

THE ADMINISTRATIVE JUSTICE IN SPAIN: CURRENT SITUATION AND CHALLENGES

RICARDO JUAN SÁNCHEZ,

University of Valencia (Valencia, Spain)

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Since the Spanish Constitution of 1978 there has been a full and effective administrative justice. The citizens have the possibility to request a judicial review of decisions taken by the public Administrations, while being either the owners of a subjective right or of a legitimate interest. The interim judicial protection is not limited to the suppression of the act or general provision and the Courts are invested with direct powers to enforce their sentences. However, different problematic issues about the inactivity of the public Administrations and the enforcement of sentences are the new challenges to ensure the administrative justice. To this it must be added that there are problems regarding the inefficient work of Courts.

Keywords: full jurisdiction system; the division of powers; subjective rights; the scope of judicial review; precautionary measures; the enforcement of judgments.

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Table of Contents

- 1. Introduction**
- 2. Some Interesting Notes on the Situation of the Spanish Administrative Justice**
- 3. Some Organisational Characteristics of the Spanish Administrative Justice and Other Elements to Access It.**
- 4. The Type of Control Granted to the Administrative Courts and its Scope.**
- 5. Some Operational Aspects of the Administrative Justice: Legal Standing, Proceeding and Appeals.**

6. The Improvement of the Interim Judicial Protection.

7. The Enforcement of Judgments Between its Judicialisation and its Limits

1. Introduction

There are two articles in the 1978 Spanish Constitution both referring to the submission of the public Administration to the legal system and the subsequent control for the Courts: the article 103.1 states that the main role of the Administration is to serve the general interest with objectivity and, in order to do that, it must be fully subject to justice and the law; as for the article 106.1 it assigns the Courts to control the regulatory power and the legality of administrative acts as well as its compliance with the objectives which justify it.

It is thus established the constitutional nature of the judicial control in terms of administrative activity in Spain which is the base to overcome the limitations, exemptions and immunities in the previous model of administrative justice. This is also the premise for the demand of the full administrative justice as a crucial element of the State of Law.

When the Spanish Constitution (hereinafter SC) of 1978 was passed, an Act of 1956 regulated the proper operation and powers of the administrative Courts. This Act was not abolished until 1998 when the current Administrative-Contentious Jurisdiction Act was passed. The period of time for this Act which was passed under a non-democratic government before the SC was so extended due to its great improvement in the protection of specific people, its better possibilities to control the administrative activity – e.g. the regulated elements of the discretionary acts and the technique of misuse of power – and its rules of locus standing marked the beginning of the current situation. However, the Act of 1956 had some considerable limitations for an effective judicial control of the Administration.

The passing of the current Act 29/1998, 13th of July about regulating the Jurisdiction for the Judicial Review (hereinafter the Act) was the result of the organic restructuring needs of the administrative Courts which were addressed in 1985 when the Organic Act on the Judiciary was passed and of the main demands from the enforced decisions by the Constitutional Court under the protection of the article 24.1 in the SC which recognises the right to the effective protection of the judges and Courts in the execution of their rights and legitimate interests, and in no case may there be a lack of defence. That way, the Spanish administrative justice has since then been regulated by a modern rule. It enshrined permanently a model of administrative justice under the characteristics as follows: a full control of the activity of the Administration as a defining element, protection of citizens' legitimate rights and interests as a teleological element and the expansion of the activity of the administrative Courts to the execution of sentences and the perfection of the judicial protection of the legal situations submitted to trial as elements of efficiency.

These are the positive aspects of the Spanish model of administrative justice, although there are also some disadvantages. A normative and structural outlook of this model is presented below with both its positive and negative aspects.

2. Some Interesting Notes on the Situation of the Spanish Administrative Justice

The task of the administrative Courts represents the 3% of the total litigiousness in Spain. The number of cases ranges from 200,000 to 300,000 per year, depending on a higher or lower economic activity in the country. These numbers are high considering the population in Spain and most importantly the contrast with the numbers in other European countries.

