

**“ENVIRONMENTAL SUSTAINABILITY AND ADMINISTRATIVE LAW: A NEW SOLUTION TO THE ECONOMIC CRISIS OR A CONSTITUTIONAL REQUIREMENT? WITH REFERENCE TO THE NEW SPANISH SUSTAINABLE ECONOMY ACT\* (LEY DE ECONOMÍA SOSTENIBLE)”**

**Author:** Francisco Javier Sanz Larruga, Professor of Administrative Law of University of A Coruña (Spain)

**Translation:** Elena Morcillo de Mercado, Alberto José Molina Hernández, Blanca Muyo Redondo. CIEDA-CIEMAT

**Summary:**

The successful formulation of the sustainability paradigm - in its many aspects: environmental, social and economic- spreading in many programmatic and strategic documents of international organizations and national governments carried out in the context of the present economic crisis, sets out important problems of legal interpretation when it comes to introducing them uncritically in standard-setting instruments.

Sustainable development is not a mere conceptual resource derived from the new trends on environmental economy but a real legal principle that can be translated into important requirements and mandates aimed to the rational use of natural resources and its protection on the future generations.

If the aim is to achieve efficiently these objectives, the reception of the sustainability criteria – or at least the environmental ones- in the legal system must be ensured taking into account the particular architecture and the systematic character of each of the normative groups in which the reception is introduced.

**Contents:**

I. INTRODUCTION.

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II. THE CONTROVERSIAL CONCEPT OF SUSTAINABLE DEVELOPMENT AND ITS MULTIDIMENSIONAL NATURE.

III. CONSTITUTIONAL BASIS FOR THE ENVIRONMENTAL SUSTAINABLE DEVELOPMENT AND ITS UNSTOPPABLE RECEPTION IN THE SPANISH ADMINISTRATIVE LAW.

IV. CONCLUSIVE CONSIDERATIONS.

BIBLIOGRAPHY

## I. INTRODUCTION

On the occasion of the diffusion of the Spanish Sustainable Economy Bill – now the Spanish Sustainable Economy Act, Act 2/2011 of 4 March (Spanish Official Gazette (BOE) n° 55 of 5 March 2011) and key element of the Government's strategy to defeat the economic crisis that we are suffering<sup>1</sup> - it was highlighted the prominent role played by *sustainability* or *sustainable development* in the Spanish administrative-legal system in the last two decades. Actually, it has not been invented in Spain but introduced by a school of economic thought whose ideas are catching on the strategic proposals of the main international organizations (UNITED NATIONS: *A Global Green New Deal*; OECD: *Green Growth Declaration*) and on the designs of the new public policies of many Governments in the world (AUSTRIA: *Growth in transition*; UNITED KINGDOM: *Prosperity without Growth*, etc.); and most recently, on the proposal of the European Commission for “a strategy for smart, sustainable and inclusive growth” (*Europa 2020*)<sup>2</sup>.

The imaginative effort of the different organizations and Governments in order to create new jobs and achieve a new economic that boosts the economic recovery is very positive. However, many doubts and uncertainties arise when it comes to import the principles of soft law instruments to the legal system and translate its contents into legal prescriptions and mandates allowing its recipients and legal operators to have security and certainty about the application of the new generated regulations in response to the crisis.

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<sup>1</sup> Information related to this project can be seen at: <http://www.economiasostenible.gob.es/ley-de-economia-sostenible/> (last view: 10 January 2011). Legal and economic comments made by J. BANEGAS NÚÑEZ related to this project can be seen at: *Comentarios al proyecto de Ley de Economía Sostenible (LES)*, Thomson-Civitas, Cizur Menor, 2008. Similarly, the collective book *Economía Social y Economía Sostenible*, managed and coordinated by R. ALFONSO SÁNCHEZ, Aranzadi-Thomson, Cizur Menor. 2010.

<sup>2</sup> See COM (2010) 2020 final, Brussels, 3 March 2010. The “sustainable growth” proposed by this Community strategic tries to “boost a more competitive and ecological economy using more efficiently the resources.” In this section, the measures to fight against the climate change and the stimulation of a “clean and efficient energy” are included.

The aim of this communication is just to demonstrate that, above the legitimate strategic governmental approaches, at least one of the aspects of the sustainability – known as “environmental sustainability”- does not constitute a legal innovation in our legal system but an element implemented for several decades in our administrative-legal system like a “silence revolution” having a constitutional ground of our Social and Democratic State of Law<sup>3</sup>.

