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Administrative Law, Public Administration, and the Administrative Conference of the United States

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Abstract

From its birth, administrative law has claimed a close connection to governmental practice. Yet as administrative law has grown and matured it has moved further away from how agencies actually function. The causes of administrative law's disconnect from actual administration are complex and the divide is now longstanding, but it is also a source of concern given the increasing importance of internal administration for ensuring accountable government. This Article analyzes the contemporary manifestations and historical origins of administrative law's divide from public administration, as well as the growing costs of this disconnect. It also describes the Administrative Conference of the United States ("ACUS")'s exceptional status as the rare forum spanning the worlds of both administrative law and public administration, and the critical role ACUS can play in reasserting linkages between these two critical dimensions of government.

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Introduction

A funny thing happened to administrative law in the United States over the course of the twentieth century. Administrative law

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emerged as a field at the century's beginning, in response to the growth in national administrative government.[1] The 1946 enactment of the Administrative Procedure Act[2] ("APA"), following an intensive study of different federal agencies' practices, represented an acknowledgement that the administrative state was here to stay.[3] Subsequent administrative law transformations have also been tied to changes in how agencies operate. For example, the expansion in the procedural requirements for notice-and-comment rulemaking followed agencies' increased use of such rulemaking.[4] Centralized regulatory review and other forms of presidential direction, perhaps the most significant administrative developments of the last few decades, are a core part of administrative law casebooks and scholarship.[5]

In short, from its birth, administrative law has claimed a close connection to governmental practice.[6] But, in fact, as administrative law has grown and matured, it has moved further away from critical aspects of how agencies function.[7] As many have noted, administrative law focuses almost entirely on external dimensions of administrative action, and the external dimensions it targets are increasingly not the main drivers of administrative action.[8] To be sure, courts police

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1 *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671–72 (1975); *see also* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 3–17 (2012) (noting the conventional view that administrative organization and administrative law came into being at the national level in the late nineteenth century, but arguing that both have actually existed since the nation's founding).

2 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–559, 701–706 (2012)).

3 For a detailed history of the APA's enactment, see George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996). *See also* Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 224–29 (1986) (describing the work of the Attorney General's Committee on Administrative Procedure).

4 *See* Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1300 & n.26 (2012). New statutes mandating use of rulemaking and imposing new procedural requirements, such as the Clean Air Act, also played a significant role.

5 *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 485–91 (2003) (describing the presidential control model in administrative and constitutional law scholarship); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2281–319 (2001) (describing different forms of presidential administration and their increasing importance); *see also* Don Bradford Hardin, Jr., Comment, *Why Cost-Benefit Analysis? A Question (and Some Answers) About the Legal Academy*, 59 ALA. L. REV. 1135, 1136–37 (2008) (documenting a dramatic rise in legal scholarship related to cost-benefit analysis, the key component of centralized regulatory review).

6 *See infra* Part I.B.

7 *Id.*

8 *See infra* notes 24–32 and accompanying text.

agency conformity with procedural requirements imposed by the APA, other statutes and regulations, and constitutional due process, but these legal mandates govern only a small part of agency operations.[9] Courts insistently exclude more systemic aspects of agency functioning from their purview and from administrative law doctrines.[10] Key internal agency dynamics—such as planning, assessment, oversight mechanisms and managerial methods, budgeting, personnel practices, reliance on private contractors, and the like—are left instead to public administration. As a result, despite their common concern with administrative agencies, the fields of administrative law and public administration interact largely as passing strangers, acknowledging each other's existence but almost never engaging in any sustained interchange.

The causes of administrative law's separation from public administration are complex and rooted in historical field development, ideological commitments, institutional role, constitutional principle, and good old-fashioned turf protection. This separation reflects administrative law's traditional court-centric focus, and much can be said for keeping the courts out of the internal world of agency functioning. Yet administrative law's growing disconnect from actual government practices is cause for concern. This disconnect perpetuates a false image of how agencies operate and the role of internal administration. In a number of contexts internal administration is the linchpin for ensuring accountable government, particularly given the obstacles to external constraint through congressional oversight or judicial review.[11] Moreover, whether intentional or not, administrative law affects internal agency operations in significant ways. Hence, administrative law's inattention to public administration risks impeding development of good administrative practices and worse, incentivizes agencies to adopt bad ones, at a time when the importance of strong internal administration is only growing.

Enter ACUS. Although the separation of administrative law from public administration is longstanding, there have been rare instances of linkage between the two. ACUS represents one such instance. Not only does its membership bridge the internal-external

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9 *See* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 96–97, 105–11 (2003); *see also* William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROBS. 61, 61–63, 70–74 (2015).

10 *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1859–73 (2015).

11 *See id.* at 1849–59.

divide, consisting of agency officials and public members from outside of government, but the projects it undertakes also span the worlds of administrative law and public administration. ACUS is thus ideally situated to address the growing disconnect between these two fields, studying how administrative law affects internal agency operations and assessing whether—and how—administrative law might be used to improve public administration.

I. The Administrative Law and Public Administration Divide

Administrative law and public administration scholars both bemoan the disconnect between their fields, a disconnect evident through a comparison of key agency internal practices and administrative law doctrines. The historical roots of this divide trace back to both fields' origins in the United States at the outset of the twentieth century. But over time the divide has expanded and become entrenched, based today more expressly on separation of powers principles, concerns about the impact of judicial review on agency functioning, and the dominance of managerialist approaches to public administration.

A. Manifestations of the Administrative Law-Public Administration Divide

At first glance, the claim that administrative law is divorced from how agencies actually function seems patently false. After all, a core focus of the APA—the nation's most foundational administrative law enactment—is agency process, setting out basic procedural requirements for agencies to follow.[12] Federal courts in turn have penned an endless number of administrative law decisions interpreting those requirements, and learning the details of the resultant doctrines is one of the joys experienced by many a student of administrative law. Moreover, study of centralized White House regulatory review, implemented through the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) and a central factor today in major rulemaking, is another administrative law staple.[13] In addition, administrative law scholars increasingly are turning their attention to important internal dynamics that shape how

12 *See, e.g.*, 5 U.S.C. §§ 553–557 (2012).

13 *See, e.g.*, Peter L. Strauss et al., Gellhorn & Byse's Administrative Law: Cases and Comments 213–41, 685–89 (11th ed. 2011) (detailing instances of presidential direction and review as well as connected scholarship); *see also* Kagan, *supra* note 5.

agencies operate, such as an agency's internal organization and design or the use of multiple agencies to implement a regulatory scheme.[14]

Yet, appearances can be deceiving. A key feature of the APA is that it represents external controls, imposed by statute and elaborated on by courts. Process requirements developed by agencies themselves rarely rise to the fore in administrative law, except with respect to whether those requirements are judicially enforceable.[15] Despite their central importance to how federal agencies function today, centralized regulatory review and presidential direction remain remarkably absent from administrative law decisions.[16] The same is true of other significant internal agency features, such as priority-setting and planning processes or the role of career officials in agency decisionmaking.[17] Perhaps the clearest evidence of this doctrinal absence is offered by *Lujan v. National Wildlife Federation*,[18] where the Supreme Court ruled it lacked jurisdiction over a challenge to the Bureau of Land Management's failure to undertake programmatic and planning activities with respect to public lands.[19] According to the Court, such activities were too "wholesale" or systematic to come within the scope of judicial review, which it deemed limited to discrete agency actions.[20] In a subsequent decision the Court tied this exclusion even more firmly to the terms of the APA's grant of jurisdiction,[21] but it has also sometimes held that general or programmatic challenges are barred on constitutional standing grounds.[22]

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14 *See, e.g.*, Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012) (detailing and analyzing interagency coordination); Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (discussing public choice theory and issues of agency design); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422 (2011) (discussing the effects of legal-institutional design choices on government decisionmakers' incentives to invest in information).

15 *See* Elizabeth Magill, *Foreword: Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 860–61, 873–91 (2009); *see also* STRAUSS ET AL., *supra* note 13, at 203–07, 926–34 (describing internal agency processes connected to rulemaking and with respect to judicial review).

16 *See* Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1138–39, 1155–57 (2014); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 7, 18–23 (2009).

17 *See* Rubin, *supra* note 9, at 97; Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L.J. 1, 10–13, 23–24 (2013); Simon, *supra* note 9, at 74–79.

18 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990).

19 *Id.* at 891–94.

20 *Id.*

21 *See* Norton v. S. Utah Wilderness All., 542 U.S. 55, 61–67 (2004).

22 *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 349 (1996); Allen v. Wright, 468 U.S. 737, 759–60 (1984).

Increasingly administrative law scholars are arguing that exclusion of these systemic internal features is separating administrative law from the main drivers of agency functioning. According to these scholars, classical or canonical administrative law—defined generally as "the text and judicial interpretations of the APA and associated constitutional doctrine. . . does not reach some of the most practically important official conduct"[23] and "can seem like a minor presence in the modern regulatory process."[24] William Simon argues that administrative law traditionally emphasizes top-down, bureaucratic delegations and specific acts of rulemaking.[25] Simon further contends that this approach not only leaves vast areas of agency discretion unregulated, but also is at odds with contemporary models of administration, which focus on overall planning and monitoring and derive legitimacy from transparency and processes for continuous revision.[26] Dan Farber and Anne O'Connell agree that current administrative law is premised on a "lost world," one in which a statutorily authorized agency implements statutory requirements, following mandated procedures and undertaking reasoned consideration of both the requirements and evidence before the agency, with the agency's determination subsequently reviewable by courts.[27] "The reality of the modern administrative state," however, is quite different: executive directives as well as statutory requirements are in play; multiple agencies (often lacking confirmed leaders) are charged with implementation, yet in practice authority may rest elsewhere, in particular in the hands of OIRA and White House staff; mandated procedures are avoided; political, as opposed to statutory, factors drive decisionmaking; and little judicial oversight is available.[28]

Edward Rubin takes the argument even further, contending that "the APA was out of date at the time it was enacted" because its requirements "are derived from an essentially judicial concept of governance in which laws are discovered rather than invented and policy making is always incremental," thereby ignoring the distinctive features of the administrative process and leaving key activities "such as priority setting, resource allocation, research, planning, targeting, guidance, and strategic enforcement" either "essentially unregulated or

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23 Simon, *supra* note 9, at 62, 64.

24 Farber & O'Connell, *supra* note 16, at 1138.

25 *See* Simon, *supra* note 9, at 63–92.

26 *Id.*

27 Farber & O'Connell, *supra* note 16, at 1154.

28 *Id.* at 1154–73.

subject[ed] . . . to inappropriate procedural rigidities."[29] Like Rubin, Sidney Shapiro faults administrative law for failing to heed the insights of public administration.[30] In Shapiro's view, administrative law is excessively focused on "outside-in accountability," specifically political and legal controls external to an agency, and ignores the ways that "hierarchy . . . institutional norms, and professionalism promote accountability from inside an agency."[31] Jerry Mashaw puts the point particularly well:

> [W]e tend to think of our administrative constitution as a set of external constraints on agencies. . . . [and] relentlessly analyze these external constraints as if they were the major determinants of agency efficiency, procedural fairness, and legal legitimacy. Yet in many ways it is the internal law of administration—the memoranda, guidelines, circulars, and customs within agencies that most powerfully mold the behavior of administrative officials.[32]

Strikingly, some public administration scholars also critique the disconnect between administrative law and public administration. But, they approach this disconnect from the opposite direction, faulting their field for its refusal to take seriously the central role of public law in public administration. Thus, Laurence Lynn critiques public administration's "anti-legal temper,"[33] arguing that "a broad consensus within public administration appears to hold that law is one of many environmental constraints on administrative discretion rather

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29 Rubin, *supra* note 9, at 96–97.

30 Shapiro, *supra* note 17, at 1.

31 *Id.* Note that although these scholars agree that administrative law fails to encompass key dimensions of modern administration, they take somewhat different stances on the specific features of this mismatch. In particular, whereas Simon argues that current administrative law is too bureaucratic and hierarchical in its focus and Farber and O'Connell describe it as failing to acknowledge the role of presidential and executive branch directives, Shapiro's complaint is that administrative law does not give hierarchy enough weight and is too focused on presidential oversight. *Compare* Simon, *supra* note 9, at 67–74, *and* Farber & O'Connell, *supra* note 16, at 1154–60, *with* Shapiro, *supra* note 17, at 11–25. *See also* Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 585–87 (2011) (detailing the benefits of bureaucratic control). This discrepancy may result from the fact that Shapiro is targeting administrative law scholarship somewhat more than administrative law's statutory and doctrinal manifestations, but in any event these differences do not take away from their shared agreement that administrative law fails to acknowledge important internal administrative features that drive agency behavior.

32 MASHAW, *supra* note 1, at 313.

33 The phrase originated with DWIGHT WALDO, THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION 79 (1948). *See* Laurence E. Lynn, Jr., *Restoring the Rule of Law to Public Administration: What Frank Goodnow Got Right and Leonard White Didn't*, 69 PUB. ADMIN. REV. 803, 803 (2009).

than its source" and gives "short shrift to the relationship between law and administration."[34] Such dismissals of law are misguided not just because of the myriad ways that law impinges on administration, but also because "public administrators necessarily play an essential role in defining what the rule of law means in practice."[35] Other public administration scholars similarly contend that "the basic theory guiding governmental organization and management . . . is to be found in public law" and bemoan that public administration orients itself around management principles instead of public law.[36]

B. Historical Antecedents

The current divide between administrative law and public administration is not a new phenomenon, but dates back to when both fields emerged as areas of academic study and practice at the beginning of the twentieth century. Early scholars of administrative law disagreed in fundamental ways about how the field should develop. Some, in particular Frank Goodnow and Ernest Freund—both political scientists as well as legal academics—saw features of internal administration as a core part of administrative law's ambit.[37] Goodnow began his 1905 treatise on administrative law with a disquisition on the meaning of administration, along with an insistence on paying attention to how government actually operates:

> Since administration and administrative law have to do with the governmental system in operation, or, in other words, with the actual operations of political life, it is absolutely necessary that the study of these subjects take into account not merely the formal governmental system as it is outlined in charters of government and legal rules, but, as well, those extralegal conditions and practices which, it has been shown,

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34 Lynn, *supra* note 33, at 803.

35 *Id.* at 805, 808–09; *see also* ANTHONY M. BERTELLI & LAURENCE E. LYNN JR., MADISON'S MANAGERS: PUBLIC ADMINISTRATION AND THE CONSTITUTION 73 (2006) ("By ignoring [law], public administration contributes to its own powerlessness.").

36 *See* Ronald C. Moe & Robert S. Gilmour, *Rediscovering Principles of Public Administration: The Neglected Foundation of Public Law*, 55 PUB. ADMIN. REV. 135, 135–36 (1995); *see also* Lynn, *supra* note 33, at 805–06 (quoting public administration scholars who emphasize public law).

37 *See* WILLIAM C. CHASE, THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT 47–59 (1982); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 973 (2011).

> have such an important influence on the real character of governmental systems.[38]

Goodnow followed this introduction with a detailed review of the organization of administration, including the organization of executive departments and chief executive authority, turning to judicial control of administration only at the end.[39] Freund, in turn, "sought to bridge what he saw as the differentiated study of administrative organization and administrative powers, the former of which focused on optimizing internal public administration and the latter of which performed the 'more strictly legal' task of protecting 'right and justice.'"[40] Freund was an advocate of greater external constraints on administrative discretion, in particular more detailed legislative specification to guide agency decisionmaking. But he also expressly highlighted the potential benefits of internal administrative systems of control, which he emphasized operate constantly on subordinate officers and—unlike courts—can fully address questions of the wisdom and expediency of discretionary action.[41] Acknowledging the tendency to see "administrative law . . . [as] primarily judicial law controlling the administration," he urged also applying the term "to a body of principles produced by the administration" on the grounds that longstanding "administrative practise [sic] has many of the characteristics of law."[42]

Goodnow and Freund were not alone. Another leading early administrative law scholar, Bruce Wyman, framed his 1903 treatise around a distinction between internal and external administrative law. According to Wyman, "[e]xternal administrative law deals with the relations of the administration or officers with citizens," while "[i]nternal administrative law is concerned with the relations of officers with each other, or with the administration."[43] Such a clear external-internal distinction could set the groundwork for downplaying

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38 FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 5 (1905).

39 *See generally id.*; *see also* Mark Fenster, *The Birth of a "Logical System": Thurman Arnold and the Making of Modern Administrative Law*, 84 OR. L. REV. 69, 77 (2005) (describing Goodnow's approach as "largely an internal one" that "focused less on common law development by the judiciary").

40 Fenster, *supra* note 39, at 78 (quoting Ernst Freund, *Administrative Law*, *in* 1 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 452, 455 (Edwin R. A. Seligman ed., 1930)).

41 Ernst Freund, *The Law of the Administration in America*, 9 POL. SCI. Q. 403, 414–15, 419 (1894); *see also* Daniel R. Ernst, *Ernst Freund, Felix Frankfurter, and the American* Rechtsstaat: *A Transatlantic Shipwreck, 1894–1932*, 23 STUD. AM. POL. DEV. 171, 175, 179 (2009).

42 Freund, *supra* note 40, at 454–55.

43 BRUCE WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS 4 (1903).

the internal dimension—more hidden to begin with and less familiar to lawyers than courts—in favor of the external.[44] But Wyman expressly acknowledged the internal aspects of administration as part of administrative law, insisting that "[t]ogether, the external law and the internal law make up the law of administration."[45]

By the late 1920s and early 1930s, when John Dickinson, Felix Frankfurter, and John Davison penned their takes on administrative law, this acknowledgement of internal administration as part of administrative law had largely disappeared.[46] Courts were now ascendant. Dickinson's volume, for example, contained detailed accounts of the nature and importance of the courts in administrative action with no discussion of topics unrelated to judicial review.[47] According to Thomas Merrill, Dickinson's approach marked the adoption of a new appellate model of judicial review, which extended the reach of the courts into areas previously left to agency discretion.[48] But it also represented the seeming removal of questions that did not lend themselves to judicial involvement from administrative law's ken—and thus the internal organizational issues that engaged Goodnow, Freund, and Wyman are notably absent.[49] Frankfurter's approach was broader. He underscored the importance of internal administrative features, such as "a highly professionalized civil service, an adequate technique of administrative application of legal standards, [and] a flexible, appropriate and economical procedure."[50] Frankfurter also defined administrative law in encompassing terms: "administrative law deals with the field of legal control exercised by law-administering

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44 *See* CHASE, *supra* note 37, at 61–71.

45 WYMAN, *supra* note 43, at 4. Moreover, Wyman emphasized that the focus of internal administrative law is administration, or the process and methods by which an administration acts and its officers engage in common action. *Id.* at 14–15 ("The purpose of the law of administration . . . is the science of common action.").

46 Jerry Mashaw has written eloquently about the importance of internal administrative law and the limitations of a court-centered perspective. *See, e.g.*, MASHAW, *supra* note 1.

47 *See generally* JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES (1927).

48 *See* Merrill, *supra* note 37, at 972–79.

49 *Id.* at 973. Merrill notes that despite Dickinson's sole focus on the court-agency relationship "[q]uite likely, [he] had no intention of suggesting that there is nothing else to administrative law besides the issue of judicial review—this was simply what he chose to write about." *Id.*

50 Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 618 (1927); *see also id.* at 620–21 (arguing that in-depth scientific study of how different agencies operate is a central precondition for development of administrative law); Ernst, *supra* note 41, at 180–82 (describing series of "intensive studies" of federal agencies undertaken under Frankfurter's supervision and supported by the Commonwealth Fund).

agencies other than courts, and the field of control exercised by courts over such agencies."[51] Yet, his and Davison's casebook similarly excludes discussion of internal agency features in favor of an extensive analysis of judicial controls on an agency-by-agency basis and materials on separation of powers.[52]

A few decades later, the identification of administrative law with judicial review had intensified. To be sure, attention to internal administrative practice remained an important theme during the New Deal period. James Landis famously defended the New Deal administrative state with an emphasis on administrative process and an argument for how agencies' internal combination of different functions made them far better equipped than the courts to address the major problems of the day.[53] The intensive study of agencies' actual practices, which led to the enactment of the APA, demonstrated continued concern with internal administrative operations.[54] Moreover, the post-New Deal period was one of significant deference to agencies and restrained judicial scrutiny.[55] Still, these developments did not undermine the increasing identification of administrative law in terms of external and, particularly, judicial controls.[56] This is perhaps best captured by the title of Louis Jaffe's dominant treatise, *Judicial Con-*

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51 Frankfurter, *supra* note 50, at 615.

52 *See* FELIX FRANKFURTER & J. FORRESTER DAVISON, CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW ix (1932); *see also* CHASE, *supra* note 37, at 14–17 (describing Frankfurter's definition of administrative law as "refer[ing] to what courts do in relation to administrative action"); J. F. Davison, *Administration and Judicial Self-Limitation*, 4 GEO. WASH. L. REV. 291, 296–99 (1936) (defining administrative law as "a body of principles followed by the regular courts of law in deciding disputes as to the proper relationship between the three powers of government or between an agency or bureau of the government and individual[s]" and arguing that similar rules and principles were not yet available from agencies in formulating their decisions); Oliver P. Field, *The Study of Administrative Law: A Review and a Proposal*, 18 IOWA L. REV. 233, 236 (1933) ("[Frankfurter and Davison's casebook] is not a casebook on administrative law. . . . [I]t is a fine collection of cases on the separation and delegation of powers, and judicial review of administrative action.").

53 JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 10–12, 24–46 (1938).

54 MASHAW, *supra* note 1, at 279.

55 *See generally* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 429–40 (2007).

56 Merrill, *supra* note 37, at 973; *see* Fenster, *supra* note 39, at 82–84 (identifying the view "that legal academic research and teaching should focus on the traditional study of the judicial role in the administrative process—that is, on the limited judicial review of administrative agencies rather than on the bureaucratic operations and [decisionmaking] of the agencies themselves" as a "core assumption of early administrative law scholars" such as Dickinson, Frankfurter, and Landis). Fenster identifies Thurman Arnold as an administrative law theorist of this period who offered a model of administrative law that emphasized greater partnership between administrators and courts. *See id.* at 103–11.

trol of Administrative Action.[57] Indeed, the APA arguably reinforced this trend, with its imposition of trans-substantive procedural requirements that applied to all agencies and were to be enforced by courts.

Why the internal dimensions of administration were initially dropped from administrative law is a complicated question, and one that implicates forces that go beyond the field of administrative law. William Chase traces early resistance to incorporating administration to broader efforts by legal academia to systematize law teaching, particularly in the form of the Langdellian case method. According to Chase, this case method "model was intensely committed to the study and teaching of the work product of the traditional courts, and it was just as intensely biased against the teaching of a topic like administrative law and . . . the study of the noncourt decisions which that topic's full scholarly development would require."[58] The valorization of courts over administration also reflected a traditional common law identification of the rule of law with judicial control. This identification and understanding of administrative law as exempting government officials from "the ordinary law of the land . . . [and] the jurisdiction of ordinary tribunals" led A.V. Dicey to famously renounce administrative law as opposed to all English ideas and "unknown to English judges and counsel."[59] Defending administrative law's legitimacy against Dicey's attack underlay Wyman's distinction of external administrative law—the law of the land, applicable to government officers as well as private citizens—from internal administrative law, as well as his insistence that external administrative law trumped when in conflict with internal law.[60] Indeed, the legitimacy not just of administrative law but also of administrative governance was at issue. Emphasizing the role of judicial review helped to portray the expanding administrative state as compatible with constitutional principles of checks and balances and divided government.[61]

Equally important were broader ideological commitments of the time, in particular the Progressives' deep skepticism of the courts and

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57 LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

58 CHASE, *supra* note 37, at 20.

59 A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 193, 330 (10th ed. 1959).

60 WYMAN, *supra* note 43, at 4–13.

61 *See* JAFFE, *supra* note 57, at 320 ("The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."). As Merrill has noted, however, judicial review could be seen to raise concerns of excessive judicial entanglement with the proper work of the political branches, a concern alleviated by development of the appellate review model in this period. *See* Merrill, *supra* note 37, at 992–1000.

commitment to making professional expertise the basis of governmental decisionmaking rather than politics.[62] This skepticism underlay enactment of administrative systems to replace common law rules and was further reinforced by the ways courts impeded new administrative regulation.[63] The experience of the *Lochner* era made Frankfurter and his fellow New Deal sympathizers deeply suspicious of the courts and intent on curtailing their involvement in administrative policy choices.[64] Distinguishing internal administration from administrative law served as a means of precluding judicial involvement in the former, even if it also served to reinforce the identification of administrative law with judicially enforced constraints. Emphasis on the need for expert exercise of discretion for successful completion of governmental tasks, meanwhile, reinforced the inclination to limit judicial involvement in the substance of administration.[65] Early administrative law scholars disagreed fundamentally over whether administrative discretion was a bane or a benefit: Freund viewed development of precise substantive rules, whether by legislatures or administrative superiors, to be inevitable and critical to preventing administrative abuse, whereas Frankfurter embraced discretion as essential for effective administrative government.[66] But, as even Freund acknowledged, courts were ill-equipped to review questions of propriety, and thus an embrace of administrative discretion served to immunize areas of administrative action from judicial scrutiny.[67]

The progressive commitment to expert administration separate from politics also led to the birth of the field of public administration. Woodrow Wilson's founding essay, *The Study of Administration*, insisted on the need to develop "the eminently practical science of ad-

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62 *See* FELIX FRANKFURTER, THE PUBLIC & ITS GOVERNMENT 157–58 (1930); Fenster, *supra* note 39, at 80–86; Shapiro & Wright, *supra* note 31, at 597–98.

63 *See, e.g.*, Schiller, *supra* note 55, at 403–04.

64 *See* CHASE, *supra* note 37, at 141–44; Schiller, *supra* note 55, at 407–14; Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1591–92 (2011).

65 CHASE, *supra* note 37, at 12–17; Fenster, *supra* note 39, at 80–84; Schiller, *supra* note 55, at 417–21; Tushnet, *supra* note 64, at 1571–73, 1584–86.

66 *See* FRANKFURTER, *supra* note 62, at 150–62; Ernst, *supra* note 41, at 173, 178–79, 185, 187.

67 *See* Freund, *supra* note 41, at 419; *see also* MASHAW, *supra* note 1, at 301–08 (describing the lack of judicial review of discretionary action as the longstanding norm before the twentieth century); WYMAN, *supra* note 42, at 11, 16 (arguing discretion is not for judicial control). The exception here is John Dickinson, who advocated the appellate review model, which allowed courts to review even discretionary agency decisionmaking, albeit under a deferential standard of review. Merrill, *supra* note 37, at 963, 971–76, 994–95, 997–1000, 1002.

ministration."[68] Although Wilson is famous for insisting on a distinction between administration and politics, he also distinguished administration and law, bemoaning undue attention to the questions of lawmaking and constitutional framing at the expense of law implementation.[69] And, he defined the object of administration in decidedly nonlegal, policy laden terms—as being "to discover, first, what government can properly and successfully do, and, secondly, how it can do these proper things with the utmost possible efficiency and at the least possible cost either of money or of energy."[70] Leonard White, author of the first public administration textbook in 1926, argued that "the study of administration should start from the base of management rather than the foundation of law."[71] Here, too, exclusion of law was intended to protect administrative exercise of discretion from judicial interference and the restrictions of a rule-bound approach.[72]

Public administration's efforts to differentiate itself from law underscores yet another force behind the exclusion of administration from administrative law: good old-fashioned turf protection, on the part of lawyers and public administration scholars alike. Defining administrative law in terms of external judicial controls made it centrally an arena for those with legal training and expertise, and thus preserved a new field for legal dominance.[73] At the same time, pulling administration out of law's ambit was central to justifying the existence of new schools of public administration and of public administration as a distinct field of inquiry.[74] Yet it merits emphasis that some founding figures in the field of public administration took an opposite approach and underscored its connection to administrative law.[75] Perhaps not surprisingly, two leading examples were Frank Goodnow and

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68 Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 197 (1887).

69 *Id.* at 198–200, 205–06, 211–12.

70 *Id.* at 197.

71 LEONARD D. WHITE, INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION vii (1926); Lynn, *supra* note 33, at 806.

72 *See, e.g.*, JOHN M. PFIFFNER, PUBLIC ADMINISTRATION 18 (1935); Marshall E. Dimock, *The Meaning and Scope of Public Administration*, *in* JOHN M. GAUS ET AL., THE FRONTIERS OF PUBLIC ADMINISTRATION 1, 6–7 (1936); Lynn, *supra* note 33, at 806.

73 CHASE, *supra* note 37, at 112–15, 134–35; Fenster, *supra* note 39, at 84–85.

74 CHASE, *supra* note 37, at 124–26; Lynn, *supra* note 33, at 808.

75 *See* Lynn, *supra* note 33, at 805 (identifying Goodnow and Freund as leading progenitors of public administration who recognized law's importance to the field); *see also* Dimock, supra note 72, at 6–12 (arguing for a synthesis between legal, institutional, and pragmatic or experience-based approaches to public administration).

Ernst Freund.[76] They were joined by Marshall Dimock, who argued for a closer association between administrative law, public administration, and political science, stating that "[p]ublic administration and administrative law are as inseparable as cause and effect."[77]

By the public interest era of the 1960s and 1970s, progressive faith in expert administration and broad discretion had become a relic of the past, replaced by growing skepticism of agencies as captured by regulated interests, unwilling to take seriously new public interest legislation, and ineffectual regulators to boot. On this skeptical view, court oversight emerged as a critical check on unaccountable and arbitrary administration. Prime evidence of the courts' centrality was their expansion of the APA's rulemaking requirements and development of searching "hard look review" to replace the deferential "arbitrary and capricious scrutiny" of the APA's early years. The identification of administrative law with judicial review was then complete.

C. Contemporary Contributing Forces

This history explains why administrative law and internal administration initially diverged, but not why that divergence continues today. This ongoing divide is perplexing given the resultant contemporary criticisms of administrative law as out of touch with actual administrative practice.[78] Even more pointed are efforts by scholars to demonstrate the existence and significance of internal administrative law. A seminal force here is Jerry Mashaw, whose recent book *Creating the Administrative Constitution* demonstrates internal administrative law's longstanding pedigree.[79] Others have analyzed the importance of institutional design to how agencies operate, and for decades both constitutional and administrative scholars have emphasized the centrality of internal executive branch oversight for agency accountability.[80] Events in the world have reinforced this emphasis on internal administration. Perhaps no sphere demonstrates

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76 Lynn, *supra* note 33, at 805.

77 Marshall E. Dimock, *The Development of American Administrative Law*, 15 J. COMP. LEGIS. & INT'L L., no. 3, 1933, at 35, 35. Dimock also cautioned against only approaching public administration through a legal lens, arguing that such an lens had ignored "methods, concrete experiences, and, generally speaking, the human side of administration" in favor of a focus on "judicial rules and decisions" as well as "statutory and constitutional limitations and requirements." Dimock, *supra* note 72, at 6.

78 *See supra* text accompanying notes 23–32.

79 *See* MASHAW, *supra* note 1, at 4–5, 12.

80 *See supra* notes 5, 13–14 and accompanying text.

the centrality of internal administration more than national security, where limited judicial review combined with substantially expanded governmental activity after 9/11 has brought public attention repeatedly to the role of internal controls.[81]

To some extent, the continuing divide between administrative law and internal administration stems from the same forces that underlay the divide's initial creation. One major factor is skepticism about the value of judicial review. This skepticism reflects concerns about the courts' ability to understand the complexity involved in regulatory choices, as well as about judicial political biases, and is further fueled by claims that the heightened judicial scrutiny born during the public interest era has severely hampered agencies' ability to function.[82] The shift in emphasis to centralized oversight and accountability through the President stems in part from this judicial skepticism,[83] and thus it is perhaps not surprising that such internal executive branch controls do not surface in judicial decisions. Nor, moreover, has the executive branch encouraged a melding of presidential oversight with judicial review, prominently declaring that key executive branch constraints such as the requirements for centralized regulatory review are not judicially enforceable.[84]

Another contributing factor is the continued image of law as rules and constraints that are externally imposed. There is a circularity here—internal administration is excluded from the ambit of administrative law because internal administrative features and processes are not seen as law. But nonetheless this image of law as externally binding rules—an image reinforced by the now lengthy period during which internal administration and administrative law have been separated—continues to stand as an obstacle to bringing internal adminis-

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81 *See, e.g.*, Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2322 & n.21, 2333 (2006); Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1046–47 (2013).

82 *See, e.g.*, Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1019–57 (2000); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 765–69 (2008); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 63–64, 70–84 (1997); Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1752–56, 1771–73 (2012).

83 *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1074–83 (1997).

