Administrative Law

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A. The Administrative Law Paradigm

1. Definition

1. Administrative law embodies the substantive corpus of laws, rules, regulations, orders, procedures, and legal principles used to govern the operations of administrative units of government and public authorities, as well as the legal and procedural grounds for their → *administrative control* and → *judicial review*. Administrative law is of a twofold character. First, it encompasses the substantive and procedural provisions which form the primary legal framework within which the actions of central, regional, and local government responsible for implementing statute law are set. Second, it embodies the legal and judicial remedies which constitute the secondary legal framework within which the implementation of statute law expressed in the decisions of central, regional, and local government is controlled. Summarily, administrative law can be defined, in the first place, as the body of law and procedure which regulates administrative action; in the second place, as the legal and procedural grounds for administrative and judicial review of administrative action.
2. The legal hierarchical structure and the procedural arrangements which make policy, rule, and decision-making by public administration and its administrative and judicial review possible, are themselves situated within constitutional parameters. Within the constitutional setting of a particular state and its accepted judicial understandings and interpretations, administrative law merges all the responsibilities, functions, competences, and methods of control of central, regional, and local government, the interactions of these administrative bodies within themselves and between themselves, their relations with citizens and nongovernmental organizations, together with the rights, legal privileges, duties, and liabilities of state officials and → *civil servants* (*fonctionnaires*). Said otherwise, if the administrative organization of the state is defined in the constitution, it is always for the public administration, with the participation of other organs of the state such as the legislature and the judiciary, to uphold the constitutional rights of citizens alongside the constitutional expectations of selectively or politically appointed public servants. In so doing, administrative law insures that institutional and bureaucratic processes as well as administrative and judicial review of the actions and decisions of central, regional, and local government place the executive arm of government under the law.
3. Although freedom of information (→ *Page: 2 right to access to information*) legislation and pre-litigation mechanisms complement it efficiently, the definition of administrative law still places a strong emphasis upon judicial review's precepts, methods, and processes according to which the courts address the deficiencies of administrative action and decision. In most administrative law systems, the lawfulness of administrative law is ensured by the establishment of legal and procedural grounds for judicial review, which supplies not only the legal basis for the judicial challenge of administrative action but also the legal conditions to guarantee the production of a valid administrative decision. Although the doctrines of judicial review remain paramount, the judicial control of → *administrative discretion* is increasingly complemented by non-judicial remedies and non-legal forms of accountability. Further, administrative law

is being reshaped by the revaluation of informal or soft interpretative and informative techniques. This calls for a renewed consideration of the organizational background and setting within which instrumental legal techniques are used by administrative institutions to implement government policy. In other words, if administrative law contributes to the practice of government, government practices shape the current alteration of administrative law, thus enhancing the constitutional and political dimension of administrative power in the modern self-regulatory administrative state.

2. Administrative Acts and Procedures

4. Categorizations of administrative acts and procedures vary from system to system. Nevertheless, some common characteristics can be identified when combining national traditions, supranational requirements, and competitive politics. These shared traits include a close link between public administration and statutory law, the central position of the administrative act in the administrative decision-making process (despite a significant rise in the utilization of contracts), and the judicial protection of individual rights as intrinsic to the democratic control of administrative action. The proceduralization and judicialization processes go hand in hand and correspond to the expansion of both the use of administrative acts and the judicial control of administrative activities.

5. Diverse in scope and nature (general acts, individual acts, authorizations, concessions, sanctions, etc), an administrative act refers to an action or inaction by an entitled administrative authority required by legislative policy to carry out the intent of statutes. An administrative act is an act of volition by which an administrative authority empowered by law recognizes new rights, liberties, legal interests, and obligations, or asserts existing ones, for the benefit of an indefinite number of citizens or for an individual person or organization. The refusal to issue an act which engenders or influences liberties to an unlimited number of addressees or the refusal to warrant an act which recognizes the exercise of a right or the discharge of a liability for an individual also constitute administrative acts.

6. Judicial review of administrative disputes is a central feature of administrative law as it encompasses the assessment of jurisdictional and procedural questions related to the legal interests of the individual which the courts tend to interpret extensively. The multifunctional dimension of procedural administrative law broadens the scope of judicial control with regard to the legality of an administrative act. As a reflection of the rule of law, the respect for administrative procedure enhances many other rules, including the legislative rules of competence, administrative information, data protection, and the defence of individual rights. Judicial review of executive action for the implementation of objective and subjective rights is itself a fundamental right provided for in constitutional provisions and guaranteed through the judicial process. Only in exceptional cases, and only by law, may an administrative act be removed from judicial control. Among the standard judicial review procedures are those commenced by an invalidity petition (setting aside an administrative act infringing individual rights or when the decision maker acts

beyond his discretionary powers with or without infringing individual rights) and those dealing with the administration's performance (commissions and omissions as well as the administration's enforcement of judicial decisions). The global expansion of judicial power is readily apparent when the courts' examination of the administrative application of the law also means implicitly or explicitly the examination of the policy of an administrative decision, up to a prognosis control of an administrative act in the context of a specific legislative programme.

7. Distinct from judicial and constitutional review, administrative relief can be provided by administrative bodies that are institutionally part of the executive and exercise statutory jurisdiction over other statutory bodies in charge of specified regulatory domains. Administrative justice is also present in the political sphere with institutions like the ombudsman in charge of identifying maladministration not remedied by judicial review or statutory litigation. Furthermore, judicial dispute resolution is increasingly complemented by pre-litigation procedures, self-review by the administrative agencies and informal preventive mechanisms such as mediation.

3. Constitutional Nature

8. Constitutional law and administrative law both rule the political undertakings of the state: constitutional law refers to the ground rules regulating state's organs; whereas administrative law relates to their operative running.

9. Constitutional law deals with the nature and pattern of government, the definition of sovereign powers, their legal architecture, dissemination and practise, as well as the relations of the sovereign powers towards the different sections of government and towards citizens. In other words, constitutional law encompasses the essential principles determining the structure and powers of the executive and the legislature, as well as their mutual relationships, combined with the judicial safeguarding of citizens' fundamental rights.

10. As a branch of public law concerned with executive power (→ *executive powers*), administrative law is intrinsically tied to the nationally specific constitutional values, historical traditions, political and judicial institutions, and governmental systems in which it intervenes. Administrative law embodies the bureaucratization of the state ideology contained in the constitution. It typifies the legal continuation and the technical crystallization of constitutional law. As such, the function of administrative law is to contend with the technical implementation of constitutional principles in the day-to-day management of state affairs. Subsequently, administrative law refers to the technical provision of substantive rules and principles as well as procedures of administrative and judicial review according to which constitutional norms can be exercised and executed. In that sense, administrative law informs and complements constitutional law with regard to both the bureaucratic organization of the state and the strengthening of human rights, civil liberties, and public freedoms in liberal societies.

11. Inevitably, depending on national constitutional arrangements, administrative law and constitutional law overlap. Irrespective of legal classifications and the existence of a written constitution, rule-making and implementation of administrative decisions are becoming embedded in an ever more complex administrative and constitutional machinery. The constitution embodies the fundamental competences, rights, and liberties in a growing welfare and service state (→ *social or welfare state*), the protection of which is defined by the executive, implemented by administrative authorities and services, and controlled by the judiciary. Consequently**,** the place of administrative law within the constitutional order determines the extent to which it fulfils the requirements derived from overarching constitutional principles such as the → *rule of law*, → *separation of powers*, and, topically, → *democracy* and the protection of → *fundamental rights*. Ultimately, via an expanding constitutionalization process, the evolution of executive power in modern regulatory states represents a contemporary political debate as to how democracies must adapt to the changing relationship between administrative law and the constitutional and organizational environment.