## II. THE CONTROVERSIAL CONCEPT OF SUSTAINABLE DEVELOPMENT AND ITS MULTIDIMENSIONAL NATURE

The concept of sustainable development rooted in the environmental economy<sup>4</sup> and successfully accepted by the International Law is “essentially controversial, suggestive, evocative, successful, with great expectations, an unstoppable attractive grip and great flexibility. Thanks to these qualities, the concept has many advantages but at the same time huge drawbacks (...) due to its excessive rhetoric and conceptual trivialization.”<sup>5</sup>

The expression of “sustainable development” was coined and divulged by the Report of the World Commission on Environment and Development entitled *Our Common Future*. Adopted in 1987, this Report, better known as “BRUNDTLAND Report” was the most important preparatory document of the United Nations Conference on Environment and Development, held in Rio de Janeiro early June 1992. Since then and after the adoption of *Rio Declaration on Environment and Development*, it is used the notion set out in Principle 3<sup>o</sup> of such Declaration under which: “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”<sup>6</sup>

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<sup>3</sup> In relation to the constitutional basis of this sustainable development, see the suggestive works of PAREJO ALFONSO, L.: “La fuerza transformadora de la Ecología y el Derecho: ¿hacia un Estado ecológico de Derecho?”, *Ciudad y Territorio. Estudios Territoriales*, Vol. II, n<sup>o</sup> 100-101 (1994) (special issue about “Región y Ciudad Eco-lógicas”), pp. 219-231, and of MONTORO CHINER, M. J.: “El estado ambiental de derecho: Bases constitucionales”, *El Derecho administrativo en el umbral del siglo XXI: Homenaje al Profesor Dr. D. Ramón Martín Mateo*, Coord. F. Sosa Wagner, III, 2000, pp. 3437-3466.

<sup>4</sup> A detailed economic treatment about the concept of sustainable development and its evolution can be seen at the monograph of JIMÉNEZ HERRERO, L. M.: *Desarrollo sostenible. Transición hacia la coevolución global*, Ediciones Pirámide, Madrid, 2000.

<sup>5</sup> RODRIGO HERNÁNDEZ, A. J.: “El concepto de desarrollo sostenible en el Derecho Internacional”, *Anuario de la Asociación para las Naciones Unidas*, 8 (2006-07), pp. 160-161.

<sup>6</sup> The evolution and origin of the concepts of sustainable development and sustainability can be seen at: ALLÍ ARANGUREN, J. C.: “Del desarrollo sostenible a la sostenibilidad. Pensar globalmente y actual localmente”, *Revista de Derecho Urbanístico y Medio Ambiente*, 226 (2006), pp. 139-211.

This formulation of “Sustainable Development” has subsequently suffered a process of widening whose most important part has been set out in the *Johannesburg Declaration on Sustainable Development*, 4 September 2002. The Declaration reaffirms the commitment of the States with the sustainable development by means of the promotion of its three interdependent and synergic pillars: economic development, social development and environmental protection itself (see paragraph 5 of the Declaration.) These components of the concept have been translated into the triple concept of sustainability: environmental, economic and social sustainability<sup>7</sup>.

The Article 2 of the *Spanish Sustainable Economy Bill* – following this version of sustainable development- defines “sustainable economy” as “a growth pattern reconciling the economic, social and environmental development in a productive and competitive economy, encouraging quality jobs, equal opportunities and social cohesion and ensuring the respect for the environment and the rational use of natural resources in order to meet the needs of current generations without compromising the ability of future generations to attend their own needs.”

Prior to this legal formulation, the components of sustainability had been set out in the *Spanish Sustainable Development Strategy*, approved by the Spanish Government in November 2007 (as a response to the renewed *EU Sustainable Development Strategy* of 2006). This strategy refers only to the environmental and social aspects of sustainability, including the “global sustainability” aspect (about the role of Spain in terms of international cooperation on sustainable development).

A clear applied legal expression of social sustainability is set out in the *social clauses of sustainability* under Spanish public procurement law (Act 30/2007 on Public Sector Contracts) (*Ley 30/2007 de Contratos del Sector Público*)<sup>8</sup>. In relation to the concept of economic and financial sustainability, it can be brought up the creation of the *State Fund for Employment and Local Sustainability*, set up by Royal Decree-Law 13/2009 of 26 October<sup>9</sup>.