84 *See* Exec. Order No. 12,866, § 10, 3 C.F.R. 638, 649 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012).

tration within administrative law's ambit.[85] Both characteristics—law as external constraints and law as rules—also explain the resistance to seeing centralized executive branch controls or congressional oversight processes other than statutes as law instead of politics.[86] Meanwhile, public administration's turn towards greater managerialism, relying on general management and organizational principles drawn from fields of business and private organizations, makes efforts to inject the distinctly public accountability concerns of administrative law appear anachronistic.[87]

Constitutional separation of powers concerns represent a final—and today perhaps most significant—force behind preserving the administrative law and public administration divide.[88] The Supreme Court often justifies its refusal to address systematic administrative features and processes on the grounds that to do so would be to overstep the judicial role.[89] As Justice Scalia put the point in *National Wildlife Foundation*, individuals "cannot seek *wholesale* improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made."[90] In institutional reform cases the Court has sung a similar refrain, insisting that "it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution."[91] Separation of powers also animated the early reluctance to bring internal agency operations within administrative law's embrace.[92] But the concerns then went more to the constitutional propriety of having courts regularly review administrative actions on direct appeal, as opposed to only through the narrow prerogative writs or common law

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85 *See* MASHAW, *supra* note 1, at 280–81.

86 *Compare* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 14–15 (2010) (arguing that constraints come from politics and public opinion, not law), *with* Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1406–08 (2012) (reviewing POSNER & VERMEULE, *supra*) (arguing that Presidents have strategic reasons for complying with law other than merely being constrained by politics and public opinion). *See also* Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1112–28 (2013) (describing skepticism about whether presidential constraints represent law and analyzing the meaning of legal constraint).

87 *See* Lynn, *supra* note 33, at 806–07; *see also* Moe & Gilmour, *supra* note 36, at 136, 142–43.

88 *See* MASHAW, *supra* note 1, at 303.

89 *See, e.g.*, Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891, 894 (1990).

90 *Id.* at 891.

91 Lewis v. Casey, 518 U.S. 343, 349 (1996).

92 *See* Merrill, *supra* note 37, at 945.

actions.[93] Moreover, as Tom Merrill has noted, the constitutionality of such appellate review was generally accepted during the early decades of the twentieth century, leaving pragmatic and political concerns to animate resistance to judicial interference in areas of administrative deference.[94]

II. Bridging the Divide: The Role of the Administrative Conference

Identifying the disconnect between administrative law and public administration raises two difficult questions. The first is a normative one: Should administrative law and public administration be more closely linked, or would it be preferable to preserve the current divide? The second follows on the first: If closer linkage is desirable, how is it best achieved?

A. The Arguments for Closer Linkage

Whether to bridge the current divide between administrative law and public administration is a close question. The divide's longstanding character suggests caution before casting it aside.[95] In particular, good reason exists to resist greater judicial involvement in administration, given concerns that judicial review already inhibits effective administration and creates poor incentives for agencies. Nonetheless, as I have argued at length elsewhere, strong arguments exist for tying administrative law and public administration more closely together.[96]

Perhaps the most basic argument in favor derives from the purpose of administrative law. Administrative law aims both to empower and constrain agencies, to ensure effective government as well as preserve accountability and prevent arbitrary rule through requirements of authorization, participation, transparency, and reasoned decisionmaking.[97] If administrative law is increasingly divorced from the realities of governmental functioning, it is less able to perform either role. For example, the risk that courts will intrude excessively into agencies' operations if they consider broader, systemic processes needs to be

93 *See* Mashaw, *supra* note 1, at 302–03; *see also* Merrill, *supra* note 37, at 996–98.

94 *See* Merrill, *supra* note 37, at 965.

95 *See supra* Part I.A–B (discussing history of divide between administrative law and public administration).

96 *See generally* Metzger, *supra* note 10.

97 *See* Mashaw, *supra* note 1, at 280–81; Farber & O'Connell, *supra* note 16, at 1140. Frankfurter put well this dual responsibility of administrative law: "Nothing less is our task than fashioning instruments and processes at once adequate for social needs and the protection of individual freedom." Frankfurter, *supra* note 50, at 617.

balanced against the ways that courts may impede agencies' operations by not considering those processes. Having a court review the legality of a proposed plan or planning process may prove less burdensome for the agency than waiting until the agency has adopted the plan and implemented it, when reversal entails opening up a number of specific applications.[98] Moreover, that the main drivers of administrative action fall outside of administrative law's ambit undermines the legitimacy of administrative decisionmaking.[99] Farber and O'Connell put this point well: "The risk is that administrative law will serve a primarily ceremonial purpose, providing the appearance, but not the reality, of public participation and accountability in policymaking. In our view, the goals of transparency, participation, and accountability are worth continued effort to strengthen them . . . ."[100]

The danger is not simply that the core aims of administrative law will not be realized, but also that the actual ways in which administrative government is constrained and strengthened will not be recognized. This raises the danger that an effective source of administrative reform will be ignored. As Mashaw argues,

> [t]o the extent that we are interested in the reform of administrative law in the United States, we might do better to operate on the internal law of administration than by ceaselessly tweaking the external law. For many, if not most, agency functions remain structured primarily by agency regulations and internal directives.[101]

Worse, such lack of recognition may lead to evisceration of those features that may be critical to effective and accountable administration. Shapiro makes this point with respect to expertise, arguing that administrative law's failure to understand administration has led to a displacement and deterioration of expertise and a crowding out of civil servants' public service and professional instincts.[102] Moreover, the evisceration of internal administration also debilitates external controls, for as Mashaw notes, "[w]ithout internal administrative law, contemporary external accountability via political oversight and direction and judicial review could not operate."[103] It is internal administration—systemic mechanisms for planning, priority-setting,

98 *See* Cross, *supra* note 82, at 1022–25.

99 *See* Farber & O'Connell, *supra* note 16, at 1178–79.

100 *Id.* at 1178.

101 MASHAW, *supra* note 1, at 313.

102 *See* Shapiro, *supra* note 17, at 11; Shapiro &Wright, *supra* note 31, at 578, 609–17.

103 MASHAW, *supra* note 1, at 281–82.

policymaking, resource allocation, and managerial oversight and supervision—that ensures agencies implement the statutes and instructions that their political and legal overseers give them and allows those overseers to hold agencies to account when they fail to do so.[104]

Recognition of the central role internal administration plays in achieving effective and accountable exercise of governmental power also reveals the weakness in the separation of powers insistence on excluding administration from constitutional and administrative law. As I have argued, built into our constitutional system is an emphasis on internal supervision of delegated governmental power. This means that separation of powers analysis cannot be limited to ensuring that courts do not exceed their proper purview. It also must include ensuring that the executive branch adheres to the constitutional duty to supervise, which in turn requires consideration of internal administration. Significantly, this does not necessitate judicial policing of internal policing so much as an acknowledgement of the constitutional and legal role that internal administration plays.[105]

B. ACUS's Bridging Function

An important variable to consider is the means by which administrative law and administration could be more closely linked. One option would be to have courts take administration more into account in undertaking judicial review and framing administrative law doctrines. Although such a judicial approach has potential, it also risks the kind of significant judicial limitation of administrative operational discretion that progressive and New Deal administrative lawyers most feared.[106]

Enter the Administrative Conference. ACUS is often praised for the way that it combines governmental and private perspectives, with a membership that spans agency officials, leading representatives of the private and nonprofit regulatory bar, and administrative law scholars.[107] Less appreciated is the way that ACUS simultaneously brings

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104 *See id.*; Metzger, *supra* note 10, at 1892–94.

105 *See* Metzger, *supra* note 10, at 1843–44.

106 *See id.* at 1917–32.

107 ACUS's authorizing statute specifies that ACUS will consist of 75–101 members, including a representative from each independent and executive agency and up to 40 public members chosen by the Chair, with the requirement that public members "may at no time be less than one-third nor more than two-fifths of the total number of members." 5 U.S.C. § 593(a), (b)(2)–(3), (b)(6) (2012). Public members are to be "members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure." *Id.* § 593(b)(6); *see also* Gary J.

together the worlds of administration and administrative law. The governmental members of ACUS are often top agency lawyers, but they are also high-level agency officials who are intimately involved with the wholly internal life of agencies. By contrast, ACUS's non-governmental members (perhaps confusingly denominated public members) overwhelmingly come from administrative law backgrounds and are deeply engaged with the external dimensions of the administrative state.[108]

ACUS's projects also span the administrative law-public administration divide and stand out in particular for their emphasis on internal agency functioning.[109] One manifestation of this emphasis is the effort of ACUS to develop agency best practices, which aim to encourage administrative self-regulation and internal controls.[110] This emphasis is also clear from the subject matter of ACUS reports, statements, and recommendations, which in recent years have addressed issues such as how agencies consider science, interagency coordination, governmental performance assessment, and the practice of centralized regulatory review.[111] The net effect of ACUS's membership and committee structure is to yield a number of opportunities for agency administrators and external administrative law experts to closely debate specific features of internal agency operations.[112] Al-

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Edles, *The Continuing Need for an Administrative Conference*, 50 ADMIN. L. REV. 101, 111–14 (1998) (describing ACUS membership and describing ACUS "as a partnership of the public and private sectors, but with a distinctly governmental flavor").

108 *See* Edles, *supra* note 107, at 113–14 ("Economists, public administrators, and other non-lawyers were occasionally named as members, but lawyers clearly dominated the membership."); Gary J. Edles, *The Revival of the Administrative Conference of the United States*, 12 TEX. TECH. ADMIN. L.J. 281, 289–90 (2011) (stating that most ACUS public members are lawyers but noting then-existing exceptions). A list of ACUS's public members is available at *Public Members Roster*, ADMIN. CONF. U.S., http://www.acus.gov/directory/public-member (last visited June 10, 2015).

109 *See* ACUS Recommendation 2013-3: Science in the Administrative Process, 78 Fed. Reg. 41,357, 41,357–58 (July 10, 2013) (identifying internal practices that agencies may adopt to promote transparency in the use of scientific techniques).

110 *See id.* (encouraging agencies to share best practices with other agencies to aid in development of the overall goal of transparency in scientific decisions).

111 *See, e.g.*, *id.* ACUS Recommendation 2013-7: GPRA Modernization Act of 2010: Examining Constraints To, and Providing Tools For, Cross-Agency Collaboration, 78 Fed. Reg. 76,273 (Dec. 17, 2013); ACUS Statement 18: Improving the Timeliness of OIRA Regulatory Review, 78 Fed. Reg. 76,275 (Dec. 17, 2013); ACUS Recommendation 2012-5: Improving Coordination of Related Agency Responsibilities, 77 Fed. Reg. 47,810 (Aug. 10, 2012).

112 *See* Edles, *supra* note 108, at 292 (recognizing the existing ACUS statute allows for membership and structure to deal with management issues within agencies).

though ACUS also considers issues relating to judicial review, internal administration and agency processes are its dominant concerns.[113]

ACUS's focus on agency administration and process is hardly coincidental. ACUS is the modern incarnation of the famous Attorney General's Committee whose detailed study of actual agency processes underlies the development of the APA.[114] The APA did not create a permanent body to undertake ongoing study of administrative procedure,[115] but regular calls were made for such an entity, and presidents periodically convened committees to study administrative process on an ad hoc basis.[116] These efforts culminated in the birth of ACUS in the Administrative Conference Act of 1964.[117] That ACUS inherited the Attorney General's Committee's mantle and focus on how agencies operate is evident from its leading statutory mandate:

> [T]o provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action . . . to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.[118]

But ACUS's statutory mandate also makes clear its bridging function, as it also instructs ACUS to focus on the more external dimensions of the administrative state by improving the effectiveness and efficiency of public participation in, and the laws governing, the regulatory process, as well as reducing unnecessary litigation.[119]

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113 *See id.* (describing ACUS as a "Conference plus" organization that combines legal and management issues).

114 *See* Gellhorn, *supra* note 3, at 226 ("The Final Report of the Attorney General's Committee on Administrative Procedure and the investigations that preceded it set the stage for the federal Administrative Procedure Act of 1946 . . . .").

115 *See* Marshall J. Breger, *The Administrative Conference of the United States: A Quarter Century Perspective*, 53 U. PITT. L. REV. 813, 814 (1992) ("[I]t soon became apparent that the APA had not settled all outstanding issues in administrative procedure.").

116 *Id.* ("[T]wo Presidents as well as the Judicial Conference appointed temporary entities to perform this function [of reviewing and recommending improvements in agency procedures].").

117 *See id.* at 814–18.

118 5 U.S.C. § 591(1) (2012); *see also id.* § 591(4) (listing improving agency use of science in regulatory process as an additional purpose of the statute); *id.* § 594(1) (authorizing ACUS to carry out these purposes by "study[ing] the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and mak[ing] recommendations . . . .").

119 *Id.* § 591(2)–(3), (5); *see also* Edles, *supra* note 108, at 292 (arguing that public management concerns fit within the revived ACUS's statutory mandate).

ACUS thus is already a rare and important exception to the separation of administrative law and public administration. Yet ACUS could also do more to link these fields together. ACUS should study more directly how the worlds of administrative law and public administration interact. ACUS should also undertake projects that target aspects of administrative operation more familiar to public administration scholars than administrative lawyers—such as federal personnel systems, agency mechanisms for priority-setting, or internal administrative supervision and management structures. Although less immediately tied to specific agency regulatory processes, such background features profoundly impact how successful these processes ultimately are. ACUS could also become a venue for suggesting ways to incorporate public administration more into administrative law doctrines and judicial review, drawing on its membership's expertise to identify ways that courts could take internal organizational features into account while still preserving agency discretion and managerial flexibility. Finally, ACUS could include more policy and public administration experts to complement the administrative law emphasis among its public members.[120]

Happily, a basis exists to think that ACUS may move more in this direction. As part of a 1998 symposium, a leading administrative law scholar envisioned a broader role for a revived ACUS, one that would link administrative law and public administration: "The 'new' Conference . . . could become a mechanism to connect legal procedures to the management issues that underlie them. The artificial distinction between legal and management process should give way to a unified concept of public management."[121] That scholar was the first chair of the revived ACUS, Paul Verkuil.

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120 *See* Edles, *supra* note 108, at 288–90, 293 (listing current members who specialize in public administration and arguing that such individuals fit the statutory criteria for public members); Paul R. Verkuil, *Speculating About the Next "Administrative Conference": Connecting Public Management to the Legal Process*, 30 ARIZ. ST. L.J. 187, 200–01 (1998) (urging that a new entity focused not just on agency legal procedures but more broadly on management should be dominated by policy analysts rather than lawyers).

121 Verkuil, *supra* note 120, at 187. Others also faulted the original ACUS for failing "to develop well-planned programs for the *systematic* in-depth study of, and important improvement in, the federal bureaucracy" or undertake "detailed studies of how, or how well, these agencies perform their respective functions in general." Glen O. Robinson, *The Administrative Conference and Administrative Law Scholarship*, 26 ADMIN. L. REV. 269, 270, 272 (1974); *see also* Breger, *supra* note 117, at 840 (agreeing with Robinson that the ACUS should undertake detailed studies of agency performance).

Administrative Law

Teaching Material

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TABLE OF CONTENTS

UNIT ONE: INTRODUCTION TO ADMINISTRATIVE LAW

Introduction

This chapter presents you some highlights of the nature, meaning, scope and sources of administrative law. Administrative law, as a branch of public law, governs the relationship of the state and its citizens. Specifically, it regulates the manner of exercising power by the executive branch of government and administrative agencies so as to ensure its legal limits. Ultimately, by controlling power, it provides protection to the citizen against ultravires acts, abuse of power and arbitrariness.

This chapter begins by giving students background information about the political and economic forces shaping the evolution and development of administrative law. How and why administrative law was recognized and later developed as a distinct branch of law is discussed under this unit.

Then, the chapter discusses the meaning, sources, scope and theories of administrative law. Different definitions of administrative law given by different scholars are compared and contrasted to show the various approaches towards the subject. Sources of administrative law may be mentioned as: constitution, enabling act, delegated legislation, and judicial and administrative decisions. The study of these instruments is relevant to understanding its practical application. It is believed that these points will ultimately enable students to understand and determine the proper scope of administrative law.

The second section compares and contrasts administrative law with other concepts and disciplines. It mainly analyzes administrative law as influencing and influenced by concepts like rule of law, good governance and human rights. Administrative law was born out of constitutional law. Hence, analyzing their close relationship and determining their differences and similarities of these two subjects is relevant and necessary. It is difficult to study and understand administrative law without reference to its constitutional roots. This section outlines the interdependence between constitutional and administrative

law. Lastly it provides a comparative survey of the nature, form and scope of administrative law in common law and civil law countries.

The last part of this chapter briefly summarizes the historical development of administrative law as new legal phenomena at a global level and in Ethiopia. The development of 'Ethiopian administrative law' is discussed with some emphasis on its current and future situations within the federal and regional context.

Objectives: At the end of this chapter, students are expected to:

- Analyze the economic and political circumstances which shaped the evolution and development of administrative law.
- Define administrative law
- Understand clearly the basic purpose of administrative law and analyze the way such purpose is attained.
- Differentiate red light and green light theories of administrative law.
- Explain the place of administrative law in ensuring rule of law and enforcement of human right.
- Describe the similarity, difference and interdependence between administrative law and constitutional law.
- Compare and contrast the nature & development of administrative law in continental and common law countries.
- Examine the present state of administrative law in Ethiopia in light of the federal structure.

1.1 The Modern Welfare State and Evolution of Administrative Law

In order to understand the nature of administrative law, you should start studying the subject by looking at the political and economic circumstances that led to its 'creation,' /or its 'invention'/ as a distinct subject at a certain point in history.

Let's begin our inquiry by asking the following preliminary questions?

1) What is the meaning of the following terms?

A) laissez faire B) police state C) welfare state D) power E) administration

2) Compare the 'police state' and the 'welfare state' in light of the following points and list down the differences.

A) The role of government

B) The underlying political philosophy

C) Individual liberty and freedom

D) Extent of power of the government (extent of governmental interference)

The change in the role of government and thereby the transformation of the 'police state' to the 'welfare state' has necessitated the need for conferring more power on the administration and simultaneously the need for controlling this power. The increasing growth of these two directions, i.e. power vs. control, their conflict and struggle somehow reflect the growth of the administrative law.

Administrative law is the by- product of the growing of socio- economic functions of the state and the increased powers of the government. Power has become very necessary in the developed society and the relationship of the administrative authorities has become very complex. In order to regulate these complex relations, some law is necessary, which may bring about regularity, certainty and may check at the same time the misuse of power vested in the administration.

In the ancient society the functions of the state were very few, the prominent among them being protection from foreign invasion, levying of taxes and maintenance of internal peace and order. The rapid growth of the administrative law in modern times is the direct result of the growth of administrative powers. The theory of laissez faire in the 19th century envisages minimum government control, maximum free enterprise and contractual freedom. The state was characterized as the law and order state. Its role was limited to the

traditional role of government i.e. as a protector. The management of social and economic life was not regarded as government responsibility. But laissez faire doctrine resulted in human misery. The unequal bargaining power between labour and management resulted in exploitation of workers, dangerous conditions of work and child labour. This ultimately led to the spread of poverty and the concentration of wealth in a few hands. Then it came to be recognized that the state should take active role in ameliorating the conditions of power. This approach gave rise to the favoured state intervention, social control and regulation of individual enterprise. The 'negative state' was then forced to assume a positive role. In course of time, out of dogma of collectivism emerged the concept of "social welfare state" which laid emphasis on the role of the state as a vehicle of socio- economic- regeneration and welfare of the state. Thus, the growth of the administrative law is to be attributed to a change of philosophy as to the role and function of the state.

The characteristics of a modern welfare state in which we line in may be summarized as:

- A vast increase in the range and detail of government regulation of privately owned economic enterprise;
- The direct furnishing of services by government to individual members of the community, and
- Increased government ownership and operation of industries and businesses.

The welfare state in effectively carrying out these vast functions to attain socio- economic justice, inevitability will come in direct relationship and encounter with the private citizens. Therefore, the attainment of socio economic justice, being a conscious goal of state policy, is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with state power holders. Striking a balance and bringing about harmony between power and justice is the central mission of the administrative law.

It is clear that political and economic circumstances brought about the existence of administrative law. Administrative law was created as an instrument to control the ever-expanding governmental power. As Acton once said ' power corrupts and absolute power

corrupts absolutely.' Concentration of power in the hands of public officials, unless regulated and controlled properly and effectively, always poses a potential danger to the rights, freedom and liberty of individuals. Administrative law was developed as a response to the threats of 'big government.' In other words as. Massey has put it, administrative law is the by-product of an intensive form of government.

Big government or what is referred to, as the welfare state, is the product of a response to the economic, social and political reality of the 19th century. The political theory prevalent at the time, i.e. Laissez faire, failed to solve the economic ills and social evils which resulted in poverty, ignorance, exploitation and suffering of the mass. Due to the emphasis given to wider individual freedom, interference of government was minimal, and its power was limited.

Administrative law was almost non-existent at this time. When the power of the government is less and limited, the degree of interaction with the individual is minimal. Hence, the need for administrative law as a power controlling mechanism becomes insignificant under these situations.

The evolution of administrative law goes in a parallel progressive stage with the transformation of the 'police state' to the 'welfare state.' The reason for the transformation was the reason that necessitated conferring more power on the state. The pitfalls, defects and shortcomings of the 'police state' became clear at the end of the 20th century, specifically after the Second World War. The suffering, poverty and exploitation of the mass of the population were sufficient to justify the need to confer more power on the government. With more powers, the government also assumed new roles geared towards alleviating the social and economic problems and social evils to bring about development, social justice and equal distribution of wealth. Administrative law is the response to the problem of power. It unequivocally accepts the need or necessity of power, simultaneously stressing the need to ensure the exercising of such power within proper bounds and legal limits. Controlling the exercise and excesses of power is the essence and mission of the administrative law.

1.2 Definition, Purpose, Scope and Sources of Administrative Law

A) Definition

There is a great divergence of opinion regarding the definition of concept of the administrative law. The is because of the tremendous increase in the administrative process that it makes impossible to attempt any precise definition of administrative law which can cover the entire range of the administrative process. Hence one has to expect differences of scope and emphasis in defining administrative law. This is true not only due to the divergence of the administrative process within a given country, but also because of the divergence of the scope of the subject in the continental and Anglo – American legal systems.

However, two important facts should be taken into account in an attempt of understanding and defining administrative law. Firstly, administrative law is primarily concerned with the manner of exercising governmental power. The decision making process is more important than the decision itself. Secondly, administrative law cannot fully be defined without due regard to the functional approach. This is to mean that the function (purpose) of administrative law should be the underlying element of any definition. The ultimate purpose of administrative law is controlling exercise of governmental power. The 'control aspect' impliedly shades some light on the other components of its definition. Bearing in mind these two factors, let us now try to analyze some definitions given by scholars and administrative lawyers.

Austin has defined administrative law, as the law which determines the ends and modes to which the sovereign power shall be exercised. In his view, the sovereign power shall be exercised either directly by the monarch or indirectly by the subordinate political superiors to whom portions of those powers are delegated or committed in trust.

Schwartz has defined administrative law as "the law applicable to those administrative agencies, which possess delegated legislation and adjudicative authority.' This definition is a narrower one. Among other things, it is silent as to the control mechanisms and those remedies available to parties affected by an administrative action.

Jennings has defined Administrative law as "the law relating to the administration. It determines the organization, powers and duties of administrative authorities. Massey criticizes this definition because it fails to differentiate administrative and constitutional law. It lays entire emphasis on the organization, power and duties to the exclusion of the manner of their exercise. In other words, this definition does not give due regard to the administrative process, i.e. the manner of agency decision making, including the rules, procedures and principles it should comply with.

Dicey like Jennings with out differencing administrative law from constitutional law defines it in the following way. 'Firstly, it relates to that portion of a nation's legal systems which determines the legal status and liabilities of all state officials. Secondly, defines the rights and liabilities of private individuals in their dealings with public officials. Thirdly, specifies the procedures by which those rights and liabilities are enforced.'

This definition is mainly concerned with one aspect of administrative law, namely judicial control of public officials. It should be noted, that the administrative law, also governs legislative and institutional control mechanisms of power. Dicey's definition also limits itself to the study of state officials. However, in the modern administrative state, administrative law touches other types of quasi- administrative agencies like corporations, commissions, universities and sometimes, even private domestic organizations. Davis who represents the American approach defines administrative law as; "The law that concerns the powers and procedures of administrative agencies, specially the law governing judicial review of administrative action." The shortcoming of this definition according to, Massey is that it excludes rule - application or purely administrative power of administrative agencies. However, it should be remembered that purely administrative functions are not strictly within the domain of administrative law, just like rule making (legislative) and adjudicative (judicial) powers. Davis's definition is indicative of the approach towards administrative law, which lays great emphasis on detailed, and specific rule-making and adjudicative procedures and judicial review through the courts for any irregularity. He excludes control mechanisms through the lawmaker and institution like the ombudsman.

Massey gives a wider and working definition of administrative law in the following way.

" Administrative law is that branch of public law which deals with the organization and powers of administrative and quasi administrative agencies and prescribes the principles and rules by which an official action is reached and reviewed in relation to individual liberty and freedom"

From this and the previous definitions we may discern that the following are the concerns of administrative law.

It studies powers of administrative agencies. The nature and extent of such powers is relevant to determine whether any administrative action is ultravires or there is an abuse of power. It studies the rules, procedures and principles of exercising these powers. Parliament, when conferring legislative or adjudicative power on administrative agencies, usually prescribes specific rules governing manner of exercising such powers. In some cases, the procedure may be provided as a codified act applicable to all administrative agencies. It also studies rules and principles applicable to the manner of exercising governmental powers such as principles of fairness, reasonableness, rationality and the rules of natural justice.

It studies the controlling mechanism of power. Administrative agencies while exercising their powers may exceed the legal limit abuse their power or fail to comply with minimum procedural requirements. Administrative law studies control mechanisms like legislative & institutional control and control by the courts through judicial review.

Lastly it studies remedies available to aggrieved parties whose rights and interests may be affected by unlawful and unjust administrative actions. Administrative law is concerned with effective redress mechanisms to aggrieved parties. Mainly it is concerned with remedies through judicial review, such as certiorari, mandamus, injunction and habeaus corpus.

B) Purpose of Administrative Law

There has never been any serious doubt that administrative law is primarily concerned with the control of power. With the increase in level of state involvement in many aspects of

everyday life during the first 80 years of the twentieth century, the need for a coherent and effective body of rules to govern relations between individuals and the state became essential. The 20th century saw the rise of the "regulatory state" and a consequent growth in administrative agencies of various kinds engaged in the delivery of a wide variety of public programs under statutory authority. This means, in effect, the state nowadays controls and supervises the lives, conduct and business of individuals in so many ways. Hence controlling the manner of exercise of public power so as to ensure rule of law and respect for the right and liberty of individuals may be taken as the key purpose of administrative law.

According to Peer Leyland and Tery Woods (Peter Leyland and Terry Woods, Textbook on Administrative Law, 4th ed.) Administrative law embodies general principles applicable to the exercise of the powers and duties of authorities in order to ensure that the myriad and discretionary powers available to the executive conform to basic standards of legality and fairness. The ostensible purpose of these principles is to ensure that there is accountability, transparency and effectiveness in exercising of power in the public domain, as well as the observance of rule of law.

Peer Leyland and Tery Woods have identified the following as the underlying purposes of administrative law.

- It has a control function, acting in a negative sense as a brake or check in respect of the unlawful exercise or abuse of governmental/ administrative power.
- It can have a command function by making public bodies perform their statutory duties, including the exercise of discretion under a statute.
- It embodies positive principles to facilitate good administrative practice; for example, in ensuring that the rules of natural justice or fairness are adhered to.
- It operates to provide accountability and transparency, including participation by interested individuals and parties in the process of government.
- It may provide a remedy for grievances at the hands of public authorities.

Similarly I.P. Massey **(I.P. Massey, Administrative Law, 5th ed.)** identifies the four basic bricks of the foundation of administrative law as:

- To check abuse of administrative power.
- To ensure to citizens an impartial determination of their disputes by officials so as to protect them from unauthorized encroachment of their rights and interests.
- To make those who exercise public power accountable to the people.

To realize these basic purposes, it is necessary to have a system of administrative law rooted in basic principles of rule of law and good administration. A comprehensive, advanced and effective system of administrative law is underpinned by the following three broad principles:

Administrative justice, which at its core, is a philosophy that in administrative decision-making the rights and interests of individuals should be properly safe guarded.

Executive accountability, which has the aim of ensuring that those who exercise the executive (and coercive) powers of the state can be called on to explain and justify the way in which they have gone about that task.

Good administration- Administrative decision and action should conform to universally accepted standards, such as rationality, fairness, consistency and transparency.

C) Sources of Administration Law

Administrative law principles and rules are to be found in many sources. The followings are the main sources of administrative law in Ethiopia.

The Constitution

The F.D.R.E constitution contains some provisions dealing with the manner and principle of government administration and accountability of public bodies and officials. It mainly provides broad principles as to the conduct and accountability of government, the principle of direct democratic participation by citizens and the rule of law. It also embodies the

principle of separation of powers by allocating lawmaking power to the house of people's representatives, executive power cumulatively to the Prime Minister and Council of Ministers, and finally the power to interpret the laws to the judiciary. Art, 77(2) talks about the power of Council of Ministers to determine the internal organizational structure of ministries and other organs of government, and also Art 77(3) envisages the possibility of delegation of legislative power are also relevant provisions for the study of the administrative law, (see also Articles 9(1), 12, 19(4), 25, 26,37,40, 50(9), 54(6)(7) 55(7), (14)(15), (17),(18),58,66(2),72-77,82,83,93,101-103 of F.D.R.E constitution).

Legislation

Laws adopted by parliament, which may have the effect of creating an administrative agency, or specify specific procedure to be complied by the specific authority in exercising its powers, can be considered a primary sources for the study of administrative law. The statute creating an agency known as enabling act or parent act, clearly determines the limit of power conferred on a certain agency. An administrative action exceeding such limit is an ultra virus, and in most countries the courts will be ready to intervene and invalidate such action. Moreover, parliament, when granting a certain power, is expected to formulate minimum procedure as to how that power can be exercised to ensure fairness in public administration. This can be done, on the one hand, by imposing a general procedural requirement in taking any administrative action mainly administrative rule making and administrative adjudication just like the American Administrative Procedure Act (APA). And on the other hand, parliament in every case may promulgate specific statutes applicable in different situations.

Delegated Legislation

Rules, directives and regulations issued by Council of Ministers and each administrative agencies are also the main focus of administrative law. Administrative law scholarship is concerned with delegated legislation to determine its constitutionality and legality or validity and ensure that it hasn't encroached the fundamental rights of citizens. One aspect of such guarantee is subjecting the regulation and directive to comply with some minimum

procedural requirements like consultation (public participation) and publication (openness in government administration). Arbitrary exercise of power leads to arbitrary administrative action, which in turn, leads to violation of citizen's rights and liberty. Hence, the substance and procedure of delegated legislation is an important source of administrative law.

Judicial Opinion

Much, but not most, of the doctrine that envelops and controls administrative power is found in judicial analysis of other sources. However, much of administrative law will not be found solely in judicial opinions. Furthermore, the opinions themselves must be carefully pursued to avoid generalizations about controls on agency behavior that may not be appropriate, as the outcome of many cases may turn on particular statutory language that may not necessarily reflect the nature of disputes in other agencies.

The American experience as to judicial opinion influencing administrative law is characterized by lack of generalization and fluctuating impacts. These may be due to two reasons. First, cases coming before the courts through judicial review are insignificant compared to the magnitude of government bureaucracy and the administrative process. Second, even as between two apparently similar cases, there is a possibility for points of departure.

In Ethiopia, judicial opinion is far from being considered even as the least source of administrative law. Only cases less than 1% go to court through judicial reviews. The subject is not known by judges, lawyers, the legal profession and administrative officials, let alone by the poor and laypersons who are expected to seek judicial remedy for unlawful administrative acts and abuse of power by public officials. However given the fact that presently the rule of precedent is applicable, judicial opinion, it is hoped, may have a limited role as one of the sources of administrative law in Ethiopia.

C) Scope of Administrative Law

I- Public Law/Private Law Divide

The boundaries of administrative law extend only when administrative agencies and public officials exercise statutory or public powers, or when performing public duties. In both civil and common-law countries, these types of functions are sometimes called "public law functions" to distinguish them from "private law functions". The former govern the relationship between the state and the individual, whereas the later governs the relationship between individual citizens and some forms of relationships with the state, like relationship based on government contract.

For example, if a citizen works in a state owned factory and is dismissed, he or she would sue as a "private law function". However, if he is a civil servant, he or she would sue as a "public law function". Similarly, if residents of the surrounding community were concerned about a decision to enlarge the state- owned factory because of environmental pollution, the legality of the decision could be reviewed by the courts as a "public law function." It is also to be noted that a contract between an individual or business organization with a certain administrative agency is a private law function governed by rules of contract applicable to any individual – individual relationship. However, if it is an administrative contract it is subject to different rules (see civ. code art 3136 ff).