Moreover, the administrative Courts have the worst rate of pending cases¹ compared to the rest of Spanish Courts which causes a longer period of time for the proceedings with an average of 500 days. However, it is necessary to clarify that while in single-judge administrative Courts the average duration of a proceeding is around 14 months, in the collegiate bodies it may range from 20 to 30 months. It is also important to bear in mind that the collegiate bodies solve those cases with more complexity or relevance, thus being responsible for approximately 35% of the total of issues handled.

There are currently 241 single-judge Courts (there were just 24 in 2003) and 23 collegiate bodies, the latter has a total of 334 magistrates. The judicial career in Spain consists of 5,847 judges and magistrates, so 8% of them are the ones dealing with the administrative justice.

The estimated rate of the disputes or complaints submitted to the administrative Courts ranges from 40 to 50% for the sentences passed by the single-judge Courts (where the majority of complaints are concentrated against local entities); although the rate is significantly lower when it comes to collegiate bodies since it ranges from 30 to 40%.

The most common issues handled by the administrative Courts are those related to immigration, sanctions, urban and territorial management, administrative contracts, tax complaints and Administration employees' issues and pecuniary responsibility with no specific order.

3. Some Organisational Characteristics of the Spanish Administrative Justice and Other Elements to Access It

The constitutional position of the administrative Jurisdiction in comparison to that of the Administration in Spain attends to a range of organisational matters resulting in the establishment of a specialised judicial system.

¹ The result to divide the number of unsolved cases by the number of cases resolved.

The article 117.5 in the SC demands the existence of only an organisational structure of the Judiciary in Spain except for some Courts specifically indicated in the Constitution itself as the case with the Constitutional Court.

This demand is responsible for the fact that members of the administrative Courts share with the civil, criminal and labour Courts the regime to have access to the judicial profession as well as their guarantee of independence and, in addition, they are under the regulations of the General Council of the Judiciary. The regime of all Courts is regulated by the Judiciary Organic Act (JOA) and all of them including the administrative ones are the part of the ordinary Jurisdiction.

Although there is an organizational unity of Spanish Courts, the JOA establishes their specialisation according to their matters. Even though there have been problems in the past when determining the jurisdiction that administrative Courts have particularly in relation to civil Courts in patrimonial responsibility of the Administration and also to labour Courts in Social Security matters, some recent reforms have finally determined the sphere of activity of each one of them.

There are no administrative Courts consisting of lay people; all judges are legally qualified. In addition to the professionalism of their members in this field, they are also specialised in administrative law matters although certain professional sectors consider it necessary to have a greater specialization in certain legal areas when recruiting judges and administrative magistrates. The JOA established a series of special tests to proceed to their designation, which is not considered for civil and criminal judges.

The administrative Courts are divided into three levels: the provincial level consisting of the Single-judge Administrative Court, the regional or 'autonomous' level consisting of the Administrative Division of the Superior Courts and, finally, the state or national level consisting of the Single-judge Central Administrative Court, the Administrative Division of the National Court and the Administrative Division of the Supreme Court. This structure is the result of a considerable physical distance between Courts and those who may be interested in applying for their protection.

Actually, this analysis of the administrative justice in Spain would not be complete without indicating that the citizens have to exhaust internal administrative remedies in the proper Administration bodies before going to Court. In certain matters (such as taxes or sports), there are also para-judicial instances to which a complaint has to be subjected before filing the administrative justice. For all these reasons, the Spanish law uses the term 'contentious-administrative jurisdiction' to refer to the judicial sphere of control of the Administration.

Finally, it is also important to note the peculiar organization of Spain in terms of politics and territories which makes it a decentralised country divided into regions called *Comunidades Autonomas* ('Autonomous Communities'). The Constitution grants them a self-organisational capacity, so each one of them has their own administrative structures which are also subject to the control of administrative Courts as it is the case with the rest of the state and local Administration.

4. Type of Control Granted to the Administrative Courts and Its Scope

It must be remembered that the article 106.1 in the SC already mentioned expands the control of administrative Courts to the supervision of the regulatory powers, the legality of the activity of the Administration and the subjugation to its purposes. A simple 'objective' – and basically declaratory – control of the activity of the Administration is apparently established. However, the Constitutional Court again applying the article 24.1 in the SC has also established the constitutional basis of what may be called a 'subjective' promoted control-regarding the rights and interests of the citizens.