The richness and flexibility of the concept of sustainability and its

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<sup>7</sup> An approach to the legal concept of sustainable development can be seen at: PIÑAR MAÑAS, J. L.: “El desarrollo sostenible como principio jurídico”, *Estudios de Derecho Público económico: libro homenaje al Prof. Dr. Sebastián Martín-Retortillo*, Coord. L. Cosculluela Montaner, Madrid, 2003, pp. 185-204, and LOPERENA ROTA, D.: *Desarrollo sostenible y globalización*, Aranzadi, Cizur Menor, 2003, pp. 45-72.

<sup>8</sup> About this subject, see the interesting and recent work of GONZÁLEZ GARCÍA, J.: *Colaboración público-privada e infraestructuras de transporte*, Marcial Pons, Madrid, 2010, pp. 69 y ss.

<sup>9</sup> See BOE nº 259, 27 October 2009.

unforeseen and innumerable aspects can be realised analysing the successive reports carried out by the *Observatory on Sustainability of Spain* since 2005. The Observatory is an organization entrusted by the Spanish Government to examine –under the basis of indicators- the sustainability of the economic and social reality of our country<sup>10</sup>. In its last Report, *Sustainability in Spain 2009*, together with the study of its economic, social and environmental-territorial dimension, sections related to “institutional” (corporate social responsibility and public governance), “cultural” and “global dimensions” (responsibility concerning on global or international cooperation sustainability ) are included<sup>11</sup>.

### III. CONSTITUTIONAL GROUNDS FOR THE ENVIRONMENTAL SUSTAINABLE DEVELOPMENT AND ITS UNSTOPPABLE RECEPTION IN THE SPANISH ADMINISTRATIVE LAW

The notion of “sustainable economy” of the Bill makes it clear that the environmental aspect of the sustainability is related to “environmental respect and rational use of the natural resources” that prevail over the economic and productive development. It is also linked to the repercussions for the future in order not to compromise the ability of future generations to meet their own needs (known as “intergenerational solidarity”).

So, long before the new strategic approaches were promoted everywhere proclaiming the prominent role played by sustainability (environmental and others), the *1978 Spanish Constitution* had included under Article 45.2 a formulation of this new paradigm by laying down the mandate to the public powers to “ensure the *rational use of natural resources*” with the aim of protecting and enhancing the quality of live, as well as, preventing and restoring the environment. To achieve these targets, public powers must take advance of the essential collective solidarity.”

Taking as a start point the valuable works written in the late 1970s by Ramón MARTÍN MATEO, pioneer of Environmental Law in Spain, and after the promulgation of the Spanish Constitution—as ALENZA RODRIGUEZ<sup>12</sup> has studied in detail- , a true and great bibliography appeared

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<sup>10</sup> See its webpage: <http://www.sostenibilidad-es.org/>

<sup>11</sup> The text of the Report is available on the internet: <http://www.sostenibilidad-es.org/informes/informes-anuales/sostenibilidad-en-espana-2009>

<sup>12</sup> “Fundamento y práctica de la investigación jurídico-ambiental en España”, *Revista Aranzadi de Derecho Ambiental*, 5 (2004), pp. 37-68 whereas in the first half of the 90’s, the monographs about sectoral subjects (classified activities, environmental impact assessment,

and has not stopped yet. LOZANO CUTANDA points out that Environmental Law is the “branch of Law currently having the most important bearing in the shaping of our society and economy”<sup>13</sup>.

There is no doubt that the effect of the Community Law has played a key role in this reception of sustainability in the Spanish Law<sup>14</sup>. In the consolidated and in force version of the *Treaty on European Union*, the paradigm of sustainable development assumes a great “expansive strength” in: its Article 3, sections 3° and 5° (objectives and missions), Article 21 on “external action” (section 2°, d and f) and all along the *Treaty on Functioning* (Articles 11, 191, 192, 193, etc.).

The new Statutes of Autonomy are also a clear and relevant expression of the magnitude of environmental sustainability in the legal structure of the new regional systems<sup>15</sup>.

From the standpoint of Administrative Law, environmental sustainability is a positive result in the application of the administrative regulations from the perspective of *efficiency* criterion as a principle of rational use of resources<sup>16</sup>.

In the last few years, the introduction of sustainable development in our legal-administrative system has been felt in many national and regional acts. Some acts include this concept in their title as for example, the Act 45/2007 of 13 December, *on sustainable development of rural environment*<sup>17</sup> (*Ley de 45/2007, de 13 de diciembre, para el desarrollo sostenible del medio rural*).

