS OF THE ADMINISTRATIVE JUDGE

The enlargement of the ruling powers of administrative judges derives from a change in the attitude towards administrative authorities, now reflected in procedural law, and from a less conservative interpretation of the principle of the separation of powers.

In order to assure effective judicial protection, administrative courts must have a real chance to restore legality and, if necessary, order the administrative authorities to take the proper steps or conduct themselves in a determined way. The previous interpretation of the principle of the separation of administrative and judicial powers led to the conclusion that this sort of ruling was not possible. Therefore, administrative authorities detained an excessively broad margin of discretion, especially regarding enforcement of judicial decisions.

In addition, because of the procedural law previously in force, conduct of administrative justice ran up against a plethora of formal obstacles. The system favoured formal justice, to the detriment of material justice.

Today, in contrast with what happened under the old system, the administrative judges are truly bound by the principle of *pro actione*¹¹⁻¹², which basically means that the right of access to justice is promoted from a material perspective. In accordance with this principle, article 7 CPAC lays down that “in order to enforce the right of access to justice, the procedural rules must be

¹¹ Vide JOSÉ MANUEL SÉRVULO CORREIA, *op. cit.*, p. 758.

¹² Vide, JORGE MIRANDA e RUI MEDEIROS, *Constituição Portuguesa Anotada, Tomo I*, Coimbra, 2005, p. 190.

interpreted in such a way as to promote the rendering of decision on the merits of the claims presented”.

In practice, the *pro actione* principle means fewer opportunities for dismissing cases on formal grounds, for instance due to the failure to meet procedural requirements which are not essential, or which may be corrected. Administrative judges are now obliged to adopt a more flexible position, with a view to providing material justice. This obligation has also brought with it an increase in the ruling powers of the administrative judges, who are no longer straitjacketed by a series of merely formal requirements. Closely related to this, the administrative judge has now the duty of analysing all the causes of illegality of the administrative act, and not only the causes invoked by the claimant. This means the judge should not refrain from striking down an administrative act based on reasons other than the ones pointed out by the claimant.

What is more, in the new system, the only limit on the ruling powers of the administrative courts is still – as proper under the rule of law – the actual principle of the separation of powers. The administrative courts *“judge whether the Administrative Authorities have complied with the legal rules and principles by which they are bound and not the appropriateness or expedience of their acts”*, in the words of article 3 CPAC.

Nonetheless, as stated above, the principle of the separation of powers is no longer perceived with the disproportionate breadth previously accorded to it, allowing for new types of rulings against the administrative authorities, namely whose nature is considered to be more *“intrusive”*.

It is now undisputed that the court may order the anticipation of an administrative act or behaviour, and even that it may issue *“substitutionary orders”*, albeit in exceptional cases (when the margin of discretion permitted to administrative authorities is practically nil, or/and where an act is simply due in accordance with strict legal rules).

An example of this new type of ruling powers can be found in a new type of action permitted in the post-reform judicial system – injunctions for the issuance of an act due according to the law. To help us explain this new type of action, let us consider the following example:

Under the applicable law, after 8 years of military service in the Portuguese Navy, an officer is allowed to resign. The law obliges the Navy to acknowledge his/her notice of resignation, which means that the navy’s act is characterized as a strictly legally binding act. What happens if the Navy refuses to

acknowledge or positively dismisses an officer's resignation? The Navy officer may require the administrative court to enforce the "issuance of the act due according to the law", i.e. the Navy is forced to merely acknowledge his/her resignation. Basically, what happens is that the administrative judge will force the administrative authorities to acknowledge the officer's resignation.

According to the example, the officer would face either an express negative decision or no decision at all.

In the second case, according to the previous system, confronted with the inexistence of a decision, the officer would have to presume tacit dismissal of his application and would have had no other option than to appeal against such dismissal. The whole procedure entailed an assumption that the act had been positively rejected, meaning that the court would rule on this "presumed" act, namely, by annulling it. The administrative authorities would then have to decide to execute the due act. The private party was left once again to wait for the act to be carried out, with the added vexation of knowing that he or she had already been recognized as having the right to this act...