The point here is that the rules and principles of administrative law are applicable in a relationship between citizens and the state; they do not extend to cases where the nature of the relationship is characterized by a private law function.

B) Substance vs. Procedure

Many of the definition and approaches to administrative law are limited to procedural aspects of the subject. The focus of administrative law is mainly on the manner and procedure of exercising power granted to administrative agencies by the legislature. Fox describes the trend and interaction between substance and procedure as:

'It is the unifying force of the administrative process – in dramatic contrast to the wide variety of substantive problems with which agencies deal- that has persuaded most administrative law professors to concentrate on agency procedure rather than agency substance. Hence, to a wider extent, the study of administrative law has been limited to analyzing the manner in which matters move through an agency, rather than the wisdom of the matters themselves.'

With respect to judicial review, the basic question asked is not whether a particular decision is "right", or whether the judge, or a the Minister, or officials have come to a different decision. The questions are what is the legal limit of power or reasonable limit of discretion the law has conferred on the official? that power been exceeded, or otherwise unlawfully exercised? Therefore, administrative law is not concerned with the merits of the decision, but with the decision making process.

1.3 Theoretical Perspectives

The role of law in modern state is evidently a complex one. The legal thought on administrative law is largely shaped by the role of law generally and the role of administrative law in public administration specifically. The traditional view of administrative law is that it should aim to bolster the rule of law and ensure the accountability of executive government to the will of parliament and, at least indirectly, to the people. Cane describes the role of courts in achieving such purpose of administrative law in the following woeds:

"It is often said that the enforcement of statutory duties and the control of the exercise of statutory powers by the courts is ultimately justifiable in terms of the doctrine of parliamentary supremacy: even though parliament has not expressly authorized the courts to supervise governmental activity, it can not have intended breaches of duty by governmental agencies to go un-remedied (even if no remedy is provided in the statute itself), nor can it have intended to give administrative agencies the freedom to exceed or abuse their powers, or to act unreasonably. It is the task of the courts to interpret and

enforce the provisions of statutes, which impose duties and confer powers on administrative agencies. In so doing they are giving effect to the will of parliament."

This approach puts more emphasis on the role of courts through judicial reviews to control arbitrary and ultravires administrative action. Presently, the perspectives on administrative law are summarized by two contrasting models labeled by Harlow and Rowling as 'red light' and 'green light' theories. The former is more conservative and control-oriented; the latter is more utilitarian (socialist) in orientation and facilitative in nature. Both significantly serve to describe the concept of administrative law, and to act as normative (i.e. moral and political) suppositions about what its role in society ought to be.

A) Red Light Theory

The red light approach advocates strong role for the courts to review administrative decisions. It considers that the function of law is to control the excesses of state power. "The red light view can be seen to originate from a political tradition of 19th century laissez faire (minimal state) theory. It embodied a deep-rooted suspicion of governmental power and a desire to minimize the encroachment of the state on the rights (especially property rights) of individuals.

According to this theory of state, the best government is the one that governs least. Wider power means danger to the rights and liberty of citizens. Hence, the red- light theory serves the function of controlling excess and arbitrary power, mainly by the courts. Its descriptive feature is that, on the one hand, it gives much attention on control of governmental power, and on the other hand, it is confident that the effective controlling instrument are the courts through judicial review; As Harlow and Rawlings put it:

"Behind the formalist tradition, we can often discern a preference for a minimalist state. It is not surprising, therefore, to find many authors believing that the primary function of administrative law should be to control any excess of state power and subject it to legal, and more especially judicial control. It is this conception of administrative law that we have called 'red light theory".

B) Green Light Theory

The green light approach considers that the function of administrative law is to facilitate the operation of the state. It is based on the rationale that bureaucrats will function most efficiently in the absence of intervention. Administrative law should aim to help simplifying the procedures and enhance efficiency. It starts from the standpoint of a more positive, largely social and democratic view of the state.

The green light theory is originated from the utilitarian tradition, which proposes promoting the greatest good for the greatest number. According to the utilitarian theory, the state is expected to provide the minimum standards of provision, including housing, education, health, social security, and local services. To provide maximum satisfaction for most of its people, the state should assume a broader role, hence, should possess wider powers. The green light theory broadly supports the introduction of policies aiming at developing public service provisions. Law is perceived as a useful weapon and an enabling tool. It is something very concrete and can provide in principle, at least, the proper authority and framework with which to govern consensually. It regards law not as a controlling mechanism, rather as facilitative tool. Consequently, it considers the court's intervention as an obstacle to efficiency.

Harlow & Rawling write:

"Because they see their own function as the resolution of disputes and because they see the administrative function from the outside, lawyers traditionally emphasize external control through adjudication. To the lawyer, law is the policeman; it operates as an external control, often retrospectively. But a main concern of green light writers is to minimize the influence of the courts. Courts, with their legalistic values, were seen as obstacles to progress and the control which they exercise as unrepresentative and undemocratic. To emphasis a crucial point in green light theory, decision making by an elite judiciary imbued with a legalistic, rights based ideology and eccentric vision of the 'public interest' was never a plausible counter to authoritarianism."

1.4 The Relationship of Administrative Law to Constitutional Law and Other Concepts

1.4.1 Constitutional Law and Administrative Law

Administrative law is categorized as public law since it governs the relationship between the government and the individual. The same can be said of constitutional law. Hence, it is undeniable that these two areas of law, subject to their differences, also share some common features. With the exception of the English experience, it has never been difficult to make a clear distinction between administrative law and constitutional law. However, so many administrative lawyers agree that administrative law cannot be fully comprehended with out a basic knowledge of constitutional law. As Justice Gummov has made it clear "The subject of administrative law can not be understood or taught without attention to its constitutional foundation"

This is true because of the close relationship between these two laws. To the early English writers there was no difference between administrative and constitutional law. Therefore, Keitch observed that it is 'logically impossible to distinguish administrative law from constitutional law and all attempts to do so are artificial."

However, in countries that have a written constitution, their difference is not so blurred as it is in England. One typical difference is related to their scope. While constitutional law deals, in general, with the power and structures of government, i.e. the legislative, the executive and the judiciary, administrative law in its scope of study is limited to the exercise of power by the executive branch of government. The legislative and the judicial branches are relevant for the study of administrative law only when they exercise their controlling function on administrative power.

Constitutional law, being the supreme law of the land, formulates fundamental rights which are inviolable and inalienable. Hence, it supersedes all other laws including administrative law. Administrative law does not provide rights. Its purpose is providing principles, rules and procedures and remedies to protect and safeguard fundamental rights. This point, although relevant to their differences, can also be taken as a common ground

shared by constitutional and administrative law. To put it in simple terms, administrative law is a tool for implementing the constitution. Constitutional law lays down principles like separation of power and the rule of law. An effective system of administrative law actually implements and gives life to these principles. By providing rules as to the manner of exercising power by the executive, and simultaneously effective controlling mechanisms and remedies, administrative law becomes a pragmatic tool in ensuring the protection of fundamental rights. In the absence of an effective system of administrative law, it is inconceivable to have a constitution which actually exists in practical terms.

Similarly, the interdependence between these two subjects can be analyzed in light of the role of administrative law to implement basic principles of good administration enshrined in the F.D.R.E. constitution. The constitution in Articles 8(3), 12(1) and 12(2), respectively provides the principles of public participation, transparency and accountability in government administration. As explained above, the presence of a developed system of administrative law is sine qua non for the practical realization of these principles.

Administrative law is also instrumental in enhancing the development of constitutional values such as rule of law and democracy. The rules, procedures and principles of administrative law, by making public officials, comply with the limit of the power as provided in law, and checking the validity and legality of their actions, subjects the administration to the rule of law. This in turn sustains democracy. Only, in a government firmly rooted in the principle of rule of law, can true democracy be planted and flourished.

Judicial review, which is the primary mechanism of ensuring the observance of rule of law, although mostly an issue within the domain of administrative law, should look in the constitutional structure for its justification and scope. In most countries, the judicial power of the ordinary courts to review the legality of the actions of the executive and administrative agencies emanates from the constitution. The constitution is the supreme document, which confers the mandate on the ordinary courts. Most written constitutions contain specific provisions allocating judicial review power to the high courts, or the Supreme Court, including the grounds of review and the nature and type of remedies, which could be granted to the aggrieved parties by the respective courts.

A basic issue commonly for administrative law and constitutional law is the scope of judicial review. The debate over scope is still continuing and is showing a dynamic fluctuation, greatly influenced by the ever changing and ever expanding features of the form and structure of government and public administration. The ultimate mission of the role of the courts as 'custodians of liberty', unless counter balanced against the need for power and discretion of the executive, may ultimately result in unwarranted encroachment, which may have the effect of paralyzing the administration and endangering the basic constitutional principle of separation of powers. This is to mean that the administrative law debate over the scope of judicial review is simultaneously a constitutional debate.

Lastly, administrative and constitutional law, share a common ground, and supplement each other in their mission to bring about administrative justice. Concern for the rights of the individual has been identified as a fundamental concern of administrative law. It ultimately tries to attain administrative justice. Sometimes, the constitution may clearly provide right to administrative justice. Recognition of the principles of administrative justice is given in few bills of rights or constitutional documents. Australia and South Africa may be mentioned in this respect.

Constitutional law needs to be understood to include more than the jurisprudence surrounding the express, and implied provisions of any constitution. In its broader sense, constitutional law connotes "the laws and legal principles that determine the allocation of decision-making functions amongst the legislative, executive and judicial branches of government, and that define the essential elements of the relationship between the individual and agencies of the state". Wade has observed that administrative law is a branch of constitutional law and that the "connecting thread" is "the quest for administrative justice".

1.4.2. Administrative Law and Human Rights

Every branch of law has incidental effects on the protection or infringement of human rights, whether by constraining or enabling actions which affect other people. Administrative law is, however, particularly vulnerable to the permeation of human rights

claims, since, like human rights law, it primarily constrains the exercise of public power, often in controversial areas of public policy, with a shared focus on the fairness of procedure and an emphasis on the effectiveness of remedies.

At an abstract level, there is a consonance of fundamental values underlying human rights law and administrative law. Both systems of law aim at restraining arbitrary or unreasonable governmental action and, in so doing, help to protect the rights of individuals. Both share a concern for fair and transparent process, the availability of review of certain decisions, and the provision of effective remedies for breaches of the law. The correction of unlawful decision-making through judicial review may help to protect rights. The values underlying public law – autonomy, dignity, respect, status and security – closely approximate those underlying human rights law. Moreover, each area of law has been primarily directed towards controlling 'public' power, rather than interfering in the 'private' realm, despite the inherent difficulties of drawing the ever-shifting boundary between the two. A culture of justification permeates both branches of law with an increasing emphasis on reasons for decisions in administrative law and an expectation in human rights law that any infringement or limitation of a right will be justified as strictly necessary and proportionate. There is also an ultimate common commitment to the basic principles of legality, equality, the rule of law and accountability. Both administrative and human rights laws assert that governments must not intrude on people's lives without lawful authority. Further, both embody concepts of judicial deference (or restraint) to the expertise of the executive in certain matters. In administrative law, for example, this is manifested in a judicial reluctance to review the merits, facts or policy of a matter.

There are also marked differences between the two areas of law. Human rights law is principally concerned with protecting and ensuring substantive rights and freedoms, whereas administrative law focuses more on procedure and judicial review attempts made to preserve a strict distinction between the legality and the merits of a decision. Human rights law protects rights as a substantive end in themselves, whereas administrative law focuses on process as the end and it may be blind to substantive outcomes, which are determined in the untouchable political realm of legislation or government policy. It is perfectly possible for a good administration to result in serious human rights violations

(and conversely, compatibility with human rights law does not preclude gross maladministration).

Human rights law is underpinned by the paramount ideal of securing human dignity, whereas administrative law is more committed to good decision-making and rational administration. The three broad principles said to have underpin administrative law are largely neutral on substantive outcomes: administrative justice, executive accountability and good administration.

The traditional emphasis of administrative law on remedies over rights reverses the direction of human rights law, which may provide damages for the breach of a right, whereas this is not the natural consequence of invalid action in administrative law. At the same time, administrative law remedies may still guarantee essential human rights; an action for release from unlawful detention (habeas corpus) can secure freedom from arbitrary detention, and an associated declaration by the courts may provide basis for pursuing compensatory damages in a tortious claim for false imprisonment.

1.4.3 Administrative Law and Good Governance

Administrative law plays an important role in improving efficiency of the administration. The rules, procedures and principles of manner of exercising power prescribed by administrative law are simultaneously principles underlying good governance. They also share a common goal. One of the common destinations of administrative law and good governance is the attainment of administrative justice. The set of values of administrative justice which mainly comprises openness, fairness, participation, accountability, consistency, rationality, legality, impartiality and accessibility of judicial and administrative individual grievance procedures are commonly shared by administrative law and good governance.

Administrative justice is considered as having two themes. First, it comprehends the range of entities which deliver complaint and review services and assurances of those services to the citizen. Second, it comprehends the kind of resolution sought to be achieved. The

attainment of administrative justice largely depends on the existence of efficient and effective institutions like the ombudsman, administrative tribunals and ordinary courts.

Review by the ordinary courts, judicial review, supports the legitimacy of the decision making process that it reviews. A decision-maker whose decisions are reviewable can claim that because the decision is reviewable for its legality, as determined by an independent judiciary, the decision has a legitimacy that it otherwise would not have. Its legitimacy lies on the fact that it is open to a dissatisfied person to challenge its validity.

It can also be said that a decision reached by a fair decision making process is likely to be a better decision. It is likely to be better because requiring the decider to hear both points of view can make a contribution to the soundness of the decision. But, beyond that, we have to acknowledge that judicial review does not have a great deal to contribute to the quality of decision making by the executive government. Its ultimate goal remains to be maintaining the rule of law.

Administrative law also helps to realize the three underlying principles of good administration: i.e. accountability, transparency and public participation. Accountability is fundamental to good governance in modern, and open societies. A high level of accountability of public officials is one of the essential guarantees and underpinnings, not just of the kinds of civic freedoms enjoyed by the individual, but of efficient, impartial and ethical public administration. Indeed, public acceptance of agovernment and the roles of officials depend upon trust and confidence founded upon the administration being held accountable for its actions. The administrative law system, when working properly, supplements and enhances the traditional processes of ministerial and parliamentary accountability in any system of government.

Accountability does not have a precise meaning. The underlying notion is that of giving an account or an explanation to a person or body to whom one is responsible. That part of it is clear enough. But the form or process of accountability, as that term is used in debate, varies widely. The process of accountability ranges from merely being subject to comment or criticism, through to loss of office, to personal liability for damage caused by a poor

decision, and to prosecution for criminal offences. The discussion in which accountability is an issue is often confused because of the different processes and meanings of accountability. There is often a silent assumption that only certain processes of accountability, such as loss of office, represent true accountability. But, it is suggested that the underlying idea of accountability is that of giving an account or an explanation, and that it is necessary to recognize that the process of accountability can vary widely.

The accountability of the executive government for decisions made in the exercise of public powers may be manifested through different ways. By public powers it is to mean powers conferred by statute, and when the power is exercised in the public interest. This typically refers to decisions that are amenable to judicial review i.e. reviewable decisions.

Executive government refers to Ministers and public servants or government employees. Ministers are accountable to the electorate. They are called upon to explain their decisions, and can lose their parliamentary seat and hence their ministerial position. However, in practical terms, they are accountable to the electorate only as a group, not as individuals. If the party of which a minister is a member loses an election, the minister will lose office along with all other ministers. In that respect, the fate of the ministry is closely tied to the performance of the Prime Minister or Premier of his or her role. But this form of accountability cannot really be described as accountability for reviewable decisions. The link is too distant. This process of accountability is, in reality, not linked to the making of reviewable decisions.

Ministers are accountable to Parliament for reviewable decisions. They can be called upon to provide an explanation for, and account of their decisions. But, there is no convention these days of ministerial responsibility for reviewable decisions made by public servants. And, even at the level of reviewable decisions made by ministers, the control that the executive government exerts over parliament means that, in the ordinary sense, there is no effective accountability to parliament for particular reviewable decisions. Whether an adverse consequence flows from the making of a reviewable decision by a minister, or by a minister's department,it depends upon political aspects of the decision, and the process of parliamentary accountability is a highly political one. This is not an effective form of

accountability for decision-making. A similar comment applies to the accountability of an individual minister to the prime minister or premier who leads the Government of which the minister is a part.

Public servants are accountable to a departmental head, and sometimes to a minister, for reviewable decisions that they make. But, in a system in which most public servants can be punished or dismissed only for a case, erroneous reviewable decisions do not lead to sanctions against the decision-maker, unless the decision involves misconduct as distinct from mere error. Accountability involving loss of office or some formal punishment has only a slender link to decision making by ministers and public servants. To treat the executive government as accountable for the making of reviewable decisions, by a process involving loss of office, is erroneous. Neither ministers nor public servants are usually required to submit their decision-making processes to contemporaneous public scrutiny. There can be contemporaneous comment upon a decision that is being made or is anticipated. A comment may take place in parliament, or on the media, or elsewhere. There can also be retrospective scrutiny, in particular through judicial review, by merits review when legislation so provides, by an Ombudsman or use of freedom of information legislation. However, it remains true to say that the decision-making process of the executive government is not transacted in public.

It is also true that responsibility for reviewable decisions made by the executive government is often diffused. This is to mean that reviewable decisions made by the executive government are often made by a process of consideration and advice at various levels. Responsibility for a given decision may be diffused downwards to various advisers, or upwards to a departmental policy. For this reason, it is often difficult to identify a reviewable decision made by the executive government with a particular decision-maker. That can be a limit upon accountability. Ministers and public servants are not routinely required to give full reasons for a reviewable decision. Ministers and public servants are usually not personally liable for damage or loss caused by a poor decision. If a decision that goes beyond power is made, the decision-maker might then be liable in damages, but even then would usually be indemnified by the executive government. Decisions made by the executive government are, of course, subject to judicial review to determine whether

they are made within power (jurisdiction), whether they are in compliance with the law, and whether they fair or natural justices. Some governments have also provided a process of review on the merits. Many reviewable decisions made by the executive government are subject to scrutiny by parliamentary committees, by an Ombudsman, or other institutions such as the Auditor General and the Ethics and Anti-corruption Commission.

Administrative law also ensures transparency in the conduct of government administration and the decision making process. One of the requirements of an open government is the right of individuals to obtain and have access to information. Government has to implement the right to get information through specific legislation. Freedom of information act, adopted in most democratic countries, affords citizens the right to have access to public documents and the right to be timely informed of decisions affecting their interests. Government cannot be held accountable and hence, subject to criticism unless it opens its door to citizens. The existence of freedom of information legislation by itself does not guarantee open government, rather a developed system of administrative law is needed for its proper implementation. Courts, through judicial review should be able to compel public officials denying citizens of their right to get information as provided by law. Institutions, like the ombudsman should also be able to give redress to the aggrieved parties whose rights are denied or violated by the administration.

In addition to this role of administrative law enabling citizens have access to government information, it also ensures openness in the decision-making process. Administrative adjudication should be conducted openly. An interested party should get prior notice detailing the nature of the case, time and place of hearing. The concerned agency proposing a certain measure should disclose all relevant evidence to that party. Such adjudication procedure allows the party to prepare his defense and generally create public confidence in the fairness of the decision- making process.

Similarly, the administration should be transparent in the rule-making process. Before an agency, through its delegation power issues a certain rule or regulation having a binding effect, it is required to make the proposed rule or regulation accessible to concerned parties for commenting and criticism. Once an administrative rule is legally issued, it

should be officially published so that the public could know its content, and if necessary challenges its legality and validity.

Such adjudication and rule making procedures fall within the proper scope of administrative law. Some countries such as America, have introduced a comprehensive and detailed administrative procedure to make the decision-making process open and fair. Other countries, without adopting a comprehensive administrative procedure, have introduced specific procedures for the respective administrative action by the agency.

Such procedures do not only make the conduct of government open to the citizen, but also facilitate public participation in the administrative process. In a state founded on democratic principles, it is axiomatic that the basic human right (beyond access to the necessities of life) is the right to participate in civil society. Indeed, the very notion of representative democracy is predicated upon people exercising their civil rights.

In any system of government representative, democracy, for its lifeblood depends upon the participation of the public. Anything, therefore, which is likely to increase public participation in government, or in governmental decision-making processes is a good thing regardless of the merits or demerits of an individual decision. Obviously, public confidence in the institutions of government is a central concern, for without it, there is likely to be little inclination to participate. And without a public perception that one will be treated fairly by the government, it is doubtful that the confidence necessary to engender a keenness to participate will exist. Fairness in the decision-making process creates public confidence and motivates citizens to engage in active and meaningful participation in government administration.

Administrative law lays down the legal framework by which public's participation is recognized and practically implemented. The principle of public participation as an element of good administration allows citizens to have their say or their voice be heard in the conduct of government administration. In a developed system of administrative law, agencies are required to observe minimum procedures while making judicial decisions or issuing rules and procedures. The principle of natural justice which mainly requires an

individual's defence be heard and get an impartial and fair treatment in the adjudication process acts as a stimulant for public participation indirectly creating public confidence. Unless the public gets a positive impression that the decision making process is fair and impartial, it will be discouraged to participate in other aspects of public affairs seriously.

The rule making procedure, on the other hand, it directly affords an opportunity to participate in the legislative process. One of such procedural requirements is the obligation to conduct consultation with concerned parties. Such consultation may be manifested through conducting an open hearing, collecting suggestions, comments and criticisms on the proposed rule or regulation. The concerned agency is further required to take comments and suggestion from interested parties as an input in the proposed rule. In some cases, it may be required to prepare a statement of reason indicating those comments incorporated, or submit a justification for the reason that were disregarded.

1.4.4 Administrative Law and Democracy

True democracy states that the executive government would be accountable to the people. The various aspect of accountability and the role of administrative law in ensuring accountability in government administration have been discussed above. The term accountability is uniformly applicable to all branches of government: parliamentary, judicial and executive accountability. Even though administrative law is concerned with executive accountability, for a true democracy to flourish, accountability should be manifested in all branches of government. For instance, the executive branch is accountable to parliament. It is an idea which is fundamental to the operation of responsible government. Accountability is accountability to parliament and, and the parliament is the place within which the idea of public scrutiny must find its fulfilment. However, unless parliament strongly challenges the executive and takes appropriate measures, members of parliament themselves should be held accountable to the people for their failure to act according to the interest of the public.

Another meeting point of administrative law and democracy is the principle of rule of law. Administrative law is rooted in the principle of rule of law. Rule of law, in turn

nourishes democracy. Every truly democratic system of government rests upon the rule of law, and no system is truly democratic if it does not. There are at least two principles that are most important for a constitutional government. The first is that the government should be subject to the rule of law. The government should mostly and particularly comply with the basic laws establishing its constitutional structure. The second is that the government should be democratic. These two principles can overlap. For example, a democratic system, particularly one involving representative democracy, requires for its proper working that certain civil liberties be recognized, protected and applied, including rights to freedom of speech, freedom of assembly and freedom of association. However, the recognition and protection of these rights necessarily require that elected governments should comply with the laws, including the common law, that protect those rights. Consequently, within a government characterized by representative type of constitutional structure, the rule of law reinforces the democratic principle.

The two principles can also be in conflict. A conflict occurs when the rule of law is inconsistent with the democratic will. Historically, such conflicts were resolved at common law by judicial review. Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which the executive action is prevented from exceeding the powers and functions assigned to the executive by the law and the interests of the individual are protected accordingly. In order for a government to be both democratic and subject to the rule of law, the government must be accountable, to the electorate and the courts. But, unless the scope of judicial review is properly limited so as to be in harmony with the principle of separation of powers, it may encroach upon the values of democracy.

The conflict between democracy and administrative law is also reflected in the challenge to justify the democratic basis of administrative agencies and administrative decision-making. Administrative agencies make individual decisions affecting citizens' lives and also set general policies affecting an entire economy, though are usually headed by officials who are neither elected nor otherwise directly accountable to the public. A fundamental challenge in both positive and prescriptive scholarship has been to analyze and different administrative decision-making from the standpoint of democracy. This challenge is

particularly pronounced in constitutional systems such as that of United States' in which political party control can be divided between the legislature and the executive branch, each seeking to influence administrative outcomes. Much work in administrative law aims either to justify administrative procedures in democratic terms, or to analyze empirically how those procedures impact on democratic values.

A common way of reconciling unelected administrators' decision-making with democracy is to consider administrators as mere implementers of decisions made through a democratic legislative process. This is sometimes called the 'transmission belt' model of administrative law. Administrators, under this model, are viewed as the necessary instruments used to implement the will of the democratically-controlled legislature. Legislation serves as the 'transmission belt' to the agency, both in transferring democratic legitimacy to administrative actions and in constraining those actions so that they advance legislative goals.

1.5 Administrative Law in Civil Law and Common Law Countries

The comparative method is useful in many branches of law. It is particularly important in administrative law, because of the nature of the leading problems, related way of controlling government according to the interests of both state and citizen, which is common to all the developed nations of the west and in many developing countries of the third world. There is a clear difference with regards to the scope of and the approach to administrative law in these two legal systems.

France is the source of a distinct system of Administrative law known as 'droit administrative', which has a huge impact not only in civil law countries, but also on the system of administrative law of common law countries. In France, Italy, Germany and a number of other countries, there is a separate system of administrative court that deals with administrative cases exclusively. As a natural consequence, administrative law develops on its own independent lines, and is not enmeshed with the ordinary private law as it is in the Anglo- American system. In France, droit administrative is a highly specialized science administered by the judicial wing of the conseil de etat, which is staffed

by judges of great professional expertise, and by a network of local tribunals of first instance.

The British system of administrative law, which is followed through out the English-speaking world, has some salient characteristics, which distinguish it sharply from the administrative law of other European countries adopting continental legal system. The outstanding characteristic of the Anglo- American system is that the ordinary courts, and not special administrative courts, decide cases involving the validity of government action. This can be attributed to the conception of the principle of rule of law as developed by Dicey, which among other things emphasizes the resolution of disputes between government and the citizens through the ordinary courts.

The scope of Administrative law is also wider in scope in the continental system compared to its common law counterpart. Administrative law in civil law countries covers issues such as the organization, powers and duties of administrative authorities, the legal requirements governing their operation, and the remedies available to those adversely affected by administrative action. It also includes subjects like the structure and composition of the various administrative agencies, civil service law, the acquisition and management of property by the administrative authorities, public works, and contractual and non- contractual liability of administrative authorities and public officials.

In Anglo- American countries, administrative law is limited to delegation of rule- making powers, adjudication of administrative cases, manners and procedures of exercising these powers, the mechanisms of controlling and the available remedies. It mainly focuses on control through the courts or judicial review of administrative action by the ordinary courts. Hence the study of composition and structure of administrative power is not its primary concern. Wade & Forsyth, commenting on this point have said:

" An exhaustive account of the structure and functions of government is not necessary in order to explain the rules of administrative law." Moreover, its domain extends only when public officials exercise powers and discharge duties, which are in the nature of public power and statutory duties. In other words, administrative actions which are a private law

nature meaning relations arising out of contract by administrative authorities and their extra- contractual liability falls outside the scope of administrative law.

1.5.1 Administrative Law in Common Law Countries

(Source- wikipidia (http://en.wikipedia.org/wiki/Administrative_law)

Generally speaking, most countries that follow the principles of common law have developed procedures for judicial review that limit the reviewability of decisions made by administrative law bodies. Often, these procedures are coupled with legislation or other common law doctrines that establish standards for proper rulemaking. Administrative law may also apply to review of decisions of the so-called semi-public bodies such as non-profit corporations, disciplinary boards, and other decision-making bodies that affect the legal rights of the members of a particular group or entity.

While administrative decision-making bodies are often controlled by larger governmental units, their decisions could be reviewed by a court of general jurisdiction under some principle of judicial review based upon due process (United States) or fundamental justice (Canada). It must be noted that judicial review of administrative decision, is different from an appeal. When sitting in review of a decision, the court only looks at the method in which the decision has been arrived at, whereas in appeal, the correctness of the decision itself is under question. This difference is vital in appreciating the administrative law in common law countries.

The scope of judicial review may be limited to certain questions of fairness, or whether the administrative action is ultra vires. In terms of ultra vires, actions in the broad sense, a reviewing court may set aside an administrative decision if it is patently unreasonable (under Canadian law), *Wednesbury unreasonable* (under British law), or arbitrary and capricious (under U.S. Administrative Procedure Act and New York State law). Administrative law, as laid down by the Supreme Court of India, has also recognized two more grounds of judicial review which were recognized but not applied by English Courts viz. legitimate expectation and proportionality.

The powers to review administrative decisions are usually established by statute, but were originally developed from the royal prerogative writs of English law such as the writ of mandamus and the writ of certiorari. In certain Common Law jurisdictions such as India, or Pakistan, the power to pass such writs is a constitutionally guaranteed power. This power is seen as fundamental to the power of judicial review and an aspect of the independent judiciary.

1.5.2 Droit Administratif

French administrative law is known as "droit administratiff", which means a body of rules which determine the organization, powers and duties of public administration and regulate the relation of the administration with the citizens of the country. Administrative law in France does not represent the rules and principles enacted by the parliament. It contains the rules developed by administrative courts. Administrative law in France is a judge- made law. This seems strange for a country, representative of the civil law legal system, characterized by the statute law as the primary source of law.

France also has dual court structure: administrative courts and the ordinary courts existing and functioning in an independent line. The highest administrative court is known as Conseil d'etat, which is composed of eminent civil servants, and deals with a variety of matters like claim of damages for wrongful acts of government servants, income tax, pension, disputed elections, personal claims of civil servants against the state for wrongful dismissal or suspension and so on.

Napoleon Bonaparte was the founder of the droit Administratiff who established the Conseil d'etat. He passed an ordinance depriving the law courts of their jurisdiction on administrative matters and other ordinance matters that could be determined only by the consei d'etat. In pre- revolutionary France, a body known as Conseil du roi advised the king in legal and administrative matters, and also discharged judicial functions such as deciding disputes between great nobles. This created tension between those who supported the executive power over judicial powers (Bonapartists) and those who supported the jurisdiction of the ordinary courts (reformists). In August 1790 a law that abolished the

Coneil d' roi and the power of the executive was passed based on the justification of the principle of powers. This law also curtailed the king's powers. However, in 1799, Napoleon, who greatly favoured the freedom of the administration, established the Consei d'etat . However, its function was limited to an advisory role. It had no power to pronounce judgments. In 1872, its formal power to give judgment was established and in the subsequent year in 1873, a law that make the jurisdiction of the Conseil de etat final, was issued respect to all matters involving the administration. In 1889, it started receiving direct complaints from the citizens and not through the ministers. In case of conflicts between the ordinary courts and the administrative courts, regarding Jurisdiction, the matter was decided by the Tribunal des conflicts. This tribunal consisted of an equal number of ordinary and administrative judges and was presided over by the minister of Justice. Droit Administratif does not represent principles and rules laid down by the French parliament; it consists of rules developed by the judges of the administrative courts. Droit administratif therefore, includes three series of rules:

1. Rules dealing with administrative authorities and officials; for example, appointment, dismissal, salary and duties, etc.

2. Rules dealing with the operation of public services to meet the needs of the citizens; for example, public utility like electricity, water etc…

3. Rules dealing with administrative adjudication; for example, private and public liability of public officials.

The following are the main characteristics of the conseil de etat

- Those matters concerning the state and administrative litigation fall within the jurisdiction of administrative courts and cannot be decided by the ordinary of courts of the land.
- In deciding matters concerning the state, and administrative litigation, special rules developed by the administrative courts are applied
- Conflict of jurisdiction between ordinary courts and administrative courts are decided by the agency known as Tribunal des conflicts.
- It protects government officials from control of the ordinary courts.
- Conseil de etat is the highest administrative court.

Brown and Garner have attributed to a combination of following factors as responsible for the success of Conseil de etat.

- The composition and functions of the consei d'etat
- The flexibility of its case- law,
- The simplicity of the remedies available before the administrative courts
- The special procedure evolved by those courts, and
- The character of the substantive law, which they apply.

Further reading

DEVELOPMENTS IN EUROPEAN ADMINISTRATIVE LAW

Frank Esparraga

The question that has frequently been asked is issues related to what can be achieved by comparing different systems of administrative law. There are those (Schwartze) who say that administrative law is a technical field which is a fruitful source for finding "functional equivalents" and that it can readily be compared. It has been suggested in this paper that different systems of administrative laws are influenced to a varying degree by political, constitutional and historical experiences and choices. It is not suggested any correctness in the view of skeptics who say that administrative law is the clearest expression of the national character of a people. The convergence of the

different European systems of administrative law leads to an even greater harmonization of law. Any comparative study also serves a variety of purposes. By providing perspective, comparative study helps us to understand better our own administrative law, to stimulate our minds as to possible weaknesses, and to assist legal reform to find creative solutions for problems.