Sustainable development in its environmental version has permeated much of the sectoral administrative-legal system and, particularly, the

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environmental assessment, waste, water, etc.) were predominant, in the second half of the 90's, more basic and general environmental-law problems (principles, right to the environment, environmental risk, etc.) were discussed. During this last period, manuals and most general publications started to appear.

<sup>13</sup> See LOZANO CUTANDA, B.: *Derecho Administrativo Ambiental*, La Ley, Madrid, 1ª ed. 2010, p. 49.

<sup>14</sup> See the suggestive work of JORDANO FRAGA, J.: “La Administración en el Estado ambiental de Derecho”, *Revista de Administración Pública* 173 (2007), pp. 101-141.

<sup>15</sup> In this regard, see the work of EMBID IRUJO, A.: “El derecho al medio ambiente en los nuevos Estatutos de Autonomía”, *El derecho a un medio ambiente adecuado*, Coord. A. Embid Irujo, Iustel, Madrid, 2008, pp. 29-62.

<sup>16</sup> See the work of SCHIMIDT-ASSMANN, E.: *La Teoría General del Derecho Administrativo como Sistema. Objeto y fundamentos de la construcción sistemática*, (Spanish translation of the German work: *Das Allgemeine Verwaltungsrecht als Ordnungs Idee*, 1998), INAP-Marcial Pons, Madrid, 2003, p. 354-355.

<sup>17</sup> Nowadays, the Spanish Parliament is dealing with a Bill entitled *Law on sustainable fisheries* (*Ley de Pesca Sostenible*)

regulation of the different natural resources (land, biodiversity, air, waters, etc.). But it is especially worthy the impact of environmental sustainability on the legal regime of the territorial town and country planning and urbanism<sup>18</sup>. However, the horizontal instruments for environmental protection that nowadays regulate the overall public and private activity from the perspective of environmental impact<sup>19</sup> are much more significant than this insertion of the criteria and rules of sustainability in the legal system. These instruments act not only over simple projects or singular actions but also over its previous planning and organization.<sup>20</sup> All of this makes up a broad and rigorous control of "environmental quality" that has barely suffered the deregulating impact of the omnipresent Directive of Services<sup>21</sup>.

#### IV. CONCLUSIVE CONSIDERATIONS

In our opinion, it is undeniable that the application of sustainability criteria (environmental, social and economic)-that advocate an economic model based on the rational use of natural resources and its implication for future generations-constitutes one the best resources in order to tackle seriously the roots of the current economic crisis that must happen through the development of a new economic model. Nevertheless, I am critical on its partial formulation in the new "*Sustainable Economy Act*" as well as on its lack of integration with the rest of the legal system.

A "sustainable energetic model", the "reduction of greenhouse gas emissions", "transports and sustainable mobility" and the promotion of a "sustainable urban environment", as sections included in the Title III ("Environmental Sustainability") of the aforementioned Law could be measures to create a strategy on environmental sustainability. However, in my opinion these measures turn out to be perturbing when they appear in a legal regulation that must be mainly focused on – as Andrés BETANCOR says- "threatening with punishment those conducts or policies that are not

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<sup>18</sup> J. M. BAÑO LEÓN considers that "urbanism and environment are now two inseparable realities"- analysing the different aspects of the environmental paradigm in urbanism (See *Derecho Urbanístico Común*, Iustel, Madrid, 2009, p. 208, in which it is mentioned the work of PONCE SOLÉ, J.: "Urbanismo y Medio Ambiente: dos realidades jurídicas inseparables", en el *Derecho Urbanístico del Siglo XXI*, Tomo II, Bosch, Barcelona, 2008).

<sup>19</sup> See the large scope under the Legislative Royal Decree 1/2008, of 11 January 2008, passing the *Consolidated Text of the Law on the Environmental Impact of Projects*.

<sup>20</sup> See Law 9/2006, 28 April, pertaining to the evaluation of the effect of certain plans and programs on the environment.

<sup>21</sup> See in that regard the work of GARRIDO CUENCA, N. M.: "Legislación básica: el impacto ambiental de la Directiva de Servicios", *Observatorio de Políticas Públicas Ambientales 2010*, Cívitas-Aranzadi, Madrid, 2010.

sustainable” (if we really want the Law contributes to sustainable development)<sup>22</sup>.

Are not possibly in our legal system legal regulations related to energy, fight against the climate change, transport or urbanism? Would not be a better example of “good regulation” (as specified in the new Act: Articles 4 to 7) the application of the aforementioned criteria of sustainability in each of the respective normative groups? All of this is perfectly compatible – as LÓPEZ CUTANDA affirms- with the necessity of a further normative simplification and some kind of “codification” or harmonization of the environmental provisions<sup>23</sup>.