The Act 28/1998, in line with these constitutional requirements, sets the 'object of the judicial review' and indicates which activity of the Administration may be brought before the Court, the reasons why and which request may be filed by the applicant in this regard. These actions are listed below.

1. The Courts will be able to take control of legality upon general provisions by means of a direct challenge (art. 25.1), a challenge of their special acts of application and a complaint that they are not lawful (art. 26.1).

The direct challenge of the general provision will allow the applicant to request that the Courts declare such provision as unlawful and to render it quashed (art. 31.1). However, with an indirect challenge the claimant will be able to request that the Courts recognise a legal situation specific to an individual and to demand the full reinstatement of that situation if necessary (art. 31.2).

In the latter case, the Court will be able to order the pronouncement of an administrative act. However, it will not be possible to demand the determination of the wording of a quashed general provision or, if it were the case, the discretionary content of the administrative case (art. 71.2). If the Administration has to pay a compensation for a damage (art. 31.2), the Court will determine the amount (art. 71.1).

2. It is also possible to have judicial control over special administrative acts which end the internal administrative proceeding and, in certain cases, over prior acts (art. 25.1).

In those cases, the complaint will basically consist of the application for annulment of the contested act for not being in accordance with law and, according to circumstances, it is possible to recognise and re-establish the legal situation specific to an individual (art. 31.1 and 2).

Here the Court may also order the Administration to pronounce an administrative act with the same limitations aforementioned if a legal situation specific to an individual is recognised.

3. The citizen may bring the inactivity of the Administration to Court by agreeing to a series of requirements (art. 25.2). This may be the case when the Administration is required to provide a specific compensation for one or several specific people

according to a general provision that do not need implementing acts or according to an administrative act, contract or agreement (art. 29.1). The request for the Court will be to enforce its obligations (art. 32.1).

The sentence in these cases will state that the proper activity is performed the way it is indicated in the general provision, in the administrative act, contract or agreement. Moreover, for such purpose, the sentence will agree on the necessary measures for its compliance and will even set a deadline (art. 71.1).

4. There may also be the case where the person concerned states that the Administration has not executed its final acts (art. 29.2). Even though the Act states that its execution has to be before the Administration in the first place, the person will be able to request the Administration to face the sentence (art. 32.1) by means of a fast-track proceeding designed for the least complex issues.

5. Finally, the administrative Courts may also admit that the Administration has committed the mistake of doing a constitutive material activity of an unlawful conduct (art. 25.2). This action will mean reporting that the administrative activity is unlawful due to the lack of the jurisdiction of the Administration or to the lack of a proceeding.

In this case, the request for the Court will have to apply for the cessation of the constitutive activity of an unlawful conduct before stating that it is not legal (art. 30 and 71.1, a). In addition, if it were the case, the request will also apply for the recognition of an individual a judicial situation which is affected by such activity and its restitution (art. 32.2).

Based on the above, it is possible to conclude that the Act 29/1998 allows the general control of the administrative activity no matter the way in which it is presented, although there may be some cases that are not under control and that are indicated in the Act due to equal constitutional relevance. However, the problem is the scope of the powers of the Court when complying with such control.

The conclusion regarding the matter depends on the sphere of knowledge allowed for the administrative Court and on its actual powers to replace the will of the Administration and, if it is the case, to recognise or restore the rights and interests of the claimant. Regarding the former, apart from the aforementioned, it is worth mentioning that the Court will be able to expand ex-officio the case by means of the assessment of more motives of control than those plead by the applicant (art. 33.2). Regarding the latter, there is a serious technical obstacle mentioned in the article 71.2 ("Judicial authorities may not determine how the precepts of a provision must be worded to replace quashed general provisions and may not determine the discretionary contents of quashed acts justified in the field of the administrative discretion which prevents the Court from being able to define new judicial realities or situations without taking the risk for its actions to be considered as 'an excessive exercise of jurisdiction'. In an attempt to balance this situation once again, the Supreme Court in Spain reaffirms that "it is clear that such discretion cannot be

exercised arbitrarily, since it is always subordinate to the rational demands resulting from the principle of interdiction of the arbitrariness of public authorities.”