Fortunately, this "obtuse" mechanism has been abandoned, and the courts are now enabled, in this type of case, to issue a single ruling ordering the authorities to carry out the act due in accordance with the law.

If, on the other hand, the Navy had issued a negative (express) decision, the central object of the action would still be the issuance of the act due according to the law. The CPAC itself states in article 66, no 2, that *"even if execution of the act due has been expressly refused, the object of the proceedings is the claim of the party concerned and not the act of dismissal, which is directly eliminated from the legal order by the decision against the authorities"*.

If there is a margin of discretion for the act sought, deriving from the exercise of administrative duties, and the assessment of the case does not point one and only solution as legally possible, *"the court may not determine the content of the act to be carried out, but should specify the binding rules to be observed by the authorities in issuing the act due"*, under article 71, no 2, CPAC.

However, if the act is a strictly legally binding act, the court simply orders administrative authorities to carry it out.

If even after the court order, administrative authorities fail to comply with the decision, administrative judge can then render a decision which produces the effects of the act unlawfully omitted. These last decisions may be called

“substitutive decisions”. They were controversially introduced by the Reform¹³, but only in cases where a strictly legally binding act is at stake. Under these circumstances, in other words, “when the question at issue is the execution of an administrative act which is legally due with a legally determined content”, CPAC states in article 164, no 4, b), that the private party may request “the court itself to render a decision which produces the effects of the act unlawfully omitted”.

It should be stressed that the introduction of this type of decision, for the first time in the history of the administrative justice system, should be considered as a clear sign of a change of perspective in relation to the extent of the ruling powers of administrative judges (which could not be sustained in the light of a more conservative interpretation of the principle of the separation of powers).

Taking into account the increase of effectiveness and equality in judicial protection, administrative authorities are expected to take all measures in order to avoid litigation and, therefore, become more accountable. This will mean increased openness in their dealings with private parties. The strengthening of accountability will, thus, hopefully lead to greater transparency.

2.2.2.3. REASONABLE TIME REQUIREMENT

It is only possible to ensure effective judicial protection when judicial decisions are taken in reasonable time. This is stated in article 20, no 4, of the Portuguese Constitution¹⁴.

The reasonable time requirement has been amply explored in the case law of the European Court of Human Rights, several times in connection with Portugal. Complaints are commonly made as to the excessive length of proceedings in the Portuguese judicial system (administrative, civil and criminal). In several cases¹⁵, the applicants submitted that there had been a breach of article 6, no 1, of the European Convention, and argued that the excessive length of the proceedings (eleven years, thirteen years, etc.) had the same effects as a lack of effective access to a court.

The Portuguese Government responded that the cases were particularly complex and/or that the country’s courts had an excessive workload. In some

¹³ Indeed, the constitutionality of this concept may be questioned, as explained in JOSÉ MANUEL SÉRVULO CORREIA, *Direito do Contencioso Administrativo I*, op. cit., p. 762 et seq..

¹⁴ JORGE MIRANDA and RUI MEDEIROS, op. cit., p. 192.

¹⁵ Vide, for instance, *Baraona v. Portugal*, 1987, *Martins Moreira v. Portugal*, 1988, *Silva Pontes v. Portugal*, 1994, *Matos e Silva, Lda., and Others v. Portugal*, 1996, *Estima Jorge vs. Portugal*, 1998, *Comingersoll S.A. v. Portugal*, 2000 (in <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>).

of the cases, the Portuguese State did not even contest the fact that the proceedings were unreasonably long.

Even though the ECHR understands that “*the reasonableness of the length of the proceedings is to be determined in the light of the circumstances of the case and with reference to the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute*”, this Court has consistently considered Portuguese justice, and particularly administrative justice, to be too slow.

In the light of this case law, the European Convention and the actual community law, there was an urgent need to overhaul the Portuguese system of administrative justice (not to mention the civil and criminal judicial systems...).

With the Reform now in place, the Portuguese administrative courts are likely to offer a faster form of justice. In practice, in the “most common” types of proceedings, the changes do not seem to be radical, and, above all, the real effects of the Reform are yet to be determined.

