

**XVII^{ème} colloque entre les Conseils d'Etat
et les juridictions administratives suprêmes
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R a p p o r t

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REPORT
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The consequences of the article 6.1 of the European Agreement to the protection of the human rights in the work of the Councils of State and of the Supreme Administrative Jurisdictions.

1. Preliminary questions.

1.1 The scope of the Spanish administrative jurisdiction is fixed in accordance with a system of general clause. The organs that integrate this jurisdiction (the different Courts) exercise a legality control of the administrative with no exception (the denominated political acts are even subject to control) and the administrative acts are within the expression administrative performance (expressed and presumed), the material inactivity of the Administration and the "de facto" ways in which this can incur. Also, the control extends to the dispositions of inferior category to the Law (regulations) and to the legislative decrees (norms with law range issued by the Government or by the Council of Government of the Autonomous Communities by virtue of the power legislative's expressed delegation) when they exceed the limits of the delegation.

On the other hand, all the public Administrations (of the State, of the Autonomous Communities, the local entities and the institutional Administration, even the Corporations of public Right if they exercise administrative powers) can be sued in accordance with the administrative jurisdiction.

Besides this competence of common right, directed to the control of the Administration in subjective and formal sense, the administrative jurisdiction is destined to investigate (attribution competence) the materially administrative activity of the constitutional organs not integrated in the executive power (Congress, Senate, Constitutional Court, General Council of the Judicial Power, National Audit Office and another similar institutions of the Autonomous Communities). And the same thing the acts of the electoral Administration, organic and functionally independent of the executive power.

In summary, all the administrative decisions, in the wide sense that has just indicated, are capable of challenge to the administrative jurisdiction, but not the

whole administrative conduct can be taken to the supreme administrative jurisdiction.

1.2 The supreme administrative jurisdiction in Spain (like the civil, penal, labour and penal supreme jurisdictions) is in the Supreme Court (Court of Appeal), and the Administrative Court acts as only instance court and casation court.

As only instance court the Administrative Court of the Supreme Court judges the appeals that are lodged against the acts and regulation dispositions emanated from the council of Ministers and from the Government's Vicarial Commissions and against the acts and regulations, as regards personal and patrimonial administration, emanated from the Congress of the Deputies, the Senate, the Constitutional Court, the National Audit Office and from the Ombudsman. It also judges in only instance the appeals against the acts and dispositions of the General Council of the Judicial Power.

When it acts as cassation court, it is attributed him the judgement of the appeals of this name (ordinary cassation and cassation for the unification of the doctrine) lodged against the judgements issued in only instance (not in appeal degree) by the Contentious Administrative Court of the Audiencia Nacional and by the Contentious Administrative Courts of the Superior Courts of Justice (these are in the Autonomous Communities). But not all the judgements issued in only instance by the mentioned Courts can be appealed in accordance with the supreme administrative jurisdiction. There are exceptions, for example, those that solve staff questions (unless they affect to the birth or the extinction of the administrative relationship) and those that were issued on matters whose quantity doesn't overcome a certain figure (25 million pesetas in the ordinary cassation and 3 million pesetas in the subsidiary cassation appeal for the doctrine unification). It is necessary to notice that all the excluded judgements from the cassation appeal (in the double modality to that mention has been made), even those that are pronounced in only petition by the Contentious Administrative Courts (first stage of the administrative jurisdiction), they can be refuted by the Administration at the Contentious Administrative Court of the Supreme Court through the cassation

appeal on behalf of the Law, with the only purpose of forming jurisprudence, remaining intact, anyone that was the fortune of this appeal, the appealed judgement.

1.3 The decision power of the Contentious Administrative Court of the Supreme Court, when it admits a cassation appeal (in the double modality of ordinary cassation and for the unification of the doctrine) includes the annulment of the sentence refuted as the definitive resolution of the litigation outlined before the inferior jurisdictional organ so much, the reshipment only takes place in the cases of "error in procedendo". And when judging on the ground, if the pretense that is satisfied is based on the exercise of a right (not an only legitimate interest), the judgement is not only limned to annul the administrative act that is the origin of the litigation but rather it recognizes the violated right and it adopts the appropriate measures for its full reestablishment, for example, the damages redress when it proceeds. Therefore, there are cases in which you decide instead of the administrative authority, with a limitation, the decision cannot determine the discretionary content of the annulled acts, neither the form in which the provisions of a general disposition should be written that must substitute those annulled.

