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ADMINISTRATIVE JUSTICE:

THE PORTUGUESE CASE

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1. Introduction

The reform of Portuguese administrative litigation was recently implemented following a fruitful public debate. Current administrative justice essentially comprises the following legislation:

(I) Administrative and Tax Courts Statute (Law no. 13/2002, of the 19th of February).

(II) Administrative Courts Proceedings Code (Law no. 15/2002, of the 22nd of February).

The first law establishes the structure and organisation of administrative and tax courts, while the second law deals with proceedings before administrative courts. Proceedings before the tax court are dealt with in another law.

In Portugal, consolidated administrative and tax jurisdiction now exist with the same constitutional status as other courts. It is necessary, however, to ensure that access to these courts is facilitated as required by the Constitution and to adequately respond to all matters submitted.

The control of public administration is based on independent courts whose judges benefit from the same guarantees, e.g. independence, and are subject to the same obligations, e.g. impartiality, as judges in ordinary courts of law. These specialised courts are a consequence of the complexity and increase of state intervention and the consequent growth of public law.

2. Administrative Jurisdiction

In the absence of an independent administrative jurisdiction, control of public administration is a fiction or an undemocratic way in which to legitimate administrative decisions.

The authority of administrative courts is based on the recognition of their independence from other state organs.

The Administrative Courts Statute accordingly enshrines three fundamental rules:

Regarding administrative and tax jurisdiction (article 1):

- The administrative and tax courts are sovereign bodies with the power to administer justice in the name of the people, in disputes arising from legal relations in the administrative and tax spheres.
- The administrative and tax courts cannot apply rules, which violate the provisions of the Constitution or constitutional principles, in the matters decided by them.

Regarding the independence of the courts (article 2):

The administrative and tax courts are independent and are subject only to the law.

Regarding judges' guarantees (article 3):

Judges of the administrative and tax courts cannot be removed from office and cannot be transferred, suspended, retired or dismissed other than in the circumstances provided by law.

We shall now consider how the Constitution deals with administrative proceedings.

3. The Constitution and Administrative Proceedings

Article 268 (nos. 4 and 5) provides as follows:

> "4. Clients of the public administration are guaranteed effective protection by the courts of their legal rights, including the recognition of their rights and interests, the challenging of any administrative acts, which violate them, whatever the form thereof, order mandating the practicing of administrative acts legally due and the taking of appropriate injunctive relief.
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> 5. Members of the general public are also entitled to challenge administrative rules with external effects, which breach their legal rights or interests."

These provisions guarantee **access to the law and effective court protection,** which constitutes a fundamental right.

Article 20 of the Portuguese Constitution states that:

"1. All persons are entitled to access to the law and to the courts in order to defend their legal rights and interests. Justice shall not be denied by reason of lack of financial resources.

4. All persons have the right that proceedings in which they are involved are decided within a reasonable time in fair proceedings.

5. The law shall provide members of the general public with legal procedures characterised by speed and priority in order to timely defend their rights, liberties and guarantees against threats to or violations of these rights."

As I already mentioned, a hierarchy of courts was created to ensure these rights.

4. The Structure of the Administrative Court System

The court structure comprises independent specialised courts with special sections for administrative and tax litigation. The courts are as follows:

- The Supreme Administrative Court in Lisbon.
- The Central Administrative Courts in Lisbon and Oporto.
- District Courts (16 throughout Portugal, including the Madeira and Azores Autonomous Regions).

The district courts generally have the jurisdiction to act as first instance courts. The central courts are courts of appeal. The main function of the Supreme Administrative Court is to decide on disputes between courts and on standardisation of case law.

5. The Jurisdiction of the Courts

The administrative courts have jurisdiction to try the following matters in accordance with article 4 of the Administrative and Tax Courts Statute:

- Protection of fundamental rights and the legal rights and interests of private individuals, which are directly based on the provisions of administrative or tax law or arising from juridical acts practiced pursuant to the provisions of administrative or tax law.
- Assessment of the legality of legal rules issued by administrative bodies.
- Assessment of the legality of legal rules issued or acts practised by private bodies, when they exercise administrative powers.
- Pre-contractual acts and contracts practised or signed under the rules of public law.
- Questions regarding the civil extra-contractual liability of the state or of its bodies, staff, agents or civil-servants.
- Disputes between public law entities and between public bodies.
- Enforcement of administrative court decisions.