4. Development

12. Historically acknowledged in France as an autonomous field of law distinct from constitutional law, which has been of particular influence in major civil law countries (the Netherlands, Belgium, Luxembourg, Germany, Portugal, Spain, Italy, Greece), administrative law gained a comparatively late recognition in the United Kingdom ('UK') and the United States ('US'). This situation was justified in the common law tradition by the alleged illogicality in differentiating in substantive legal terms administrative law from constitutional law. Be that as it may, administrative law has developed in both civil law and common law countries as a progressive construction and legitimization of Western values of the rule of law, representative politics, pluralist democracy, and economic → *liberalism*. The acknowledged prevalence and growth of administrative law in modern self-governing nations and the consequences for the bureaucratization of society are historically due to economic and societal reasons which have led to the complexification of the functions and obligations of the state in the late nineteenth, twentieth, and twenty-first centuries. Both civil law and common law democracies have witnessed the notion of the state evolving from a mere neutral arbiter limiting its intervention towards citizens and the economy, to an interventionist corporate and corporatist organization, creating executive principles, rules, and regulations as well as legal and judicial processes increasingly interlocked with and within an international and supranational legal setting (→ *supranational constitutionalism*).

13. Surely, although historically nationally bound, administrative law is presently enjoying a transnational phase of its evolution (→ *Page: 5 transnational constitutional law*). Fundamentally shaped by domestic constitutional experiences, national politics, and historically specific democratic traditions, administrative law is tending to converge due to the commonality of democratic aspirations and the impact of international organizations on national

administrative systems. Accordingly, the study of administrative law is currently propelled by a comparative approach placing national legal definitions in a multi-layered historical, constitutional, European, and international perspective. Ultimately, selected aspects and designated trends of administrative law inscribed in diversified national, transnational, and supranational legal infrastructures will permit the recognition of common administrative developments as well as the questioning of the suitability or limits of administrative convergence in an increasingly globalized world.

5. Discourse

14. Presently, no comprehensive, unifying definition of administrative law can be satisfactorily formulated. The particular principles, arguments, values, and ideologies internal to the administrative systems at national, transnational, and supranational level not only carry out historically and legally the political ambitions of the executive, but mainly inform the doctrinal discourse on administrative law itself and vice versa. In that sense, the historical, institutional, political, and academic discourse on the development of administrative law is itself a creative exercise which redefines legal obligations, furthering an ever evolving model of administrative governance in modern democracies and beyond the democracy paradigm.

B. Administrative Law and Legal Classifications

15. In relation to the traditional legal classifications in which national legal orders operate, the commonality of administrative law systems belonging to similar legal traditions is currently being challenged by the hybridization of the legal classifications themselves with regards to a converging promotion and application of increasingly common legal and judicial values, irrespective of legal traditions. These values aim towards the → *legitimacy* of administrative authority and the rule of law. They include the political neutrality of an expert and professionalized public administration through tenured employment, judicial and informal accountability mechanisms, as well as the protection of human rights and administrative citizenship. They also consist of market-based or hybrid public administration management techniques, transparency guarantees, as well as the participation of vested-interest groups and consultation of → *civil society* in the policy, rule, and decision-making process; thus upholding the concept of democratic administrative governance within the administrative state.

16. If the outlook and perception of administrative law vary between countries of civil law tradition (France, Portugal, Spain, Italy, Greece, the Netherlands, Belgium, Luxembourg, Germany, Thailand, Turkey, Lebanon, etc) and countries of common law tradition (UK, Ireland, Canada, Australia, New Zealand, South Africa, Malaysia, India, etc), they also fluctuate nationally amongst those belonging to the same legal tradition (French grouping of France, Italy, Greece, the Netherlands, Belgium; versus German grouping of Germany, Austria, Switzerland, Poland).

Furthermore, within the same legal classification, administrative law has different meanings in different countries according to the specific 'background' constitutional theories of state and government (Commonwealth countries under the historical influence of the UK, versus the US). Making it more complicated, varied intersected interpretations of administrative law exist within a specific country according to different legal classifications, constitutional orders, and legal fields of social intervention (British grouping of UK, Ireland, Denmark, Norway, India).

17. Although the polarity of national administrative law systems is shifting, thus establishing culturally a new administrative paradigm requiring an interdisciplinary academic approach, it remains obvious that historical traditions of legal classifications retain a significant intellectual validity for a contextualized understanding of administrative law. The expanding destatization and denationalization of administrative law allow the comparatist to reflect differentially on the established characteristics identifying the traditional legal classifications. In that respect, depending on the focus adopted—administrative law as a power structure or administrative justice as the goal of administrative law—the civil law tradition appears to be theoretically more relevant to the focus on institutional and organizational aspects of administrative law related to the prerogatives, competences, and procedures of public administration. Symmetrically, the common law tradition proves itself to be notionally more engaged with the remedy rules and procedures for the regulation and control of public administration.

1. Administrative Law in Civil Law Countries

18. In the civil law tradition, administrative law relates primarily to the organization and exercise of state power—ie the constitution, composition, institutional features, and legal competences of the executive branches of the state. The distinctive mission of administrative law is the defence of the public good and, as such, it justifies ideologically and legally the protected exercise of state authority. To that effect, administrative law refers distinctively to the rules and principles ordering the structure, powers, and procedures of public administration as well as the rules and principles guiding administrative or judicial remedies. In other words, the executive supremacy of administrative law in the civil law classification is reflected not only in the distinctiveness of the legal regime of the forms of redress, but also in the institutional fact that legal redress has to be fixed by a specialized set of courts (→ *administrative disputes in civil law jurisdictions*). The main characteristic of administrative law in the civil law world is that administrative legality, as an autonomous type of legality separate from the private law doctrine and proceedings, is generally reflected in a dual system of courts.

19. Separated from private law litigation, administrative disputes are dealt with by separate administrative courts (France, Belgium, Italy, Greece) or at least by institutionally specialized administrative sections within the court system (Austria, Portugal, Spain, Luxembourg, Sweden, Poland). The distinct professional expertise

of judges dealing with administrative cases is connected to the specialization of procedural rules applicable to the claims taken against the executive branches of national, regional, and local government. Therefore, it is the very substance of administrative law as detached from private law which requires a fully developed set of independent procedures to be implemented by autonomous administrative courts or specialized judicial chambers, this without the imperative need for codification.

(a) France

20. France can undoubtedly be presented as an influential initiator and propagator of administrative law. It has inspired to varying degrees individual countries (the Netherlands, Belgium, Luxembourg, Germany, Portugal, Spain, Italy, Greece) as well as supranational and international organizations and courts (**European Union, Court of Justice and General Court**; Administrative Tribunals of the UN). Resulting from a historically based original conception of the principle of separation of powers, according to which to judge public administration is still to administer, French administrative law is a topical and paradoxical example of an uncodified field of law in a civil law country politically prone to an elevated legal tradition of codification. The division of powers, between public administration and judiciary, guarantees that independent expert courts assigned with administrative issues possess specific inquisitorial judicial procedures and grounds of review: 'substantive *ultra vires*' (*incompétence*), 'procedural *ultra vires*' or 'procedural impropriety' (*vice de forme*), 'abuse of power' (*détournement de pouvoir*), 'violation of the law' (*violation de la loi*).