Nonetheless, concerning the request and grant of provisional protection, as well as other types of proceedings classified as urgent, CPAC has amounted to a real revolution.

These two areas will be explored in greater detail below.

2.2.2.3.1. PROVISIONAL PROTECTION

The CPAC has significantly extended the scope of provisional protection available. One may say, without exaggeration, that the situation prior to the Reform was catastrophic. As stated by JOSÉ CARLOS VIEIRA DE ANDRADE, the forms of provisional protection were limited, in practice, to injunctions for stay of execution, which were provided for, understood and applied on very narrow grounds¹⁶.

In 1997, a reference to adequate provisional protection as a dimension of the principle of effective judicial protection was introduced into the Constitution¹⁷. Portuguese case law also sought to better the deficiencies of stay of effect, but with little success, due to the legal restrictions. It was therefore urgent to reform the field of provisional protection.

¹⁶ JOSÉ CARLOS VIEIRA DE ANDRADE, *op. cit.*, p. 325. This author describes these limitations in detail. In terms of subject matter, an injunction of stay of execution could only be taken out against administrative acts. In terms of content, it could only conserve the existing situation, and not consist of anticipatory measures. And finally, in order for an injunction to be granted the damage deriving from the execution of the act would have to be irreparable, but the injunction would only be granted if it did not result in serious harm to the public interest.

¹⁷ Vide JORGE MIRANDA and RUI MEDEIROS, *op.cit.*, p. 203.

Nowadays, finally flexible¹⁸ and comprehensive forms of provisional protection were introduced, which have been applied in surprising ways. This has led to a risk which should not be underestimated: it is possible that the frequent request for provisional protection will occupy the administrative courts to such an extent that decisions on the principal proceedings will be excessively postponed.

Article 112 CPAC allows for provisional measures of any type provided they are appropriate and assure the usefulness of the final decision to be handed down. The absence of any restriction on the possible types of injunctions clearly reflects the change in the paradigm of administrative justice, as explained above¹⁹. Instead of merely permitting parties to request any measure appropriate to regulating the situation, CPAC actually allows judges to adopt measures different from those requested, or in addition to these (article 120, no 3, CPAC)²⁰.

CPAC does not allow only measures of a “conservatory” nature, but also allows for anticipatory measures. In other words, in addition to measures designed to preserve an existing situation (conservatory measures), CPAC now provides for measures designed to prevent damage - obtaining in advance the availability of a thing or the enjoyment of a benefit to which the private party is entitled (anticipatory measures)²¹.

Another major change is the importance given, by CPAC, to the criterion of *fumus boni iuris*. Article 120, no 1, a), accepts, for instance, that, if it is proven that an act is manifestly unlawful, and consequently that it is evident that the principal action will be upheld²², the measure may be decreed immediately, even in the absence of *periculum in mora*.

The current concern for the effectiveness of provisional protection is also reflected in cases dealing with stay of effect. In this sort of cases, it is sufficient for the administrative authorities to be notified of the application for stay of effect, for them to be legally prohibited (article 128, CPAC) from executing the act or rule (unless they invoke, through a decision from the relevant body,

¹⁸ For further exploration of this question, *vide* ANA GOUVEIA MARTINS, *A Tutela Cautelar no Contencioso Administrativo*, Coimbra, 2005.

¹⁹ *Vide* JOSÉ MANUEL SÉRVULO CORREIA, *op. cit.*, p. 760.

²⁰ This is a further illustration of the extension of the ruling powers of the administrative judges.

²¹ JOSÉ CARLOS VIEIRA DE ANDRADE, *op. cit.*, p. 331.

²² Other examples where it is evident that a principal action will also be accepted are when the question at stake is the application of a rule which has been annulled, or the case of an act identical to another which has been annulled or declared null and void, or inexistent (article 120, no 1, a), CPAC).

stating due grounds, serious harm to the public interest as a result of deferring execution).

Another interesting new feature is the possibility of injunction proceedings being converted into the principal proceedings, allowing the Court to bring forward a final decision, when there is a manifestly urgent need to resolve the case definitively (article 121, CPAC²³).