BELGIUM

The Belgian legal system is patterned to a large extent upon that of the France's legal system During the 19th century, the Belgian ordinary courts worked out a system of substantive droit administratif similar to that of the French system. In Belgium, the Constitution requires the judicial courts to hear disputes over civil and political rights. Citizens' rights with respect to administration are held to be included in these rights, except when they are specifically withdrawn from the jurisdiction of the courts by statute and placed within the jurisdiction of the administrative courts. The Conseil D'Etat, established in 1946, is the highest administrative body with several specialist administrative courts. The lower courts known as la Deputation Permanente du Conseil Provincial also have jurisdiction in certain administrative matters such as taxation. The Conseil D'Etat has five divisions, each with five members. Two of these handle cases in French; two handle cases in Dutch; and one is bilingual. The laws relating to the Conseil D'Etat empower the administrative section of the court to set aside a decision (a term which covers all acts and regulations of administrative authorities) made by an administrative authority, or court. This power is also limited by the general jurisdiction of the judicial courts. The Conseil D'Etat may quash a decision and undertake full judicial review under a number of conditions.

Power to quash or vary: The Conseil D'Etat has the power to quash decisions dealing with disputes with the administration. However, Belgium does not have lower administrative courts. For administrative matters, the Conseil D'Etat is the place of the first and the last resort. The most important cases that the Conseil D'Etat can deal with are those which involve the quashing of acts and regulations of administrative authorities. Such cases are of general interest and are brought to ensure that the law, as opposed to individual rights, is respected.

The Belgian Conseil D'Etat lacks competence when the applicant has the possibility of taking action before the judicial body which is empowered to hear problems involving personal rights, with the exception of disputes over certain political rights which are reserved to the administrative courts. However, an application to quash an administrative regulation always falls within the jurisdiction of the Conseil D'Etat since such applications are of a general nature and independent of whether or not an individual's right has been interfered with.

Belgian law makes a sharp distinction between personal applications to have an administrative measure quashed and objective applications where the application is made independently of whether or not individual rights have been interfered with. The former applications are generally heard in the judicial courts and the latter in the administrative courts.

Power of full judicial review: This is a very restricted power and is only available for a limited number of specific cases laid down by statute and essentially dealing with electoral matters. The jurisdiction of Belgian administrative courts, as will be seen, is quite narrow when compared with the administrative courts of other countries. When it comes to substituting a decision, the principle of separation of administrative and judicial functions prevents the Conseil D'Etat from further activity than quashing the decision. Consequently, when requested to vary or substitute an administrative act that is being challenged before it, the Conseil D'Etat must declare itself incompetent. As to fines, the controversial question of whether or not the Belgian Conseil D'Etat was entitled to impose a fine was answered in a 1990 statute, which granted the Conseil D'Etat the right to impose a fine on an administrative authority that failed to act on a judgment to set aside a decision. With regard to damages, the Conseil D'Etat does not have the authority to attach an order to pay damages to its judgment to quash. Persons subject to public law are subject to tort liability, and an applicant must turn to the judicial judge to enforce performance ordered in judgments of the Conseil D'Etat. As to compensation, the Conseil D'Etat determines requests for damages brought against the state or public bodies for injury sustained as a result of measures taken by them. The

procedure is rare and the Conseil D'Etat only determines it when no other competent court is found.

Belgian Conseil D'Etat is, therefore, obliged by virtue of Article 177 of the Treaty, as a court of last resort, to submit all questions raised by it that involve interpretation of European Union Law to the European Court for preliminary ruling.

The effects of decisions of administrative courts: Any decision emanating from the Conseil D'Etat, which quashes an administrative act, has retrospective effect, although this is limited, in cases of the considerations of equity, public utility and certainty. When an administrative act is quashed, the decisions taken by virtue of that act also lose their legal basis. Because of the fact that it has an absolute binding effect, a decision ordering that an administrative act be quashed creates a precedent binding on all courts. In theory, the Conseil D'Etat is not bound by the decisions of other courts, but it takes them into account.

With regards to the enforcement of decisions of administrative courts in Belgium, some laws force public persons and public bodies to be subject to public law to register in their accounts, should the case arise, the debts that result from adverse judgments handed down by administrative courts. An applicant may, in the case where the Conseil D'Etat decision has not been granted, apply to a non-administrative court to obtain reparation for the loss suffered and may also request the annulment of the new administrative decision. In 1991, a law which allowed the Conseil D'Etat to suspend the carrying out of a particular act or decision by the administration, if the act or decision would be likely to cause the applicant serious loss or damage of a kind which would be very difficult to repair once it had occurred. Was introduced.

GERMANY

Administrative law in Germany is concerned primarily with the validity or revocability of administrative acts and the right to administrative action. There is a tendency towards codification in large parts of German administrative law being codified.

There are five jurisdictional branches in Germany, each with its own court organization: the general courts; the administrative courts; the tax courts; the social courts; and the labour courts. There is also a constitutional court. In addition to the general administrative courts, the tax courts and the social courts are also considered to be administrative courts in certain instances.

There are thirty-five general administrative courts of the first instance—Verwaltungsgerichte; ten appeal courts—Oberverwaltungsgerichte; and the Supreme Court, the Bundesverwaltungsgericht.

Power to quash or vary: The administrative judge in Germany has the power to quash a decision in two ways. The first, which is most often used, is intended to protect a personal right or interest by quashing the contested act. Since the object of this action is the protection of rights or interests of individual persons, the judge must restrict considerations to the part of the act that appear to be unlawful. The second form of action is the direct review of rules and regulations. This enables the administrative judge to revoke certain executive rules which do not have the authority of law. This right to review may be exercised over certain local planning regulations and the law of the "Lander", on condition that the 'Land' has incorporated this review procedure into its law.

The German administrative judge has also the power to obtain an administrative act from the administration, but cannot issue an administrative act in the place of the administration. However, the administrative judge can quash any decision which refuses to grant a request and can oblige the administration to come to a new decision which takes into account the grounds for the decision. In some instances, the judge can oblige the administration to issue the act requested by the applicant. Another possibility open to the German administrative judge is to order measure that is to be served or withheld. This involves full judicial review, but is reserved to certain well-defined matters and is intended to get the administration to pay out a certain sum of money.

Additional powers: In the case of the quashing of an administrative act that has already been carried out, the administrative judge may decide the manner in which the administrative authorities should restitute the previous situation. The

judge cannot, however, substitute himself for the administration to do this. Judicial courts, in principle, have jurisdiction to order the payment of damages. This is the case when the State acts as a private person, in the case of State liability as a result of administrative acts governed by administrative law, or in the case of compensating private persons in expropriation for public purposes. Administrative courts determine State liability resulting from contracts entered into by the administration and, in likewise, the State's liability towards its public servants. The orders or judgments and decisions of these courts may be carried out in accordance with the rules of the Code of Civil Procedure involving the State. The court can appoint a competent authority to carry out its orders in accordance with the orders of the court when the administration is inactive. The provisions of the Code of Civil Procedure to force performance are applicable to the decisions of the administrative courts. However, it is indeed rare that steps have to be taken to force the administration to apply or carry out an order. On most occasions, the court's decisions or orders are obeyed.

Referral before an international court: In the case of conventions dealing with refugees and stateless persons and also in the case of the European Convention for the Protection of Human Rights, the German judge applies international conventions on condition that these conventions have been incorporated into the domestic law. The general rules of international law take precedence over domestic laws, and directly create rights and obligations for all citizens.

Article 177, paragraph 1 of the EEC Treaty, requires courts of the last resort, from which there is no appeal, to transfer all questions to which European Union law may be applied, to the European Court of Justice for preliminary ruling. German administrative courts are bound to take account of the judgments of the European Court of Justice.

The effects of decisions of the administrative courts: Judgments given in administrative cases have relative authority and are subject to challenge. They only bind the parties in relation to the matter concerned. This relative effect stems from the fact that the object of the action is not to decide whether the

administrative act is unlawful, but to pass judgment on the applicant's claim. The subjective nature of an action to have an administrative act quashed explains the fact that the decision has only relative binding authority. Third parties are, however, bound by the fact that the administrative act has been quashed. Decisions quashing regulations are final and these decisions are published. Any administrative act which is quashed is made retrospectively invalid and, if possible, is deemed never to have existed. A decision declaring that a regulation is unlawful takes effect ab initio unless this would cause legal uncertainty.

The enforcement of decisions of administrative courts: In general, the administration respects the principle of the rule of law, and applies the decisions of the administrative courts without direct outside pressure. Problems of enforcement that occur in the cases where the application brought before the court do not have the effect of suspending the act, or decision challenged. In such cases, when the administrative court declares an act or decision annulled, the court may, upon the application of an interested party, specify the way in which a administration must apply its judgment.

The administrative courts may oblige the administration to take a decision or carry out an act that it previously refused to do so. Such a court order may be accompanied by the imposition of a periodic fine. As a general rule, the Code of Civil Procedure may be relied upon the administrative matters to ensure that the decisions and judgments of the administrative courts are enforced. The Code of Civil Procedure provides a specific measure to be taken to encourage the administration to comply voluntarily with the decisions of the courts. The court, before deciding what enforcement measures to adopt, must inform the administration of the decision it intends to pronounce and accord a specific time limit in which the decision should be applied.

FRANCE

Administrative law has evolved as a special branch of law in France with a three tier system of general administrative courts. The first tier has the Tribuneaux Administratifs; the second tier has five Cours Administratives d'Appel; and the

highest administrative court is the Conseil D'Etat to which appeal is required, although in some instances the Conseil D'Etat may be a court of the first instance.

Power to quash or vary: In actions brought involving abuse of power, the judge is informed of arguments which challenge the legality of administrative acts. A judge, in the French Conseil D'Etat, may pronounce the contested decision quashed, if it turns out to be unlawful, otherwise, there are no further powers to annul.

Power of full judicial review: In full judicial review, questions involving the recognition of personal rights and which are attached to an individual legal situation are, in principle, referred to a judge. In such cases, the judge may order the payment of money, or reverse the decision, and in certain cases the judge may even substitute a decision. The extent of the powers actually varies according to the subject matter. Appeals against the judgments made after full judicial review are heard by the administrative courts of appeal, and only go to the Conseil D'Etat on further appeal. Cases concerning abuse of power are appealed before the Conseil D'Etat, but since 1992 appeals involving abuse of power lodged against individual administrative decisions have been progressively assigned to the administrative courts of appeal.

Additional powers: In actions against the abuse of power and in actions for full judicial review, the administrative judge is neither enabled to issue an injunction against the administration, nor may the administration be ordered to pay a fine.

It is a basic principle of French Public Law that the administrative judge is careful not to interfere with the activity of the administration or to give orders to the administration.

The effects of decisions of administrative courts: In France, the effect of a court decision varies. In most cases, it is only relative, but may be absolute if the decision quashes the administrative act as ultra vires. Once administrative acts have been quashed, they lose all legal effects and can no longer be enforced, either by the administration itself or by any other court. Acts quashed

as ultra vires are deemed to have never existed, and they disappear with retrospective effect from the country's legal framework.

The enforcement of decisions of administrative court: The majority of the decisions of the administrative courts are applied in France, although, in recent years, there has been an increase in the number of applications claiming that decisions have not been applied. Putting aside bad faith on the part of those involved, the principal cause is due to the complexity of the decisions, and the lack of legal knowledge of many persons and bodies is subject to administrative decisions. A Decree dating back to 1963 provides a mechanism that aims to prevent administrative court decisions being ignored so as to encourage their application. There is a separate division of the Conseil D'Etat which ensures that this aim is attained. Two Acts of the Parliament, in 1980's and the 1987's, reinforced this aim and added coercive measures. These Acts empower the Conseil D'Etat to impose periodic penalty payments by compelling fines on persons or bodies subject to public law and, in more general terms, on private persons or bodies charged with running public services.

1.6 Development of Administrative Law

1.6.1 In General

Unlike other fields of law, administrative law is a recent phenomenon and can fairly be described as 'infant.' Historically, its emergence could be dated back to the end of the 19th century. This era marked the advent of the 'welfare state' and the subsequent withering away of 'the police state.' The interventionist role of the welfare state practically necessitated the increment of the nature and extent of power of governments. Simultaneous, with such necessity came the need for controlling the manner of exercise of power so as to ensure protection of individual rights, and generally legality and fairness in the administration. With such background, administrative law, as a legal instrument of controlling power, began to grow and develop too fast. Typically, with the proliferation of the administrative agencies, administrative law has shown significant changes in its nature, purpose and scope.

Presently, administrative law, in most legal systems, is significantly developed and undoubtedly recognized as a distinct branch of law. However the path followed to reach at this stage is not uniform and similar in most countries. Administrative law is unique to a specific country. Such uniqueness can be explained by the fact that it is the outcome of the political reality, economic circumstances and the nature of the legal system prevailing in that country. It is also highly influenced by the constitutional structure, the system of government and principles of the public administration adopted by that country.

Generally, the proliferation of the administrative agencies and the expansion of delegated legislation were two significant factors for the growth of the administrative law in most countries. The 20th century marked with the vast increase of administrative agencies with vast and wide-ranging powers. This necessitated legislative measures and judicial interference aimed at controlling the manner of exercise of power of these entities so as to ensure protection of individual rights and freedoms. As a result, most countries introduced specific and comprehensive rules and procedures governing administrative adjudication and rule-making. In US, the Administrative Procedure Act which was made law in 1946 is one such example of a comprehensive response to deal with the growing power of agencies. Since then, the landscape of the history of the American administrative law has been changed significantly. Similarly, in England the Statutory Instrument Act was promulgated in the same year (1946) even though it was not as comprehensive and influential as the American counterpart. The Act was a direct response to the ever increasing power of agencies, more specifically, the delegation power of agencies. In the 1920s fear developed about the volume and nature of the delegated legislation being produced, which was not receiving parliamentary scrutiny; many sought necessary or desirable.

In 1929, lord chief justice Lord Hewart published The New Despotism in which he railed against what he saw as dangerous and uncontrolled growth of bureaucratic power. In 1932, the report of the Donoughmore-Scott Committee on Ministers' powers was issued. The report, amongst other things, explained the inevitability of the delegated legislation, and also suggested some

safeguards. The report also recommended better scrutiny of the vesting in Ministers of 'oppressive' powers. This, finally, led to the enactment of the Statutory Instruments Act of the 1946.

However, the growth of the administrative law is not limited to statutory prescriptions of rules and procedures governing the administrative process. Courts have also played important roles in shaping the form, substance and scope of the administrative law. In England, until the Second World War and in the period immediately following 1945, courts continued limiting the scope of their controls. Such judicial restraint was relaxed after the 1960s and there was judicial revival and activism with the judiciary reclaiming their proper role of ensuring the legality and fairness of exercise of governmental powers. In America, where the judiciary has firmly asserted its strong position in checking the constitutionality of parliamentary legislation, the courts didn't hesitate to review administrative decision, including delegated legislation.

In France, Italy, Germany and in a number of other countries, there is a separate system of administrative courts which deal with administrative cases exclusively. As a natural consequence, administrative law has developed on its own independent lines, and is not enmeshed with ordinary private law as it is in the Anglo-American system.

1.6.2 Ethiopia

It is very difficult and challenge to talk about the history of administrative law in Ethiopia. Administrative law is still not well developed, and it is an area of law characterized by the lack of legislative reform. It is also a subject in which too little attention is given in terms of research and publication. Even though it cannot be denied that there are some specific legislations scattered here and there, which are relevant to the study of administrative law, it is still at a very infant stage.

When one looks into some of the specific legislations, one could easily realize that they are not in effect rules and procedures of manner of exercising power, or in general terms tools of controlling governmental power. Rather they are

enabling acts conferring power on administrative agencies. However, since administrative law is in essence the mechanism of controlling power such enabling acts granting judicial and legislative powers it could not in any way signify the existence of administrative law in one country.

Hence, the historical development of the administrative law should be studied in terms of the process of legislative and judicial movement to curb the excess of power. In Ethiopia, the history of government is largely characterized by arbitrariness and lack of effective legislative, judicial and institutional control of power. That is why it is challenging to record the historical development or growth of administrative law.

In the final analysis, it becomes convincing that the issue has to be dealt with in terms of describing the growth of administrative power and the respective absence or few instances of legislative, judicial institutional attempts to control the exercise of administrative power. Ultimately, this task becomes the study of the constitutional history of Ethiopia, as the administrative law history could not be significantly different from its constitutional history.

Up to 1987, the previous three constitutions of the 1931, 1955 and 1974 did not contain any meaningful and practical limit on the power of government.

The 1931 constitution was simply a means of centralizing power of the Emperor, and as Markaris has explained, it was 'designed as a legal weapon in the process of centralization of governmental power.' The 1955 revised constitution has showed little improving in this regard as it tried to define and distribute powers of government. It also included provisions entitling the citizen's fundamental rights and freedoms. But it failed to do away with the accumulation of power in the hands of the Emperor. The Emperor still retained law-making power sharing it with parliament, and judicial powers, which were illdefined in the constitution as 'the power to maintain justice' and the essential executive powers were vested directly on him.

Such being the constitutional set up during that time, it is naïve to talk about the control mechanisms of power of the executive since that ultimately means

checking the unquestionable power of the Emperor. However, it is be unfair to inter this conclusion as an indicative of the total picture. There were some attempts and signs towards addressing the grievances of citizens against maladministration. There was, for instance, a legislative effort to establish the Ombudsman during the last days of the Emperor Haile Selasie's regime. In attempt to come up with a new constitution, a draft constitution was prepared which devoted the ninth chapter to the establishment of the office of the Ombudsman. This draft, and thereby the establishment of the Ombudsman, remained in paper as a result of the fall of the Emperor in 1974.

During the same period, an unsuccessful attempt was made to introduce for the first time an Administrative Procedure Act that governs the decision making process of the administrative agencies. The draft was not actually as comprehensive as the American Administrative Procedure Act since it failed to deal with the rule making procedure of the agencies. Its scope is limited only to providing mandatory adjudication procedures of the agencies and the establishment of the administrative court reviewing their decision.

In addition to such unsuccessful attempts, the establishment of some the administrative courts like the Civil Service Tribunal and an administrative tribunal entrusted with the power of reviewing assessment of tax may be taken as one step ahead for the evolution of the administrative law in Ethiopia.

The courts were also not totally silent in exercising their proper role of checking the legality of power of the executive. In very few instances, the courts used their ordinary power of interpretation of laws and entertained disputes between the citizen and the government. In one reported case, a court issued an order of mandamus compelling the agency to discharge its legal duty towards the plaintiff. This, even though, is a single and isolated incident is an indicative of the uncoordinated effort of the judiciary to wake up from the deep sleep of judicial restraint. It should also be remembered that the judiciary be totally blamed for failing to assert its proper place as 'the guardian of liberty.' This is mainly due to the fact that the citizen didn't look to the judiciary seeking redress against the government. There is no role for the court to play in the absence of a petition made to it. Too many reasons could be mentioned for such incident.

But, lack of public confidence in the judiciary reflective of absence of independence of the courts may be cited as one of the contributing factors for the lack of an active judiciary.. This is true not only with respect to the scope and extent of judicial control of administrative action during the Imperial era, but can also be taken as a general truth about the judiciary to the present day.

Administrative law didn't show any progress during the Dergue regime. The 1987 constitution was not devised to limit the power of the government. Hence, one should not expect administrative law to deviate from the prevailing constitutional structure and develop as an instrument of checking the executive.

The present Federal Democratic Republic of Ethiopia of the 1995 has laid down the constitutional framework for the development of the administrative law. It contains key principles of government administration like accountability, transparency, and public participation. It also envisages the establishment of the Ombudsman and the Human Rights Commission. Six years after the constitution, the two institutions were established by the parliament.

1.7 The Present State and Future Prospects of Administrative Law in Ethiopia

Around 1880, the renowned English constitutional lawyer professor A.V.Dicey, misled by his misconception of the rule of law, proudly stated that England did not have administrative law. Almost after a century, in what can be said a total reversal of the Dicey's position, the renowned English judge Lord Denning commented that '…it may truly now be said that we have a developed system of administrative law.'

Given the current situation in Ethiopia as to the scope and impact of the administrative law, it may be unfair to say that Ethiopia does not have administrative law. But, it is equally true that no one can boldly declare that ' we have a developed system of the administrative law.' Still there is no administrative procedure governing administrative decision-making or delegated legislation, either at the federal or state level. There are only few administrative courts poorly organized, highly subject to executive control and

ineffective due to lack of expert administrative judges and absence of clear guidelines regarding their qualification, procedure of appointment and dismissal. Control of administrative action through judicial review is almost non-existent. Institutional control through the Ombudsman and the Human Rights Commission is not as developed and effective as it should have been. Generally, the legal instrument to bring about administrative justice, executive accountability and good governance is far from being developed in a comprehensive and systematic manner. Presently, the need for such a developed system of administrative law is beyond necessity. The question of the administrative justice is still an unanswered question for the citizens of Ethiopia.

The implication of the federal structure is that there is a possibility of the Federal and the state administrative law. Since the constitution envisages for the establishment of the executive branch at the state level as one organ of government, it is be up to the states to formulate their own administrative law. This means that the decision making and rule-making procedure of one regional state may be different from that of the other state, or even from that of the federal state.

UNIT SUMMARY

Administrative law is a recent phenomena and it is still at an infant stage. It was even recognized as a distinct subject during the 19th century. This is due to the fact that the political and economic circumstances that gave rise to its existence occurred at that time. At the end of the 19th century, the 'Police State' which was rooted on the ideals of the free market economic and political system, has proved a failure in addressing the social evils and suffering of the mass population. The outcome of this condition was the birth of the 'Welfare State'; that endowed with more and wider powers in charge of playing a positive role in the political, economic and social life of the individual and the population at large.

The birth of the welfare state justified conferring wider powers on government regarding the interest of the public. But with more powers came, there was the inevitable danger and the potential danger of its abuse. Hence, it was realized that there should be a mechanism to control such power abuse. Administrative law was then born as a legal instrument to carry out such control on the exercise of power.

Administrative law could be defined in so many different ways. However, its main purpose, to control of power, should always be the basic element in any attempt made to define it. When one starts to study administrative law, he should begin by closely looking at its sources. That includes constitution, statute, delegated legislation and judicial opinion. Administrative law is closely tied with constitutional law, and it could not be understood fully without reference to its constitutional foundations. Actually, there is no significant difference between the two, apart from their scope and hierarchy.

The scope of the administrative law is always becoming wider due to the dynamic changing nature of the administrative process. In most countries, the rules, principles and procedures of the administrative law are applicable not only in case of exercising public power by agencies, but also in the decision making process of the public enterprises having monopoly power, universities and private companies exercising governmental functions through contracts.

However, it should always be remembered that administrative law is only concerned with the manner of exercising power and the legality of administrative decision, but not with the substance or merit (wisdom) of the decision itself.

Administrative law is not an isolated subject. It is influenced by different factors and it shares a common ground with other concepts. Administrative law has now become a pivotal legal instrument to maintain rule of law, to facilitate good governance, to ensure the protection of human rights and to uphold the principle of democracy.

Administrative law evolved along different lines. Its nature and characteristic vary from the common law and civil law legal systems. Administrative law in France is characterized by the existence of independent administrative courts side by side with the ordinary courts, the consei de etat, which is the final administrative court in disputes between the citizen and the government, was established as the supreme judicial organ on administrative matters. On the contrary common law countries didn't have such type of dual court structure. The ordinary courts were empowered to adjudicate disputes between the citizen and the government.

Administrative law does not have a very long history. However, its nature, essence and scope is expanding and rapidly changing. Such rapid growth and change could be explained by the ever-fluctuating form and structure of nature of government and administrative process.

Review Questions

1. Is it possible to define administrative law without resorting to its control element? If, "Yes," how?

2. What distinguishes the red light theory from the green light theory?

3. How does the administrative law ensure the protection of human rights?

4. Assume that the Ethiopian Electric Light and Power Corporation refuses to provide service to an applicant and discontinues its service to a certain customer without any justifiable ground. Are such cases simply matters that should be settled based on the law of contract (private law issue) or public law issues to be governed by the rules and principles of the administrative law?

5. What is Conseil de etat? Is there any constitutional basis to establish such type of administrative court in Ethiopia at the federal level?

6. Discuss the role of administrative law in facilitating the democratic process.

7. Describe the relationship between administrative and constitutional laws.

8. What is the central purpose of an administrative law?

9 What makes it difficult and challenging to write the historical development of the administrative law in Ethiopia?

UNIT TWO: CONSTITUTIONAL FOUNDATION AND LIMITATION OF ADMINISTRATIVE LAW

Introduction

This unit explores the impact and implications of the constitutional principles of rule of law and separation of powers on the nature and scope of administrative law. It begins by introducing meanings of rule of law which comprise procedural and substantive elements. The traditional meaning of rule of law may be summarized as the principle of legality. Legality here refers to the legality of an administrative action. Any action taken by any public official or an agency should be within the scope of power given by law. Administrative law is rooted on the principle of rule of law since it is a power-controlling instrument. It simply tries to ensure the legality of the administrative action. The first part of this unit discusses how administrative law could be justified on the principle of rule of law.

The second part tries to see the impact of the principle of separation of powers on the scope of the administrative law. According to the strict application of the principle of the separation of powers, neither organ of the government should have the powers of the other organ. Contrary to this administrative agencies accumulate all the powers of the three organs of government. Although this could be justified on practical grounds, the principle of separation of powers acts as a limitation on the extent and exercise of such powers by agencies. On the other hand, the principle limits the scope of the judicial review. The proper scope of power of ordinary courts only checks the legality of an administrative action. If they try to review the merit of the decision, they are in effect of encroaching upon the power of the executive, which is a gross violation of the principle of the separation of powers.

Objective: At the end of this, unit students are expected to:

- Define rule of law
- Distinguish procedural and substantive elements of rule of law
- Discuss how rule of law is the foundational basis of the administrative law

- Define separation of powers
- Identify the application of the separation of powers under the F.D.R.E. Constitution
- Discuss how separation of powers is a limitation of the administrative law

2.1 Rule of Law as a Basis of Administrative Law

The expression "Rule of law" plays an important role in administrative law. It provides protection to the people against the arbitrary action of the administrative authorities. The expression ' rule of law' has been derived from the French phrase 'la principle de legalite', meaning a government based on the principles of law. In simple words, the term 'rule of law, indicates the state of affairs in a country where, in main, the law rules. Law may be taken to mean mainly a rule or principle which governs the external actions of human beings, and which is recognized and applied by the state in the administration of justice.

2.1.1 Procedural Elements

Almost all administrative lawyers or anyone embarking a research on this dynamic concept usually starts to treat the subject by espousing the approach and definition given to it by the renowned English constitutional lawyer,Dicey. (1888)gave the most influential definition of rule law which mainly comprises the following three elements.

A. Supremacy of Law (Principle of Legality)

For Dicey (1888 :) the primary meaning of rule of law is supremacy of the ordinary laws of the land over the actions of public officials and administrative agencies. He writes:

> *It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government.*

Hence, one aspect of the concept of rule of law is absolute predominance, or supremacy of law over arbitrary, government actions. Simply stated, it means every administrative action that should be taken according to law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong (such as taking a man's house), or which infringes a man's liberty (as by refusing him a trade license), must be able to justify its action as authorized by law. An administrative agency or public official is required to justify its action by clearly establishing that it is expressly or impliedly empowered or authorized by act of the parliament (i.e. proclamation issued by the House of People's Representatives). This means also that in the absence of any authority, the affected party whose rights and liberties have been violated as a result of the action of government, should be able to take the case to court and have it invalidated.

However, acting according to law does not satisfy the meaning of rule of law in the presence of wide discretionary powers. Parliament may confer on the specific administrative agency, wide discretionary powers that enables the agency to take unpredictable and in some cases of the arbitrary actions. Hence, the government should be conducted within the framework of the recognized rules and principles that restrict discretionary power. In many countries, typically in England, many of the rules of the administrative law are rules for restricting the wide powers, which acts of parliament confer very freely on ministers and other authorities.

B Principle of Equality

" . . .It means equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts."

One meaning of the above statement is that disputes, as to the legality of acts of government, are to be decided by judges who are independent of the executive. This aspect of the rule of law, which is typical characteristics of English administrative law, is largely based on the principle of the separation of powers which prohibits interference among the three government branches, Hence, not

only civil cases, but also administrative disputes that should be adjudicated by the ordinary courts; not by the separate administrative courts.

In France, the same principle of separation of powers resulted in a totally opposite conception of the rule of law. According to French administrative law (droit adminstratif), disputes between the individual and the government are settled by separate administrative courts, the conseil de etat being the supreme administrative court. It is said that this system was developed in France based on the strict interpretation of the separation of powers. Dicey emphatically rejected the French system of the administrative law (droit adminstratif). because of his emphasis on the ordinary law courts as opposed to any specialized administrative law courts as ultimate arbiter of disputes between the government and the individual.

Another aspect of the principle of equality is that the issue that states the law should be even- handed between government and citizen. In other words, those laws governing the relationship between individuals should also similarly be applicable to the relationship between individuals and government. This implies that government officials should not entertain different, or special privileges. However, the intensive form of the government and the complexities of administration sometimes necessitate granting special powers (privileges) to the government. What the rule of law requires is that the government should not enjoy unnecessary privileges, or exemptions from the ordinary law.

C Constitution Is the a result of the Ordinary Law of the Land

" It means the constitution is the result of the ordinary law as developed by the courts through the common law tradition and provides for the legal protection of the individual not via a bill of rights, but through the development of the common law"

The rule of law lastly means that the general principles of the constitution are the result of judicial decisions of the courts in England. In many countries rights such as right to personal liberty, freedom from arrest, freedom to hold public meetings are guaranteed by a written constitution. However this is not so in

England. These rights are the result of judicial decisions in concrete cases that have actually arisen between the parties. The constitution is not the source but the consequence of the rights of the individuals. Thus, Dicey emphasized the role of the courts as ultimate guarantors of liberty.

2.1.2 Substantive Elements

The modern concept of the rule of law is fairly wide and, therefore, sets up an ideal for government to achieve. This concept was developed by the international commission of jurists, known as Delhi Declarations, in 1959, which was later on confirmed at Logos in 1967. According to this formulation, the rule of law implies that the functions of government in a free society should be exercised so as to create conditions in which the dignity of man, as an individual, is upheld.

In recent years, wide claims have been made as to the proper sphere of rule of the law. The presence of representative democracy, beneficial social and economic services and conditions, personal independency (privacy) and independent judiciary has all been taken as indicators and elements of the rule of law. One way to understand the concept is making a contrast between the two approaches which are the 'formal' and 'substantive' (ideological) versions of the rule of law. The former is not much more than the principle of legality, and the latter insists on a wide range of positive content.

2.1.3 Rule of Law as a Foundation of Administrative Law

In simple terms, the rule of law requires that government should operate with in the confines of the law; and that aggrieved citizens whose interest have been adversely affected be entitled to approach an independent court to adjudicate whether or not a particular action taken by or on behalf of the state is in accordance with the law. In these instances, the courts examine a particular decision made by an official, or an official body to determine whether it falls with in the authority conferred by law on the decision maker. In other words, the courts rule as to whether or not the decision is legally valid.

It is in this way that the principle of rule of law serves as the foundation of the administrative law. It has been repeatedly said that the basic purpose of the administrative law is to control excessive and arbitrary governmental power. This purpose is mainly achieved through the ordinary courts by reviewing and checking the legality of any administrative action. Therefore, administrative law as a branch of law, is rooted in the principle of the rule of law. This principle mainly stipulates that every administrative action should be according to law. The different control mechanisms of power in administrative law by preventing government not to go beyond the authority granted to it by law ensure that rule of law is respected.

Hence, the expression "Rule of Law" plays an important role in administrative law. It provides protection to the people against arbitrary action of the administrative law.

To clearly understand the relationship between the rule of law and the administrative law, it is important to examine a related doctrine of the administrative law, which is the doctrine of ultra virus. The doctrine to some extent is a derivation of the principle of the rule of law. The former underlines that power should be exercised according to law. The later, goes one step further and states that an action of any official or agency beyond the scope of power given to it is ultra virus (i.e. beyond power), hence it is considered as null and void. An ultra virus act does not have any binding effect in the eyes of the law.

The simple proposition that a public authority may not act outside its powers (ultra virus) might fitly be called the central principles of the administrative law. The juristic basic of judicial review is the doctrine of ultra virus. According to Wade & Forsyth an administrative act that is ultra virus or outside of jurisdiction (in case of action by administrative court) is void in law, i.e. deprived of any legal effect. This is, in order to be valid, it needs statutory authorization, and if it is not within the powers given by the act, it has no legal leg to stand on it. Once the court has declared that some administrative act is legally a nullity, the situation is as if nothing has happened. Administrative law by invalidating an ultra virus act ensures that every administrative action is in conformity with the law; indirectly guaranteeing the observance of rule of law.