21. French administrative law as a flexible corpus of logical rules and technical procedures fixing the boundaries and parameters of executive action, administrative discretion, and administrative liability is historically judge-made law; namely, the normative product of the *Conseil d'État* as the supreme administrative court of a specially constituted hierarchy of separate administrative courts, the independence of which has been constitutionalized by the → *Constitutional Council of France (Conseil Constitutionnel)*. Running parallel to its opinions (*avis*) formulated in its capacity as legal counsellor/advisor to the executive and often complementing them, the *Conseil d'État* in its judicial decisions (*arrêts*) has progressively laid down, articulated, and developed the main normative and procedural aspects of administrative law. Substantive administrative law in terms of acts, decisions, procedures, and behaviours is governed and fashioned by the principles of administrative legality (*principe de légalité*) and administrative liability (*responsabilité administrative*). These principles embody the respect for the hierarchy of norms (→ *theories concerning the hierarchy of norms*) by administrative institutions in their policy, rule, and decision-making process and the redress and compensation of administrative wrongs.

22. Furthermore, the judicial statement by the *Conseil d'État* of legislative and constitutional principles such as the 'General Principles of the Law' (*Principes Généraux du Droit*) and the 'Fundamental Principles Recognized by the Law of the

Republic' (*Principes Fondamentaux Reconnus par les Lois de la République*) has provided an expansion of the principle of the rule of law whenever superior reasons of administrative morality and ethics required it. From a comparative perspective, the *Conseil d'État* has contributed with striking normative audacity to the doctrine of administrative law as a core subject by combining administrative prerogatives and privileges of the executive, such as the privilege of the administrative authorities to implement their decisions without prior intervention by a judge (*privilège du préalable* and *privilège de l'exécution d'office*), with the protection of the subject of public administration, for example through the establishment of the rights of the defence (*droits de la défense*). The *Conseil d'État* has managed to promote internationally the academic coherence of an idiosyncratic and judicially creative national legal order. Hence its doctrines have been exported outside the limits of the civil law system (Thailand, Turkey, Lebanon, and former colonies of Indo-China and Africa, etc) as a distinctive model of administrative institutions, government and public services (*services publics*), administrative justice, and administrative citizenship.

(b) Germany

23. As a long established, stable, and successfully constitutionalized administrative legal order with a specialized judiciary in charge of administrative law disputes, specially conceived to guarantee the exercise of → *individual rights* and liberties, Germany is an example of a country that blends various systems into one (*Verwaltungsrecht*). As a constitutional reaction to the political past, the Basic Law of 1949 (*Grundgesetz*) recognizes a fundamental right of recourse for any citizen to the administrative courts against any act of a public authority affecting subjective rights guaranteed by the constitution or enshrined in parliamentary or delegated legislation. Under the remit of abstract constitutional instructions interpreted as to insure a comprehensive and concrete legal safeguard against any administrative wrongdoings, state actions are being controlled almost without limitation. However, as opposed to France, where access to judicial review is easier (*intérêt à agir*), the German applicant has to demonstrate upfront that his rights may have been infringed (*Klagebefugnis*). As the foremost feature of the rule of law, the present tendency in Europe is to overcome the threshold of *Klagebefugnis* without limiting the extent of judicial control. In some Scandinavian countries like Finland where the Finish Supreme Administrative Court invokes, as a dominant argument, the legal expectations of the applicant, the extent of judicial control goes beyond what is judicially in place in Germany. Even in France, where the administration enjoys some discretion which is beyond judicial control, the list of administrative acts outside the remit of judicial review is receding as evidenced by the case law of the *Conseil d'État* relating to purely internal managerial measures and disciplinary decisions within the administration (*mesures d'ordre intérieur*).

24. Alongside the principles of the legality of administrative action and administrative authority, → *equality*, legal security, non-retroactivity (→ *Page: 9 retroactive application of laws*), and legitimate expectations, the German

administrative law system has been especially influential in relation to the concept of → *proportionality*, notably in European Union institutions. The principle of proportionality (*Grundsatz der Verhältnismäßigkeit*) as a ground of judicial review means that an administrative decision must always be necessary, suitable, effective, balanced, and appropriate. As a universal expression of the rule of law, it has widely migrated, although with different standards of application, into domestic and European Union (**Page: 10 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)**) jurisdictions.

25. The current evolution of German administrative law matches the trends observed in other European countries. Without compromising on flexibility of administrative discretion in complex individual matters, federal codifications have been legislated (*Verwaltungsverfahrensgesetz*) and served as the basis for the enactment of administrative codes in each of the German states. While substantive administrative law might vary slightly from state to state, procedural administrative law, which has been uniformly regulated, is a federal matter (*Verwaltungsgerichtsordnung*). Combined with the guarantee of universal judicial review, the system of codification has strengthened administrative efficiency and citizens' rights alike by harmonizing administrative procedural law and transparently stating the constitutional limits of state action. Furthermore, no longer uniquely tied to the prerequisite of domestic legality and constitutionality, the Europeanization process has acted as a second phase of constitutionally governed administrative law through parliamentary and judicial interpretations of legal definitions, putting at the centre of a democratic and lawful government action, the administrative act and the doctrinal emphasis thereupon.

(c) Italy

26. Administrative law has been prominent as a systematic discipline in Italy since the second half of the nineteenth century. It has been shaped by the unification process of the Italian state and its political consequences, evolving from authoritarian trends towards democratic achievements in a liberal constitutional republic. Although general concepts of administrative law and judicial review continue to be construed from *Consiglio di stato*' case law, the constitution of 1947 has been influential in terms of provision, exclusion, and distribution of administrative powers and duties, from the establishing of economic and social relations (such as the guarantee of a public education sector) to the protection of fundamental rights (such as freedom of assembly). Since its extensive reform in 2001, the constitution has set out the general and particular rules between the state administrations and regional and local public structures (*regioni, città metropolitane, province, comuni*) by referring explicitly to the principles of subsidiarity (*sussidiarietà*), adequacy (*adeguatezza*), and differentiation (*differenziazione)*. It has also determined the regulation of administrative functions and administrative agencies in the name of principles such as good administration, impartiality, proportionality, and equality. Moreover, resulting from the constitutional obligation of implementing European and

international law, the Constitutional Court has been proactive in asserting new principles such as due process, simplification, and public information as constitutional requirements for the transparent democratic functioning of public administration.

27. With a system of increasing complexity—due to the escalation of administrative missions and structures, legislative policies of administrative reform and various operations of codification *à droit constant* in domains such as the environment, cultural heritage, and consumer protection among others—administrative law has triggered a new administrative culture which focusses less on the privileges and commands of the state and more on the rights and concerns of citizens. By doing so, administrative law has eroded the frontier between the imposition of obligations and the provisions of services, between public and private regulations, thus reflecting the pluralism and permeability of national regulation toward supranational law—most notably in economic matters for which public power, operating in a renewed model of market economy, now has a merely regulatory role of guidance over public and private business.

28. The legislative regulation of administrative acts and procedures (such as the rule of statement of reasons in administrative decisions) has been reinforced by the means of the administrative courts themselves influenced by European and international law (for example with the right of access to administrative documents). Somehow paradoxically, this has re-established the centrality of the administrative act by shifting its *raison d'être* from an expression of state sovereignty and administrative supremacy towards an articulation of checks and guarantees for the service and protection of citizens' fundamental rights and legal expectations.