5. Some Operational Aspects of the Administrative Justice: Legal Standing, Proceeding and Appeals

The legal standing to promote judicial control of the administrative activity is built on a regime of the situations which allow the citizens to act as the claimants (art. 19). However, there is no *actio popularis* regime except for very specific matters. Citizens do not have the authority to promote the control of the legality of the general provisions; and in case of singular activity of the Administration for their challenge citizens have to affirm the ownership of a subjective right or of a legitimate interest as the basis of its standing. Certain legal provisions have allowed the access to administrative Courts for some groups that represent collective interests and the defence of general interests (particularly, the right to equality between men and women).

This standing system also considers those cases in which the control of the administrative activity may be pressed by another public authority and even by another Administration.

In regards to the guidelines for the handling of issues, the Act 29/1998 presents two proceedings: the written ‘first or only instance proceeding’ and the verbal ‘fast-track proceeding’, although the latter may be handled without an oral hearing or without any evidence other than the documentary.

The main difference between both proceedings is the simplification of formalities in the case of the fast-track proceeding. Contrary to the ordinary proceeding, the fast-track proceeding begins with the application and without being necessary for the claimant to have the administrative case file before, since it will be sent afterwards in order to expand on the allegations in the oral hearing.

The Act states the cases in which the fast-track proceeding may be used in reference to its minor complexity, the amount of money (less than 30,000 Euros) or the solution for certain issues with no third parties involved (Administration employees’ issues, asylum request, immigration or doping in sports).

In the rest of the situations, the ‘first or only instance proceeding’ must be used. In this case, a written memo for the Court is compulsory before filing the application. This is for the Court to claim the administrative case file and for the Administration to prepare a series of activities for the proper development of the proceeding (especially, the citation of third parties for the case, art. 49).

When it comes to mass acts in tax matters and to the Administration employees, there is also a possibility to have a simplified declarative proceeding. This is to agree on the effects of a favourable judgment for the third parties which has been passed in another proceeding for those people in the same legal situation as the applicants in the first procedure.

There are some special proceedings and it is worth noting the judicial protection of fundamental rights whose characteristics are the reduction of waiting times and a preferential processing by the Court (art. 114). In 2013, a 'proceeding for the market unit guarantee' was introduced to challenge those acts of the Administration that may be opposite to the freedom of establishment or movement.

When passing the sentence of the first instance, the general criterion is the possibility to appeal both in the second instance and in a cassation appeal before the Supreme Court.

However, the sentences passed by the single-judge Courts are not appealable in those cases with a total amount of money less than 30,000 Euros or in those dealing with electoral processes. In some cases, such as the challenge of general provisions, conflicts between different Administrations or the judicial protection of fundamental rights, it will be possible to appeal (art. 81).

The remedy of appeal will not prevent the provisional enforcement of the sentence and it may be based on any plea considered by the parties. However, they could only apply for the evidence that was denied or was not practised in the first instance for causes that are not imputable to the same parties.

In July 2015 – and with effect from July 2016 – there was an important reform in terms of a cassation appeal. Using this remedy, both the sentences passed in the first instance by the single-judge Courts and the sentences against those who passed in the only instance or appealed by the collegiate Court are appealable in cassation. In other words, every sentence passed by the lower Court is subject to appeal in cassation to the Supreme Court, thus modifying the structures followed up to date.

The effective access to the Supreme Court will be possible according to the alleged legal infringement and the presence of a 'cassation interest' (normally a matter upon which there is a conflicting Case Law and an appeal may help to ensure a uniform application of Law). When there is a sentence passed by a single-judge Court, there will be an exclusive access to cassation if it is reported that such sentence provides a doctrine that may be considered damaging for the general interests and when its effects affect the third parties (art. 86.1, II). When it comes to the sentences of the collegiate Courts it will only be possible to appeal in cassation on the basis of the infringement of the State law or European Union rules if such infringement is relevant and determining for the challenged verdict. This will only be possible when they have been properly plead during the proceeding or considered by the Court that passed the sentence (art. 86.2). Regarding the 'cassation interest', the Act determines the scope of this concept (art. 88.2); although the Supreme Court has plenty of power for the purpose of declaring the cassation appeal inadmissible.