Rule of law as a foundation of the administrative law has been briefly explained above. But at the same time, you should also be aware of the fact that the principle also serves as a limitation on the scope of administrative law.

It has been clearly pointed out in chapter one that the proper scope of the administrative law is procedure, not substance. This means, it is concerned with the decision-making procedure (how power is exercised), rather than the decision itself. To a wider extent the study of the administrative law has been limited to analyzing the manner in which matters move through an agency, rather than the wisdom of the matters themselves. Whether a certain decision is right is not a matter to be investigated under the administrative law, rather it should be left to the decision-making agency since it purely involves policy considerations. Similarly, the principle of the rule of law does not go to the extent of ensuring whether a certain agency's decision is right or wrong. Its primary meaning is attached to the principle of the legality or the superiority of law. Its concern is to ensure that a administrative action is taken according to law.

The court, in reviewing an administrative action, is expected to see or examine the legality of the action only. In judicial review, the judges do not substitute their own discretion and judgment for that of the government. They simply rule whether the government or its officials have acted within the ambit of their lawful authority. Thus, the judges do not "govern" the country, and do not "displace" the government when government decisions are challenged in the courts.

The principle of the rule of law, by limiting its scope only to legality, or in some cases to fairness of the administrative action, simultaneously serves as a limitation to the scope of the administrative law.

As stated by *MARSHAL* In *MARURY Vs. MADISON*

"The province of the Court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court."

Further Reading

The rule of law and development (in "Law and development in the third world")

George Rukward

It is trite knowledge that rule of law is not of recent origin. The Greek and Roman thinkers examined its concept. In medieval England the issue was quite important as also it was in the rest of Europe. That period produced the Magna Carta in England which was one of the great charters of freedom of mankind, as the name implies. But the issue of rule of law was raised again in the 17th century, especially in respect of the extravagant, but understandable claim of the European monarchs to rule by Divine Right. In England, the issue took the loss of a King's head and the flight of another, thereby luckily losing only his throne, to establish the supremacy of law.

But, when one talks of the rule of law in modern times and in the common law world, one starts with Dicey if only to dismiss him. For his influence, after expounding systematically what he thought were the main tenets of the rule of law, held sway for an unduly long time. His lectures were published in 1885 in book form.

According to him, there were three cardinal tenets of the rule of law:

- Absolute supremacy of regular law as opposed to influence of arbitrary power:
- Equality of all citizens in law;

- Constitutional rights should be, and in England are, protected by the ordinary law of the land as a result of decisions of courts.

Among these Diceyan postulates, only the second could still be relevant today, but even that has not escaped criticism. The first is easier to dismiss. In the first instance, Dicey's use of "arbitrary power" as being equivalent to discretionary power and therefore not in conformity with the rule of law cannot be valid today. The rule of state has changed from the one that it was supposed to play during his time. The activities of the state are not just only to defend the citizens from external and internal threats, and also to handle external affairs generally, but also to serve as an activities factor or agent in development. Thus, the state provides social services for which there has to be taxation; it is engaged in planning of towns and cities to prevent social disorder, and so many other activities which would have horrified Dicey if he came back to life. Nonetheless, Dicey would be easily converted if he came back to life today. Today, one cannot legislate precisely for all matters because events are bound to change from day to day, or even from hour to hour. So, discretion must be given to those in authority to enable them to deal with such contingencies. At the end of the day, such functionaries have to account for their activities.

While there has been some disagreement on the validity of Dicey's postulates, some of the arguments used against Dicey are also spurious. To say that there are distinctions, as a matter of law, between landlords and tenants, between employer and employee, aliens and subjects it is to reduce Dicey's postulate to absurdity because he would not have had that kind of "inequality" in mind. All that he meant is, that at the general level, no tenant or landlord, no employer or employee should be given preferential treatment purely because of his status.

The final postulate of Dicey is definitely devoid of validity and does not require any extensive discussion. Indeed, the United Kingdom itself now has many leading jurists who are convinced that entrenchment of constitutional rights is required in the U.K. The majority of the present day constitutions have those rights entrenched in one form or another. Whether they are effective or not, or rather to what extent they are effective depends on the indeterminate variables

and threats are listed below and also the extent to which the country in question has taken the rule of law as a national ethic.

Irrespective of Dicey's erroneous, or perhaps idiosyncratic views, the rule of law is still as a vibrant issue as it was during his age. It is an issue that is going to be with us so long as there are wielders of power since there is a tendency of those wielders of power to claim as much territory as possible and, rightly or wrongly, for those are subjected to such power to try to rein in such power wielders. Indeed, such challenge to power holders is the surest safeguard against its abuse.

The best, and probably the most comprehensive, statements of the theme have come from the efforts of the International Commission of Jurists in their various conferences. Their work has been dedicated and purposeful, and for that reason, it has gained almost universal acceptance. Their conclusions are therefore very relevant to the theme of this paper. The sum total of their statements and restatements areaptly summarized by one author as follows:

The acts of the government towards the subject, particularly those affecting his right to the freedoms of the person, speech and association, and the right of choosing representatives to make the laws, shall be in accordance with previously established general rules having a reasonably specific reference.

The rights enumerated in paragraph 1, being essential to the operation of law as an order designed to regulate human affairs according to reason, shall be maintained as part of the legal system but subject to

- Well-recognized limits upon their exercise;
- Limitations consequential upon the need to reconcile them with one another; and
- Qualification of such rights in times of exceptional crises.

The interpretation and application of the general rules referred to in paragraph 1, and adjudication upon the necessary limitations upon the rights referred to in paragraph 2, shall be under the control or supervision of an independent judicial

body with effective remedial powers and acting according to fair trial procedures (or the requirements of procedural due process).

In addition to the above elements, jurists also stressed issues of effective maintenance of law and order to ensure that social and economic conditions are fostered to enable the citizens to realize their total development and dignity. Seen in this light, the political and legal aspects of the rule of law are complemented by the social and economic rights. Indeed, they are merely two side of the same coin.

However, while admitting that the state should not remain passive in the process of development, wholesale government interference should be discouraged. In any case, if the citizen is given as much freedom as possible, there may be no need for the state to become a trader. It will, then, perform its legitimate role as a guarantor of security from both external and internal threats. We do not subscribe to Hayek's theory that government interference necessarily leads to serfdom. Indeed, there is something faulty with such a proposition. What is being suggested here is a happy mean between the two extremes.

2.2 Separation of Powers as a Limitation on Administrative Law

2.2.1 Nature and Meaning of the Principle

The doctrine of separation of powers means that none of the government, i.e., the legislative, executive and judicial should ever exercise the powers of the other. It means that the three departments of government are to be separated and distinct. They are to be independent of one another, and each can exercise only one type of authority, legislative, executive or judicial.

According to some writers on the topic, like Wade and Philips, this doctrine of separation of powers means that the same person can not compose more than one of the three departments of the government. One department should not control and interfere with the acts of the other two departments, and one department should not discharge the functions of the other two departments.

Thus, according to them, the theory of separation of powers signifies three formulations of structural classification of governmental powers.

A) The same person should not form part of more than one of the three organs of the government; for example, ministers should not sit in parliament.

B) One organ of the government should not interfere with any other organs of the government. For example, the executive should not interfere in the administration of justice by the courts.

C) One organ of the government should not exercise the functions assigned to any other organ. For example, the executive branch cannot legislate laws, and as well it cannot adjudicate cases.

Given the division of powers, it should also be noted that the authorities of the three organs or departments of the government are interrelated. They are to a large extent dependent upon another. Ministers are politically responsible to parliament, and legally responsible to courts. Complete separation is found to be not possible. A complete separation of powers, in the sense of a distribution of the three functions of government among three sets of organs, with no overlapping or co- ordination, would bring government to a stand still. Similarly, some writers described this situation as:

"Had the doctrine of separation of powers been followed rigidly in any country, the development of modern administrative agencies would have been impossibility."

The division of governmental powers into legislative, executive and judicial is not an exact classification. It is abstract and general and it is not true only theory, but it is also impossible in actual practice to make complete separation. There are many powers which may be assigned to one department, or delegated to a commission, or agency created for the purpose of administering a law, while they are inherent powers of the other departments. Thus, the true meaning of the theory of separation of powers, as it has been modified by practice, is that the whole power of two or more departments shall not and should not be lodged

in the same hand, and that each department shall have and exercise such inherent powers as shall protect it in its performance of its major as well as minor duties.

2.2.2 The Principle of Separation of Powers as a Limitation on Administrative Law

Even though the principle of separation of powers mainly draws a line between legislative, executive and judicial functions of government, administrative law runs, to some extent, contrary to this principle. It could be concluded that, it violates the principle of separation of powers. This could be clearly manifested with little examination of powers of administrative agencies, or the executive. According to the principle of separation of powers, the power and function of this branch of government is limited to the execution or enforcement of laws.

However, in order to ensure efficient and effective enforcement of laws, it has become a compulsive necessity to delegate the executive and administrative agencies with additional legislative and judicial powers (functions). Administrative agencies are given the power and function of writing regulations or rules that have the force of law. For instance, the council of ministers, through a power delegated to it by the house of people's representatives, may issue regulations. Similarly, specific administrate agencies can issue directives in accordance with the power granted to them by the house of people's the representatives.

Delegation of legislative powers by the legislature is clearly against the principle of separation of powers. However, it is justified on practical grounds. The lack of time and expertise in the legislature to provide laws necessary to solve a certain social or economic problem practically makes the legislature compelled to transfer some of its legislative powers to the administrative agencies. Delegation is also justified on the ground that it makes the administration effective and efficient. Agencies could not attain their purposes for which they are established unless other wise they have wider power, mainly rulemaking powers.

Agencies also share some of the judicial powers which traditionally belong to the ordinary courts. They can decide matters affecting individual rights and freedoms. Reversing a license, imposing administrative penalty, with holding benefits (e.g. pension), etc. all could properly be called as judicial functions. Most of the judicial functions of the agencies are usually exercised through organs within or outside that agency, which enjoy, relatively, little independence. These agencies are the administrative courts. Administrative courts give decision after hearing the argument of parties by applying the law to the facts. Such function normally belongs only to courts. Giving judicial power to agencies clearly violates the principle of the separation of powers. Still the justifications are practical necessities, which are more or less similar to that of the above justification with regard to granting legislative functions. Some matters, by nature, are technical and require detail expertise. This expertise is found in the specific administrative agencies, not the courts. Moreover, the trial process in the courts is lengthy, costly and rigid due to the complex procedural rules of the litigation. By comparison, a certain matter may be easily decided by an agency or an administrative court with the least cost to the parties and even to the decision-making process. Once again, practical necessities have prevailed over the principle of separation of powers.

We have seen how administrative law could be considered as a violation of separation of powers. This fact, even though, accepted due to practical necessities, serves as a limitation on the scope of the administrative law. Granting legislative and judicial powers to agencies is an exception, or it may be said a 'necessary evil'. This leads to the conclusion that such powers should be given and exercised narrowly i.e. only when it becomes a compulsive necessity to do so. Agencies should not be delegated on areas primary left to the legislature. Essential legislative functions should not be delegated to agencies. Delegation of legislative powers should be limited only to the technical or detailed matters necessary to fill the gap in the law issued by the legislature. In this way, the principle serves to check the legislature not to delegate wider powers.

In a similar fashion, ordinary judicial powers should not be given to administrative agencies or administrative courts. It should be limited only to matters which are technical by nature and require expertise of the administration. Generally, the principle of separation of powers imposes limitation on the extent of legislative and judicial power of agencies.

In addition to this, the principle mainly serves as a limitation on the scope of administrative law, by making courts not to question the substance of administrative action, but only its legality. As far as a decision is taken by an agency, which is within its confines of power, courts should refrain themselves from reviewing that decision. Administrative action that is not beyond the limits of powers conferred on the decision maker is not the proper sphere for courts to intervene. If they intervene, it will be a violation of the principle of separation of powers since they are, in effect, encroaching the power of the executive.

UNIT SUMMARY

Administrative law is rooted on the principle of the rule of law. The typical meaning of the rule of law, as expounded by the renowned English constitutional lawyer Dicey, is the principle of legality or supremacy of law. This means that every act, decision or measure of any public official or administrative agency should be made according to law. Any administrative action should be backed or supported by a law which gives a clear mandate or power to the decision making organ.

An action taken in the absence of valid legal authority or power is ultravires (beyond power), and hence is considered null and void in the eyes of the law. Administrative law, by controlling the excesses of power, ensures respect for the rule of law. For this reason, the principle of the rule of law serves as the foundation or basis of the administrative law.

Another principle having a great impact on the administrative law is the principle of the separation of powers. This principle envisages distribution of power among the legislature, executive and the judiciary. According to this principle, each organ is to exercise only a power that is assigned to it.

Administrative law violates the principle of the separation of powers since it recognizes the exercise of judicial and legislative powers by administrative agencies. This could only be justified on practical grounds. Since judicial and legislative powers of agencies offend the traditional notion of the separation of powers, the scope of delegation and exercise of such powers should be construed narrowly.

There is also another implication of the principle of separation of the powers on the scope of the administrative law. The proper scope of the administrative law is how a certain decision has been taken or reached, and as to whether there is an authority justifying such decision. It is not in any way concerned with the merit or substance of the decision. Whether the decision is wrong or right should be left to the executive. Hence, judges, while applying judicial review, should restrict themselves only to checking the legality of the administrative

action. If they go further and form their own opinion on the merits of the case, they are in effect encroaching upon the powers of the executive.

Review Questions

1. Discuss the procedural elements of the rule of law.

2. It is true that rule of law is the foundation or cornerstone of the administrative law. In some respect it is also a limitation on the scope of administrative law. Explain.

3. How does the administrative law violate the principle of the separation of law?

4. Does the F.D.R.E. constitution explicitly refer to the rule of law as the cornerstone of the constitution?

UNIT THREE: ADMINISTRATIVE AGENCIES: SUBJECTS OF ADMINISTRATIVE LAW

Introduction

Administrative law involves a challenge to the exercise of power by the executive government. For this reason, it is necessary to look at the composition and powers of executive government, and at how they exercise their powers when they take action or make decisions. In practical terms executive government interferes in our lines and their actions affect our lives in many ways. When we venture on a certain business, we have to acquire a relevant permit and license before commencing our business. Even after we comply with such requirement, a government inspector sent by the relevant agency enters into our premise without court warrant and can conduct investigation. The food and other household provisions we buy are subject to regulations. In work areas the jobs we do, and the premises on which we work are subject to licensing approvals and permits. As we are paid, we are subject to requirements as to tax. When we are ill, we seek medical treatment in health system subject to a high degree of government regulation. This brief reference is by no means complete or detailed, but it shows clearly that government intrudes into our lives in many ways..

Administrative agencies make individual decisions affecting citizens' lives and they set general policies affecting an entire economy through they are usually headed by officials who are neither elected nor directly accountable to the public.

Under this unit we will have a deeper look at the nature, purpose, scope and nature of power of the administrative agencies. The growth of the administrative law to large extent may be identified with the proliferation of administrative agencies, not only in number but also in power and function. Hence, the study of the administrative law is greatly interrelated with the study of the agencies, that shape the administrative process.

Objectives: At the end of this unit students are expected to:

- Explain the nature of administrative agencies.
- Define administrative agency and identify ways in which a definition of agency affects the scope of the administrative law.
- Identify the reasons for creating administrative agencies.
- Distinguish executive agencies from independent agencies.
- Examine the mechanisms used to enforce a law by administrative agencies particularly in Ethiopia.
- Differentiate executive, legislative and judicial power of agencies.
- Reason out why administrative law is closely related to administrative agencies.

3.1 Nature, Meaning, and Classification of Administrative Agencies

3.1.1 Nature of agencies

There is hardly any function of modern government that does not involve, in some way, an administrative agency. The 20th century has witnessed an unprecedented proliferation of agencies with varying size, structure, functions and powers charged with the task of day – to- day governing. Their existence and growth have been the typical characteristics of the modern administrative state (welfare state.) For this reason, they have been responsible for the expansion and development of administrative law greatly influencing its content, scope and future. In the broadest sense, administrative law does not involve the study of how those parts of our system that is neither legislature nor courts make decisions. It is concerned with the study of the procedures, powers and control mechanisms of the administrative agencies. For this reason, the complex web of the administrative process of agencies constitutes an essential aspect of administrative law.

Administrative agencies have become a major part of every system of government in the world. In Ethiopia, for instance, they are the primary tools through which local, states and the federal government performs regulatory functions. The vast increase of agencies in number and power has been observed by a U.S. Supreme Court judge who makes the following remarks:

" The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts . . . They have become a veritable fourth branch of government."

3.1.2 The **Meaning of Administrative Agency**

Defining an administrative agency is not an easy task. Agencies come in a huge array of sizes and shape. This is coupled with their wide ranging and complex functions and their power to legislate and adjudicate, in addition, to their normal executive powers, makes it challenging and difficult to precisely provide a precise and concise definition covering all these aspects of the administrative process.

Agencies may be defined as governmental entities, although they affect the rights and duties of persons are neither courts nor legislatures. For one thing it is true that agencies are not located within the legislative or judicial organ of the government. Although they are within the executive branch, most of them are not mainly accountable to the executive branch. The term executive branch of government is used either to refer to the president (e.g. in U.S.), or the prime minister and the council of ministers (e.g. Ethiopia). This definition lacks some precision. A government entity outside of the judiciary or the legislature does not necessarily qualify as an administrative agency. This does not mean that the legislature for some public policy reasons may not opt for a wider inclusive approach in determining which agency may properly be called as agency. The American Administrative Procedure Act adopts this and defines agency as any U.S. governmental authority that does not include Congress, the courts, the government of the district of Columbia, the government of any territory or possession, courts martial, or military authority. In this definition, the reference to "authority" signifies a restriction on the scope of government entities that may be properly called as agency. Authority refers to a power to make a binding decision. Therefore, only entities with such power constitute an agency. In a similar fashion, Black's Law dictionary defines agency as a governmental body with the authority to implement and administer particular legislation. Generally,

it can be said that the authority or power of the entity is a common denominator for a precise definition of an agency.

A more detailed definition of an administrative agency is given in the New York Administrative Procedure Act, which reads:

"An agency is any department, board, bureau, commission, division, office, council, committee or officer of the state or a public benefit corporation or public authority at least one of whose members is appointed by the governor, authorized by law to make rules or to make final decisions in adjudicatory proceedings but shall not include the governor, agencies in the legislative and judicial branches, agencies created by interest compact or international agreement, the division of the military and naval affairs to the extent it exercise its responsibility for military and naval affairs, the division of state police, the identification and intelligence units of the division of criminal justice services, the state insurance fund, the unemployment insurance appeals board."

You can see from the above definition that a very long description is used to avoid the difficulty of identifying the exact location and scope of an administrative agency. Determining whether a certain government entity constitutes an agency or not is greatly a matter of government policy so that the legislature may exclude some organs from the scope of an agency.

Generally speaking, we may identify two important elements in distinguishing whether a certain government entity is an administrative agency or not. Firstly, the nomenclature may be indicative of the status of an entity as an agency. Most agencies have names like department, authority, commission, bureau, board etc;…Secondly, the government entity should be empowered to legislate (through delegation), or adjudicate individual cases, in addition to its merely executive functions. Generally, an entity is an agency if it has authority to take a binding action. Even though the above two elements are fulfilled, it is also important to check whether there is any express exclusion from the above definition. You can clearly see in the New York Administrative Procedure Act that some entities are excluded expressly by the legislature.

Due to the absence of an administrative procedure act in Ethiopia, there is no comprehensive definition of an administrative agency. There are some specific legislation that make a reference to "government agency", though failing to provide a satisfactory definition. For instance, the income tax proclamation and the civil servants proclamation similarly define a government agency as an entity fully or party funded by the federal government. Practically, the allocation of fund by the federal government is unimportant to determine whether a certain entity is an administrative agency or not. Hence, if there is any dispute as to status of a certain governmental entity, resort has to be made to its nomenclature, and mainly to the existence of legislative and /or adjudicative power of that entity.

The Draft Administrative Proclamation of the Imperial government (draft proclamation No 251/1967) and that of the draft prepared by the federal government define agency relatively in a similar way.

The 1967 draft administrative procedure act uses the term "administrative authority" instead of "administrative agency" and defines it as:

" Any ministry, public authority or other administration of the imperial Ethiopian government, including chartered municipalities, competent to render an administrative decision."

This definition combining nomenclature with power of the agency attempts to identify which government entity may be properly called an administrative authority. The reference to competency to render administrative decision indicates that the power of the agency to legislate through delegation is missing as criteria.

The draft does not categorically exclude some entities from the purview of an administrative authority. However, it excludes some administrative decisions such as those regarding selection or tenure of public servants, those based solely on inspection tests or election, decisions as to the conduct of military or foreign affairs functions, decisions of any judicial division by courts of law, and any decision establishing rules or regulations.

Still it could not be known with exact precision what entity falls within and outside the definition of an administrative agency. Lastly, the draft administrative procedure of the federal government defines administrative agency taking the ability to render an administrative decision as criteria.

The 1967 is draft, different from the current Amharic text only in the substitution of "the imperial government" by F.D.R.E government and "chartered municipalities" by Addis Ababa and Dire Dawa Administrations. one may wonder whether the latter draft is simply a translation of the former rather than an original one. Such type of word-for-word translation is not only the characteristic of this definition, also it but extends to the whole text of the federal draft. The following parameters should be used to determine whether a certain government entity is an agency or not.

- The nomenclature used to describe the entity is ministry, authority, agency, bureau, office, commission, board, etc., or any other similar terms.
- That it has legislative and/or adjudicative power granted by the legislature.
- That the head of the agency is appointed by the executive or by the house of people's representatives.

3.1.3 Classification **of Administrative Agencies**

Agencies are created with varying size, structure, functions and powers. Some of them may be established with broader powers; in charge of regulating a certain sector of the economy. This is typically the case with ministries, which are headed by a high-level government minister. Ministries not only enforce a government program or policy, but they also supervise and overview other lower agencies that are accountable to them. Others are comparatively small in structure and are charged with a very specific task of implementing a certain portion of government policy or programme. With the exception of few, almost all agencies are under the direct control and supervision, in their day to today implementation of government task law, or policy assigned to them by the enabling act. The remaining very small agencies function independently outside

the direct control of the executive branch and they are accountable to the legislature. Agencies are classified or categorized based on such mode of accountability.

Accordingly, those agencies directly accountable to the executive branch are known as executive agencies, where those accountable to parliament are called independent agencies. In Ethiopia, executive agencies are usually accountable to a certain ministry, or council of ministries, or the prime minister. Even though the enabling act may subject an agency to the control of another ministry, it has also to be noted that they are ultimately accountable to either the council of ministers, or to the prime minister. This is true because the F.D.R.E constitution grants the highest executive authority to the Prime Minister and the Council of Ministers (Article 72 sub 1 of F.D.R.E constitution). This fact can also be inferred from the cumulative reading of Articles 74(2) and 77(3) which similarly confer the power of ensuring the implementation of laws, regulations, directives and decisions of the house of people's representatives. Such powers mainly include the power to follow up and supervise the activities, functions and exercise of power of specific administrative agencies. Besides, even though an agency is made accountable to a certain ministry or another, superior agency or authority of the ministry is directly accountable to the Prime Minister, or the Council of Ministers.

The executive impacts the work of agencies in so many ways. The Prime minister may freely appoint the head of an agency, and dismiss him at any time even without valid reasons. However, the appointment of ministers and other commissioners is subject the approval of the house of people's representatives. An executive agency has also a duty to submit report of its activities to the higher executive organ. The budget to be allocated to a certain executive agency is also greatly determined and influenced by the decision of the executive branch. Even though the budget has to be prepared and be submitted to the house of people's representatives for approval, most of the time the demand of the executive is affirmatively accepted by the house.

Can you mention at least two executive agencies having the name of a ministry, authority, agency and commission?

It has been said that independent agencies, are accountable to parliament, i.e. to the house of people's representatives. The establishment of these agencies, even though they need the act of the house of people's representatives for their material and legal existence, their is predetermined by the constitution. This implies that their creation is not dependent on the will of the parliament. Normally, the parliament retains exclusive right to bring a certain executive agency into existence, which includes the power to modify, increase, or decrease the power and function of that agency. By the same token it is up to the parliament to terminate that agency. However, this is not the case with independent agencies. The constitution clearly imposes a duty to establish independent agencies indicated in the constitution. There are time agencies falling under this category are listed below.

- The Federal Ombudsman
- The Human Right Commission
- The National Election Board
- The Auditor General
- The Population and Census Commission

With respect to these agencies parliament has the right to appoint heads. and remove them if there are valid reasons.

3.2. Formation of Administrative Agencies

3.2.1 Mode of Creating an Agency

In Ethiopia, whether it is at the Federal or state level, agencies are creatures of the legislature. They do not spring up on their own, and courts or the council of ministers cannot create them. The F.D.R.E. constitution expressly requires the establishment of some independent agencies. They do not have i.e. material and legal existence unless the house of people's representatives enacts a specific law for their establishment. Hence, agencies that are in function so far those that a legislature has given them the authority to function. The authority may be exceptionally broad or incredibly narrow.

Hence, it may be said that agencies are created in two ways: one is through the constitution, and the second is through act of parliament. However, one important point that should be emphasized. Is that the independent agencies, which have a constitutional basis, still require an enabling act of the parliament for their legal existence. The only difference between the two modes of creating an agency is that when the constitution requires the establishment of some agencies the house of people's representatives has a duty to promulgate the enabling act for that specific agency. When an agency is created only through the enabling act, in the absence of constitutional duty from the parliament, its existence is totally dependent on the will or option of the parliament.

Apart from the above two modes, there is no other means of creating an agency. Neither the prime minister, nor the council of ministers has the power to create an administrative agency.

3.2.2 Reasons for the Creation of Agencies

Agencies are created and assigned specific tasks by the legislature. They carry out the tasks making decisions of various sorts and supervising the procedure by which the decisions are carried out. There are many reasons why administrative agencies might be needed. Almost every governmental agency has been created because of a recognized problem in society, and from the belief that an agency may be able to help in solving the problems. The following are the main reasons for the creation of the administrative agencies.

A. Providing Specificity

The legislative branch of government cannot legislate in sufficient detail to cover all aspects of many problems. The house of the people's representatives cannot possibly legislate in minute detail and, as a consequence, it uses more and more general language in stating its regulatory aims and purposes. For instance, the house of people's representatives cannot enact a tax law that covers every possible issue that might arise. Therefore, it delegates to the council of ministers and ministry of revenue the power to make rules and regulations to fill in the gaps, and create the necessary detail to make tax laws

workable. In many areas, the agency has to develop detailed rules and regulations to carryout the legislative policy.

It is also true that courts could not handle all disputes and controversies that may arise. They simply do not have the time or the personnel to handle the multitude of cases. For instance, the labour relations board entertains and resolves so many number of collective labour disputes between employees and employers. Similarly, the tax appeal commission and the welfare (pension) appeal tribunal adjudicate and decide vast number of administrative litigations within their jurisdiction. The creation of such adjudicatory agencies (usually known as quasi- administrative agencies) is necessary, because of the fact that they have, specialized knowledge and expertise to deal effectively with the detailed, specific and technical matters, which are normally beyond the competency of judges of ordinary courts.

A reason many agencies are created is to refer a problem or area to experts for solution and management. The National Bank of Ethiopia, Ethiopian Science and Technology Commission, Intellectual Property Office are examples of such agencies with expertise beyond that of the house of people's representatives or council of ministers. The development of sound policies and proper decisions in many areas requires expertise. Similarly, administrative agencies often provide needed continuity and consistency in the formulation, application, and enforcement of rules and regulations governing business.

B. Providing Protection

Many government agencies exist to protect the public, especially from the business community. Business has often failed to regulate itself, and the lack of self- regulation has often been contrary to the public interest. For instance, the Environmental Protection Agency is created to regulate environmental pollution. In the absence of such agency, business could not voluntarily refrain from polluting the environment. The same can be said with respect to quality of private higher education and unjustified and unreasonable increase in the price of essential goods. The Ministry of Education and Ministry of Trade and

Industry, regulate respectively both of these cases to protect consumers and the public at large.

Most of the time, an agency protects the public from the negative impacts of business through regulation. When a business organization is given monopoly power, it loses its freedom of contract, and a governmental body is given the power to determine the provisions of its contract. We have some government companies that have monopoly power in Ethiopia, like the Ethiopian Electric and Light Corporation and Ethiopian Telecommunication Corporation, which have the monopoly of power over electricity and telecommunication. Previously, there was no agency regulating such business. Currently, we have the Electric Agency and Telecommunication Agency, which have the power to set the rate for the utility.

Similarly, agencies also regulate transportation, banking and insurance because of the disparity in bargaining power between the companies and consumers. The ministry of transport for instance determines the rate taxi and bus owners may charge the customer for their service. The National Bank of Ethiopia is given wider power to regulate banking and insurance due to the difference in bargaining power between bankers and customers.

C. Providing Services

Many agencies are created simply out of necessity. If we are to have roads, the Ethiopian Roads Authority is necessary. Welfare programs require government personnel to administer them. Social security programs necessitate that there should be a federal agency to determine eligibility and pay benefits. The Ethiopian Social Security Authority is established to process pension payment and to determine entitlement to such benefit. The mere existence of most government programs automatically creates new agencies or expands the function of the existing ones.

3.3 Structure and Organization

The structure and internal organization of an administrative agency may greatly vary depending on the government policy and the programme it is expected to accomplish. Some of them may have different departments enjoying a substantial portion of power given to the agency by the enabling act. Still there will be lower organs labeled usually as sections with the specific tasks of the day-to-day governing. Usually, the arrangement of the internal organization will take so many factors into considerations, like budget implication. However, the main objective of the form of structure is aimed at ensuring efficiency and effectiveness in administration. Since this requires expertise, such task is left to the executive branch. In Ethiopia, the constitution specifically authorizes the council of ministers to determine the structure and organization of the administrative agencies.

Due to the limitation on parliament to deal with structure and organization of an agency, which is justified on the lack of expertise, the pardiment does not interfere with the internal form of that agency. The enabling act simply provides in broader terms, the function, power, duty and rights of the agency. This being the case, it has to be noted that the enabling act greatly influences the form and scope of structure and organization that an agency assumes. The type and scope of government programme, the extent of its power and the nature of mission to be accomplished by the agency outlined in the enabling act are factors to be taken in to consideration before designing the appropriate structure and organization.

3.4 Purpose of Administrative Agencies

Administrative agencies are established by the legislator to perform specific tasks assigned to them by law. What they actually do is to enforce a specific law. They are usually charged with the day-to-day details of governing. The agencies carry out their tasks by making decisions of various sorts and supervising the procedures by which the decisions are carried out.

The function of administrative agencies is closely related to the reasons for their creation. A certain administrative agency comes into existence when the legislator creates an agency for either of those reasons. The agency, by making use of its expertise and giving close attention to detail and technical matters, takes the necessary administrative action, which may be legislative or judicial in order to enforce the law. Accordingly, the following may be summarized as purposes of the administrative agencies.

A) Regulation

One of the key reasons for regulating economic activities by the government is the inability of business to regulate itself. When the government decides to regulate a certain sector, it entrusts the task to the administrative agencies. Agencies offer several advantages over regulation through the legislature and courts in the management of complex and technical regulatory problems. Because they are specialized bodies, they can consider technical details more effectively than the legislature.

When the government regulates business its aim is to minimize the negative impacts of a free economy. In the absence of regulation, business does not respond to concerns over the environment and consumers. Some of the justifications for regulation include:

To control monopoly power

Agencies are often created to replace competition with regulation. In this case the agency may determine rate (e.g. transportation, or electricity). Sometimes the difference in bargaining power may be a ground for regulation, avoiding monopoly power of one party. Such instances include regulation of banking, insurance and labour relations.

To control excess profit

The agency regulates business to ensure that business is not collecting excess profit, which may endanger the laws of free market and also may pose a danger to consumers.

To compensate for externalities

"Externalities" occasionally referred to as "spillovers", that occur when the cost of producing something does not reflect the true cost to society for producing the goods. One example is manufacturing process that creates air pollution for which society pays the clean up costs. A business organization, unless otherwise it becomes sure that there is also corresponding participation by other companies, will not install costly pollution control equipment. Doing so will drive up that company's costs which makes it unable to compete with other companies in producing the same product without equipment and selling their products at a lower price. So, some entity i.e. a government agency must require all companies to make those investments (installing equipments) in order to spread the costs of pollution control over the entire industry.