2. Administrative Law in Common Law Countries

29. Administrative law in the common law world refers to the body of statute law, common law, and procedural rules through which bureaucratic actions of government institutions, agencies, and semi-public bodies are regulated and supervised. Administrative law is governed by statute and common law principles and doctrines through which the law is developed and applied out of the respect for appropriate standards of government policy, rule, and decision-making. As a pervasive field of law, administrative law, while granting the exercise of extensive public powers to government authorities and assessing the reviewability of decisions made by administrative law bodies, provides a number of avenues through which organizations and citizens can test the accountability of government actions and decisions. Allowing opportunities for → *public participation* and contribution by social and economic actors in the actions of government, administrative discretion can be reviewed by a court of ordinary jurisdiction under varying but increasingly definite principles of judicial review.

30. As a less specified field of law, in comparison to the civil law tradition with its distinctive administrative regime regulated by a specialized hierarchy of courts, administrative law in the common law system has adapted and developed its own

philosophical concepts and procedural grounds to address the ubiquitous nature of administrative discretion in relation to the protection of personal rights and public freedoms. In the names of natural justice, fairness, reason, and answerability, the executive administrative wrongdoing can be redressed before a court of ordinary jurisdiction although taking into account the distinctiveness of the mission and concepts of administrative law, and more recently instituting a judicial administrative expertise in certain sections of the judiciary.

(a) UK

31. In the UK, every aspect of administrative law is an articulation of constitutional norms. Specific procedures for judicial review of administrative disputes are applied by specific administrative divisions within the generalist court system in furtherance of natural justice and normative principles of good government. Judicial review of administrative action is performed by the High Court (or, on appeal, by the Court of Appeal or Supreme Court), exercising an inherent jurisdiction which it jealously guards. However, constitutional principles such as the sovereignty of parliament and the separation of powers lead to an exercise in self-restraint, limiting the grounds for judicial review to a narrow set that mirrors those constitutional principles. Administrative decisions are interfered with on the basis that they are in excess of jurisdiction—*ultra vires*—that is, beyond the powers granted by parliament or the Crown, as if judicial review was wholly concerned with upholding parliament's will. In the alternative, a narrow basis exists for interference on irrationality grounds, guarding against administrative decisions that are capricious or absurd. A minimum level of procedural fairness is guaranteed as well, because it is mandated by statute or because a → *precedent* can be found for a fair hearing or other expectation in a particular context like administrative detention. Courts further limit their judicial review function with regard to the → *justiciability* of the issue or subject matter, declining to interfere with matters of high policy like war and peace, diplomacy, and the national interest. If successful, the main remedy is a quashing order, effectively nullifying the administrative decision and requiring the executive to decide again.

32. The judicial review of administrative discretion is supplemented by a system of administrative tribunals which are executive bodies of statutory jurisdiction acting mainly as appellate bodies. Decisions made by these administrative tribunals can be challenged before the ordinary courts or may be subject to supervision by an appellate tribunal like the Upper Tribunal. As a recent innovation, the Upper Tribunal, a statutory tribunal with comparable jurisdiction to the High Court, can hear a discrete number of cases in judicial review; however, it must always be presided by a High Court judge. The judicialization of dispute resolution has been gradually integrated to the administrative process with the expanding creation of statutorily independent administrative tribunals in charge of specified regulatory domains such as immigration. In that respect, the proceduralization of individual guarantees has been advantageously combined with the judicial modelling of bureaucratic practises and administrative action.

(b) US

33. In the US, public administration is at the independent disposal of both the president and the Congress. American federal administrative law is the area of law that governs the regulation of autonomous agencies that are non-legislative and non-tribunal bodies. These agencies are granted executive powers and stand effectively on their own at the executive level. The Environmental Protection Agency is one such agency. The agencies internally review all regulations and disputes as standard procedure. The agency brings a cause of action against an individual that may have violated an agency rule. The individual will be tried by the agency in a process that mirrors the civil court system. Similarly, an individual that wishes to bring a dispute with a particular agency cannot go directly to the courts, but must first exhaust all possibilities and procedures within the agency. If after this they are still not satisfied, they may seek judicial review. This review is limited to the courts having subject matter jurisdiction as well as the individual showing 'personal injury in fact, economic or otherwise' (*Morrison v. Olson*, 487 U.S. 654 (1988)) that was directly related to the action of the agency. Certain federal courts have the ability to hear cases on administrative law and the cases can be heard by an administrative law judge. Although individuals may bring an action for judicial review, the federal courts are quite reluctant to hear such cases and do prefer Congress to resolve the issue.

C. The Functionality of Administrative Litigation

34. The argument for a self-contained political dimension of administrative law goes beyond the administrative transformation of a bureaucratic system of government; it involves the consideration of the judicial activism in the regulatory scheme. The practical importance of executive decisions is always combined with the practical impact of legal and judicial principles upon which the courts may act in controlling varied exercises of statutory powers and policy-making by public authorities. Ultimately, the self-ruling political dimension of administrative law is ascertained at a national, transnational, and supranational level by the co-expansion of the executive and judicial administrative processes taking place in various contexts of cross-fertilization between national private law and public law systems: the law of the European Union, and more broadly, the European Convention of Human Rights and varied international declarations and conventions.

35. In charge of the general interest and the public good, administrative units of central, regional, and local government and the judiciary presiding over administrative disputes present the two complementary sides of the same coin. On the one hand, manifesting the essence of the state acting in the → *public interest*, the acts and actions of administrative bodies should not compromise the government requirements while attending to the preservation and the promotion of civil liberties and public freedoms; thus, fulfilling the evolving legal prerequisites, schemes, and terms defining the pressing political concepts of administrative democracy and administrative citizenship. On the other hand, by establishing the substantive and

procedural standards of a professionalized and expert public administration compelled to the respect of the law, the administrative judge achieves the task of promoting liberal principles of good government, limiting to its maximum any considerations of political allegiance to the government of the day. The judicial review of administrative action is always a subtle exercise of equilibrium by merging the administrative obligations of government with the administrative necessities of judicial control. This integrates fully in its articulation the concept of the executive pre-eminence of the state, while the administrative legal order establishes, somewhat circularly, the constitutionalized independence of administrative justice.

1. The Organization of the Administrative Courts

36. Alongside established hierarchical self-review procedures (*recours gracieux* and *recours hiérarchique* in France; *Widerspruchsverfahren* in Germany) and extrajudicial institutions of legal redress such as the → *ombudsman* and the mediator, the organization of administrative litigation focusses on the institution of judicial review and the liability of public administration. From a comparative perspective, judicial redress in administrative law is traditionally presented in relation to the structure and composition of the court system. The comparative approach regarding the organization of administrative courts shows clearly a commonality of legal views and practices overcoming national institutional differences as well as legal classifications under the growing influence of supranational standards.

37. The classical trilogy of groupings with regard to the organization of the administrative courts is the following.

(a) Separate Judicial Order

38. In the first grouping, represented by France, Belgium, Italy, Greece, Turkey, Senegal etc, administrative law, administrative discretion, and administrative litigation are warranted by a separate judicial order often organically linked with the executive in its capacity as legal counsellor/advisor to the government. The distinct status of public administration in the carrying out of its special powers leads to the guaranteed specialized judicial scrutiny with an entrenched division between administrative law courts and private law courts. In principle, the division of judicial competence is based on the technical and substantive difference of the legal rules as evidenced by the distinct corpus of administrative rules which governs administrative privileges and obligations in administrative employment, administrative contract, and administrative liability.