Finally, one more original aspect of the new procedural rules deserves to be mentioned: the existence of double provisional protection. Article 131 CPAC regulates this situation allowing for an injunction (which constitutes provisional protection) to be granted within only forty eight hours (provisional granting of provisional protection). This is possible when the measure is sought to protect civil liberties which could not otherwise be exercised in good time (possibility of imminent and irreversible injury to the right invoked) or in other situations of special urgency.

In conclusion, the Reform has wrought sweeping changes to the legal system as regards provisional protection, finally bringing the system into line with the Constitution²⁴ and with the requirements of European law. These have clearly been changes for the better.

2.2.2.3.2. URGENT JUDICIAL PROCEEDINGS

Urgent proceedings have also been created and/or reinforced (articles 97 *et seq.* CPAC) to assure effective judicial protection.

The law considers that both this type of proceedings and provisional protection proceedings, as described above, are urgent in character (article 36 CPAC). However, only in urgent proceedings is the Court supposed to consider the full subject matter *sub judice* and issue real decisions on the merits.

The difference between urgent and non-urgent proceedings is that the former are conducted to faster or simplified procedural rules, taking into account the nature of the legal rights or goods protected, or other circumstances attaching to the situation. In addition to the procedural phases and time limits being shortened, depending on the type of proceedings, all proceedings continue during the judicial recess, secretarial acts are carried out on the day of

²³ The legal preconditions for this are, however, quite tight: there must be an evidently urgent need for definitive resolution (consequent insufficiency of provisional protection), in view of the nature of the questions and the seriousness of the interests involved, the court must be in possession of all the information needed to reach a decision, and the parties must be allowed to contest each other's positions.

²⁴ *Vide* MÁRIO AROSO DE ALMEIDA, *O Novo Regime do Processo nos Tribunais Administrativos*, Almedina, 2005, p. 294.

receipt, taking precedence over any others, and appeals are sent up immediately, with time limits halved.

The CPAC specifies four types of urgent proceedings: (i) proceedings relating to electoral disputes, (ii) pre-contractual disputes, (iii) injunctions for the provision of administrative information, consultation of administrative proceedings or the issuing of certificates, (iv) injunctions for the protection of civil liberties. This list does not mean that there is a cap on the number of types of urgent proceedings. Different types of urgent proceedings are provided for in other legislation, such as planning orders or proceedings relating to the right of asylum²⁵.

Accordingly, urgency may be required due to the type of situation, as in electoral proceedings (articles 97 to 99 CPAC), which are not compatible with the time normally taken by proceedings, as it is impossible, *a posteriori*, to reinstate fully the hypothetical situation²⁶. The same is true in pre-contractual proceedings (articles 100 to 102 CPAC)²⁷, in other words, proceedings which challenge acts relating to the formation of certain contracts are also deemed urgent in view of the type of situation in question.

The provision of independent urgent proceedings for pre-contractual litigation cases stems, as explained by JOSÉ CARLOS VIEIRA DE ANDRADE, from the need to assure two sets of interests at the same time, public and private: on the one hand, to promote openness and competition in this field, through adequate protection of the interests of tenderers seeking to conclude contracts with public bodies, whilst on the other hand ensuring the stability of the contracts of the administrative authorities after they are concluded, providing adequate protection for the substantial public interests at stake and the interests of the parties to the contract²⁸.

Injunctions for the provision of administrative information, consultation of administrative proceedings or issuing of certificates, provided for in articles 104 to 108 CPAC, can be traced back (under the previous system) to a remedy²⁹ which, albeit in the form of an accessory remedy, was in practice also used as an autonomous remedy to assure the right to information on administrative

²⁵ Law 15/98, of 26th March 1998 (Article 62).

²⁶ These proceedings may only be brought by electors and eligible persons, including, in the event of omissions in the electoral roll or lists, the persons whose registration is missing (article 98 CPAP).

²⁷ These pre-contractual proceedings represent the continuation of the system instituted by Decree-Law 134/98, of 15th May 1998, applying the terms of Directive 89/665/EEC.