To compensate for inadequate information

Compensating for inadequate information is a justification for a great deal of legislation for consumer protection. Purchasers of food, for instance, cannot analyze the nutritional content or the health hazards of various food products so that there has to be some organ that ensures these tests are fulfilled.

To compensate for unequal bargaining of powers

Contracts between banks & customers, insurers & the insured, employees & employers are adhesive in their nature. Either the consumer has to take it or leave it. Hence, it becomes self-evident to regulate and set minimum standards to minimize the effect of unequal bargaining of power.

B) Government exactions

In addition to regulation, administrative agencies may also engage in government exactions. Government exactions are the traditional powers and responsibilities of agencies. Such functions include collection of tax and military conscription.

C) Disbursement of money or other commodities

This purpose of administrative agencies is also the prominent one which characterizes the welfare state. In this regard, through the social security programme and other government systems of insurance or compensation, agencies disburse public money as payment of pensions for veterans or assistance for the aged, the disabled, the unemployed and generally the needy. The payments may be directly through cash or food rations.

D) Provision of goods and services

Nowadays, the government is in charge of building and maintaining roads, high ways and dams, the provision of police force and other protective services. Funding public education and the health service may also be mentioned as additional examples. More recent additions include mass transit communications, satellite systems, government research and development programmes, public hospitals and public housing.

3.5 Powers of Administrative Agencies

3.5.1 Nature and Source of Power of Administrative Agencies

At federal and state levels, administrative agencies gain whatever power they have by delegation-that is to say, that they don't have inherent, constitutionally mandated power to act. Rather, a, higher level of government, normally the legislature, must delegate some of its own power to the agency.

How much power is that? It depends. In order for an agency to exist, it must first be created by the enabling legislation. This statute is a device that sets up the basic framework for the agency, and the set of rules and limitations by which it must live. These may include a variety of things including organizational matters, staffing, salaries and procedures for conducting business. The most important is the delegation of power and its limitation. The delegation may be quite broad, giving the agency virtually complete power within an area (e.g., all taxation matters within a jurisdiction), or it may be quite

specific and restrict the agency's authority to a very narrow range of activities, such as operating a single toll road.

An agency may only exercise authority within the delegation of authority provided for in its enabling legislation, or subsequent legislation granting specific additional power. This specified authority is all the authority the legislature has "handed over" to the agency, and since the agency has no inherent authority outside of this "handed over" authority, there is no other authority to wield.

The limitation of agency power is an important concept, since actions taken by an agency which turn out to be outside the scope of its authority are not binding. A good deal of litigation between agencies and regulated parties concerns the question whether the agency acts within the scope of authority delegated to it, or whether it acts in a manner contrary to the act of the superior branch of government.

Since the delegating body has such a wide degree of latitude in deciding how much power to delegate, there is no absolute rule as to how much power an agency has. If the question arises, the first step is to read the enabling legislation or decree, and subsequently granting or restricting its authority. These define the parameters of the agency's power. However, since, in most cases, the whole point of creating the agency is to get the legislature out of the business of day-to day management of some area of activity, delegations of power tend to be fairly broad.

3.5.2 Meaning and Significance of the Enabling (Establishment) Act

The F.D.R.E. constitution imposes a duty on the house of people's representatives to create some agencies. Can you mention some of those agencies?

Even though their establishment has a constitutional basis, is there any way tin which hey may materially exist in the absence of the act of the parliament?

Whatever forms a new administrative agency takes the legislature must enact a statute creating the agency. This statute, sometimes called an agency's organic act, parent act, or establishment act but more frequently is referred to as an agency's enabling act, is the fundamental source of an agency's power. The principle that the legislature creates agencies and sets limits on their authority should be regarded as cardinal rule number one of the administrative law.

Many people running the administrative machinery and on occasion even legal professionals lose sight of this fundamental principle. A misunderstanding of this basic concept can lead to erroneous assumptions about an agency's ability to deal with a particular issue or a problem.

Some enabling acts contain specific provisions establishing agency procedures, but more often than not, when the legislature creates an agency, that agency acquires a specific substantive mission but derives its procedures from a general statue setting out procedural requirements for all agencies sharing its jurisdiction. One such example is the American Administrative Procedure Act of 1946 that uniformly governs the adjudicative and legislative procedure of administrative agencies. In Ethiopia, neither such broad, uniformly applicable administrative procedure, nor specific law detailing agency procedure exist at all. The first attempt was made under the imperial government in 1967. At that moment, a draft of proclamation dealing only with adjudicatory procedure of administrative agencies was prepared. However, it remained as a draft. Currently, the justice and legal system research institute has prepared a similar draft of the administrative procedure which is more or less similar to the 1967 draft.

Agencies make a great deal of policy within the boundaries of their enabling acts. They also establish procedures for efficient and fair decision – making. Enabling acts and administrative procedure acts often establish only minimum standard and requirements for individual agencies.

These statues are often so broadly phrased that agencies have enormous leeway to fill in the gaps, both procedural and substantive aspect of the legislation so long as they keep within the terms of the governing statutes. The areas in which

many agencies are left free to set their own policies and procedures are quite extensive. We refer this to the freedom of action as agency's discretion. Agency discretion is a second fundamental concept to keep constantly in mind in the study of administrative law.

Unfortunately, the concept of agency discretion is one of the least studied and most poorly understood aspects of administrative law. It is so little analyzed that it is frequently referred to as "the hidden component" of administrative law. A complete understanding of administrative law mainly requires a closer examination and appreciation of this phenomenon.

3.6 Classification of Powers of Administrative Agencies

Administrative agencies, in order to realize their purpose efficiently and effectively, need wider power and discretion. For this reason, they blend together three powers of government: executive, legislative and judicial powers. Even though in principle the later two powers belong to the legislature and courts, granting such powers has become a compulsive necessity for an effective and efficient administration.

Administrative agency rules and regulations often have the force of law against individuals. This tendency has led many critics to charge that the creation of agencies circumvents the constitutional directive that laws are to be created by elected officials. According to these critics, administrative agencies constitute an unconstitutional, another bureaucratic branch of government with powers that exceed those of the three recognized branches (the legislative, executive, and judiciary). In response, supporters of administrative agencies note that agencies should be created and overseen by elected officials, or the president. Agencies are created by an enabling statute; a state or federal law gives birth to agency and outlines the procedures for the agency's rule-making. Furthermore, agencies include the public in their rule-making processes. Thus, by proxy, agencies are the will of the electorate.

Supporters of administrative agencies also note that agencies are able to adjudicate relatively minor or exceedingly complex disputes more quickly or

more flexibly than the state and federal courts, which helps to preserve judicial resources and promotes swift resolutions. Opponents argue that swiftness and ease at the expense of fairness are not virtues, the thrive of the administrative agencies.

The following is a brief discussion of the nature of the three powers of the administrative agencies.

3.6.1 Legislative (Rule Making) Power

Legislative power of administrative agencies, usually known as rule- making power and more formally delegated legislation, is the power of agencies to enact binding rules through the power delegated to them by the legislator. The complex nature of the modern state is that such elected representatives are not capable of passing laws to govern every situation. Many of their lawmaking powers, as well as the power to administer and implement the laws, are therefore delegated to administrative agencies. These agencies are involved in virtually every area of government activity and affect ordinary citizens in many ways, whether these citizens are home owners needing a building permit to erect a new room, or injured employees seeking workers' compensation, or farmers selling their produce.

Efficient and effective administration necessarily requires promulgation of laws, flexible to the existing situation and dealing with detailed technical matters. These laws have to be provided in the required quantity and quality. However, due to the limitation of the on parliament as regards to the availability of sufficient time and expertise, the lawmaker will be compelled to delegate some of its powers to the administrative agencies.

When legislative power is delegated to administrative agency, it has to be exercised fairly and only with a view to attain its purpose. The agency should also enact rules within the limits of delegation set by the lawmaker.

Practically, it is difficult to avoid instances in which power may corrupt. Thus the lawmaker when delegating power should simultaneously introduce

controlling mechanisms to ensure that individual's liberty and freedom is not violated by the administration. Most importantly, the lawmaker, when granting power, is expected to provide specific procedure of rule-making. In most countries, an administrative agency exercising its legislative function is required to give notice to the public of the proposed rule and incorporate comments from the public. This ensures public participation in the administrative process. The rules issued by the agencies should also be published in a formal instrument, which is easily accessible to the public, thus, encouraging openness in the public administration.

3.6.2 Judicial (Decision – Making) Power

Efficient and effective administration also requires that those entities in charge of implementing the law be armored with judicial power, to some extent, similar to the power of the ordinary courts. Enforcement of law demands imposition of sanction and taking administrative measures and decisions. When agencies exercise their judicial powers, they are in effect applying the facts to the law just like a court. Consequently, they determine rights, entitlements and benefits of individuals. The decisions may greatly affect individual's rights and benefits, for example, revocation of license, deportation of aliens, determining whether an applicant is entitled to pension, imposition of administrative fines for non-compliance, dismissal of a civil servant, dismissal of a university student, etc … are judicial decisions that by nature that affect the rights of individuals.

When an agency exercises its judicial function it is engaged in adjudication, a process very much similar with a trial court. While adjudicating a case, it will conducts an oral hearing with direct and cross examination, administers oath, decides on the admissibility of evidence and may compel an individual or a company to produce evidence. Then by weighting evidences of the applicant and respondent applies and interpreters the law to give a reasoned decision. To ensure impartiality and fairness the person deciding the matter should be relatively neutral from agency influence.

Still there is likelihood that agencies may abuse their decision- making power. As a result, the lawmaker, while granting such powers, is expected to provide minimum procedures applicable in the adjudication process.

3.6.3 Administrative Power

Administrative power is the residual power that is neither legislative nor judicial. It is concerned with the treatment of a particular situation and is devoid of generality. It has no procedural obligations of collecting evidence and weighing argument. It is based on subjective satisfaction where decision is based on policy and expediency. It does not decide on a right though it may affect a right. Advisory and investigative power of agencies may be mentioned as two typical examples of administrative power. In its advisory function, an agency may submit a report to the president or the head of executive and the legislature. Cases falling under advisory function include proposing a new legislation to the legislature, and informing the public prosecutor the need to take measure when there is violation of law. Disclosing information to the general public that should be known in the public interest and publishing advisory opinions are also regarded as advisory (administrative) functions.

Investigation is one of the major functions of administrative agencies. While exercising their investigative powers, agencies investigate activities and practices that may be illegal. Because of this investigative power, agencies can gather and compile information concerning the organization and business practices of any corporation or industry engaged in commerce to determine whether there has been a violation of any law. In exercising their investigative functions, agencies may use the subpoena power. A subpeona is a legal instrument that directs the person receiving it to appear at a specified time and place either to testify or to produce document require reports, examine witnesses under oath, examine and copy documents, or obtain information from other governmental offices. This power of investigation complements the exercise of the agency's powers, especially the power to adjudicate.

Further Reading

The writer in the following passage strongly opposes the wider powers of administrative agencies, and tries to justify his view on constitutional grounds.

Do you agree with the writer? It is true that accumulation of administrative, legislative and judicial powers in the hands of administrative agencies pose a serious danger to individual's right and liberty. On the other hand, what do you think will be the negative consequence of depriving agencies of such powers?

The Fiction and Tyranny of Administrative Law

The conservative columnist Joseph Sobran has a lecture on audiotape called "How Tyranny Came to America." This seems like a shocking and absurd claim. How could anyone believe that "tyranny" exists in America? Sobran must be some kind of extremist nut. Well, Sobran is a bit of an extremist, but to evaluate his claim in this case, even apart from his arguments, one thing we might do is look at definitions of tyranny as formulated by the Founders of the Nation. Thus, Thomas Jefferson said, in his Notes on Virginia [1784], warning about a legislature assuming all the powers of government:

"All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentration of these powers in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one.... As little will it avail us that they are chosen by ourselves. An elective despotism was not the government we fought for..."

This is significant, not only in defining "despotic government" as that which combines the three powers into the same hands, but also in noting that such a despotic government can exist even if it is democratic and elected. Some people might think that an "elective despotism" would be contradiction in terms -- since if those in office are elected, then "we are the government." No, all it

means is that those are in office in every two years, or four years, or six years simply have to look preferable to the other guy. Otherwise, they are on their own.

Similar to Jefferson's views are those of James Madison, who quotes the above Jefferson's words and continues to say, in the Federalist No. 47:

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

Jefferson and Madison thus agree that combining the three powers of government is the last thing that we would want to see happen, even in elected hands. It will always produce despotism and tyranny. We might think, however, that Jefferson and Madison might represent no more than some party sentiment. They brought to an end Federalist rule, so perhaps the true spirit of the country was lost after Washington and Adams. This would be a mistake. In his own Farewell Address in 1796, George Washington said:

"It is important, likewise, that the habits of thinking in a free Country should inspire caution in those entrusted with its administration, to confine themselves within their respective constitutional spheres; avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create whatever the form of government, a real despotism. A just estimate of the love of power, and proneness to abuse it, which predominates in the human heart is sufficient to satisfy us of the truth of this proposition."

Despite all the cautions of the founders, this consolidation is precisely what has happened, and not even in the elected hands. It is now quite common, and embodied especially in the form of administrative agencies, particularly those of the federal government like the IRS, the FCC, the FDA, OSHA, the USDA, the EEOC, the EPA, the Federal Trade Commission (FTC), and countless others.

The consolidation of powers in these agencies, and their breach of constitutional protections, may be examined in turn in relation to each power:

Executive Powers

These agencies have executive powers, because they are part of the executive branch of the government. Often they do not only have their own armed agents but even also para-military SWAT teams. This is disturbing enough since it is not clear why the Postal Service, the Forest Service, etc. all need to have their own SWAT teams. More important, however, are the extra-constitutional executive powers that have been given to theseadministrative agencies. The Supreme Court has ruled (United States v. Morton Salt, 1950) that such agencies have what it actually calls "Powers of Inquisition," which means that the agencies can "investigate merely on suspicion that a law is being violated, or even just because they want assurance that it is not." Consequently, they may initiate investigations and demand records for no reason at all. This violates the Fourth Amendment in the most painfully obvious way

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no Warrants shall be issued, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The current grotesque breaches of this protection are possible through the sophistry that administrative agencies are not engaged in criminal investigations, but in "administrative actions." Of course, the Fourth Amendment does not specify that this protection only applies to criminal actions, so that avenue is really not available to honest argument. Otherwise, the thought seems to be, whether stated openly in the law or not that no one has a right to engage in certain actions, mainly business activities, without government, especially federal, licensing permission, and that this permission may then be granted under whatever conditions the government decides to grant it. If business licenses are granted under the condition that searches, it may be conducted in any way and at any time. Again, such dishonest arguments

obviously void the Fourth Amendment altogether and are only made in order to circumvent the protections embodied in that Amendment and in the rest of the Constitution and the Bill of Rights. Only tyrants, of course, would want to accomplish that task and assume such "Powers of Inquisition."

I am also informed that according to the Supreme Court, the Fourth Amendment does apply to inspections, searches, and seizures by administrative agencies, but with not as much protection as to private homes, on the theory of the "greater expectation of privacy in one's home." First of all, this is a typical of jurisprudence that erodes the protections of private property when applied to businesses, rather than residences. This in itself is specious, and allows for voiding the Fourth Amendment, the Fifth Amendment "takings" clause, and other Constitutional protections. Such a holding is also disingenuous. A drug company, for instance, is not allowed to manufacture even an approved drug until the FDA inspects the factory. Since there aren't enough inspectors, and there is consequently a large backlog of facilities to be inspected, productive capital sits idle for long and expensive periods, increasing the cost of manufacture and driving up drug prices. Such companies, thus in effect, give up their Fourth Amendment rights when they agree to the procedures by which the FDA approves the sale of drugs (those powers justified under the power of the Federal Government to "regulate interstate commerce").

Legislative Powers

The same agencies also have legislative power because they have been given the function of writing regulations that have the force of law. These regulations need only be published in the Federal Register to become effective (after some "procedural requirements" that, among other things, invite public comment -- which usually ends up largely with meaning testimony from interest groups that stand to benefit from the regulation). Thus, the entire Constitutional process of passing laws -- the consent of both houses of Congress and the President (unless his veto is overridden) -- is bypassed. Instead, a bureaucrat writes a regulation, and publishes it The next thing, the agency SWAT team is breaking in on some citizen or business.

Although allowed by the Supreme Court in United States v. Grimand (1911), congress is given no power in the Constitution to delegate its functions; and the Constitution explicitly says in Article I, Section 1, "All legislative Power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representative" -- not, "a Senate and a House of Representatives and whoever else they want to pass the buck to." The illegitimacy of this kind of device was already recognized by John Locke in his great Second Treatise of Civil Government [1690]:

Â§141: *Fourthly, The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they who have it, cannot pass it over to others. The People alone can appoint the Form of the Commonwealth, which is by Constituting the Legislative, and appointing in whose hands that shall be. And when the People have said, We will submit to rules, and be governed by Laws made by such Men, and in such Forms, no Body can say other Men shall make Laws for them; nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen, and Authorized to make Laws for them. The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands."*

The benefit for legislators of passing these powers on to others is that they can avoid the blame for the oppressive acts of the "regulators" and earn favor by individually rescuing constituents who appeal to them for help. The constituents then, do not blame the legislators for having given the regulators improper powers in the first place.

Judicial Powers

These grotesque abuses of representative government pale beside the next one the very same administrative agencies that write and enforce their own regulations have also often been given the power of judging them in their own courts and through their own "administrative law" judges. There is a spectrum

of misrule in this case, since some administrative law judges are employed by their own agencies, while others belong to relatively independent organizations. Thus, the "Occupational Safety and Health Review Commission" is either part of the Occupational Safety and Health Administration (OSHA), nor is the United States Tax Court part of the IRS or the Department of Justice. However, these "quasi-judicial" organizations are not part of the Independent Judiciary and do not contain many of the Constitutional protections; for example, trial by jury that belongs to the proper court system. The precedent for them, indeed, is the system of Military Justice, which, unlike the modern administrative courts, actually existed when the Constitution was written. The harsh truth, then, is that the precedent for even the relatively independent "quasi-judicial" organizations is the Court-Martial. That development should have been allowed means that elements of martial law are now part of the ordinary operations of the United States Government. At the same time, a judicial function like imposing fines is usually retained by the executive agencies themselves, which then assess such punishments in summary fashion without even the pretext of a judicial procedure.

The existence of these monstrous vehicles essentially spells the end of the rule of law and democratic government. "Administrative law" judges, of whatever stripe, do not belong to the independent judiciary, and frequently (as at the Federal Trade Commission, the FTC) are creatures of their executive agencies. They know who pays the piper. Agencies can simply ignore the findings of their own administrative law courts.

Beside these transparent formulae for corruption and injustice, the fiction of "administrative law" also conveniently bypasses all of the protections of the Bill of Rights. Defendants before an administrative law judge are not protected by due process, the presumption of innocence, trial by jury, or any other barrier built around criminal or civil law; for "administrative law," is in effect neither criminal nor civil law. Unmentioned in the Constitution, "administrative law" is without essential constitutional limitations or protections.

Such "administrative" procedures, to be sure, cannot imprison any American, but the agencies are free to levy fines, without evidence, trial, or defense, seize

property, and then bring criminal charges against citizens for failure to obey their often unknown, obscure, and self-contradictory regulations. If the agencies are content, just to harass and impoverish a citizen, we have been told by the Supreme Court that the citizens cannot have recourse to a real court, in the real judiciary, to appeal the tyranny of the agency until all "administrative remedies" have been exhausted. Since the agency itself defines what the "administrative remedies" are, it can take decades before such "remedies" are exhausted. Citizens are, thus, essentially at the mercy of the agencies, unless a Congressman or the President personally intervenes.

Therefore , at least in one very precise sense, tyranny came to America. Locke, Washington, Jefferson, and Madison would be appalled -- and that not so much at the "insolence of office" and the grasping arrogance of those given power, but at the thoughtlessness, passivity, and acquiescence of Americans in allowing this to come to pass. Instead, Americans usually don't even notice how vicious it is in both principle and practice They are seduced by the idea that power is good when it is used for what they like, but n it is too late when that power is turned against them for things they don't like. Tyranny has come to America.

In light of this, the following legal principles should be adopted:

- No actions by government agents or agencies are free of the restrictions imposed by the Fourth Amendment or other articles of the Constitution and the Bill of Rights.
- There are no legal actions apart from the criminal and the civil, with the full constitutional protections established for each.
- There can be no courts or judicial proceedings apart from duly constituted components of the Independent Judiciary, wherein the protections of Trial by Jury cannot be suspended or restricted.
- Legislative bodies cannot delegate the power of making laws, or confer upon anyone the power of making any rule or regulation that has the force of law.
- The only Constitutional exceptions to these rules concern the military, military discipline, military justice, and (in times of war, invasion, or rebellion) martial law.

These principles will not prevent any further bad laws or tyrannical practices, but they will defuse the structural tyranny that has been created through "administrative law," its "inquisitors," its regulatory extra-constitutional legislators, and its fraudulent "courts."

Administrative Agencies in Ethiopia

Administrative law is mostly tied with the study of manner of exercise of governmental power. By governmental power here refers to power of the executive and administrative agencies. The evolution of administrative law may be traced back to the emergence and proliferation of agencies.

The outstanding feature of administrative agencies in the history of Ethiopian government is their non-existence. For instance, a century back there were no regularly established royal councils, no clear cut system of local government, no established national army police force and no civil service system. Agencies as a machinery of public administration is relatively a recent phenomena in Ethiopia.

It was in the mid of the 19th century during the reign of Emperor Tewodros that a series of reforms including abolition of slave trade, suppression of the custom of vendetta, regulation of the power and lands of the church, and the civil service system were introduced in Ethiopia for the first time. Foreseeing the need of a decentralised system of administration to implement these reforms, Tewodros sought to turn the local chiefs into salaried officials responsible to the imperial power. However, apart from the establishment of a territorial police force and a regular army any specific agency charged with public administration was unknown and non-existent. Despite this there was some traditional administrative personnel in the government. Early historians e identified four primary heads of department under the emperor; 1) *Yetor Abegaz*(commander-in-chief of the army) 2) *Afe Negus*(judge on all appeals in the name of the emperor save the death sentence) 3) *Tsehafe Tezaz*(keeper of the great seal of the Enperor and writer of all imperial orders) ; 4)*Ligaba*(communicator of all imperial orders, deputy yettor Abegaz, and sergeant-at-arms to the Emperor.)

In 1907, Emperor Menelik created the first ministerial framework in ethiopia, consisting of the following ministries:

- Ministry of Justice
- Ministry of Interior
- Ministry of Foreign Affairs
- Ministry of Finance
- Ministry of Agriculture and Industry
- Ministry of Public Works
- Ministry of War
- Ministry of Pen
- Ministry of Palace

To some extent, the process was simply of giving new titles to old officials. The Afenegus became Minister of Justice and the Tsehafe tezaz became the Ministry of Pen. Further, the ministers bore the status of personal servants to the crown. However, during this time, though autonomy was hardly realized and though delegation of usable power existed more on paper than in reality, a permanent administrative body was established as an integral organ of the central government.

The 1931 constitution laid a foundation for the existence of the first administrative agencies in the Ethiopian history of public administration. The constitution recognised the existence of the executive branch of the government. Under Article 11 it was provided that the Emperor would lay down the organization and the regulation of all administrative departments. During that time a number of ministries and administrative departments.

In 1962, the most relevant government institution for the development of formal administration, the Imperial Ethiopian Central Personnel Agency (CPA), was established by order no. 23 of 1962. The agency was given the power to classify jobs, to recruit public servants, to establish pay scales and to issue regulations necessary for the establishment of homogeneous public service.

Until the fall of the imperial regime in 1974, various administrative and chartered agencies were established. Most of those administrative agencies bearing names of ministry, commission authority or agency were made accountable to the prime minister. There were about twenty one agencies at the ministerial level. These are The Ministry of National Community Development and Social affairs, The Ministry of Public Health, The Ministry of Land Reform and Administration, The Ministry of Communications, The Ministry of Information and Tourism, The Ministry of Mines, The Ministry of Public Works, The Ministry of Education and Fine Arts, The Ministry of Commerce and Industry, The Ministry of National Defence, The Ministry of Interior, The Ministry of Agriculture, The Ministry of Foreign Affairs, The Ministry of Finance, The Ministry of Imperial Court, The ministry of Pen, The Ministry of Justice, The Ministry of Planning and Development, The Ministry of Posts, Telegraph, and Telephones, The Ministry of Stores and Supplies, and The Ministry of Pensions. A number of chartered agencies were also established during that time. These include National Community Development(1957), Board of National Community Development(1957), Our National Defence Council(1958), Central Personnel Agency and Public Service(1962), Public Employment Administration(1962), Technical Agency(1963), Charter of The National Bank of Ethiopia(1963), Ethiopian Tourist Organization(1964), Land Reform and Development Authority(1965), Institute of Agricultural Research(1966), Haile Selassie I University Charter(1961), and Awash Valley Authority Charter.

The 1987 constitution of The People's Democratic Republic of Ethiopia under Article 89(1) gave all administrative powers to the council of ministers. The council was composed of the prime minister, deputy prime ministers, ministers and other members including heads of the secretariat of state committees. authorities and commissioners. Following the constitution, in the created the cabinet there were twenty ministries, seven commissions, six authorities, two state committees, and two institutes.

The 1995 F.D.R.E constitution introduced a federal structure sharing power between the federal government and the regional states. The federal government

comprises of the house of people's representatives as the supreme lawmaker, the executive (the prime minister and the council of ministers) and the judicial branch (first instance, high court and supreme court) A similar division of power also introduced at each regional state.

Currently, administrative agencies are established at the federal and state level. The constitution does not directly or indirectly make a reference to administrative agencies as parts of the system of government. It recognises the separation of powers among the three branches of government. This means, in effect, the source of legislative and judicial power of administrative agencies, typically those at the federal level could not be easily justified on constitutional grounds. For instance, the constitution does not in any way allow the house of people's representatives to share or transfer some of its law making powers to agencies headed by unelected officials. Legislation through delegation is only mentioned with respect to the council of ministers. Hence, it will be a challenge for the Ethiopian administrative law to formulate a theoretical justification for the very existence and source of power of administrative agencies.

Two types of agencies exist at the federal level: These are independent and executive agencies. The independent agencies have a constitutional basis for their existence, and are directly accountable to the house of peoples representatives. They are five in number and all of them have been formally established through an act of parliament. These are the Human Rights Commission, The Ombudsman Office, The Auditor General, The Naational Election Board and The Population Census Commission.

The executive agencies are accountable directly to the prime minister, or the superior ministry, or the council of ministers. In 2007, there were about fifty government entities named as government agencies. Due to the lack a precise definition of an administrative agency in Ethiopia, every government entity partially or fully funded by the government is considered to be an administrative agency.

UNIT SUMMARY

When a law provides for a program with framework to carry out program services and enforcement, it more likely develops an administrative Agency. The agency is created to carry out designated tasks in a defined program. An administrative agency can be defined as authority of government other than the judiciary and the legislature. But not all government entities characterized in this way could be taken as an agency for the purpose of the administrative law. The power that the entity is to exercise, either judicial or legislative functions, is the most important test to determine whether it is an agency, or not.

One of the basic characteristics of an agency is that it is always the creature of the legislature. since its creation may be to provide specificity, or providing protection, or service. The purpose of an agency which is greatly tied reasons for its creation may be to regulate business, or to provide service or directly to provide goods and services to the community.

Agencies are generally classified as executive or independent based on their accountability. Executive agencies are directly accountable to the executive, whereas independent agencies are accountable to the legislature. The F.D.R.E. constitution envisages for the establishment of five agencies thereby guaranteeing their independence from the executive. Even though the house of people's representatives has the sole mandate establishes all agencies, their structure and organization is determined by the Council of Ministers.

The scope of power of an agency should be interpreted in line with its enabling act. The enabling act, sometimes called parent act or establishment act, is the necessary statute for the material and legal existence of the agency. Normally, the typical power of an agency is enforcement of law or administrative power. In addition it also shares legislative and judicial powers.

Review Questions

1) The Ethiopian government is distributing wheat at a lower price to the community that affected by the recent high inflation. Currently each federal

and state kebeles are in charge of such distribution. Do you think that the government should have established an agency for the sole purpose of wheat distribution? Discuss factors that should be taken in to consideration before creating an agency?

2) Administrative agencies have a power of investigation, which mainly includes conducting search without obtaining a court warrant. In Ethiopia too, most regulatory agencies (e.g. National Bank, Ministry of Labour and Social Affairs, Ministry of Revenue, Ministry of Education etc…) possess the power to enter into a premise of a company without court order, and conduct investigation. Do you think that such kind of search could be can justified constitutionally? Does it violate any of the provisions of the F.D.R.E. constitution?

3) What is the difference between executive and independent agencies?

4) Can a directive or a regulation be the source of power of administrative agencies?

5) Is it possible that an entity (other than a public enterprise) established by the legislature may not be considered as an administrative agency?

UNIT FOUR: RULE-MAKING (QUASI-LEGISLATIVE) POWER OF ADMINISTRATIVE AGENCIES (DELEGATED LEGISLATION)

Introduction

'Delegated legislation' is legislation made by a body or person to whom the parliament has delegated its power to legislate. It refers to a binding law issued by a body subordinate to the parliament. In Ethiopia, Delegated legislation refers to directives and regulations issued by administrative agencies and the council of ministers, respectively.

Delegated legislation tends to provide detail legislative scheme setting out matters that are regarded as not necessary for the parliament itself to approve by passage of primary legislation. Since legislation should preferably be made by the parliament, and not delegated to non-parliamentary entities, delegated legislation is regarded, at best, a necessary evil that is only tolerated because of the growth in functions and requirements of a modern government. A more problematic issue is that delegated legislation might be regarded as a challenging concept regarding the separation of powers in that it is 'legislative in form and executive in source'.

This unit discusses the nature, definition the challenge and justifications, the constitutional scope and procedures of a delegated legislation.

Objective: At the end of this unit, students are expected to:

- Understand and enumerate the practical justifications for and theoretical objections against delegated legislation
- Discuss the scope or constitutional limit of delegating power by the legislator under the F.D.R.E. constitution,
- Indicate the forms of delegated legislation in Ethiopia
- Compare and contrast rule-making procedure in different countries and summarize the common standards
- Examine the practice with respect to rule making procedure by agencies and the council of ministers in Ethiopia

4.1 The Nature and Definition of Delegated Legislation

The term legislation refers to the process of making or enacting and repealing a positive law in written form by a branch of government constituted to perform this process, which is the legislature. The legislative organ of every country has the power to make laws on every matter concerning the lives of its citizens and the government subject to the limitations imposed by the constitution. In England, where the doctrine of parliamentary sovereignty is propounded, parliament as a matter of principle can enact or repeal legislation as it sees fit. Whether there is a clear limitation or not, the legislature is in charge of making laws in the form of primary legislation. Any other legislation that is subordinate or auxiliary to primary legislation is known as delegated (or sometimes ancillary) legislation.

In short, delegated legislation means the exercise of legislative power by an agency that is subordinate to the legislature. This subordinate body acquires the power from the act of the legislature. Power is transferred from the principal lawmaker to the lower body, which may be the executive, cabinet, council of minister, or a specific administrative agency, by the mechanism of delegation. Generally, delegation refers to the act of entrusting another authority or empowering another to act as an agent or representative. By the same token, delegation of legislative powers means the transfer of law-making authority by the legislature to the executive, or to an administrative agency. In line with the power granted to them by the legislature administrative, agencies can issue rules, regulations and directives, which have a legally binding effect.

The study of rule-making (delegated legislation) by the executive branch of government occupies a significant place in the administrative law due to its increasing growth, complexity and the dangers it poses to individual liberty and freedom. Scholars regard delegated legislation as a typical characteristic of administrative activity in public administration.

One of the most significant developments of the present century is the growth in the legislative powers of the executive. Measured by volume, more legislation is produced by the executive government than by the legislature. The increase in

quantity and quality of delegated legislation, if not supplanted by clear procedures and effective controlling mechanisms, may ultimately result in arbitrariness and abuse of power, which in turn leads to injustice and violation of liberty. That is why it is regarded by many as a "necessary evil." It was considered a danger to the liberties of the people and a devise to place despotic powers in few hands. It was said that delegated legislation preserved the outward show of representative institutions while placing arbitrary and irresponsible power in new hands.

However, in reality, the intricacies and complexities of modern government have proved beyond doubt that the delegation of legislative powers to administrative agencies is a compulsive necessity. In no democratic society committed to the establishment of a welfare state, the legislature monopolizes the legislative power. It will be futile for the legislature to solve the ever increasing social and economic problems, unless it shares some of its powers with the executive and other administrative organs of the state. A statute may be inexact, incomplete, and unintelligible, and may even be misleading unless it is read with specific rules and regulations made there under. Delegated legislation also serves a technique to relieve pressure or legislature's time so that it can concentrate on principles and formulation of polices. After this, it has to leave technical and detailed matters which are necessary to fill the gaps in the primary legislation. Nowadays, administrative rule-making has become a typical characteristic of the administrative law and administrative activity. The 20th century has been termed as the age of regulation due to the increasing number of instruments issued by the executive branch of government. Most of the legislations that govern the conduct of the individual come from administrative agencies, not from the legislature.