During the solving of a cassation appeal (contrary to what happens in first or second instance) the suspension of the performance administrative originally appealed cannot be requested, neither any other precautionary measure, since the cassation appeal doesn't block the provisional execution of the appealed judgement, without prejudice to that requested this can agree that the measures that are adapted to avoid or to palliate the damages that, in its case, they could be produced to the appellant, even ending up being refused the provisional execution when it can create irreversible situations or to cause damages of difficult repair.

1.4 The competence of the Contentious Administrative Court of the Supreme Court, as much as only instance court like cassation court, is not limited to the litigations that have the aim to direct claims to the recognition of rights. The distinction between these litigations and those that pursue the annulment claims lacks significance among us to determine the scope of competence of the Courts that integrate the administrative jurisdiction, competence in which is included -

also responding to this epigraph- the control of the Administrative penalty power (we think that to this refers the questionnaire when it mentions to "criminal character dispute")

1.5 The decisions that can be target for cassation appeal are those that emanate, inside the administrative jurisdiction, from the Audiencia Nacional and from the Superior Courts of Justice when they judge in first instance (not in appeal regarding the resolutions of the Contentious Administrative Courts).

It was already said when answering to the epigraph 1.2 that in our administrative justice system the Contentious Administrative Court of the Supreme Court also judges, in only petition, the appeals against acts and orders of the Government and that it is also attributed him the control of legality of the administrative performance of the constitutional organs.

1.6 In our administrative classification -so much in the 1956 Law like in the current 1998 Law- the appellant can invoke as legitimation condition a subjective right or a direct interest (in the 1988 Law the "legitimate interest" is mentioned). The jurisprudence said that interest should mean a damage that the act causes or a benefit or advantage that its elimination cause the appellant. Nevertheless this distinction, no other difference separates later, as for the procedural rule, these two legitimation classes, so much one as other allows the plaintiff to invoke in support of its pretense any infraction from the classification juridical reproachable to the refuted administrative performance, of objective legality or of the due respect to the subjective rights. There is no difference between the contentious of annulment and of full jurisdiction. So much when the one administered has subjective rights against the Administration (derived from the juridical classification or from administrative acts) as when it is perturbed in their vital sphere of interests by an illegal administrative performance, it is legitimated to exercise the contentious administrative appeal.

In short, procedure rules don't exist in our administrative jurisdiction - neither in the Contentious Court of the Supreme Court, neither in the Courts and inferior Courts- that allow to distinguish between litigations to those that it is

applicable the article 6 of the CEDH and those to that it would not be applicable such a provision.

1.7 and 1.8. We refer ourselves to the previous paragraph.

1.9 No administrative act is free in Spain from the control of the contentious administrative jurisdiction.

2. Applicability of the art. 6.1 of the CEDH

In our juridical classification exist some applicable norms in all the jurisdictional orders, and in the contentious administrative order that prevent that no difficulty can be raised when solving if the article 6 of the Rome Agreement is applicable to a certain matter, whichever it is the scope of the Administration that produced that performance.

The notes that characterize the right to a "fair judgement", without damage of what will be added when answering to the epigraph 3, are in certain way included in the fundamental right of all the people -recognized in the article 24.1 of the 1978 Constitution- to obtain the effective protection from the judges and courts in the exercise of their rights and legitimate interests without producing defencelessness. Also the art. 10.2 of the same constitutional text provides that the norms relating to the fundamental rights and the freedoms that the Constitution recognizes should be interpreted according to the treaties and international agreements on the same matters ratified by Spain, what involves the necessity of respecting the art. 6.1 of the Agreement and the TEDH jurisprudence.

Regarding the financial dispute (epigraph 2.7), in Spain it is subject to the same rules of procedure of all the matters attributed to the administrative jurisdiction that, on the other hand, it lacks competence in the cases of Social Security (epigraph 2.8) -they are judged by the social jurisdiction, and their supreme instance is the Labour Court of the Supreme Court- except in relation to fees liquidation and infractions of affiliation to the Social Security whose judgement corresponds to the Courts of the Contentious Administrative order.

3. Main problems relating to the fair process.

3.1. The main problem, related to the article 6.1 of the CEDH, emerges because in Spain the procedure at the organs of the administrative jurisdiction, so much in first or second instance like in cassation, it is characterized by the written prevalence as way ordinary of communication between the parts and the jurisdictional organ. The procedure is not secret, the Spanish Constitution and the procedure laws guarantee the publicity of the judicial performances, but the allegations, the test and the conclusions are not personally presented, as a rule, but in written form ("vox mortua") that certainly file the effective publicity of the debates .

We will come back to this question in the epigraph 4.