²⁸ JOSÉ CARLOS VIEIRA DE ANDRADE, *op. cit.*, p. 251.

²⁹ This remedy was consecrated in articles 82.º *et seq.* of the old Law of Procedure in the Administrative Courts (after the Reform introduced by the Decree Law 267/85, of 16th July).

procedure. This is now clearly established as a form of independent urgent proceeding, including the possibility of applying compulsory fines on the holders of office responsible for satisfying requests for information, in the event of failure to comply with the injunction without acceptable justification (article 108, no 2, CPAC).

The urgency of proceedings can also stem from the nature of the rights in question, as is the case of injunctions for the protection of civil liberties, in accordance to articles 109 *et seq.* CPAC, which counts as a complete innovation introduced by the Reform, and applauded by legal scholars³⁰.

These orders may be requested, under the terms of article 109 CPAC, when the rapid rendering of a decision on the merits requires the administrative authorities to adopt a positive or negative conduct which is essential in order to assure the exercise, in good time, of a civil liberty, when it is not possible or sufficient, under the specific circumstances, for provisional protection to be provided in the form of an injunction³¹.

If the act in question is a *strictly legally binding administrative act*, the Court should issue a decision producing the effects of the act due (article 109, no 3, CPAC). This clearly reflects the enlarged ruling powers of the administrative judges, who posse here genuine powers of substitution³².

The procedural steps in this case may be summarized as follows: the respondent has seven days to reply to the statement of claim, and the judge then has five days to reach a decision. If the subject matter is too complex, the procedure may be different (similar to that for *special administrative actions*) and the time limits longer (half those for *special administrative actions*).

Nonetheless, in situations of special urgency, when imminent and irreversible violations of civil liberties are at stake, the judge may shorten the time limit for the Respondent to present its defence, or else opt for an oral hearing, at the end of which he hands down an immediate decision, such hearings taking place within 48 hours (article 111 CPAC).

Another special feature of these proceedings is the impossibility of invoking any type of public interest defence.

³⁰ Vide MÁRIO AROSO DE ALMEIDA and CARLOS ALBERTO FERNANDES CADILHA, *Comentários ao Código de Processo nos Tribunais Administrativos*, Almedina, 2005, p. 536, JOSÉ CARLOS VIEIRA DE ANDRADE, *op. cit.*, p. 262.

³¹ The classic example of this type of court order is that of the question of permission for a demonstration, on the occasion of the visit to Portugal of a foreign figure. In this case, if the demonstration were authorized through an injunction, this would mean that once the demonstration were over, the principal proceedings would be rendered meaningless (*vide* MÁRIO AROSO DE ALMEIDA, *op. cit.*, p. 283).

³² This is the only situation in which the judge can issue substitutory decisions in declaratory proceedings.

Rather than describe this type of court order in the abstract, it would seem useful to present an example of the use of this procedural form, in a case which captured the headlines both in Portugal and abroad – the *Borndiep* case, between the Portuguese State, on the one hand, and, on the other, “Women on Waves” and other Portuguese associations campaigning for the decriminalization of abortion.

III CASE STUDY – *BORNDIEP* (WOMEN ON WAVES VS. PORTUGUESE STATE)

3.1. FACTS

In August 2004, the Dutch registered ship, *Borndiep*, chartered by the organization “WOMEN ON WAVES” (WoW), sailed to Portugal on the invitation of various Portuguese associations, to take part in an initiative related to sexual and reproductive rights, and in particular the decriminalization of abortion in Portugal. This initiative was to take place between 29th August and 12th September 2004.

On its website, WoW announced that the aims of its visit to Portugal were to provide/carry out:

- Information on and distribution of condoms and emergency contraception;
- Pregnancy testing;
- Support for women taking personal decisions on pregnancy;
- Abortions in cases where menstruation was more than 16 days overdue;
- Information on sexually transmitted diseases.