(b) Administrative Section of Courts within the Ordinary Judiciary

39. In the second grouping, led by Austria, Portugal, Spain, Luxembourg, Sweden, Poland etc, administrative litigation, separated from private law disputes, is resolved before an institutionally distinct administrative section of courts within the

ordinary judiciary. The specialized professional knowledge of judges dealing with administrative claims coexists with the distinctiveness of procedural rules applicable to the disputes held against the executive branches of national, regional, and local government.

40. In the civil law system represented by these two groupings, supreme administrative courts and specialized judicial chambers provide the space for deliberation on key issues of law outside any reliance on the doctrine of judicial precedent. Although the civil law judge operates in an institutional hierarchy of administrative courts, thus encouraging judicial expertise and experience, he is not legally bound to apply past decisions to similar sets of circumstances. If supreme administrative courts and specialized judicial chambers remain always very influential on lower administrative courts in the management of their own judicial decisions, their case law as a principled set of judicial principles is never by itself legally binding. It is equivalent to a persuasive precedent which encourages judges to decide coherently on future cases on a particular matter, thus keeping administrative law adaptable and responsive to the realities and intricacies of public administration. Anyhow, the legal reasoning expressed by administrative supreme courts and specialized judicial chambers acts in practice as a very authoritative and effective guidance. As demonstrated by the French *Conseil d'État* with its leading case law (*jurisprudence de principe*), the highest administrative courts, often well known for their experimental and forward looking legal thought, are fully aware of the transformative effect and political implications of their decisions. As no statutes can anticipate all situations, the highest administrative case law advantageously combines special procedures and principled decisions for the legally precise solution of administrative disputes together with an intrinsic understanding of the political character and normative repercussions of judicial review of administrative discretion.

(c) Administrative Litigation within the Remit of the General Judicial System

41. The third grouping comprising the UK, Ireland, India, Australia, New Zealand, and the US keeps administrative litigation within the remit and competence of the general judicial system and the common law doctrine of judicial precedent. However, tribunals specialized in specific administrative spheres of human interaction which require the application of particular expertise and experience have been progressively established in several countries. In the UK, the High Court, although never examining the merits of an executive decision, plays a major role in administrative law supervision through judicial review. The extent of its involvement will depend in practice on whether there is a right of appeal. Characteristically, English administrative law is now supplemented by a system of administrative tribunals composed of lawyers and professional experts in a designated field which have been created by statute to resolve disputes between citizens and government departments. The gradual process of judicialization of these tribunals has given them in juridical practice the status of administrative courts.

42. In the common law system represented by this third grouping, successful subjection of the active administration to the rule of law lies in the progressive distinctiveness of its control and the adaptability of substantive administrative law. The benchmarks of good administration are therefore made possible, not only by the flexibility and predictability of the case law formulated by the administrative courts situated at the top of the judicial pyramid, but also by the administrative knowledge and proficiency of non-judicial experts participating according to the legal redress processes: either by the exercise of strictly judicial functions or by the exercise of regulatory functions in a judicial form. The systematization of administrative law lies therefore more and more in a joint effort and mutual respect of the executive, the legislature, and an identifiably distinct body of professional judges in charge formally or informally of administrative litigation, acknowledged and relied upon as such by public administration personnel and the general public.

2. Alternative Methods of Dispute Settlement and Administrative Transparency

43. The range of judicial remedies in the challenging of the use of administrative powers gives the administrative judge the ability to delineate and differentiate between his jurisdiction and the features of policy not to be infringed upon. Furthermore, with the general interest in mind regarding a participatory and willing acceptance of administrative rule by the public, and in order to alleviate the burden and length of judicial control by the administrative courts, several institutions (such as administrative tribunals, ombudsmen and mediators, independent administrative authorities and regulatory agencies, advisory boards, consultative commissions, and → *parliamentary committees*), with various administrative and judicial competences, have been put in place by the legislature together with the creation of alternative dispute resolution procedures.

44. As a substitute for litigation before the administrative courts, alternative methods of dispute settlement aim at addressing the defects traditionally attributed to the civil law administrative systems, namely the delays of implementation, enforcement, and execution of the administrative courts' decisions. With their ability to innovate and to investigate more quickly and informally, pre-litigation procedures result in a more rigorous application of public administration decisions. They intervene as a complement to the apparatus of remedial instruments aiming at sanctioning a defiant public administration not conforming to judicial decisions. They comprise legal tools such as injunctions, fines, and temporary suspensive emergency measures when a crucial violation of the law is at stake (for example the *référé liberté* in France).

45. Consultation, involvement, discussion, negotiation, and participation aiming conciliatorily at preventing litigation prove to be more than a complement to the corrective jurisdiction of the administrative courts. As such, the citizen's democratic contribution to the public debate in an open society sustaining obligations of social solidarity presents the additional political bonus of

consolidating the powers of the executive. In this vein, the US follow a mandatory process of 'notice-and-comment' rule-making which allows the general public to comment on a rule proposed by public authorities, and public authorities to reply to the comments expressed by the general public. Although this nonbinding procedure makes exceptions in relation to specific fields of executive powers such as defence and foreign affairs, it enables a more active participation of civil society in administrative law-making; thus furthering the standards of administrative transparency and strengthening the administrative policy, rule, and decision-making process.

D. The Mutation of Administrative Law

1. The Constitutionalization of Administrative Law

(a) The Process of Constitutionalization

46. Progressively, the justification of a 'good' decision made by national government and public administration carries with it a constitutional pondering, by administrative authorities and judges, of rights, interests, and expectations held against a substantive set of reasons and concepts expressed in domestic constitutional documents and international declarations and conventions. The constitutionalization of administrative law illustrates the rising need to articulate specific administrative fields (such as the delegation of powers to administrative authorities and the restriction of administrative action with regard to the protection of rights and liberties) with the view to develop appropriate democratic responses across the constitutional and administrative divide. Performed through procedurally formalized constitutional amendment or constitutional review in civil law countries like France and Italy, the process of constitutionalization is developing notably in the common law world (UK, New Zealand, Australia, Canada, India) via the progression of a general principle of legality and a doctrine of proportionality, functioning as constitutional principles within an emerging legal culture commonly described as a culture of justification.

47. The principle of legality signifies that administrative discretion should always respect values expressive of rights. Subsequently, it also means that administrative decisions should indicate comprehensively the reasons justifying them to enable the courts to assess if a particular decision fits its executive objective and its legal standard of reference—domestic or international. As such, the constitutionalization of administrative law entrenches how administrative discretion and decision-making are organized, channelled, controlled, and reviewed. By doing so, it acknowledges explicitly the public right to circumvent executive excess as well as the constitutional nature of administrative justice. Reciprocally, the constitutional framing of administrative discretion informs accordingly on the strength of the ever-evolving administrative state within the configuration of the constitution.

48. Most importantly, the updating of the administrative decision process and judicial review in the name of human rights' standards and values blurs the traditional distinction in administrative law between procedure and substance; in other words, the distinction between reviewing the regularity of the procedure and reviewing the merits of the decision. It also lead towards a generic reinterpretation of constitutional principles like the separation of powers and the rule of law, less as principles dealing formalistically with the institutional distribution of powers and → *due process*, and more as constitutional precepts allowing the safeguarding of values in the sense of promotion of rights against the motives put forward in defence of administrative action and decision. This shift in constitutional politics, according to which the judge assesses how administrative authorities express their decisions through a constitutional articulation of rights increasingly based on international declarations and conventions, not only challenges the traditional categories in administrative law; it also furthers the scope and content of administrative justice as restructuring administrative governance in renewing the constitutional order. It generates a set of complementary interrogations in relation to international rights subscribed to by the executive, independently of their incorporation by the national legislator: whether or not, when assessing judicially the administrative rule and decision-making process, the silence of administrative authorities on international rights, or conversely the assimilation by administrative authorities of international rights, ought to be automatically considered by the courts.