How do you distinguish administrative actions from quasi-legislative actions?

There is only a hazy borderline between legislation and administration, and it is difficult to show there exists a fundamental difference between the two. One common point of difference is that the legislative power is the power to lay down the law for people in general, whereas administrative power is the power

to lay down the law for them, or apply the law to them in some particular situation. It is also a common principle of legislation that legislative acts should be public.

One test of distinction may be that where the former is a process of performing particular acts or of making decisions involving the application of general rules to particular cases, the latter is the process of formulating a general rule of conduct without reference to particular cases and usually for future operation.

Rule - making action of the administration partakes with some exceptions, all the characteristics of a normal legislative action process. These may be generality, non-retroactivity and a behavior which bases action on policy consideration and gives a right or a disability. In some cases, however, administrative rule making action may be particularized, retroactive and based on evidence. On the other hand, a quasi-judicial action is particularly based on the facts of the case and declares a pre-existing right.

4.2 The Need for Delegated Legislation

Despite the ever-increasing volume of primary legislation, the complexities of governing a sophisticated society (and even a developing society) demands the delegation of some legislative functions to inferior bodies such as ministers and administrative agencies. Clearly parliament does not have time or resources to enact every single piece of legislation that is needed in the form of primary legislation, which can be fully debated and scrutinized in accordance with legislative procedures. The result is delegated legislation- legislation produced by an 'inferior body' which nevertheless has the force of law.

Tackling the complexities of modern administration in an efficient and efficient manner demands an atmosphere of complexity. Parliament has to follow strict legislative procedures to make a single law. Hence, it will be far from being flexible without delegating some of its powers to the executive.

Can you try to identify impacts of retaining all legislative power by the lawmaker (parliament)?

The complexities of modern administration are so baffling and intricate and bristle with details, urgencies and difficulties. Therefore, to tackle these problems, an atmosphere of flexibility is needed. A parliament which sits for a limited period of time and which is required to observe strict legislative procedures will be far from being flexible without delegating some of its powers to the executive.

Taking into account the above general justification, the following factors may be mentioned as reasons for the need for delegated legislation.

A) Limitation on Parliamentary Time

Art 58(2) of the F.D.R.E. constitution reads:

"The annual session of the house shall begin on Monday of the final week of the Ethiopian month of Meskerem and end on the 30th day of the Ethiopian month of sene. The House may adjourn for one month of recess during its annual session"

As stated in Art. 58(2) of the constitution, assuming that there is one month recess, for how many maximum days will the House of representatives sit in parliament? Then subtract 39-week days and multiply it by 8 working hours. Taking into consideration the average time necessary to make law, do you think the house of people's representatives has sufficient time to provide all the laws in quantity and quality?

It is said that even if today parliament sits all the 365 days in a year and all the 24 hours, it may not give the quantity and quality of law, that which is required for the proper functioning of a modern government. Therefore, it is clear and self-evident that the main reason for delegation of legislative power is to relieve the pressure on parliamentary time.

B) Technicality Subject of Matter

Read carefully the following provisions:

I.) *"For the purpose of fostering monetary stability and credit and exchange conditions conducive to the balanced growth of the economy of Ethiopia, the Bank may issue directives governing its own credit transactions with banks and other financial institutions, and credit transactions of banks, and other financial institutions.* **"(Art 28(1) of Monetary and Banking Proclamation No.83/1994)**

II) *"The council of ministers may by regulations exempt any income recognized as such by this proclamation for economic, administrative or social reasons"*

(Art 13(e) of Income Tax Proclamation No.286/2002)

III) *"1. Regulations and directives may be issued for the complementary of this proclamation.*

"*2. The regulations shall, in particular, provide for the payment of fees in connection with applications for the grant of patents and utility model certificates and for the registration of industrial designs and matters related there to."*

(Art 53 sub 1 and 2 of Inventions and Industrial Designs Proclamation No 123/1995)

Which of the above provisions do you think are technical matters which do not involve policy issue and need some expertise knowledge?

Legislation has become highly technical because of the complexities of a modern government. Members of the parliament are not experts, and so they cannot comprehend the technicality of the subject matter of some economic and social issues. Technical matters, as distinct from policy issues, are not susceptible to discussion in parliament and therefore cannot be readily be included in legislation. Therefore, technicality of the subject matter stands as another justification for delegation. It is convenient for the legislature to confine itself to policy matters only and leave the technical law making sequence to the administrative agencies.

C) Flexibility

Ordinarily legislative process suffers from lack of viability and experimentation. A law passed by parliament has to be in force till the next session of parliament when it can be replaced Therefore, in situations which require adjustments frequently and experimentation, administrative rule making is the only answer.

The need for frequent adjustment or flexibility can be observed from the following provision.

"The Bank may, from time to time, prescribe by regulations the terms and conditions upon which persons departing from Ethiopia may carry with them foreign exchange or make remittance for services." **(Art 55 of Monetary and Banking Proclamation No.83/1994)**

In the above provision, the terms and conditions for carrying foreign exchange by persons departing from Ethiopia could be changed from time to time. Hence this flexibility could be attained through delegation of power to make these rules.

D) Emergency

During emergency, it may not be possible for the parliament to pass necessary legislation to cope up with the situations. Under such conditions, speedy and appropriate action is required to be taken. The parliament cannot act quickly because of the time that requires passing an act. Moreover, immediate knowledge and experience is only available with the administration. For this reason, wide legislative power must be conferred up on the executive to enable the government to take actions quickly.

The above grounds clearly justify the need for administrative rule making. On the other hand, this rule-making may have some negative effects. Can you give one undesirable impact of the administrative rule making?

4.3. Theoretical Objections against Delegated Legislation

The fact that delegation is indispensable and inevitable due to practically convincing needs, it has not been a bar to theoretical challenges and criticisms against it. The main constitutional objection raised against delegation of rule making power to administrative agencies has been the doctrine of non delegability of power, which holds that power delegated to one branch may not be redelegated to another. People elect their representatives based on their fitness, knowledge and ability to represent their interest. Hence, it is a generally accepted rule that this mandate bestowed by the people cannot be delegated to another individual or organ, which does not stand in a direct relation to the people. It is a cardinal principle of representative government that the legislature cannot delegate the power to make laws to any other body or authority.

One of the most commonly cited sources of the rule of non delegation is the common law maxim delegates potestas non potest delegari which means that a delegate can not further delegates his power. Simply, the maxim indicates that power that has been delegated originally may not be redelegated.

The maxim was originally invoked in the context of delegation of judicial power and implies that in the entire process of adjudication, a judge must act personally except in so far as he is expressly absolved from his duty by a statue. Therefore the basic principle underlying the maximum is that discretion conferred by the statute on an authority must be exercised by that authority alone, unless a contrary intention appears from the language, scope or object of the statute. Generally, it implies that, since the people delegated legislative power to the lawmaker, executive power to the prime minister and cabinet and judicial power to the courts, none of the institutions may redelegate its power to any other authority.

Another objection to delegation of power is based on the doctrine of separation of powers. In America, the doctrine of separation of powers has been raised to a constitutional status. The U.S. Supreme Court has observed that the doctrine of separation of power has been considered to be an essential principle underlying

the constitution and that the powers entrusted to one department should be exercised exclusively by that department without encroaching up on the power of another.

4.4 Scope of Delegated Legislation

It is accepted at all hands that a rigid application of the doctrine of non-delegability of powers or separation of powers is neither desirable nor feasible in view of the new demand on the executive. The new role of the welfare state can be fulfilled only through the use of greater power in the hands of the government, which is most suited to carry out the social and economic tasks. The task of enhancing the power of the government to enable it to deal with the problems of social and economic reconstruction can be effectively and efficiently accomplished through the technique of delegation of legislative power to it. Thus it can be clearly observed that pragmatic considerations have prevailed over theoretical objections.

Therefore, the position has been shifted from one of total objection to the issue of the permissible limits of valid delegation. Legislative delegation raises the issue of delegable and non-delegable legislative powers. There is no agreed formula with reference to which one can decide the permissible limits of delegation. However, as a rule, it can be said that the legislature cannot delegate its general legislative power and matters dealing with policy.

The legislature after formulating the fundamental laws, can delegate to administrative agencies the authority to fill in gaps which is an authority necessary to carry out their purposes. The matters which are appropriate for delegation are such matters as procedures for the implementation of the substantive provisions contained in the principal legislation. This indicates that only the subsidiary part of the legislation could be delegated to administrative agencies so as to enable them fill any available gaps;i.e. the legislative body ought to state an intelligible principle and that the executive branch would merely fill in the details. Subordinate legislation can cover only subject matters delegated expressly in the principal legislation.

As a summary, the following points may be noted.

- Delegation of some part of legislative powers has become a compulsive necessity due to the complexities of modern legislation.
- Essential legislative functions cannot be delegated by the legislature.
- After the legislature has exercised its essential legislative functions, it can delegate non-essentials, however, numerous and significant they may be.
- The delegated legislation must be consistent with the parent act and must not violate legislative policy and guidelines. Delegatee cannot have more legislative powers than that of the delegator.

In Australia, the following matters could not be delegated.

A. Appropriations of money;

B. Significant questions of policy including significant new policy or fundamental changes to existing policy;

C. Rules which have a significant impact on individual rights and liberties;

D. Provisions imposing obligations on citizens or organizations to undertake certain activities (for example, to provide information or submit documentation, noting that the detail of the information or documents required should be included in subordinate legislation) or desist from activities (for example, to prohibit an activity and impose penalties or sanctions for engaging in an activity);

E. Provisions conferring enforceable rights on citizens or organizations;

F. Provisions creating offences which impose significant criminal penalties (imprisonment or fines equal to more than 50 penalty units for individuals or more than 250 penalty units for corporations);

G. Provisions imposing administrative penalties for regulatory offences (administrative penalties enable the executive to receive payment of a monetary sum without determination of the issues by a court);

H. Provisions imposing taxes or levies;

I. Provisions imposing significant fees and charges (equal to more than 50 penalty units consistent with (f) above);

J. Provisions authorizing the borrowing of funds;

K. Procedural matters that go to the essence of the legislative scheme;

L provisions creating statutory authorities (noting that some details of the operations of a statutory authority would be appropriately dealt with in subordinate legislation); and

M. Amendments to Acts of Parliament (noting that the continued inclusion of a measure in an Act should be examined against these criteria when an amendment is made.)

Which of the following do you think are essential legislative functions which could not be delegated?

a) Power to levy tax

b) Power to exempt any item from tax

c) Power to repeal or amend a proclamation

d) Power to extend the applicability of a proclamation to other sectors

e) Power to exempt certain sectors not to be covered by the proclamation

f) Power to determine the standard rate of interest for borrowings and saving

4.5 Form and Classification of Administrative Rule Making

A close scrutiny of delegated legislations reveals that they usually contain enacting clauses and that they are also detailed legislations. Enacting clause is a provision in a legislation that indicates how and from where the authority of legislating the law was derived. It is found in the preamble part of the legislation. Delegated legislation is considered as legislated by the legislature in so far as they are enacted following the proper procedure. They are also considered as part and parcel of the main legislation under which they are issued. These legislations are detailed because they are issued to implement other superior legislations that are drafted in broader terms.

Thus, delegated legislation may assume different forms. In our country there are mainly two types of delegated legislations regulation and directive.

Regulation

Pursuant to Art 771(13) of the F.D.R.E. constitution, the council of ministers has the power of issuing regulations in accordance with a power vested to it by the house of people's representatives. The power to issue regulations is found in the specific legislation.

Directive

These types of delegated legislations are issued by each administrative agency. Agencies issue these subordinate legislations to implement regulations and other primary legislations.

Pursuant to Art. 93 of the F.D.R.E. constitution, the council of ministers has the power to declare emergency, which is subject to approval by the House of Representatives. Can we say that this decree by the Council of Ministers is a delegated legislation?

Administrative rule-making may also be classified based on the different purposes, that it is made to serve.

A-Enabling act- Such acts contain an "appointed date" clause under which the power is delegated to the executive to appoint a date for the act to come into operation. In this category, the legislature prescribes the gun and the target and leaves it to the executive to press the trigger. It is aimed at easing the executive the time to equip itself for the administration of the law. In this class of legislation, rule making exercise is valid only to the extent it is preparatory to the act coming in to force.

B-Extension and application act- The technique of administrative rule-making may sometimes be used for the extension and application of an act in respect of a territory, or a given for duration of time, or for any other such objects. Power may be delegated to extend the operation of the act to other territories.

E.g. Reduction or Extension of Time

" Notwithstanding any provision of these regulations which may specify a period of time within which an act is to be performed, the licensing authority may for good cause provide for a shorter or longer period, provided that such reduction or extension shall not jeopardize the rights of a licensee or engender his ability to perform the duties and obligations under the license or under the proclamation."

(Art 42 of Mining Operations Regulation No 182/94)

C-Dispending and suspending act- Sometimes the power may be delegated to the administrative authority to make exemptions from all, or any provision of the act in a particular case or class of cases. These exemption clauses are meant to enable the administrative authority to relieve hardship, which may be occasioned as a result of uniform enforcement of the law.

See for instance the following provision:

"Not withstanding the provisions of rule - articles (1) of this article, the council of ministers may be regulations determine the inapplicability of this proclamation on employment relations established by religious or charitable organizations."

(Art 3(b) of Labour Proclamation No 377/96)

D- Classifying and sanctioning acts- Under this type of delegation, power is given to the administrative authority to fix standard of purity, quality or fitness for human consumption. See, for instance, Classification of Hotels, Pensions and Restaurants Regulations No 209/1995.

E- Penalty for violation acts - Sometimes power may be delegated to an administrative agency to prescribe punishment for the violation of rules. Usually, making an act penal is a parliamentary function and cannot be delegated to the administrative agency.

4.6. Rule Making Procedure

In order to ensure power delegated by the legislature is exercised fairly and lawfully, the administrative agency is expected to follow some minimum rule making procedures. Such procedure is usually provided in a comprehensive manner applicable to every agency at all time (e.g. the American Procedure Act.) In other cases, it may provide on specific legislations i.e. on the enabling act. The rule making procedure under the U.S. Federal Administrative Act (hereinafter referred to as APA) is a detailed one that provides different types of rule-making procedures ensuring flexibility in the administrative process. Before discussing the specific requirements applicable for each type of rule-making procedures under APA, let's have a brief look at the rule-making procedure in England.

Rule Making Procedure in England

A- Prior Consultation

Under English administrative law, the rules of natural justice do not apply to delegated legislation, and failure to consult parties does not entail invalidity of the rules by court. As has been noted by one judge:

"Many of those affected by delegated legislation and affected very substantially, are never consulted in the process of enacting that legislation and yet they have no remedy."

Even though prior consultation with concerned parties is not a mandatory requirement, in practice, many agencies informally comply with this requirement upon their own initiative. The informal consultation of representative bodies by the legislative administrative body is very common. Few statutes may also specifically provide a general process of considering objection, or prior consultation and publishing draft delegated legislation. Where consultation with certain parties is required by the enabling act, the courts are likely to interpret this as being a mandatory requirement; failure to comply could invalidate any resulting order.

B-Laying procedure

In England, most rules and regulations issued through power of delegation will not have a binding force unless they comply with review mechanism by parliament. Such parliamentary review mechanism commonly known as laying procedure affords an opportunity for the legislature to control the exercise of the power of delegation by subordinate bodies. In effect, it is an effective mechanism to ensure legality and fairness in delegated legislation. If the enabling act subjects the agency to comply with laying procedure, non-observance results in the nullity of the rule or regulation. Laying procedure may assume different forms some of which are indicated below.

Bare Laying Procedure

No further procedure is necessary for the provision to be effective. The statutory instrument is drawn to the attention of members and can come into operation once laid.

Negative Resolution Procedure

The legislative instrument once it is laid before parliament may be annulled if there is a request (prayer) to this effect. However, the annulment of the instrument does not invalidate retrospectively action taken by the minister.

Positive Laying Procedure

The enabling act requires the instrument to be laid before parliament; it can only become law if it receives the affirmative approval of the parliament.

Laying of a Draft Statutory Instrument

A draft instrument is laid before parliament, and the instrument itself cannot be made until 40 days have passed from the date of laying of the draft instrument. During this period, the draft instrument may be subject to a negative resolution procedure.

C-Publication

Under English administrative law, there is difficulty and argument as to when a statutory instrument is "made". One view is that the statutory instrument is made as soon as it is signed by the appropriate minister, and it becomes effective from that time onwards notwithstanding that any publication or laying requirements have not been complied with. According to the second view, the statutory instrument is made when it is signed, but only comes into effect on a certain date, on the order itself. Third it is said that it becomes after it is signed and is due to become into effect on some specified date in the future, after one of the various laying procedures has been complied with.

As can be seen from the above different arguments, it is clear that there is no uniform procedural requirement of publication. However, the enabling act may specifically provide for the publication requirement that is mandatory, resulting in invalidation for non-compliance.

Rule Making Procedure in U.S.

The Administrative Procedure Act (APA) enacted in 1946 and recodified in 1966, is the procedural roadmap for the federal executive branch. The federal government passed the act in 1946, in response to the increasing resentment of the agencies' latitude in matters affecting the rights of individuals. Following the federal lead, most of the states also passed similar statutes during the late 1940s and early 1950s. Unless another statute provides otherwise, every executive branch department and agency must follow the APA's minimum procedures for adjudication and rule making. It also establishes general ground rules for the judicial review of agency actions. Although it has been supplemented by several other laws discussed in this volume (e.g., the Freedom of Information Act, Regulatory Flexibility Act, and Administrative Dispute Resolution Act), it has been amended remarkably little since 1946, and its provisions have served as models for many other administrative procedure laws in the fifty states and other countries around the world.

The Administrative Procedure Act sets up the procedures to be followed for administrative rule making. Before adopting a rule, an agency generally must publish advance notice in the Federal Register, the government's daily publication for federal agencies. This practice gives those who have an interest in, or are affected by the proposed rule an opportunity to participate in the decision making by submitting written data or by offering views or arguments orally or in writing. Before a rule is adopted in its final form, and 30 days before its effective date, the agency must publish it in the Federal Register. Formally adopted rules are published in the Code of Federal Regulations; a set of paperback books that the government publishes each year so that rules are readily available to the public.

Administrative agencies promulgate three types of rules: procedural, interpretative, and legislative. Procedural rules identify the agency's organization and methods of operation. Interpretative rules are issued to show how the agency intends to apply the law. They range from informal policy statements announced in a press release to authoritative rules that bind the agency in the future, and are issued only after the agency has given the public an opportunity to be heard on the subject. Legislative rules are statutes enacted by a legislature. Agencies can promulgate legislative rules only if the legislature has given them this authority.

Types of Rule-Making Procedure

The APA subdivides the categories of rule-making into formal and informal proceedings. A rule-making procedure is considered formal when the proceeding is required by another statute to be "on the record after opportunity for an agency hearing." The APA prescribes complex procedures for hearings in formal rule-making procedure. It requires relatively minimal procedures for informal rule-making. Each agency which will be affected by section 4 should publish under section 3 (a) (2) the procedures, formal and informal, pursuant to which the public may participate in the formulation of its rules. The statement of informal rule making procedures may be couched in either specific or general terms, depending on whether the agency has adopted a fixed procedure for all its rule making or varies it according to the type of rule to be promulgated. In the latter instance, it would be sufficient to state that the proposed substantive rules will be adopted after allowing the public to participate in the rule-making process either through submission of written data, oral testimony, etc. The method of participation in each case to be specified in the published notice in the Federal Register.

A- Informal Rule Making

In every case of the proposed informal rule-making according to the requirements of section 4 (a), section 4 (b) provides that "the agency shall afford interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments with or without opportunity to

present the same orally in any manner." The quoted language confers discretion upon the agency, except where statutes require "formal" rule-making subject to sections 7 and 8, to designate in each case the procedure for public participation in rule-making. Such informal rule making procedure may take a variety of forms: informal hearings (with or without a stenographic transcript), conferences, and consultation with industry committees, submission of written views, or any combination of these. These informal procedures have already been extensively employed by federal agencies. In each case, the selection of the procedure to be followed will depend largely upon the nature of the rules involved. The objective should be to assure informed administrative action and adequate protection to private interests.

Each agency is affirmatively required to consider "all relevant matter presented" in the proceeding; it is recommended that all rules issued after such informal proceedings should be accompanied by an express recital that such material has been considered. It is entirely clear, however, that section 4 (b) does not require the formulation of rules upon the exclusive basis of any "record" made in informal rule-making proceedings. Accordingly, except in formal rule-making governed by sections 7 and 8, an agency is free to formulate rules upon the basis of materials in its files and the knowledge and experience of the agency, in addition to the materials adduced in public rule making proceedings.

Section 4 (b) provides the completion of public rule-making proceedings "after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose". The required statement will be important in that the courts and the public may be expected to use such statements in the interpretation of the agency's rules. The statement is to be "concise" and "general". Except as required by, statutes providing for "formal" rule-making procedure, findings of fact and conclusions of law are not necessary. Nor is there required an elaborate analysis of the rules or of the considerations upon which the rules were issued. Rather, the statement is intended to advise the public of the general basis and purpose of the rules.

B-Formal Rule Making

Section 4 (b) provides that "Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection." Thus, where a rule is required by some other statute to be issued on the basis of a record after opportunity for an agency hearing, the public rule-making proceedings must consist of hearing and decision in accordance with sections 7 and 8. The provisions of section 5 are in no way applicable to rule-making. It should be noted that sections 7 and 8 did not become effective until December 11, 1946, and, pursuant to section 12, did not apply to any public rule making proceedings initiated prior to that date.

Statutes authorizing agencies to prescribe future rates (i.e., rules of either general or particular applicability) for public utilities and common carriers typically require that such rates be established only after all opportunity for a hearing before the agency. Such statutes rarely specify in terms that the agency action must be taken on the basis of the "record" developed in the hearing. However, where rates or prices are established by an agency after a hearing required by statute, the agencies themselves and the courts have long assumed that the agency's action must be based upon the evidence adduced at the hearing. Sometimes, the requirement of decision on the record is readily inferred from other statutory provisions defining judicial review.

UNIT SUMMARY

Delegated legislation also, referred to as 'ancillary', subordinate, administrative legislation or quasi-legislation is the exercise of legislative power by an agency, which is subordinate to the legislature. Delegation has now become almost an every day fact of public administration of the modern welfare state. The complexities and intricacy of modern government practically necessitates sharing some of the legislative functions of the legislature. More specifically, the lack of sufficient parliamentary time to provide the necessary laws in quantity and quality makes delegation inevitable. Elected representatives also lack expertise to deal with technical and scientific matters. On the contrary, the executive and agencies have ample time and specialized expertise and competency, giving them a better hand to effectively deal with detailed and technical matters in due time. Procedurally, delegation creates a conducive environment to flexibility, paving the way for the agencies to experiment with ever changing practical problems. Lastly, in case of emergency, there is no such short-cut as delegation enabling the executive to take immediate measure.

In spite of its advantages due to practical necessities, it should be similarly be emphasized that delegated legislation is a necessary evil. There has been a serious criticism against it by scholars. Most of the arguments are theoretical in nature. However, there has also been practical concern. Theoretically, such challenge refers to the fact that it offends the traditional constitutional principle of separation of powers. The principle of non-delegability of legislative power, as it is against dictates of democracy, since power delegated to the legislature by the people is being re-delegated to unelected officials, is also another theoretical objection to delegation. On practical terms, there has been a serious concern by politicians, the legislature, the judiciary and even administers on the dangers of delegation for the fear that it may lead to the abuse of power and subsequently violation of individual right, liberty and freedom.

To balance the pros and cons, much attention is now given, to administrative rule-making procedures providing safeguards against abuse by the rule-making organ, which may be taken as the key concern for administrative law. Administrative rule-making may assume different forms, and is classified differently based on its nature and purpose. Generally, regulation, rule, order, memorandum, circular, directive, decree, etc., may be used to describe a certain delegated legislation depending on its

nature and the intention of the legislature. In Ethiopia, a delegated legislation may take the form of regulation or directive. The former is issued by the council of ministers, and the latter is by each specific administrative agency.

Currently, it is accepted in most jurisdictions as to the requirement of the clear and specific procedures governing the rule-making process. The rule-making procedure may be applicable universally by every administrative agency (like the Administrative Procedure Act, 1946. U.S.A.) Otherwise the enabling act may specifically require minimum procedures to be followed in each particular case.

Be it universal or specific, agencies should mainly be cognizant to the minimum procedures of consultation, and publication. Consultation which allows the citizen to participate with the rule-making process, requires taking into consideration the comments, suggestions and criticisms of parties likely to be affected by the proposed rule. Publication in an official document is also a requirement, which significantly increases its acceptance and obedience by the public. In the absence of publication and access to the approved rules, it will be inconceivable for the affected persons to challenge its legal validity in case it violates their rights and interests. The rule-making procedure ensures fairness in the administrative process and similarly serves as a control mechanism of the delegated legislation.

Activity

This is an activity which helps you to thoroughly understand the substance, procedure and control of delegated legislation. Make a group of 5-7 students. Then, the group will conduct an investigation on the rule-making process by administrative agencies and submit a report of its findings to the class following the problems given below.

1. Go to a nearby administrative agency and make a formal request for a copy its directives.

2. After obtaining the directive, conduct an interview with the relevant officials as to the rule-making procedure applied to that specific directive (if any) and in general the procedure adopted by that agency while issuing other directives. (for instance, check whether agency has complied with consultation & publication requirements),

3. Next evaluate the constitutional and legal validity of the directive by asking the following questions and following the procedures suggested.

    - Is the directive constitutional? Firstly, check whether the matter delegated by the legislature is an essential legislative function which could not be delegated under the constitution. Secondly, check whether it contains any provision(s), which violates the F.D.R.E. constitution.
    - Is the directive ultravires? Compare it to the enabling act which confers a legislative authority to issue that directive and determine whether it goes beyond that of the scope of the delegated power.
    - If it is intravires, does it contain any provision which constitutes unreasonable, irrationality, bad faith or generally abuse of discretion?

4. in case you have found that the directive is either unconstitutional, ultravires or if there is an abuse of power and the agency hasn't complied with any of the rule making procedures point out the negative impact on right, liberty and interest of the interested parties.

5. Suggest some mechanisms by which the delegated legislation could be controlled in Ethiopia. Indicate the role of the house of people's representatives, house of federation, the ombudsman and the human right commission, and the judiciary.

6. Prepare your report and present it to the class.

7. Each member of the group should actively participate in each activity.

8. Every student is also expected to actively engage himself in the discussion at the time of the presentation of the reports.

Review Questions

I) Discuss the following statements

1. In spite of the supposed justifications, delegated legislation offends traditional constitutional principles and is open to obvious abuse.

2. The most effective safeguard against the abuse of delegated powers is not to delegate them in such terms as to invite abuse.

3. Administrative rule making is highly democratic because of the fact that it can provide effective people's participation for better acceptance and efficiency. Discuss the validity of this statement in line with the practice and procedure of administrative rule-making in Ethiopia.

4. The source of power to issue regulations and directives by the council of ministers and administrative agencies does not emanate directly from the F.D.R.E constitution; rather the source of power is always the act of the legislature in the enabling act.

5. "A legislature cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to insure the proper implementation of its policy decisions, but established legislation is not rendered invalid, as an unlawful delegation, by the mere fact that a third party, whether private or governmental, performs some role in its application or implementation."

II) Answer the following questions

1) Wade says that to delegated legislation is 'a necessary evil.' Why is delegated legislation considered a necessary Erie?

2) The F.D.R.E. constitution does not expressly or impliedly allow the legislature to delegate some of its law making functions either to the council of ministers or to other administrative authorities. Do you agree? If you disagree, how can you justify delegation of legislative power in line with the constitution?

UNIT FIVE: JUDICIAL POWER OF ADMINISTRATIVE AGENCIES

Introduction

As it has been already indicated in the previous discussions, administrative agencies may exercise one or all of the three powers of government- administrative, legislative and judicial powers. The first two powers of agencies are thoroughly appreciated in the previous unit. This unit, in turn, shall discuss the meaning and nature of agency adjudication, the forms of agency adjudication, the merits and demerits of agency adjudication; the nature, composition, power and tenure of administrative tribunals in a comparative perspective.

Objectives

At the end of this unit, the students are expected to:

- Understand the meaning of judicial power (decision-making power) of administrative agencies and distinguish it from the legislative power;
- Discuss the nature, characteristics and need for tribunals (administrative courts).
- Identify administrative courts in Ethiopia and examine their organization and structure;
- Identify the qualification, appointment and dismissal of administrative law personnel;
- Identify the power and procedure of inquires;
- Understand the principle of natural justice and its basic elements.

5.1 The Meaning and Nature of Administrative Adjudication

As it has been discussed previously, an administrative agency may be conferred with the tripartite powers (executive, legislative and adjudicative) of various nature and scope. As a logical sequence, of the previous chapters have delt with the executive and legislative powers of administrative agencies. This unit discusses the concept agency adjudication in detail keeping taken this in mind, let's turn to the merits of the discussion.

An important question that may be and should be raised here is that related to the meaning of judicial/adjudicatory powers of the administrative agency. What are the peculiar features of an agency's adjudicatory powers vis-à-vis its executive and legislative counter parts? A clear-cut answer cannot be provided to this question. However, it is possible to put some objective tests as a benchmark to differentiate the adjudicatory powers of administrative agencies from their executive and legislative powers. The first of such often -cited test is related to the conclusiveness of the agency's decision. This is to mean that the agency's decision in this regard must have a binding effect on the parties in dispute without any need for confirmation by any other organ. As an authority stated it properly, "…the broad exercising of power which are of a mere advisory, deliberative, investigatory, or conciliatory character or which do not have a legal effect until confirmed by another body, involve only the making of a preliminary decision will not normally be held to be acting in a judicial capacity…." Thus, the decisions that administrative agencies render in their judicial capacities are conclusive in the sense that such decisions are binding on the parties in dispute without awaiting for further confirmation for any other authority, or without checking whether such decisions subject to review collaterally. However, as conclusiveness of the agency's decision is only one test not the only test and it shall not be confused with other binding acts of an agency passed in its administrative or legislative capacity. For example, an administrative agency may adopt rules and regulations that have the force of law. These rules and regulation, like judicial or quasi- judicial determinations, are binding. But unlike the latter, which focus on the resolution of factual disputes concerning a specific party, rules and regulations are general in their application. So, conclusiveness of the decision should not be taken as the only decisive test.

The second test for identifying whether a certain agency's function is judicial or not relates to the availability of some sort of procedural attributes. While exercising their adjudicatory powers, administrative agencies normally follow preset procedures. The procedure adopted for this purpose may be formal, which is more or less similar to the ordinary court procedures, or informal, which is a simplified procedure that provides only the minimal procedural safeguards to the persons subject to the decision. The

action could be initiated by private individuals against an administrative agency or vice versa, or by an administrative agency against another administrative agency. The administrative forum to which such action is brought for determination is expected to entertain the parties' opinions, arguments and evidences as the case may be. So, decisions passed by administrative agencies in their judicial capacity are fruits of certain procedures. This to mean that the decision making process is not arbitrary, rather it is guided by procedures adopted in advance.

The third important test for identifying whether or not an administrative agency passes a decision in its judicial capacity is related to the presence or absence of interpretation and application of legal rules. Obviously, interpretation of laws, application of laws to resolve specific factual disputes and declaration of laws are the core functions of the judiciary whether it is a regular court or an administrative body. Hence, in order to determine whether the decision of an administrative agency is judicial or not, it has to be tested whether or not the decision passed is based on pre-existing legal rules or other prescribed standards. The point of controversy to be resolved by the concerned agency could be legal or factual that involves the interpretation and/or application of the governing laws to the controversy or mere declaration of the meaning of laws in issue.

To summarise, the judicial act of administrative agencies can be identified by reference to their formal, procedural or substantive characteristics, or by a combination of any of them. So judicial act may be differentiated from the rest of other administrative functions in that if the decision has conclusive effect, binding nature, have force of law without confirmation by another body, solve questions of law or fact, the function is treated as judicial [Steven: P.18]. keeping this in mind, what follows is a definition of the term administrative adjudications given by various authorities.