3.2. Reference is made to the previous epigraph.

3.3. It is not frequent the problems related to the right to the impartial judge. Anyway, the administrative judge's subjective and objective impartiality is guaranteed by means of a abstention causes system and, where appropriate, a challenge system that include all the hypotheses that could be call that impartiality into question.

3.4. The contentious administrative process is understood in Spain like a true process, the process in the organs of the administrative jurisdiction usually respects the principle of equality of the parties.

3.5. Usually the procedural errors that produce defencelessness, if they are not corrected *ex officio* or at the request of party, they can be alleged in the organ jurisdictional superior when appealing against the judgement.

4. Publicity of the judicial process.

4.1. It was already said in the epigraph 3.1 that the process is essentially written, a characteristic that limits the effective publicity of the debates. But that the form written in the relationship between the parts and the jurisdictional organ prevails it doesn't impede the publicity of the judicial performances. The article 120 of the Spanish Constitution proclaims "the public judicial performances, with the exceptions of the procedure laws and it also prescribes that the sentences will always be motivated and they will be pronounced in public audience". Also the proof diligences and the hearings of the cases are public.

The orality, inseparable from the publicity of the debates, is one of the novelties on the new Law of the Administrative Contentious Jurisdiction (Law 29/1998) that regulates a process abbreviated for the smallest matters (staff matters and in general those matters that don't overcome 500.000 pesetas) based on the orality principle.

Also, it is necessary to keep in mind that in the ordinary process, once finished, the parties can ask for the oral hearing (first hearing), which can also be ordered *ex officio* by the jurisdictional organ according the matters.

The hearing, although possible it is not obligatory, except if it's requested by all the parties.

4.2. Bearing in mind the answer to the previous epigraph, it will be understood that it is very reduced the number of matters in which it is obligatory the celebration of hearing at the Contentious Administrative Court of the Supreme Court, since depends on the uniform will of the parties and it is not very frequent that is requested by these. On the other hand, the imperious necessity to respond to the biggest number possible of pending matters of resolution causes that it is rarely ordered *ex officio* the hearing celebration.

4.3. According to the hearing, the Contentious Administrative Court can annul the resolution of the organ "a quo" when being that mandatory it has not

been consented by this organ to its celebration and defencelessness is also observed.

4.4. The resolution of the inferior organ can also be annulled because of judgement infraction (incongruity) and, also because of infraction of the norms that govern the acts and procedural guarantees, in general, whenever defencelessness has occurred and the party has requested the rectification of the lack or transgression in the instance, of existing opportune procedural moment for it.

4.5. The Third Court before solving a cassation appeal can celebrate public hearing for own decision. With regard to the subject that raises in this epigraph there is no experience, -we have never had this case-, it can only be responded from a theoretical point of view. If we take into account the extraordinary character of the cassation appeal whose scope of knowledge is limited, it doesn't seem that an equivalence can settle down between the hearing in the instance court and the hearing at the cassation court, what would prevent to substitute that for this.

4.6. The hearings are public and the public's access can only be limited exceptionally for reasons of public order or of protection of the rights and freedoms, but for it is precise motivated resolution of the jurisdictional organ.

4.7. You can give up having the hearing that is not necessary step, simply not requesting that it takes place.

5. Admissibility of the proofs.

5.1. Admissibility of the proofs obtained by illegal means

5.1.1. In direct relationship with the principle in good faith procedural, the article 11 of the Organic Law of the Judicial Power says that "they won't have effect the obtained proofs, direct or indirectly, forcing the rights or fundamental freedoms."

5.1.2. The doctrine of the Constitutional Court, even previously to the expressed Law (STC 114/84 29th November), had already said that not yet expressed rule that establishes the procedural interdiction of the illicitly obtained proof, we have to recognize that it derives from the inviolable condition of the fundamental rights the inability to admit in the process a proof obtained forcing a right or fundamental freedom.

5.2. In Spain governs the principle of the free valuation of the proof It dominates the principle of the free proof (the judge appreciates the value of the proofs), but they are cases of appraised proof, in those that it is the law the only one that values the proof (excluding the judge's opinion). It is norm of legal proof the one that determines that the public document and the recognized private create proof and the same occurs when the judicial confession that creates proof against their author.

The proofs that are kept in mind are those practiced in the jurisdictional organ. Referencen is made to what was said in the epigraph 3.1. about the prevalence of the writing principle in the contentious administrative process.

5.3. The intervention of experts (experts proof) takes place to appreciate some influence fact in the litigation are necessary or convenient special knowledge (scientific, artistic or practical) that the judge doesn't possess or it cannot possess.