49. Inserted in constitutional mechanisms of increasing sophistication, the mapping, allocation, use, and judicial control of administrative rule and decision-making becomes a difficult task because two dynamics concurrently drive the organization of administrative governance: on the one hand, the widening of the administrative state with an extensive range of diverse actors, public and private, across central, regional, and local government; on the other hand, the emphasis of administrative power and judicial review of administrative action on core tasks of policing and controlling compliance to constitutional norms, and more widely to social norms of natural justice and equality. This emerging legal culture of a rights-based public law calls for a new contextualization of administrative procedural requirements and their judicial assessment. This cultural shift influences how judicial review is exercised in relation to the consideration and enforceability of rights—and not only rights deemed as constitutional. More broadly, it also shapes how the law provides a structure or a space for administrations to balance potentially competing procedural, substantive, institutional, and political factors which, for policy makers, may not involve human rights at all or may or may not involve rights (domestic or international) of constitutional relevance. In any event, what remains compelling is that the internalization of human rights of potential constitutional significance informs a process of juridification. Most significantly, the culture of justification which entails substantive commitments on the part of administrative agents far above a mere explanation of an administrative decision leads towards the

judicialization of administrative procedure often in the name of international legal values.

(b) Constitutionalization and Internationalization

50. The recalibration of administrative law through the internalization of international norms into domestic legal systems is currently perceived as a key characteristic of the constitutionalization process. Indeed, the judicial review of administrative action and decision-making related to the growing incorporation of international norms into national administrative law systems provides the legal space where the processes of constitutionalization and internationalization meet. In that respect, the integration of the European Convention of Human Rights into domestic law in the UK (Human Rights Act 1998) generates a new mode of constitutionalized judicial review of administrative action. Similarly, it is accepted in New Zealand, Australia, and Canada that the so-called 'International Bill of Human Rights' which includes the **Page: 19 Universal Declaration of Human Rights (1948)**, the **Page: 19 International Covenant on Civil and Political Rights (1966)**, and the **Page: 19 International Covenant on Economic, Social and Cultural Rights (1966)** has had a gradual—sometimes off-stage—impact on their internal constitutional orders. Most significantly, the ratification in 1989 by New Zealand, Australia, and Canada of the United Nations Convention on the Rights of the Child has been instrumental for the judicial internationalization of these countries' administrative law systems.

51. As it revisits the dualism between law and values, the constitutionalization of administrative law amounts not uniquely to the judicial assimilation of rights and concepts increasingly found in international declarations and conventions. It also takes possession of specific features of the common law to match the standards of an internationalized human-rights-based administrative law. Initially, the constitutionalization of administrative law comes from the administrative consideration or legal integration of combined streams of international human rights and the broadening of the interpretive principle recognized in the common law for the judicial consideration and implementation of treaties. In some instances, it is not uncommon to see the judiciary circumstantially distancing itself from the principle of subsidiarity in adjudication according to which more specified and specialized norms ought to be applied in preference to more general and speculative ones, in order to make national norms fit international standards. Additionally, the internationalization of administrative and judicial review is underpinned by a judicial activism aiming at the harmonization of international legal obligations with common law values traditionally promoted via statutory interpretation.

52. In that sense, the human rights requirements found in international treaties inform domestic administrative litigation—unless explicitly expressed to the contrary by the national legislator—in the same way that the principles of natural justice, the rule of law ideal, and the constitution shape the domestic interpretation of statutes. Inevitably, whatever the constitutional settlement nationally observed, the renewed

legislative and judicial control of discretionary power to accommodate legally international prerequisites in the administrative rule and decision-making process modifies the continuum of standards employed for reviewing the administrative interpretation of statutes. Subsequently, this new influx of constitutionalism linked to the internationalization of administrative legal systems gives rise to innovative experiments. In relation to the examples of the UK, New Zealand, and Canada, the constitutionalization of administrative law oscillates in the name of parliamentary democracy between two types of legal interactions: firstly, the interpretive obligation related to international norms combined with pre-legislative scrutiny and the possibility of legislative override (UK, New Zealand); secondly, the entrenchment of fundamental values combined with the option for parliament or the judiciary to curtail it on justified and proportionate legal grounds (Canada).

53. The interpretive and normative turn related to the incorporation of international standards entails varied doctrinal conceptions of rights in administrative law. More widely, it revisits in depth the function of rights in constitutional structures and modern organizations of governance within an ampler vision of administrative justice. Ultimately, these rights-based and justification developments in administrative law point towards the unification of an internationalized public law accountable to aspirational and universal values derived from varied domestic and international legal sources and establishing various categories of rights of different legally binding force. Following from this, the interpretive international enforcement mechanism pertaining to the judicial control of administrative action expands the list of common law rights and strengthens the background presumption that human rights inspired by international norms benefit from a constitutional status.

(c) Topical Example: South Africa

54. This new stage in the regulation of administrative justice via the constitutionalization of administrative law has been paramount in South Africa since the constitutional arrangements were radically modified in order to establish the constitutional right to administrative justice. In the post-apartheid era of constitutional democracy, the right to administrative justice is expressed in Section 33 of the Constitution of the Republic of South Africa (1996) (S Afr) completed by the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') (S Afr). Both the constitution and the constitutionally mandated PAJA provide the framework and grounds for administrative review. As their wording refers to the right to administrative justice as the fundamental right to lawful, reasonable, and procedurally fair administrative action, it has been argued that if bureaucratic accountability was the constitutional objective to be achieved, it will depend upon the courts' interpretation of what constitutes an administrative action. The response of the → *Constitutional Court of South Africa* towards the regulation of executive action was the extension of the principle of legality as a constitutional expression of the rule of law and therefore the availability of administrative justice towards all exercises of administrative power. The lawfulness, → *reasonableness*, and

procedural fairness constitutionally requested for all exercises of public power signify that administrative decisions have to be rational, justifiable, and, when legally required, justified. The constitutionalization of the justifiability and justification requirements calls for an objective substantiation of administrative decisions tested against prerequisites of relevance, suitability, necessity, and proportionality. These conditions are completed by a rationality principle according to which the promotion of both administrative efficiency and good governance on the one hand, and administrative accountability and justice on the other hand, causes for administrative rule and decision-making to be accessible and transparent.

55. Expanding the right of just administrative action on the basis of a rationality principle understood as the imperative request for procedural fairness and the duty for administrative authorities to provide written reasons for their decisions when legally required, the South African Constitutional Court allows the judiciary a wide legal space to assess the extent to which the → *legality principle* is constitutionally respected. In other words, with the constitutional affirmation that the control of public power through judicial review of administrative action is a constitutional matter, the courts can creatively assess the degree to which the constitutional requirement for the legitimation of administrative decisions meets the applicable standard of legality. Shifting from → *parliamentary sovereignty* to constitution supremacy as the foundation for judicial review of executive action, the courts have in effect constitutionalized the pre-existing common law form of administrative review. In that sense, as influential as they may have been, the common law principles of administrative review do not constitute a system of administrative law existing separately alongside the administrative principles expressed in the constitution and detailed in the PAJA: the common law principles are now subsumed under the constitution. In other words, the influence of common law principles in South Africa is effective only as it is constitutionally compliant. There is now a single South African system of administrative law which is characteristically receptive to the internationalization process, ie the system grounded in the constitution and defined in the PAJA; a system according to which administrators and judges are constitutionally obliged to take into consideration both binding and non-binding international law documents related to human rights in their assessment of their administrative functions or in their judicial interpretation of the law respectively (→ *application of international law in domestic legal systems*).