## BIBLIOGRAPHY

ALFONSO SÁNCHEZ, R. (Dirección y coordinación): *Economía Social y Economía Sostenible*, Aranzadi-Thomson, Cizur Menor, 2010.

ALENZA GARCÍA, J. F.: “Fundamento y práctica de la investigación jurídico-ambiental en España”, *Revista Aranzadi de Derecho Ambiental*, 5 (2004), pp. 37-68.

ALLÍ ARANGUREN, J. C.: “Del desarrollo sostenible a la sostenibilidad. Pensar globalmente y actual localmente”, *Revista de Derecho Urbanístico y Medio Ambiente*, 226 (2006), pp. 139-211

BANEGAS NÚÑEZ, J. (Dir.): *Comentarios al proyecto de Ley de Economía Sostenible (LES)*, Thomson-Civitas, Cizur Menor, 2008

BETANCOR, A.: “La contribución del Derecho al desarrollo sostenible”, Conferencia pronunciada el 18 de marzo de 2009.

EMBID IRUJO, A.: “El derecho al medio ambiente en los nuevos Estatutos de Autonomía”, *El derecho a un medio ambiente adecuado*, Coord. A. Embid Irujo, Iustel, Madrid, 2008, pp. 29-62.

GARRIDO CUENCA, N. M.: “Legislación básica: el impacto ambiental de la Directiva de Servicios”, *Observatorio de Políticas Públicas Ambientales 2010*, Civitas-Aranzadi, Madrid, 2010.

GONZÁLEZ GARCÍA, J.: *Colaboración público-privada e infraestructuras de transporte*, Marcial Pons, Madrid, 2010

JIMÉNEZ HERRERO, L. M.: *Desarrollo sostenible. Transición hacia la coevolución global*, Ediciones Pirámide, Madrid, 2000.

JORDANO FRAGA, J.: “La Administración en el Estado ambiental de Derecho”, *Revista de Administración Pública* 173 (2007), pp. 101-141

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<sup>22</sup> Ideas drawn from the *power point* presentation of the conference given by Prof. BETANCOR, held on 18 March 2009 and entitled: “La contribución del Derecho al desarrollo sostenible”.

<sup>23</sup> LOZANO CUTANDA, B.: “Eclósión y crisis del derecho ambiental”, *Revista de Administración Pública*, 174 (2007), pp. 367-394.



LOZANO CUTANDA, B.: “Eclosión y crisis del derecho ambiental”, *Revista de Administración Pública*, 174 (2007), pp. 367-394.

LOZANO CUTANDA, B.: *Derecho Administrativo Ambiental*, La Ley, Madrid, 1<sup>a</sup> ed. 2010.

LOPERENA ROTA, D.: *Desarrollo sostenible y globalización*, Aranzadi, Cizur Menor, 2003

MONTORO CHINER, M. J.: “El estado ambiental de derecho: Bases constitucionales”, *El Derecho administrativo en el umbral del siglo XXI: Homenaje al Profesor Dr. D. Ramón Martín Mateo*, Coord. F. Sosa Wagner, III, 2000, pp. 3437-3466.

PIÑAR MAÑAS, J. L.: “El desarrollo sostenible como principio jurídico”, *Estudios de Derecho Público económico: libro homenaje al Prof. Dr. Sebastián Martín-Retortillo*, Coord. L. Cosculluela Montaner, Madrid, 2003, pp. 185-204

PAREJO ALFONSO, L.: “La fuerza transformadora de la Ecología y el Derecho: ¿hacia un Estado ecológico de Derecho?”, *Ciudad y Territorio. Estudios Territoriales*, Vol. II, nº 100-101 (1994) (número especial sobre “Región y Ciudad Eco-lógicas”), pp. 219-231, and of MONTORO CHINER, M. J.: “El estado ambiental de derecho: Bases constitucionales”, *El Derecho administrativo en el umbral del siglo XXI: Homenaje al Profesor Dr. D. Ramón Martín Mateo*, Coord. F. Sosa Wagner, III, 2000, pp. 3437-3466 ¿hacia un Estado ecológico de Derecho?, *Ciudad y Territorio. Estudios Territoriales*, Vol, II, nº 100-101 (1994) (número especial sobre “Región y Ciudad Eco-lógicas”), pp. 219-231.