Under the heading “*abortion on our ship*”, the same site stated “*you can make an appointment with us by telephone, email or by visiting the ship. We will inform you about when and where to board the ship. You will be treated according to Dutch professional medical standards, which include full confidentiality about counselling and/or treatment*”³³.

³³ In: <http://www.womenonwaves.org/index.php>

In short, WoW announced publicly (through the Portuguese media and its own site) that, although termination of pregnancy is a crime under Portuguese law, the crew of the *Borndiep* intended to carry out abortions on the high seas up to a given period of pregnancy, given that, as the ship was Dutch registered and abortion was permitted by Dutch law, an abortion carried out under these circumstances would not constitute a crime. The *Borndiep* carried on board a gynaecological clinic installed in a container.

In addition to talks, visits, information sessions and meetings with journalists, politicians, activities, opinion makers and health professionals, the “official programme of activities” for the WoW visit to Portugal included “departures for the high seas or free days” for every day of their stay.

On 27th August 2004, the Maritime Transport Port Institute and the Figueira da Foz Port Captain’s Office were requested to authorize the *Borndiep*’s arrival and berthing at the port of Figueira da Foz. On the same day, the Secretary of State for Maritime Affairs refused the *Borndiep* permission for passage through territorial waters, basically because it considered that this could not qualify as “innocent passage”, in accordance with the United Nations Convention on the Law of the Sea (UNCLOS), of 1982³⁴.

The *Borndiep* was therefore obliged to remain in international waters, i.e. 12 miles off the Portuguese coast³⁵. In addition, two ships from the Portuguese Navy were deployed in the area³⁶.

3.2. INJUNCTION FOR THE PROTECTION OF CIVIL LIBERTIES

Faced with the rejection of their request for authorization for passage through Portuguese territorial waters, WoW (and other Portuguese associations) launched one of the urgent proceedings provided for in CPAC – an injunction for the protection of civil liberties, as provided for in article 109 *et seq.* CPAC.

³⁴ More specifically, under articles 18 and 19 UNCLOS.

³⁵ Portugal has still not declared its contiguous zone (Article 33 UNCLOS), which can extend as far as 24 miles from the coast, meaning that, as from 12 miles from the coast, ships are in the economic exclusive zone. In this zone, the waters have the nature of international waters, and the freedoms of the high sea (article 86 UNCLOS) prevail, in all matters not relating to the conservation of natural resources and other matters defined in article 56 UNCLOS.

³⁶ The presence of naval units in the area aroused the particular indignation of WoW and other writers, as may still be seen on the organization’s website at <http://www.womenonwaves.org/> (in January 2006). This presence was deemed excessive and disproportionate to the threat represented by the *Borndiep*, as these were warships. It is nonetheless important to recall, in connection with this, that the Portuguese State does not possess resources for inspecting compliance with the law in maritime areas which offer a less “threatening” appearance and yet are able to withstand marine conditions 12 miles from the Portuguese coast.

3.2.1. THE APPLICATION

In the view of WoW, by prohibiting the ship from entering Portuguese territorial waters, the Portuguese State had acted in breach of several rights protected by the Constitution, and more specifically the “*rights of movement, information, reunion, expression and manifestation of the ship’s crew, WoW and the Portuguese organizations*”.

By making this application, WoW requested the Court to substitute the Portuguese State in granting authorization to enter the country’s territorial waters, or to order the State to permit such entry, thereby putting an end to the alleged violation of these rights.

Claiming special urgency in the resolution of the dispute, WoW also requested an oral hearing, to be held within 48 hours, under the terms of article 111 CPAC.

The holding of this hearing within this time limit – it was booked late afternoon on the Friday (3rd September) for the following Monday morning (6th September), at 10.00 a.m. – was truly innovative in the light of the rules of the previous system of administrative justice, especially considering that this took place during the judicial recess.

This case demonstrates that it is today possible to resolve a dispute involving the protection of civil liberties in 48 hours (or even less, if we count only the number of working hours).

The oral hearing was held at the Administrative and Tax Court of Coimbra, starting at 10.00 a.m. and ending about 11.00 p.m.. It included the production of evidence by the parties, with the questioning of various witnesses, oral closing arguments from the parties and the reading of the decision³⁷. The decision handed down did not limit itself to a temporary ruling on the situation, but instead constituted a final decision on the merits.