The same reform in 2015 created an 'autonomic' or regional cassation appeal. Its main characteristics are that the High Court of Justice in every Autonomous Community has jurisdiction to resolve this cassation appeal and it is used to report those judgments which have infringed the law of the region. However, apart from

the infringement of rules in the Autonomous Community, the fact of reporting such infringement in the State law and/or the European Union is not considered. This may make the Supreme Court to adopt criteria in that regard, as it has already been done in the field of civil proceedings.

The new regime of the cassation appeal before the Supreme Court entails the suppression of the previous extraordinary appeals for doctrine unification against certain judgments. This happened when such judgments included different pronouncements to solve facts, fundamentals and petitions that are substantially equal. This new regime also entails the suppression of the extraordinary appeal in the interest of the Law against judgments that were not appealable in ordinary cassation and that could be considered damaging for the general interest.

6. The Improvement of the Interim Judicial Protection

The Constitutional Court in Spain considers the interim judicial protection as an essential element of the right to an effective judicial protection in the article 24.1 of the SC, thus considering that the legislator has the duty to foresee precautionary measures that may be applied in all the judicial spheres and for all kinds of controversies.

In this sense, the current Act which regulates the administrative justice is a significant advance for both technical and political-judicial reasons, since it constitutes a model that may be described as universal and flexible.

In a way that is consistent with the claims that may be issued before the administrative Court, the interim judicial protection is not limited to the suppression of the act or general provision. In that case, a regime of undetermined precautionary measures is chosen in order to apply for the most suitable measure regarding the main request of the proceeding ('precautionary measures to be taken to ensure ruling efficacy', art. 129.1). The precautionary measures may be taken in any field or sector of the administrative activity.

Among the measures that may be taken it is worth mentioning the suppression of the act or general provision, the judicial deposits of movables properties, the judicial intervention for asset management, the preventive annotations in public registers...

In order for the petitioner to take the measure applied for the Court will have to conduct a previous 'circumstantiated evaluation of all the conflicting interests' and this evaluation will be used by the petitioner when its execution 'may render review moot' and when it does not cause 'a serious disturbance of general or third-party interests' (art. 130). The petitioner may also take appropriate measures 'ordered to avoid or palliate the injuries' of any nature for the parties (art. 133).

According to one particular author (Ortells Ramos) there is still the problem of which criteria must be taken into account in order to determine whether it is the

interest of the petitioner or the interest of the Administration (and a third party) that has to prevail. This same author suggests paying those compensations that are less expensive as a decisive criterion.

These elements prevent the precautionary proceedings from becoming a way to solve the case in advance since taking a precautionary measure will not depend on the prognosis of the protection requested which in fact is the most required criterion for this protection to be granted. With this regime of the interim judicial protection, it is difficult to avoid altering the regime of the administrative acts when using these measures, both in the suspension of the execution and in the field of the inactivity of the Administration or of the unlawful conduct.

As a general criterion, taking the measure will lead the Administration to face a hearing. However, one of the most important aspects in precautionary matters is the possibility that the measures are taken urgently in those cases in which the administrative activity is imminent and their execution may carry out the damage that is intended to prevent. In these cases, the Court may observe the urgent circumstances stated by the petitioner. Therefore, it will be possible to agree to a precautionary measure without the Administration facing a hearing, although it will be allowed to present allegations once the measure is taken and it will allow the Court to reconsider its decision (art. 135).

7. The Enforcement of Judgments between Its Judicialisation and Its Limits

The article 117.3 in the SC states that the Courts are responsible for 'passing judgment and having judgments executed'. This has two immediate consequences: firstly, the execution of all the sentences has a clear jurisdictional element; secondly, the relations between the constitutional powers are defined, particularly between the Judiciary and the Executive power, always in favour of the supremacy of the former over the latter.

In addition, according to the Constitutional Court in Spain, ensuring compliance with the order, which contains the legal ruling and the right to enforce the final judgment by the terms considered, forms a manifestation of the right to judicial protection in the article 24.1 of the SC. However, the Constitutional Court notes that the law may exceptionally allow the Courts to modify the terms of executions in their pronouncements although the complete failure to comply with the judgment is not possible (the Sentence 211/2013, 16th of December could be a good example of the current status of the constitutional doctrine in this regard).