2. The Hybridization of Administrative Law

56. In the past few decades, the evolution of administrative law has favoured a more managerial and consumerist approach of administrative services taking into account the notions of accountability, efficiency, risk assessment, economic initiative, and commercial profitability. The division between public law and private law is eroding in some respects as public administration is increasingly applying private law instruments such as contracts in its dealings with private individuals, whereas private organizations such as state owned enterprises are using

consistently administrative law processes. The encroachment of aspects of private law into administrative management and processes has generated a more flexible assignment of issues before the civil and administrative courts, thus leading towards a more communal and rational approach to comparable issues by civil and administrative judges. In Europe, the cross-breeding between public law and private law under the joint influence of the European courts of Luxembourg and Strasbourg is noteworthy in labour law, although the status of civil servants in some countries like France remains categorically distinct from the law applicable to private sector employees.

57. The broader flexibility in the distribution of issues between civil and administrative courts shows that the formal separation between public law and private law, while valid, is fundamentally permeable in relation to the running of public administration and the functionality of its control. The core issue of administrative law as differing from private law lies mainly in the distinctiveness of principles and the extent of scrutiny required for reviewing the legality of administrative decisions and the exercise of discretionary power. If one can argue in relation to the increased use of private law notions by the public administration, whether or not the concept of justice is better served by a dichotomy between two types of justices, it remains undeniable that, in varied pragmatic degrees and from system to system, the judicial assessment of the exercise of administrative authority calls for specialized judicial institutions or personnel; or at least, for distinctive procedures.

58. The system of separate administrative courts or increasingly specialized judiciary open to a collaborative transnational process of cross-fertilization between public law and private law under the supervision of supranational institutions is tending towards the institutional uniformity of administrative structures and the conceptual unity of administrative justice. Democracy benefits from the specialized judicial policing applying combined legal standards to an increasingly complex transnational administration steadfastly coping with economic, social, and societal mutations. The enforcement of the proper standards of administrative action and decision-making in a shifting administrative world is assured by the judicial treatment reserved to the rule of law principles relevant to the administrative sphere and by the judicial management of the fundamental rights, personal liberties and public freedoms embodied in the constitutional arrangements at national and supranational level. If the theoretically unrestricted intervention of the legislator and the scope of regulatory schemes are growing in relation to administrative national and supranational matters—for example with regards to the need for improved administrative transparency policies—the reliance of the democratic legal community worldwide on a principled framework of flexible, cohesive, and interconnected legal rules is continuously expected and is decisive to the very conception of a **global administrative law**.

3. The Globalization of Administrative Law

59. The problem as to how government can be administratively structured, regulated, supervised and controlled to the mutual benefit of the state and the citizen is shared

by all developed democratic nations and it is emerging in many developing countries. It is strongly established in political and legal science that every national government achieves political outcomes, on a large scale, through statutory delegation of legislative power, in accordance with constitutional and judicial frameworks within the interconnected European and international context of a globalized world. Administrative law, as historically the bureaucratic incarnation of the state, is primarily linked to national institutions, political and constitutional standards, and legal categorizations. However, beyond the concept of the state and the constitutionalization of administrative law, each national tradition is recurrently revisiting the traditional taxonomies in response to the processes of Europeanization, internationalization, migration, and globalization.

60. The policy, rule, and decision-making of administrative units of government, → *administrative agencies*, and independent administrative authorities charged with specific social matters has expanded significantly in numerous areas of public welfare at national and supranational levels (areas such as defence, policing, trade, manufacturing, → *public transport*, taxation, broadcasting, education, public assistance, → *social security*, medical treatment, immigration, refugees, the environment, and planning). Charged with the task of balancing the legitimacy of unilateral executive power with the protection of democratic rights within a liberal society evolving in a globalized world, administrative law must assess the accountability of the bureaucratic state within the evolved and normatively pluridimensional paradigm of administrative governance. Firstly, the constitutionalized regeneration of administrative law doctrines and techniques guided by international norms and informing the democratic culture of justification is made possible by an ever more globalized judicial dialogue. In that respect, the nationally specific features of administrative law systems are nowadays increasingly underpinned by transnational judicial standards of implementation: through European Union law, through the European Convention of Human Rights, and through the so-called 'core International Human Rights instruments' including the previously mentioned United Nations Convention on the Rights of the Child. Secondly, this inclusive judicial engagement is itself enhanced by a wider national and supranational legislative intervention as well as a broader regulatory scheme related to administrative governance structures and mechanisms.

61. The ever growing corpus of orders, processes, and decisions, formulated by national and supranational government bodies and → *independent agencies* in charge of operating the sources of law and potentially controlled by courts or by non-judicial tribunals at different levels, renews fundamental political questions about the practice of government and public administration. Contrary to the alleged political neutrality of the interpretation and implementation of the law by the bureaucracy, administrative law is prominently becoming the most salient political embodiment of the state or the supranational organization it regulates. Effectively, the mounting exercise of public power in national and transnational structures has given rise to significant concerns about legitimacy and accountability. In an expanding regulatory state in constant interaction with other states and

supranational organizations, the diverse forms of interplay between administrative institutions on different stages, and in which regulation is operative despite its primarily non-binding configurations, conceal a virtually autonomous political process of policy, rule, and decision-making. Bureaucratic self-regulation of national governments and supranational institutions in their administration of the law, intensively effective for being covertly political, decisively undermines the political neutrality of administrative law as a prescriptive ideological argument.

62. Furthermore, the consideration of a legally plural multinational community at international level prompts different patterns of responses in relation to the gradual establishment of a global administrative law. Democratic precepts and methods for a global administrative law system appear desirable and are generally gaining ground; this includes liberal standards such as due process and legality principles, transparency in the procedures of policy, rule, and decision-making, organization and participation of public opinion, answerability, accountability, the rule of law, and the protection of human rights. Nevertheless, a universal set of administrative law principles and avenues of administrative and judicial review remains today very complex to identify for cultural contingencies and political reasons even though the dichotomy between domestic and international spheres is receding. Remaining historically and constitutionally nationally contingent despite a rising transnational evolution and a globalized context, administrative law cannot currently be gratified with a single uniting and universal definition.

E. The Future of Administrative Law

1. The Current Challenge of Administrative Law: the Soft Law Phenomenon

63. As the executive must act in accordance with the law, compliance with the law requires that government departments and public bodies interpret legislation and case law to fulfil their political ambitions. This carries with it a danger of interpretation being used as a creative operation to re-characterize legal obligations, furthering the current transition in liberal societies from a model of representative government to a model of administrative governance in deliberative democracies. In a transnational administrative world, administrative governance is understood as administrative functions being performed at various stages in a complex set of effective interactions between administrators and institutions despite their predominantly non-binding forms. In that respect, the soft law phenomenon concerns the role of the administrators themselves in interpreting law through their utilization of legal instruments which are generally excluded from judicial scrutiny. A soft law instrument is generically defined as an internal administrative measure whose function is to guide administrative action informally, including advising on the interpretation of legislation often under the premise that the bureaucratic interpretation of the law is as politically neutral as it is legally innocuous. But an empirical examination of administrative interpretative practices shows this

postulate to be a legal myth: the alleged neutral nature of the bureaucratic interpretation and implementation of legislation often conceals an entire administrative process of instruction, policy, rule, and decision-making of considerable legal and political importance in relation to public liberties and fundamental rights.