3.2.2. THE DEFENCE

³⁷ My involvement in the case was that I was working at that time in the Legal Department of the Ministry of National Defence. The Ministry of Defence and the Maritime Transport Port Institute were represented, and their legal defence conducted, by the law firm which at that time represented the Ministry, *Sérvulo Correia & Associados*, and in particular by Dr. Bernardo Diniz de Ayala, with whom I had the privilege of working.

The State's defence was based on the following arguments, which will be set out in brief, as the case in question is examined only to illustrate the virtues of the new category of urgent proceedings, created by CPAC:

a) No civil liberties were at issue, as the holders of the rights invoked by WoW were the persons and not the ship. The persons (crew and members of the association) *could* move freely within Portuguese territory, and also inform, meet, demonstrate and express themselves freely without any restrictions. The authorization for entry by the ship was not therefore in any sense essential in order to guarantee these rights.

b) The first of WoW's requests – that the Court would substitute the State in authorizing the ship to enter Portuguese territorial waters – would imply that the act in question were a strictly legally binding act, under the terms of article 109, no 3, CPAC. The second request, however, that the Court order the authorities to authorize the ship to enter Portuguese territorial waters, implied that the judicial authority should pronounce on the appropriateness of a decision by the administrative authorities.

However, the applicable law allows the administrative authorities to exercise a degree of discretion concerning permission/prohibition of innocent passage: article 19 UNCLOS (to which Portugal has been a signatory since 1997) states that "*passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State*" and, under article 25 (rights of protection of the coastal State), "*the coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent*". Accordingly, entry by ships into Portuguese territorial sea and the docking of such ships at ports within national territory presupposes a number of particular judgements for which there is a margin of administrative discretion, meaning that this is not a matter on which a Court may pronounce without violating the principle of the separation of powers, provided for in article 3 CPAC. So, even in relation to the second request, the Court could not assess whether the decision of the administrative authorities was appropriate or opportune, on pain of breaching the principle of the separation of administrative and judicial powers.

c) WoW's real intentions (as publicly announced) involved carrying out abortions on the high seas, up to a given period in pregnancy, given that, as the ship was Dutch registered and abortion is permitted under Dutch law, abortions carried out under these circumstances would not constitute a crime.

As the termination of pregnancy is classified as a crime under Portuguese law (save for the exceptions provided for in the law), the Portuguese State argued that the WoW's intended conduct would correspond to at least two concepts not permitted under Portuguese law.

- (i) *evasion of law* - by crossing Portuguese territorial seas, taking Portuguese women on board at the port, carrying them out into international waters, carrying out abortions, and the recrossing Portuguese seas for them to disembark in national territory, the Applicant hoped to find a way of evading compliance with Portuguese criminal law, when it was naturally obliged to comply with it (this would amount to a kind of "magic formula" which would allow it to avoid complying with the provisions of Portuguese law).
- (ii) *abuse of right*, specifically abuse of the right of innocent passage, insofar as by acting in this way WoW would be availing itself of its right – the right of innocent passage - in order to achieve an end clearly prohibited by the legal system, i.e. the committing of a crime.

3.2.3. THE DECISION

Despite being issued so quickly, the decision handed down by the Judge, on 6th September 2004, in the *Borndiep* case, was a final decision on the merits, as mentioned above, and not a mere decision on an injunction.

The Court found in favour of the Portuguese State, dismissing the applications submitted by WoW. It did this on the basis of the arguments I shall now outline.

In the first place, the Court did not recognize the existence of any violation of the fundamental rights of WoW or the other applicants, making a distinction, as explained above, between, on the one hand, the holders of rights, in other words, the persons who could move, meet, demonstrate and expressly themselves freely, and, on the other hand, the ship, which never held any rights. It, therefore, threw out the grounds invoked by WoW for using *that particular* action, given that it is designed to protect civil liberties, when there was no civil liberty actually under threat.