They are enabled to be experts the titled professionals and their appointment is usually made by means of *insaculatio*. They can be one or three experts and it also exists the possibility to go to a collegiate expert (an Academy, School or official Corporation). The expert's impartiality (since their function is similar to that of the own judge) it is assured by means of a system of appeal causes.

The experts emit their verdict at the jurisdictional organ that judges in first instance, they can be heard in appeal, but never in cassation, since in this extraordinary appeal there is not proof phase.

5.4. When the supreme administrative Jurisdiction -Third Court of the Supreme Court- processes a cassation appeal, the appellant cannot allege facts different from those that the inferior jurisdictional took into account in order to dictate the appealed resolution. It has been traditionally said that the fact configuration of the litigation was outside of the cassation appeal, but this characteristic has broken with the new Law of the Jurisdiction -Law 29/1984- that allows to the appellant to integrate in the facts admitted as having proven by the instance Court other facts that have been omitted by this when they are sufficiently justified in the performances.

6. The parties.

6.1. All person affected in their juridical scope by an administrative performance, as regular of a subjective right or of a mere legitimate interest, is entitled to ask the judge or competent administrative judicial court for the judicial protection, being the decision that this adopts obligatory for the parts.

6.2. The intervention of the parties in the process, whichever it is the Judge or administrative Court that judges the same one, like plaintiff or like defendant, (with Administration author of the appealed performance) it doesn't necessarily depend on their intervention in the previous administrative process.

Reference is made to what has been said when answering the previous epigraph.

6.3. The condition of party can derive from the lesion of a right or fundamental freedom for whose protection the Law 29/1998 regulates a special process based on the preference principles and summary form.

7. Public pronouncement of the resolution.

The pronouncement in public hearing of the judgements by the Judge (in the unipersonal jurisdictional organs) or by the Reporting Magistrate (in the collegiate jurisdictional organs), although demanded by the law and even by the Spanish Constitution, it usually takes place only in very concrete cases. The principle of predominant writing in the administrative process has contributed to the disuse of the reading in public hearing of the judgements.

8. The reasonable term in which the administrative resolutions are dictated in the administrative instances.

The article 24.2 of the Spanish Constitution, in similar terms to the article 14.3.c) of the International Agreement of Civil and Political Rights of New York, 19th December 1966, recognizes the right to a process without "undue delays" that cannot be identified -as repeatedly says the Constitutional Court- with the mere nonfulfilment of the procedural terms, standing out the interpretive value that has in this matter the TEDH jurisprudence on the article 6.1 of the Agreement of Rome that also recognizes all person the right to that "their cause is heard within a reasonable term". In accordance with that jurisprudence, the Constitutional Court has said that the reasonableness of the duration of the process must ponder assisting to the nature and circumstances of the litigation, singly to its complexity and ordinary margins of duration of the litigations of the same type, the plaintiffs behavior, performance of the judicial organ that settles the process and consequences that are derived of the delay for the litigants.

8.1. The situation in Spain, from the point of view of the judicial organization, is the following one:

a) The resolutions of the Administration, except that they put a stop to the administrative process, they are appeals capable of having of appeal in the superior administrative organ. It can also intervene with voluntary character, before going to the judicial process, reinstatement appeal that solves the same organ that has dictated the act that puts a stop to the administrative process.

b) The term that there are between the initiation of a contentious administrative appeal and the judgement depends on a group of circumstances difficult to ponder and mainly it is determined by the work load that exists at the judge or court.

c) In Spain several jurisdiction degrees exist:

- first instance and appeal
- only instance and cassation
- only instance (without appeal possibility)

Into the Supreme Court (its Third Court) only come the judgements lodged in only instance by the National Audience and by the Superior Courts of Justice with some exceptions. The inadmissibility grounds for the cassation appeal exist so much for formal reasons as materials.

The Contentious Administrative Court of the Supreme Court when admits a cassation appeal also decides the litigation outlined in the instance. There is only return effect if the estimate of the appeal is determined by a procedural error that force to restore the performances to the moment in that the lack took place.

d) According the law, the direct appeals against general dispositions (regulations) have preference and once concluded they are prefixed for their voting and verdict to any other administrative contentious appeal, whichever it is their instance or degree, unless it is the special process of protection of fundamental rights that have absolute preference.

The cassation appeals on behalf of the law have also preferable character, in their procedure and resolution.