64. In the civil law world, the role of administrators as policy-makers in unravelling the law through their use of soft law instruments is highly topical. In French administrative law, with landmark cases, the *Conseil d'État* has modified the legal status of the 'administrative circulars' (*circulaires administratives*) and reflected on the appropriate criteria of their judicial review so as to differentiate the approach to the interpretation of statutes through 'interpretative circulars' (*circulaires interprétatives*) from the approach to the implementation of statutes through 'administrative directives' *(lignes directrices)*; thus enabling the identification of differing judicial approaches towards the methodology of interpretation used by administrative bodies and their presuppositions. The political allegation of the non-binding nature of the bureaucratic interpretation and implementation of legislation is not confined to the French legal system. An evolution similar to the French law of *circulaires administratives* is documented in Italy in relation to the legal status of *circolari amministrative*.

65. In the common law world, the UK has progressively developed the executive use of a more predictable legal and policy framework for documents such as 'ministerial guidance' and 'code of guidance'. In the US, 'interpretative rules' produced by agencies are designed to fulfil a similar function. Creating no enforceable rights, they are explanatory documents detailing the meaning of a statute or a promulgated regulation administered by the agency. Although the agency is authorized to forgo 'notice-and-comment' procedures in relation to interpretative rules, an interpretative rule adding or changing the content of an existing regulation can be invalidated on the basis that it fails to abide by notice-and-comment rule-making.

66. Furthermore, the phenomenon of soft law through the study of the interpretation of the law by public administration is of considerable relevance at supranational level. At European Union level, the interpretative instruments are unilateral acts by the European Commission detailing legal instruments adopted by the European Council and/or the European Parliament. The European Commission can indicate how it interprets or intends to apply provisions of Community legislation through 'interpretative communications'. It can also provide guidance on how it expects the Member States to behave in circumstances where the legislative texts do not provide sufficient details through 'Commission recommendations'. Despite the adoption of these instruments normally being preceded by extensive consultations with Member States and stakeholders, challenging questions are raised in terms of political and administrative balance between the different institutions. The conditions in which these types of administrative acts are internally adopted and applied determine their impact as interpretative factors in the case law of the European Court of Justice and subsequently their effect on national administrative

systems. In that respect, the consideration of the soft law phenomenon in the administrative policy, rule, and decision-making process requires as much an acute realization of the hard law/soft law interface as a complex recognition of differing levels of soft law within and between administrative and jurisdictional national and supranational levels.

67. The practice of government by informal internal rules and departmental circulars creates a complex phenomenon of intersecting issues within a divisible and multi-layered global administrative space. Policy formulation, agenda setting, bureaucratic implementation, and interpretation of the law involve cooperation amongst all active administrations, intranationally and supranationally. With responsibility for defining an important aspect of administrative governance, the soft law phenomenon contributes to the broader constitutional debate on the extent to which the national and supranational interpretative practices of an increasingly integrated multinational and international public administration system are participating in the crisis of the definitional rationality of administrative law.

2. Towards a Post-Modern Administrative Law?

68. With the constantly evolving readiness and ability of the government and the administrative judge to pioneer new standards and objectives in the legislative, administrative, and judicial processes, administrative law performs today the political and societal task of addressing the potentially conflicting requests of public services and citizens with a commonality of purposes and principles which extend across the legal families. In other words, the multiplicity and diversity of executive and judicial interferences at national and supranational levels form part of a transnational phase of administrative governance common to both civil law and common law administrative legal and judicial systems. If the implementation of a national administrative law system is confined to a geographical space, its substantive evolution is heavily influenced by its affiliation to international and supranational jurisdictions such as the European Union, the European Convention of Human Rights, and the international law promoted by the United Nations. National administrative procedures, processes, and policies transpose supranational standards of bureaucratic behaviour and fundamental rights so as to impact on the nature and the scope of national juridical and judicial remedies. Accordingly, the reshaping of national standards of administrative and judicial review as a consequence of a membership of supranational organizations changes surreptitiously the historical and conceptual legal frame of administrative reference. However, if the current transnationality trend relies essentially on a renewed analysis of administrative justice, it remains difficult to authenticate and define supranationally a universal function forming the nucleus of administrative law.

69. Unquestionably, administrative law is currently experiencing a transitional phase of its development. The contention that administrative law is mainly historically determined by the legal classification and national tradition within which it operates is being scientifically revisited. In that sense, the present ideological evolution of administrative law through interpretative practices as well as the interaction and

mutual influences of national and supranational administrative principles represent—as such—a major historical phase of the later development of administrative law. As contemporary developments of administrative governance have blurred traditional principles, criteria, and values, hence contributing to the perceived decline of the definitional unity of administrative law, conceptual adjustments are required for a post-modern rationalization of its narrative. Undergoing reform, modernization, and harmonization, administrative law is presently at the juncture of intertwined processes of → *privatization*, → *decentralization*, constitutionalization, Europeanization, internationalization, and migration, thus remodelling the role of the state. The continuity of administrative law is challenged by the structural and legal changes affecting its institutions, principles, and practices. Originally a product of the state, administrative law is evolving intranationally with varied forms of administrative → *devolution* as well as transnationally with an increased administrative communication amongst national and supranational legal orders. In other words, the administrative fragmentation of national executive structures exists in parallel with the administrative cooperation in supranational intergovernmental institutions and hybrid regulatory bodies. The transnational circulation of administrative principles such as the principle of proportionality is made possible by the homogenization of enactable administrative cultures within compound structures and organizations which in return elaborate these principles further.

70. As a consequential argument, the concepts of democracy, public power, legitimacy, and accountability are shifting due to the establishment of a new inter-institutional balance at different levels. A national, supranational, and international technocracy presumed detached from political influence is coupled with the developments of a deliberative democracy involving not only the electoral representation of citizens but their active collaboration in the policy, rule, and decision-making process. Far from merely serving hierarchically the implementation of the law, the proceduralization and judicialization of administrative law modify the Weberian-style patterns of political and bureaucratic decisions. Giving weight to the idea of an administrative market within the administrative state paradigm, the dynamic of administrative law as a networked system of collaborative interactions between administrators and civil society is emerging as a source for change. The multipolarity of administrative law triggers the mutation according to which the regulations of administrative proceedings equates the rights of the private individual not as an addressee of the administrative authorities exercising their superior powers, but as an administrative citizen entitled to democratic rights *vis à vis* the executive. In that sense, within the state and beyond the state, administrative law serves less as a self-contained legal and procedural form and more as an evolving societal function.

71. However, as the superlative embodiment of executive institutions and powers, administrative law remains dependent upon historical requisites, cultural traditions, the constitutional provisions of the executive over public administration, and, ultimately, national territorial implementation. If a national administrative order

cannot be viewed in isolation with regard to administrative governance and legal globalization, it cannot be understood either without specific reference to its culturally based historical principles, civic values, and constitutional arrangements. Very receptive to multiple cross-fertilizations and judicial dialogues in an internationally open and divisible legal space, administrative law combines a transformative spirit of harmonization with a definite ethos of differentiation. Administrative pluralism represented by the transplantation and self-harmonization of administrative concepts and methods, legal instruments and practices, goes hand to hand with cultural and social administrative singularity. In other words, historical predetermination and interconnected institutional sedimentation in the plurinational and multipolar context of communicating administrative systems are mutually inclusive. For this very reason, administrative law in its relation with constitutional law should be regarded as a paradigmatic meeting point in the field of social sciences.

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