Secondly, the Court found that, in keeping with the principle of the separation of powers, it was not within its powers to judge whether the acts of the administrative authorities were appropriate or opportune.

Finally, it declared its agreement with the argument presented by the Portuguese State to the effect that WoW was seeking, through its intended actions, to evade the law and commit an abuse of right.

In short, the court considered as invalid all the reasons invoked by WoW and the other applicants as grounds for their applications, and consequently rejected them.

3.3. CONCLUSION

Despite the necessary brevity of this account of the *Borndiep* case and the extra-legal nature of the following consideration, it is important to note that the question at issue, in the view of the defence team working for the Portuguese State, was not the support for either of the two positions – commonly referred to as *pro-choice* and *pro-life* – on a matter which has divided Portuguese society and which formed the background to discussion of this case (giving the case a high media profile), in other words, the decriminalization of termination of pregnancy.

The Portuguese Criminal Code is categorical in classifying this conduct as a crime (except in exceptional and duly identified cases), although the underlying question is highly controversial, from a perspective of *de lege ferendo*.

Whilst, in legal terms, it was possible to approach and defend this case, without taking any position on this hotly debated issue, it was unfortunate that the ensuing discussion in the public domain failed entirely to separate the issues involved, as may easily be imagined.

After this short digression, it remains to recapitulate the ground-breaking features of this case in the context of the Portuguese administrative justice system, resulting from application of the new rules of CPAC:

- The “injunction for the protection of civil liberties” is a new type of proceeding, which was introduced in response to concerns for the assurance of effective judicial protection, from the perspective of “every right matches an adequate remedy”;

- The speed with which the final decision on the merits was obtained (within 48 hours), especially considering that the case involved fundamental rights (which is once again related to the need to guarantee effective judicial protection);
- Erosion of the privileges previously enjoyed by the administrative authorities, which in this case were required to pay court costs and were immediately summoned to appear in Court, in a position of absolute equality with the other party;
- Fundamental principles, such as the separation of administrative and judicial powers, are not undermined by the new system.

IV CONCLUDING REMARKS

This report has sought to provide a picture – necessarily in outline – of the Portuguese system of administrative justice as it stands today, following 2004’s Reform. We have aimed to highlight the main shortcomings of the previous system, and set out the principal achievements and implications of the Reform’s changes.

This was more than a simple reform of administrative justice: it was a revolution in the current judicial model, which has brought it into line with European requirements. The two main innovations analysed by this paper are the strengthening of the principle of the equality of the parties and the assurance of effective judicial protection. The latter has had consequences at various levels: a shift in paradigm with regard to the possibility of applying for judicial review, the strengthening of the ruling powers of the administrative judges, and the guarantee that jurisdictional decisions will be rendered in reasonable time.

As stated by VASCO PEREIRA DA SILVA, the CPAC is now close to the constitutional optimum, but also to the European optimum, namely as concerns realization of the principle of full and effective protection of the rights of private parties through principal proceedings, proceedings for provisional protection and enforcement proceedings³⁸.

On the other hand, the community influence should help to maintain a reasonable balance between the “objectivist” and “subjectivist” functions of administrative justice, as explained by JOSÉ MANUEL SÉRVULO CORREIA³⁹.

Although it is still too early to make a definitive assessment, it may be that administrative judicial protection in Portugal was effectively reborn in 2004, and is now taking its first steps with increased effectiveness and a much clearer focus on the rights of private parties, obliging the administrative authorities to adjust their practices to higher standards of openness and democracy, and leading them to become more accountable.

The outcome, albeit laudable in various respects, still however falls short of perfection. In addition, some of the measures introduced in the Reform had unexpected practical results. For instance, the surprising improvement in the level of provisional protection and the upsurge in the number of urgent proceedings, which are a positive outcome themselves, have caused non-urgent

³⁸ *Op. cit.*, p. 216.

³⁹ *Op. cit.*, p. 782.

proceedings to fall down the list of priorities and to become subject to excessive delays.

It is now time to take stock, to learn from experience – an experience which overall has been positive – and to make adjustments where possible, as we move towards the better provision of justice.