6. Citizens' Rights and the Public Interest

In their development of the constitutional model, legislation regarding judicial control of public administration has tended towards the subjective conception of the protection of individual rights.

The recent reform did away with the traditional objective conception, which gives the courts the control of respect for legality, in accordance with the French tradition. The move towards the subjectivist model is reflected in the construction of contentious business as party proceedings extending the judge's powers to take note of matters and assume jurisdiction in relation to public administration.

It is nevertheless important to stress that the existence of increased guarantees in relation to public administration has not obviated the need to defend legality and to find a balance between citizens' rights and the public interest.

Examples for a trend of converging and complementing in this context are the powers of the Attorney-General's Department, the *"Ministério Público"*, and the power of judges to take judicial note of the illegalities of administrative acts challenged, on their own motion. Furthermore, the reform has not altered the executive administration system and preserved the existence of freedom of administrative appreciation.

To summarise, the model of administrative justice in Portugal grants effective court protection without doing prejudice to the defence of public interest.

7. Effective Court Protection

Administrative Courts Proceedings Code regulates the principle of effective court protection in accordance with the relevant constitutional imperative. In this area, civil court procedure law is similar to administrative court procedure law, namely guaranteeing judicial review for **every alleged violation of an individual right**.

I consider it worthwhile to describe parliamentary implementation of this principle. It will be noted that the enumeration of private rights is not merely instructive but has a relevant educational effect when reform alters a traditional and markedly objectivist model of administrative justice.

Article 2 of the Code provides that:

> "1. The principle of effective court protection includes the right to obtain a final and binding court decision with regard to each claim properly made in court within a reasonable time, together with the option of enforcing the same and obtain both mandatory and restrictive interlocutory injunctive relief, in order to ensure the effectiveness of the decision.
>
> 2. Every legal right or interest shall be afforded adequate protection by the administrative courts, i.e. in order to obtain:
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> a) Recognition of subjective legal circumstances, which arise directly from legal-administrative provisions or legal acts, practiced pursuant to administrative law provisions;
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> b) Recognition of possession of capacities or compliance with conditions;
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> c) Recognition of the right not to act and in particular, not to practice administrative acts when there is a risk of future harm;
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> d) The setting aside, declaration of nullity or non-existence of administrative acts;
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> e) Orders for public administration to allocate money, supply goods or practice acts;
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> f) Orders for public administration to provide natural restitution of damage and pay damages;
>
> g) To decide disputes regarding the construction, validity or performance of contracts within the ambit of administrative jurisdiction;
>
> h) To declare the illegality of rules issued pursuant to administrative law provisions;
>
> i) Orders that public administration practise administrative acts legally due;
>
> j) Orders that public administration carry out acts and operations necessary to reinstate subjective legal rights;
>
> l) Orders for public administration to provide information consult documents or issue certificates;
>
> m) Orders to implement appropriate interlocutory injunctive relief to ensure the useful effect of a decision."

It is necessary to stress that individuals may make various claims during one and the same proceeding, such as for example the setting aside of an administrative act and the payment of damages for the loss and damage caused by it.

8. Equality of the Parties and the Promotion of Access to Justice

Unlike in the former tradition of Portuguese administrative litigation, the principle of equality of the parties and its corollaries are of great importance today. In order to ensure swift administrative justice and to reduce excessive litigation by public administration, the said principle means that public bodies can be the subject of litigant orders. Similarly, the state and other public bodies can be required to pay court fees on the same terms as private parties.

The promotion of access to justice is a declared principle of the Code. It is based on the idea that circumstances must be created so that questions submitted to the administrative courts are decided on their

merits rather than as subject to purely formal decisions. This has various consequences for procedural rules The law specifies these principles which govern the various phases of administrative proceedings:

“Article 6. (Equality of the parties):

> The court shall ensure that there is effective equality of the parties to the proceedings, both in terms of the exercise of powers and the use of means of defence and in terms of the application of sanctions or procedural sanctions, i.e. regarding litigation.