8.2. In Spain the damages that can suffer the parts, generally the plaintiff, for an unconscionable delay that supposes abnormal operation of the Administration of Justice, gives right to a compensation in charge of the State, whenever the damage is effective, évaluable economically and individualized. The recognition of the right to obtain the compensation corresponds to the Ministry of Justice and against the resolution that is adopted by this it can intervene administrative contentious appeal.

a) The Law 29/1998, contrary to the Law promulgated in 1956, allows to the appellant, with the exception of the legitimation that invokes (the ownership of a right or a simple legitimate interest) to seek the declaration of not being according to Justice and, in its case, the annulment of the refuted administrative performance and, also, the recognition of an individualized juridical situation and the adoption of the appropriate measures for the full reestablishment of the same one. among them, the damages compensation, if appropriate, that is usually in charge of the Administration author of the annulled administrative performance.

b) The annulment of an administrative decision that has finished (or suspended) the staff relationships between an employee and the Administration causes the reinstate automatically in its position or function, as well as the payment of the corresponding wages.

8.3 Current situation in each country - Statistics.

a) The average period of the resolved litigations during 1998 by the Contentious Court of the Supreme Court is different (and it continues being at the present time) as it is appeals in only instance or of appeals in cassation. As there are less appeals in only instance than appeals in cassation, the appeals in only instance are usually solved in one or two years, since they come to the Court and sometimes in less time if it is a matter of special significance. On the other hand

the large number of the appeals in cassation and the necessity to keep a shift in their fixing depending on their antiquity determine that the average term for its resolution generally ranges between three and four years.

These data are obtained from the fixing cadence on the matters. The Presiding Judge of the Court makes that fixing every three months with the aid of the Presiding Judges of the Sections.

- b) The number of appeals of only instance admitted in 1998 into the Third Court amounts to 636.
- c) the number of appeals in cassation registered in 1998 was 11868.
- d) and e) the number of judgements pronounced in first instance and in cassation, during 1998 was 4.358 and the amount of the resolved matters was 12.775.
- f) The finished matters and while waiting for fixing amounted to 14.855 in 1998.

The data referred to the group of the inferior jurisdictional organs (National Audience and Superior Tribunals of Justice) are the following ones:

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| - matters admitted in 1998 | 145.095. |
| - matters solved in 1998 | 108.173. |
| - pending matters on the 31 st of December 1998 | 328.797, |
| - number of judgements pronounced in 1998 | 64.178. |

8.4. Means of the supreme administrative Jurisdiction in Spain to accelerate the procedures.

a) Since a matter enters the Contentious-administrative Court of the Supreme Court its procedure is computerized and the surveillance of its chronology corresponds to the Reporting Judge appointed to judge each matter, in accordance with a preset shift, in the first providence that is dictated.

b) To the similar matters it is tried to point out them simultaneously. It is necessary this essential control by the Presiding Judge and by the Presiding Judges of the sections.

c) The Government, in Spain, can not fix a timetable to the judgement and resolution of the jurisdictional procedures. Neither can the jurisdictional organs

suggest legislative reforms. The judicial power relationships (in all the jurisdictional orders) with the Government concern the General Council of the Judicial Power.

d) The new Contentious Administrative Jurisdiction Law (Law 29/1998, dated 13 July, *Entry into force*: 14th December 1998) authorizes, when exists several matters with identical aim, to process one or several with preferable character, suspending the other ones until firm judgement issues in the first ones. And if the issued judgement recognizes the claim, the appellant damaged by the suspension can request during the execution period that the effects of the judgement or firm judgements extend to its favor issued in the resolved appeals.

To this effect, and with the object of reducing the litigiousness, the Law 29/1998 arbitrates a simple incidental procedure to extend the effects from a firm judgement to third parties that are in identical situation that the favoured ones by the issued judgement, in two scopes of the administrative activity with many litigations, in the matter of taxes and staff in the service of the Administration.

9. The decision of the supreme administrative Jurisdiction.

9.1. Reference is made to the answer of the epigraph 1.

9.2. The changes in the composition of the Tribunal don't force to repeat the hearing, since all the Magistrates, even in the cases of transfer or jubilation, they are forced to deliberate, to vote and to sign the judgements in the cases to whose hearing had attended and that they had not still been failed, it rules applicable to all the collegiate jurisdictional organs.

9.3. The jurisdictional control of the discretionary powers of the Administration is admitted a while ago among us -since the 1956 Law- by means of different technical as the deviation of power, the control of the decisive facts of the decision, the general principles of the Justice and after the 1978 Constitution by means of the interdiction of the outrage of the public powers that guarantees its article 9.3. But the administrative judge, in general, cannot go beyond the annulment of the discretionary act, since, like he has come to stand out the article

71 of the Law 29/1998, the jurisdictional organs cannot determine the form in that the precepts of a general disposition must be edited in substitution of those that annul neither to determine the discretionary content of the annulled acts.