The article 118 in the SC also states the obligatory nature to comply with the judgment and the duty to collaborate in this regard.

Although the Spanish model of the enforcement of administrative sentences provided non-judicial notes up until the Constitution in 1978, the administrative

Courts now have some more effective mechanisms for the enforcement but with some significant shortcomings. Moreover, apart from legal difficulties, the performance of the administrative Courts has to be taken into account as well, since they do not always take an advantage of the improvements made. This situation makes it even more common among legal practitioners to think that there are still features in the enforcement of administrative rulings which are more related to other previous models. Particularly, urban planning and environmental issues are those in which the enforcement of the sentence is less satisfactory.

The enforcement of the sentence has to have as a base the recognition of a judicial situation specific to an individual and the imposition of a sentence or duty of compensation to have an effective protection. The problems about the enforcement of sentences are related to the effectiveness of the regime of the executive activity once those problems dealing with constitutional matters have been overcome. In addition, there is also a modality of inappropriate execution for those cases in which 'the ruling quashes all or part of a general provision or an administrative act' (art. 107).

The Act does not regulate an actual enforcement of rulings but it contains a series of isolated provisions for the enforcement of the sentences according to their content. There is not an organised regulation for a common way to end with the adoption of specific measures which are suitable for the effective enforcement of the sentence. An act similar to the executive claim is not planned and an accurate regulation of the enforcement orders and its requirements is not established; there are many differences with the regulation of the enforcement in the Civil Procedure Act whose implementation is dismissed by the administrative Courts in some cases.

The starting point, unless another one is decided, is that the Administration has to comply with the sentences voluntarily within two or three months when it comes to compensations. After this period of time, the claimant will be able to urge the Court to act in order to ensure the enforcement.

The enforcement of economic compensations is specifically stated in the article 106 and it is indicated that the Administration has to pay according to the provisions in its budgets, otherwise these provisions will have to be included to these effects.

The main obstacle for these types of enforcements may be the economic situation of the Administration or the refusal to comply with the enforcement, and in this case the general criterion of immunity from seizure of properties of public domain (art. 132 in the SC) may lead to a refusal of the enforcement. In these cases, it is questionable that other measures such as those mentioned below might be taken but the Administration will be able to incur procedural interests because of the delay. The Court will also be able to agree to a credit compensation of the Administration for the claimant. Moreover, in the event of it being an "inconvenience" for the Administration due to its financial situation, the Court will be able to agree to a less burdensome payment plan.

Regarding the sentences of the Administration which lead to perform an activity or to pass an act, the Act establishes direct and indirect measures of enforcement (arts. 108 and 112). In the former the Court may take these measures on its own (basically when it comes to regulated elements of the administrative activity) or with a third party (art. 108.1) acting as a commissioner of the Court. In the latter, if these direct measures are not appropriate the measures will basically involve executing means of coercion on those who have to comply with the enforcement by threatening with penalty payment or by demanding criminal responsibility (art. 112).

In the event of a fraudulent enforcement or the unnoticeable non-compliance with the sentence, the Court may invalidate the administrative acts that were passed in this regard (art. 103.4 and 108.2). However, just as in the precautionary measures field, the Act provides the Court with a wide range of possibilities to take 'the necessary measures to ensure the effectiveness of what was ordered' (art. 112.1).

There are no specific provisions when the judgment requires the Administration to stop carrying out certain actions.

For its part, the article 105.2 states the possibility for the Administration to allege 'attendant causes making it physically or legally impossible to execute a ruling', although the Court will be in charge of evaluating the impossibility of such ruling which will involve the appropriate compensation. Likewise, the legitimate rights and interests recognised in the sentence may be expropriated due to public or social interest reasons, as it is stated in the Act itself.

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Information about the author

Ricardo Juan Sánchez (Valencia, Spain) – Professor of Procedural Law and Justice Administration at the University of Valencia (Avenida de los Naranjos, s/n, 46022, Valencia, Spain; e-mail: Ricardo.juan@uv.es).