Article 7. (Promotion of access to justice):

> In order to promote the right of access to justice, procedural rules shall be interpreted so as to promote judicial statements regarding the merits of the claims made.”

9. Forms of Action

The new system is based on the combination of several forms of action that already exist.

(I) There are currently two main forms of action to challenge administrative acts: The **ordinary administrative action** covers all disputes within the scope of administrative jurisdiction that are not to take the form of special administrative action (art. 37 *et seq.*). **The special administrative action** is used to obtain implementation of due administrative acts, as well as declarations on the unlawfulness or omission of rulings (art. 46 *et seq.*).

The procedure in ordinary administrative actions is the same as in normal civil procedure. Special administrative actions have their own procedure established by the Code. Openness and flexibility regarding a case implies a great permeability between these two procedural means. Accumulation of requests both for common and special administrative actions is possible, often leading to an overlap between procedures. In cases where accumulated requests correspond to different forms of procedure, the rule is to follow the terms of the special administrative action (art. 4°, 5° and 47°).

(II) In addition to the two main forms of action there are also a number of **urgent and autonomous procedures**. These include litigation related to elections or pre-contractual aspects of some types of contracts, as well as applications for judicial notifications to provide information, examine documents or issue certificates and judicial notifications to defend rights, freedoms and guarantees and provisional relief (art. 36).

(III) The system governing **pre-contractual litigation** is the same as in Civil law, with the aim of ruling out pre-contractual acts with regard to public works?

(IV) Proceedings for the issue of judicial notification to provide information, examine documents or to issue certificates are now the main means used to obtain such relief. There is also a new procedure to ensure the timely exercise of a right, freedom or guarantee (art. 109).

Judicial notification to protect rights, freedoms or guarantees can be used to require the Administration or private parties do act or refrain from acting in order to ensure the exercise of a right, freedom or guarantee.

(V) One of the areas where the changes are most felt is the area of **provisional remedies** (art. 112), which differ from other urgent forms of injunctive relief ancillary to the main law suit. The Code stipulates that provisional relief can be granted even in a form not specified by the law, and that the parties can apply for, or the court may order, any measures considered adequate in order to ensure the utility of the final decision.

(VI) Another form of proceedings available in the administrative justice system are **enforcement proceedings**, which in the new procedural model can have three aims: Enforcement of implementation of acts or the delivery of goods (art. 162 *et seq.*), enforcement of payment of the right amount (art. 170 *et seq.*) and the enforcement of orders setting aside administrative acts (art. 173 *et seq.*). In this area, there has been a complete change in the existing system so that for the first time, real enforcement mechanisms exist, which can be used by the courts against public bodies.

(VII) Finally, the restructuring of **jurisdictional appeals** shows a clear move towards civil procedure. A statement of the grounds of appeal must now accompany a notice of appeal, thus

avoiding the existence of two different time limits for the filing of the notice of appeal and the grounds of appeal, respectively. The court of appeals at second instance decides on the appeal based on its factual merits and not only on its admissibility or other procedural elements.

10. Separation of Powers and Judicial Review of Administrative Decisions

The intensity of control is related to the problem of discretionary power. Can the courts second-guess the decisions made by public administration?

The reply to this question involves the difficult issue of the separation of powers and raises the spectre of government by judges.

Article 3 of the Portuguese Administrative Courts Proceedings Code states that “the administrative courts shall, in compliance with the principle of separation and interdependence of powers, judge the compliance by public administration with the legal rules and principles to which it is subject and not the convenience or appropriateness of its conduct”.

The extension of court control over administrative activity thus depends on the concept of legality of which the Portuguese administrative courts have adopted a broad concept of. They require the administration to comply with the law and to apply it in accordance with the principles of proportionality, equality and impartiality.

This means that when courts consider the use of discretionary powers by the administration, they consider the facts in question on which the said exercise was based and also whether the decision in question took the said constitutional and legal principles governing administrative activity into consideration.

Furthermore, the courts consider that legal concepts need to be reviewed focusing on legality rather than on what seems opportune.

The hitherto brief experience of the application of the Administrative Courts Proceedings Code has contributed to the correction of illegalities, as well as to an improvement in the quality of administrative activity by guaranteeing the rights of individuals and pursuing public interest.