The United States of America's Federal Administrative Procedure Act of 1946 defines the term "adjudication" as every final agency action resulting in an order other than rule-making. More precise definition is provided under the 1961 Revised Model State Act of the United States of America. Under this act, adjudication is equated with the determination of contested cases. The term contested cases further defined as " a

proceeding including but not restricted to ratemaking and licensing, in which the legal rights, duties or privileges of party are required by the law to be determined by an agency after an opportunity for hearing." As per the definition provided under the Model Act, an administrative act of ratemaking (price fixing) is included within the spectrum of adjudication. However, it has to be noted that the fact that the result is an outcome of a contentious process does not warrant adjudication. Such contentious cases must be resolved conclusively based on principles and rules already in being if the act is to be treated as adjudicatory. Most states of the United States of America adopting administrative procedure laws have followed similar approach to that provided in the Model Act. There are also few states in the US that define adjudication in a language more closely approximating that of the federal act.

Other definitions departing both from the pattern of the Revised Model State Act and that of the federal act that deserves special note are the following:

Ohio defines adjudication as "the determination by the highest or ultimate authority of any agency of the rights, duties, privileges, benefits, or legal relationships of a specified person." Similarly, the Pennsylvania statute defines adjudication as "any final order, decree, decision, determination, or ruling by an agency affecting personal or property rights, privileges, immunities or obligations of any or all of the parties to the proceeding." Wisconsin provides that contested cases means "a proceeding before an agency in which, after hearing required by law, the legal rights, duties, or privileges of any party to such proceeding are determined or directly affected by a decision or order in such proceeding and in which the assertion by one party of any such right, duty, or privilege is denied or contravened by another party to such proceeding."

The Federal Democratic Republic of Ethiopia also prepared a draft Federal Administrative Procedure Proclamation in 2001. The Federal Administrative Procedure Proclamation does not mention the term adjudication at all Instead, the term "Administrative Decision" is used as synonymous term for similar purpose in the draft document. An "Administrative Decision" as defined in Article 2 Sub-Article 2 of this draft states that administrative procedure is to "any decision, order or award of an agency having as its object or effect the imposition of a sanction or the grant or

refusal of relief, including a decision relating to doing or refusing to do any other act or thing of an administrative nature, or failure to take a decision…." This draft attaches some exceptions restricting the scope of this definition. The following administrative acts are excluded from the spectrum of the formal definition of administrative decision:

- Decisions as to the selection or tenure of a public servant;
- Decisions based on inspections, tests or elections;
- Decisions as to the conduct of military or foreign affairs or security of police functions;
- Decisions of any of the courts established by law made in exercise of the judicial power as referred to in Article 79 of the Constitution of the Federal Democratic Republic of Ethiopia;
- Decisions establishing rules and regulations;
- Decisions made by the Council of People's Representatives and the Federation Council; and
- Decisions made by the President of the Federal Democratic Republic of Ethiopia.

As was discussed in the previous units, the legislature and the judiciary, despite their role in developing and shaping administrative laws, are not subject to the regulation of administrative law. Thus, decisions made by these organs of the government in their respective spheres of powers are not within the domain of the administrative adjudication. Even decisions of the administrative agencies establishing rules and regulations are excluded from the spectrum of the administrative adjudication. Other prerogative powers of the executive organs of the government that involve administrative discretion are also not subjected to the formal limitations of administrative adjudication. Decisions of the FDRE President, for example, granting amnesty and decisions of the executive organ of the government related to the conduct of the military and foreign affairs are discretionary by their nature. For these and other similar reasons, the draft federal administrative procedure proclamation of Ethiopia exclude some administrative acts, which may pass the general test, from the definition of adjudication as understood in the formal sense of the draft proclamation.

These types of exclusions are, of course, not noble to Ethiopia. Although the scope may vary from country to country, there are similar tendencies in other jurisdictions in excluding administrative acts that are contentious or adjudicatory in their attributes from the statutory definition of the term administrative adjudication. The experience in some member states of the United States of America can be taken as a good example in this case. In Indiana, it is excluded from the definition of adjudication of the issuance of warrants for the collection of taxes, the payment of benefits under the unemployment insurance laws, certain appellate functions of the state board of tax commissioners, determination as to the eligibility for public assistance, and the dismissal of certain public employees.

In Maine, the term-contested case, which is equated with adjudication, does not include "informal meetings held by consent of the agency and all interested parties." Massachusetts, likewise, with exception to the definition of "adjudicatory proceedings," exempts certain types of administrative adjudication from the procedural requirements of the Act, including (a) proceedings to determine whether the agency shall institute or recommend institution of proceedings in court, (b) proceedings for the arbitration of labor disputes, (c) proceedings for the disposition of grievances concerning public employees, (d) proceedings to classify appointment to governmental positions.

In Virginia, it is excluded from the definition of contested case controversies relating to the amount, the payment, or the refund of taxes; controversies relating to the issuance, denial, revocation or suspension of licenses by the Virginia Alcoholic Beverage Control Board; and controversies, in cases in which an agency issues a license, permit or certificate after an examination to test the knowledge or ability of the applicant, whether the examination was fair or whether the applicant passed the examination. In Pennsylvania, the definition excludes from "adjudication" matters involving the seizure for forfeiture of property. [Smith: pp.57-77]

From the comparative understanding of the facts provided above, it is possible to conclude that the term adjudication in administrative law context is a fluid concept. The meaning and scope of this term may vary from country to country, and even from time to time in the same country to a certain degree. As can be inferred from the

discussions above, different states of the United States of America excluded various administrative acts that are contentious or adjudicatory in their general attributes from the formal working definition of adjudication. Thus, although an administrative act may pass the general tests discussed earlier to qualify as a judicial or adjudicatory act, it may be excluded from the working definition of the term for one or another compelling pragmatic reason. In fact, such exclusions may not frustrate the due process of law guarantee incorporated in their respective constitutions or other basic laws.

An important question that may be triggered at this juncture is that what would be the practical significance of including or excluding an administrative act within the formal definition of adjudication in administrative law context? The discussion whether or not an administrative act should be included or excluded in the formal or statutory definition of the term adjudication is not merely an academic discourse. It has far reaching practical significance. Related to this point, **Smith** in his 3rd edition book titled "Judicial Review of Administrative Action" noted as follows:

> *The importance of the statutory definition of adjudication (or contested cases) lies in the fact that it is only with respect to the administrative proceedings which are included within the definition that the parties can insist, as a matter of statutory right, an observance of the procedural safeguards specified in the respective statutes. These procedural safeguards (guaranteeing adequate notice, a faire hearing in accordance with prescribed rules of evidence, a separation of prosecutory and adjudicatory responsibilities, and a decision made on a written record by responsible officials having personal familiarity with the contents of the record) are vital not only in protecting the private right of respondents, but also in preserving the public interest that administrative determinations shall reflect fully informed decisions made on an adequate record.*

5.2 Forms of Administrative Adjudication

As was stated somewhere else, one of the striking features of adjudication is the existence of predetermined procedures that guide the decision-making process. The decision may be preceded by full-blown formal hearings that are similar to court trials or an informal process, which is just like a summary proceeding where the participation of the parties is very minimal. Normally, adjudication process begins either with a complaint filed against a private person, a business, or even another agency. The party charged in the complaint is the defendant (called the respondent). The respondent has the right to file an answer to the complaint. In principle, respondents are entitled to a hearing before the agency adjudicating the case. However, the depth of the hearing may vary from circumstance to circumstance.

5.2.1 Informal Adjudication

The vast majority of administrative adjudications involve informal actions. As will be discussed in the subsequent sub-sections, the informality of the process of administrative adjudication is among the justifications behind the delegation of judicial power to administrative agencies. The informal mode of adjudication, although it may vary from county to country and from case to case in terms of content, tries to provide the minimal statutory safeguards for the protection of fundamental rights of individuals.

The United States Administrative Procedure Act (APA) can be cited as a typical example. In the USA, the Administrative Procedure Act (APA) governs federal agency adjudicatory procedures in general. However, most states have their own counterpart to the APA. The APA requires the most basic elements of due process, that is, notice and hearing. Regarding notice, APA provides that "persons entitled to notice of an agency hearing shall be timely informed of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing is to be held; and the matter of fact and law asserted. As to the hearing, the agency is required to give all interested parties opportunity for …the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit…" The APA requirements for

administrative hearings are minimal, allowing agencies to operate rather informally. Although hearing in this sense may be treated as important elements of the procedural due process of law, it does not necessarily mean that a full-blown oral hearing is to be conducted. Depending upon the nature of the case in hand, a written submission of opinion, argument, data, or otherwise may suffice. So, in the majority of cases, APA dictates administrative agencies to fulfill the minimum requirements of notice and hearing before proceeding to act on matters that affect the rights of others. Indeed, the notice has to be adequate enough in terms of time, place and content. But hearing could be informal such as written submissions and interview like oral communications. In all cases, the due process clauses of the fifth and fourth amendments to the US constitution dictate that neither the federal nor state governments shall deprive of "life, liberty, or property, without due process of law." The notion of due process of law connotes two things: the substantive aspect of the action that the decision of the agency must be backed by lawful authority and the procedural aspect that the process of decision making must be guided by predetermined procedures, or in default by the minimum requirements set under APA. To put it simply, a person cannot be deprived of his entitlements to life, liberty and property except for strong reasons expressly provided under the relevant substantive laws and in accordance with the procedures set under the related laws.

The ordinary rules of procedure and evidences that govern court proceedings are not fully applicable to administrative/tribunal proceedings in their entirety. Courts in the common law tradition, therefore, have developed general principles that are expected to ensure fairness in agency adjudication. These principles are known as the rules of natural justice and fairness. The rules embody two concepts. First, *audi alteram partem*- that means a person should not be condemned without a fair hearing. Second, nemo judex in causa sua–which means that no one should act as judge in any matter if he or she has some kind of vested interest in the decision since all decisions should be free from bias. In the United Kingdom, there is an established precedent on the application of the rules of natural justice in the following types of situations:

- Where someone is dismissed from office; or
- Where someone is deprived of membership of a professional or social body;
- Where someone is deprived of property rights or privileges.

Where the rules of natural justice apply in their entirety, a fair hearing will be expected to consist of the following elements:

a) Adequate notice must be given to the person affected;
b) The person affected must be informed of the full case against him or her;
c) Adequate time must be allowed for that person to prepare his or her own case;
d) The affected person must be allowed the opportunity to put forward his or her own case;
e) The decision maker may be required to give reasons for his or her decision;
f) The affected person may be able to cross-examine witnesses;
g) The affected person may be entitled to legal representation.

But it has to be noted that the concept of fair hearing may not imply the same thing in all circumstances. The requirements listed from (a) to (d) are made mandatory- the minimum requirements of fair decision, whereas those listed from (e) to (g), are discretionary in the sense that their application may be required having regard to the nature of each particular type of case. In McInnes v Onslow-Fane [1978] 1 WLR 1520, Megarry V-C said that natural justice was a flexible term which imposed different requirements according to the nature of the case. The closer a decision came to being termed 'judicial,' the more applicable the full elements of the rules of natural justice. However, the closer a decision came to being 'administrative' in nature, it was more appropriate to talk about the requirements of 'fairness'. [Cumper & Waters: P. 311]. Normally, the consideration of an application for a license is an administrative task - the full rules of natural justice do not apply - the requirement is only that of fair consideration of the application. In contrast, the revocation of a license is more of a judicial decision – it is taking away someone's rights – therefore they are entitled to the full protection of the rules of natural justice. [Id.]

It has to be noted further that fair hearing does not always necessitate oral hearing. Sometimes, written representations will comply with the rules of natural justice or the duty to act fairly. Case law suggests that written representation will suffice when the facts of a case are not in dispute. However, where this is not the case, the requirements of natural justice may require that there be an oral hearing.

To put it in nutshell, informal adjudication does not involve full-blown trial type hearing. Unless otherwise statutes or case laws (in common law practice) dictate the agency to follow a full-fledged formal hearing process, agencies are usually at liberty to adopt their own decision-making procedures having regard to the minimum requirements of due process of law or natural justice or fairness as such terms may be differently known in different jurisdictions. The more the process of administrative adjudication is highly formalized, the less would be the resultant advantages sought from the delegation of adjudicatory powers to administrative agencies. The more administrative adjudication process is made highly informal, the more would be the possibility for administrative arbitrariness and the threats posed on the rights of individuals. Thus, while it is important to dispense administrative agencies/tribunals from the highly formalized and stringent ordinary court procedures so that laws and policies will be enforced, it is equally important to device the minimum procedural safeguards for the protection of individual rights from arbitrary violation for such powerful agencies. These are the two apparently conflicting and actually competing important interests what APA and the doctrine of fairness as developed from case laws try to strike balance.

5.2.2 Formal Adjudication

As mentioned above, informal administrative adjudication offers only the minimal statutory safeguards of notice and hearing; and hearing in the majority of cases does not involve oral hearing, but written submission of opinions, arguments, data, and so on. But formal adjudication involves an almost full-blown trial type hearing. Having regard to the magnitude of the individual interest at stake, the enabling legislation (parent act) or other statutes may dictate the concerned administrative agencies to hold a formal hearing before passing decisions. Formal adjudication, among other things, may provide the following procedural safeguard to the respondent:

- Notification of charges;
- Notification of hearing;
- Representation by an attorney;
- An impartial tribunal/administrative law judge;
- Presentation of evidence;

- Cross examination of the witness of the agency;
- A decision based on the regulation.

In a formal adjudication, the respondent has the right to confront an agency witnesses. Hence, oral hearing must be always there. Even where the statutory requirements regarding agency adjudication process appear inadequate to ensure fairness or to protect the fundamental rights of individuals, the US Supreme Court has applied the Due Process Clause of the Fifth and Fourth Amendments that dictate neither the federal nor the state governments shall deprive persons of "life, liberty, or property, without due process of law." Regarding the notion of administrative due process, authorities are noted as follows:

In administrative due process cases, the Court must make two determinations. First, it must decide whether the Due Process Clause is applicable. Administrative decisions are constrained by the Due Process Clause only if, they in some meaningful way, deprive an individual of "life, liberty or property." Of course, today those interests are broadly defined. Second, assuming that the Due Process Clause does apply, the Court must determine what "process" is in order to ensure fundamental fairness. Here, the Court has been reluctant to adopt a one-size-fits-all approach to administrative due process. In *Mathews v. Eldridge*, the Court said, "due process is flexible and calls for such procedural protections as the particular situation demands." Beyond the general requirements of fair notice and fair hearing, it is difficult to say precisely what due process requires in a specific administrative context. But one guiding principle is that the greater the magnitude of the individual's life, liberty or property interest, the greater the requirement for procedural protections**.**

The greater an agency's action tends to encroach to the fundamental constitutional rights of individuals, the greater should be the procedural protections provided to such individuals. This is also what the principle of natural justice and the doctrine of fairness as discussed in the previous subsection dictate. Thus, there are circumstances where administrative agencies/tribunals are required to conduct a full-fledged formal administrative adjudication. They may be dictated to do so in the majority of cases by the enabling legislations or other related statutes, by the constitutional principles guarantying due process of law, the principles of natural justice and fundamental fairness.

To date, Ethiopia has not come up with an instrument that provides uniform standards or guidelines that regulate administrative agencies' adjudication process. Both at the federal and the regional levels, there is no uniform legislative guidance that dictates administrative agencies concerning the procedural steps they must go through while adjudicating cases. So, if there are any, such procedures have to be searched in each of the pieces of enabling legislations that create the respective agencies. At the federal level, a fruitless attempt was made in 2001 to adopt a federal administrative procedure proclamation that was intended to regulate the process of rulemaking and adjudication by federal administrative agencies. But for unknown reason, it has remained as a draft for almost a decade. Federal administrative agencies can refer to this draft document like any other an unbinding legal literature at their discretion; the draft document cannot dictate such agencies decisions for it is not yet adopted in the form of law.

However, this does not necessarily imply that administrative adjudication in Ethiopia is completely arbitrary. You can see some procedural requirements dispersed here and there in the enabling legislations that create and empower particular agencies. Even where the procedural safeguards provided in such particular legislations are found, inadequate to protect the fundamental constitutional rights of individuals, recourse has to be made to the principles of due process of law enshrined under the FDRE Constitution. Our constitution expressly protects, among other things, the right to life, liberty and property. These rights cannot be restricted or taken away arbitrarily by any individual or administrative authority. Rather, all citizens and organs of the federal and regional government have the duty to ensure the observance of the constitution and obey it. Thus, as it happens in the United States of America, there is a wide room for our courts to play active role in ensuring the principles of due process of law incorporated in our constitution. Implicit in the concept of due process of law are there always the core requirements of fair notice and fair hearing.

In an attempt to provide a procedural safeguard to the protection of individual rights from administrative agencies, the draft federal administrative procedure proclamation of Ethiopia (herein after referred to as the draft) incorporates the core principles of due process of law such as notice and hearing. The joint reading of Articles 24 and 26 of the draft indicates notice and hearing as requirements. Before an administrative

action that affects the right of individuals is taken, adequate notice and a fair hearing opportunity shall be given by the agency to such concerned individuals. The general requirement of notice under Article 24 of the draft dictates administrative agencies to notify the cause of action of the case they intended to take, the time, place and nature of the hearing. The purpose of notice is to let individuals aware of the action an agency actually plans or intends to take on cases that involve their legitimate interest. The right to hearing before an administrative measure is taken is also provided under Article 26 of the draft. Unless otherwise hearing is dispensed in those circumstances expressly provided under the law for different reasons, an agency is obliged to conduct a public hearing (Article 26 cum Article 28). The hearing enables the party to the case voice his objections and arguments against the decision. Article 28(3) of the draft confers parties to administrative proceedings the right to submit documentary and other evidences to request agencies to summon witnesses, and to cross-examine the allegation of the other side. Article 25 of the draft allows parties to administrative proceedings the right to counsel and represent by a licensed advocate, or any other person.

In the conduct of the hearing, agencies are required to maintain the record to all proceedings carried out in rendering decision, and upon request to give the copy of the record to the parties or their representatives. Furthermore, Article 32 of the draft dictates administrative agencies to reduce their decision into a written form and to include disputed facts under consideration including the substance and source of the evidence, the findings of facts made and the evaluation of the evidence which bases the decision, the determination of the issue and action to be taken on the basis of such decision.

5.3 Tribunals and the Tribunal System

5.3.1 Meaning and Nature of Tribunals

The attempt to provide a uniformly applicable single definition of the term tribunal is more than difficulty. Even where the subject of discussion is one and the same, there are situations where different authorities use different terminologies having regard to the diverse social realities surrounding them. This is also the case that one may

appreciate while discussing the term tribunals in administrative law context. While discussing the forums where administrative disputes are being formally resolved different jurisdictions use different terminologies having regard to the social set up of their own systems. The Federal Administrative Procedure Act of America use the term Administrative Law Judges to connote those persons who adjudicate administrative disputes. Whereas the French uses "Conseil d'Etat", "Cours Administrative d'Appel" and "Tribunaux Administratifs" to refer to their three-tier hierarchy administrative courts that adjudicate administrative disputes. Other authorities also use the term "tribunal" with or without the designation "administrative" to denote the same thing.

Despite the differences in the terminologies used and their organizational set-up from country to country, tribunals or administrative tribunals or administrative courts, as the case may be, refer to the forums where justiciable disputes that involve government agencies, in one or another form, are being adjudicated by a panel of impartial decision makers. So, instead of trying to define this fluid concept of tribunal, it seems convenient to state what tribunals usually do and how they proceed. Tribunals are bodies established outside the structure of ordinary courts to adjudicate disputes that involve the government as a party on matters pertaining to governmental functions. The dispute could be between two or more government agencies, or between government agencies or between one or more individual parties. Hence, the typical tribunal, like an ordinary court, finds facts and decides the case by applying legal rules laid down by statute or legislation. In many respects, the tasks performed by tribunals are similar to that of performed by regular courts. As the jurisdiction of these tribunals are restricted to adjudicating disputed cases involving administrative agencies as parties in their governmental functions based on the principles, rules and standards set under administrative law, it seems appropriate to call them with the designation "administrative tribunals" instead of simply "tribunals." However, in using the term 'tribunal' together with the adjective "administrative", care has to be taken in order to avoid the concerns raised by some authorities in using that designation. Two prominent administrative law authorities criticized the very designation of the term "administrative tribunal" for being misleading for the following four reasons:

In the first place, no tribunal can be given power to determine legal questions except by Act of Parliament. Normally a tribunal is constituted directly by the Act itself. Sometimes, however, the power to constitute a tribunal like may be delegated by the Act to a minister, but in such cases the act will make it clear a tribunal is intended. Secondly, the decisions of most tribunals are in truth judicial rather than administrative, in the sense that the tribunal has to find facts and then apply legal rules to them impartially, without regard to executive policy. Such tribunals have in substance the same functions as courts of law. These tribunals therefore have the character of courts, even though they are enmeshed in the administrative machinery of the state. They are "administrative" only because they are part of an administrative scheme for which a minister is responsible to parliament, and because the reasons for preferring them to the ordinary courts are administrative reasons. Thirdly, tribunals are not concerned exclusively with cases to which government departments are parties. Rent assessment committees and agricultural land tribunals, for example, are adjudicating disputes between landlords and tenants without any departmental intervention. Fourthly, and most important of all, tribunals are independent. They are not subject to administrative interference as to how they decide any particular case. No minister can be held responsible for any tribunal's decision. Nor are tribunals composed of officials or of people who owe obedience to the administration. [Wade & Forsyth: pp. 907-908]

However, three of the critics labeled against the designation administrative tribunal as stated above do not stand valid. Of course, the term tribunal seems broader in meaning and scope than the term administrative tribunal as the former may embrace bodies formally instituted outside the structure of the ordinary courts to adjudicate disputes of private characters as contrasted to disputes that involve the agencies of the government. The Labor Relations Board that resolves collective labor disputes between employers and employees may be taken as a good example of these tribunals. But, the designation administrative tribunal is purposefully used to exclude the types of tribunals established here and there to resolve disputes between private individuals in their private relations. The adjective "administrative" as used in

the above critics does not necessarily imply that the tribunal is created by the administration or that the tribunal resolves non-justiciable administrative disputes or that the tribunal is an appendix to the government agencies with no relative autonomy. It is simply to mean that the term administrative tribunal is a tribunal with all its attributes, but its jurisdiction is limited to resolving disputes of governmental nature as distinguished from disputes of private character.

As suggested by Garner and Jones (Administrative Law), tribunals have the following five hallmarks:

- Independence from administration;
- Capacity to reach a binding decision;
- Decision taken by a panel of members (as opposed to a single judge);
- A simpler procedure than that of a court; and
- A permanent existence.

5.3.2 Jurisdictional Issues

On the basis of the nature and scope of their jurisdiction, administrative tribunals can be classified into two. These are tribunals having general jurisdiction (general tribunals) and tribunals having special jurisdiction (special tribunals). The French model is a typical example of the tribunals having general jurisdiction on administrative matters. In France, there is a clear dichotomy between administrative law and private (ordinary) law, on the one hand, and between the machineries applying these laws, that is, administrative courts and civil courts also known as regular courts or ordinary courts on the other hand. Administrative courts adjudicate cases falling within the domain of the administrative law. These courts are, thus, the focus of the discussion in this section.

In France, judicial control of the administration is entrusted to a special corps of judges who sit in special courts- known as administrative courts. These courts form a three-tier hierarchy headed by the Conseil d'Etat (Council of State) in Paris, below which are the regional intermediary Cours Administratives d'Appel (Administrative Courts of Appeal) and the Tribunaux Administratifs (Administrative Tribunals) in metropolitan France. They respectively correspond to the Supreme, Higher and First

Instance ordinary courts in structure. These three-tier administrative courts have general judicial jurisdiction on administrative matters falling under their respective material and/or local jurisdictions.

In addition to these courts of general jurisdiction, there are a number of other administrative tribunals exercising judicial functions in narrowly defined fields of activity. These are administrative courts of special jurisdiction that are established in special circumstances where the appropriate expertise does not exist in a general tribunal. But these specialized administrative tribunals are still under the supervision of the Conseil d'Etat as the supreme administrative court. Thus, the French administrative justice system has two striking features: firstly, there is a full-fledged system of administrative law that regulates the relationship between the administrative agencies and citizens and the interrelationship among the various organs of the government. Secondly, there is a full-fledged administrative court system. All administrative disputes are finally resolved within the system of the three-tier administrative court of general jurisdiction as supplemented by those relatively fewer (for example, compared to U.K.) administrative tribunals of special jurisdiction. The Conseil d'Etat is the court of final resort on administrative matters. There is neither possibility of lodging appeal nor possibility for invoking judicial review against the administrative decision before regular courts in France. Inspired by Montesquieu's theory of separation of powers, the French strictly prohibits interference of regular courts on the affairs of the administrative organs of the government on whatever ground. In French, it is a criminal offence for the judges of the ordinary courts to interfere in any manner whatsoever with the operation of the administration, or to call administrators to account before them in respect of the exercise of their official functions.

Most of the common law jurisdictions do not have the French type system of administrative law and tribunals; but tribunals of special jurisdiction proliferated here and there in response to particular circumstances. The same thing seems true in Ethiopia, where there is neither full-fledged corpus of administrative law, nor structured system of administrative court. Of course, this does not mean that Ethiopia has no administrative law and administrative tribunals. As it has been explained earlier, there are diverse sources of administrative law such as the constitution, pieces

of primary and delegated legislation. So, the law is there and also the tribunals are there. But what is missing there is that unlike the French system of administrative justice, here in Ethiopia there is that is no generally defined administrative law jurisprudence. We do not have general principles of administrative law that govern the jurisdictional dichotomy between the adjudicatory powers of administrative agencies/tribunals on the one hand and regular courts, on other hand, Thus, for academic purpose it would be quite important to appreciate the French experience where there is a unified system of administrative justice.

If administrative tribunals and ordinary courts are required to confine themselves within the domain of their respective sphere of powers, a clear demarcation has to be made between the jurisdictions of administrative courts and that of the ordinary courts. This is especially important for countries that adopt the French model of administrative system that provides a clear dichotomy between the provinces of administrative law and private law. It is also important for countries where tribunals of special jurisdiction are proliferated here and there like ours. But the problem is that how this ideal line can be drawn. As it was discussed in the previous chapters, the concerns of the administrative law are governmental activities that administrative agencies carry out. There is a possibility where a given administrative agency may involve in activities that are governmental in nature; for example, regulating private business such as issuing or canceling of license, or rate fixing, or setting safety standards and so on, or in activities that are private in nature such as owning and administering property and producing goods and services for gain. There is a general opinion that when the dispute arises from activities of the first category, it falls within the domain of the administrative law- thus it is the jurisdiction of the administrative tribunals. But when the disputed act arises from activities of the second category, that is, activities private in nature, it falls within the province of private law-subjected to the jurisdiction of ordinary courts. This general criterion, homers, may not be always true.

French administrative law writers and practitioners have been engaged in searching for general principles and criteria which make a clear demarcation between the jurisdiction of administrative courts and ordinary courts. According to Brown and

Bell, in the period before Blanco (TC 8 February 1973), the following criteria were developed:

- The first was that of the state as a debtor, under which the Conseil d'Etat denied the ordinary court's competence to condemn the state to any money payment.
- The second was the criterion of 'the act of public authority' that drew a distinction between those actions of the administration, which involved its public authority and mere acts of management that did not: the former were outside the jurisdiction of the ordinary courts, the latter were within it.
- The third criterion and the one favoured by the ordinary courts, was that of 'public administration' as distinct from 'private administration'; in the latter the administration used the same process as the private citizen and therefore came within the scope of the ordinary courts. On the other hand, disputes arising out of its public administration belonged to the administrative courts.

These early criteria, tentative and overlapping, were discarded in Blanco in favour of a new principle, that of 'public service'. The child Agnes Blanco was injured by a wagon, which was crossing the road between different parts of the state-owned tobacco-factory at Bordeaux. The question then arose, to which court, civil or administrative, the claim for damages should be brought. The Tribunal des Conflits, adopting the analysis proposed by Commissaire du gouvernement David, held that the injury arose out of the activities of a *service public* and that for this reason the administrative court had jurisdiction. Such influential doctrinal writers as Duguit…Jeze, and Rolland subsequently approved this approach. According to this last criterion, 'a public service is any activity of a public authority aimed at satisfying a public need'. This definition stresses that for a public service two elements must both be presented: the activity of a public authority, and satisfying a public need. [Brown and Bell: pp125-126] A 'public need' is not only that defined by statute; it can simply be identified by a decision of public authority. The second element in the concept of *service public*, namely, that the activity in question must be carried on by a public authority, has been extended almost to vanishing point in recent decades. In particular, it is necessary to distinguish between the public authority's role as creator

or director of the public service from its role as provider. For a public service to exist, it is not necessary for a public body actually to provide the service.

A third element may be distinguished in the concept of *service public,* in addition to the meeting of a public need and the participation of a public authority. The authority must have recourse to methods and prerogatives which would be excluded in relations private parties. For example, it may operate as the service concerned as a monopoly, or may finance it by compulsory contributions from those it benefits.

But even where the activity has the appearance of a *service public,* it may not come under the supervision of the administrative courts sime the special regime of administrative law is excluded. Such exclusion may be expressed by statute, or implied because the interests involved are ones traditionally within the protection of civil courts, or because the public authority decides to function under the same conditions as private operators.

In short, the choice of criterion has been swung back and fro between the concept of public service and public authority. However, the latter seems currently the preferable test for the competence of administrative judge. The basic principles for separating the functions of the administrative courts and the ordinary courts as indicated above would lead to giving jurisdiction to the ordinary courts only when the activity of public body was private in character. However, these principles are subject to a number of exceptions based on convenience more than principle. So, some disputes, although they arise from acts of public authorities, may in exceptional circumstances be left to the jurisdiction of ordinary courts. Hence, a watertight demarcation of jurisdiction cannot be made based on a single principle only.

It is suffice say that disputes involving administrative agencies, which arise out of the conducts of public authorities, are in principle falling under the jurisdiction of administrative courts. But the French administrative law gives a room for some exceptions to this principle.

5.4 The Advantages and Disadvantages of Administrative Adjudication

Technically speaking, judicial power/function is the primary function of courts. As mentioned somewhere else, the FDRE Constitution expressly vested judicial power, both at the Federal and State levels in courts. This goes in line with the principle of separation of state powers. However, it does not necessarily imply that only regular courts shall exercise judicial power. There are possibilities where judicial power may be delegated to other bodies falling outside the structure of ordinary courts. As can be inferred from the wordings of Articles 37(1) and 80(4 & 5) of the Constitution, such possibilities are not prohibited. Having said this, let us discuss the arguments developed concerning the advantages and disadvantages of delegating judicial power to administrative agencies

To begin with the advantages, judicial power is usually delegated to administrative agencies/tribunals with the purpose to provide cheap, accessible, informal, speedy and specialized justice. Concerning the paramount advantages of administrative adjudication over adjudication by ordinary courts, Philps, Jackson and Leopold: p886

> *…They (administrative tribunals) could offer speeder, cheaper and more accessible justice, essential for the administration of welfare schemes involving large number of small claims…. The process of courts of law is elaborate, slow and costly…it (court process) is to provide the highest standard of justice; generally speaking, the public wants the best possible article and is prepared to pay for it…. In administering social justice…the objective is not the best article at any price but the best article that is consistent with the efficient administration. Disputes must be disposed of quickly and cheaply for the benefit of the public purse as well as for that of the claimant*. [Philips, Jackson and Leopold: p 886]
>
> As can be inferred from this, the arguments asserted in favor of delegating adjudicatory power to administrative agencies can be summarized as follows:

- Expediency: administrative agencies are better than ordinary courts in disposing cases timely.

- Administrative adjudication is cheaper than court adjudication
- Administrative adjudication is more convenient and accessible to individuals compared to ordinary courts.
- The process of adjudication in administrative agencies is flexible and informal compared to the rigid, stringent and much elaborated ordinary court procedures.
- Another justification which is not included in the above suggestion, that is related to the special expertise knowledge administrative tribunals manifest as compared to ordinary court judges. Administrative tribunals are filled by a panel of persons vested with special skill and expertise related to the complicated dispute they adjudicate. Whereas ordinary court judges are generalists in law and lack such expertise knowledge on the needs of the administration in this technologically advanced world.

  In short, due to the informal adjudication process, liberal standards of evidence in administrative adjudication and the special expertise administrative tribunals demonstrate the possibility of getting quality justice timely and cheaply is very high. However, administrative/tribunal adjudication is not free of critics. Of the prominent critics are:

- Lack of legal expertise: The argument here is that, as many of the members of the panel are selected from different walks of life with no or little legal background, they may lack the requisite legal expertise to adjudicate disputes.
- Partiality: The fear here is that, as many or all of the members of the administrative tribunals are at the same time employees of the various offices or agencies, they might not be free from bias and partiality towards the agency.
- Violation of the principle of separation of powers and rule of law: Adjudication is the primary business of ordinary courts. So, transferring this power to administrative agencies is argued by some authorities to be a violation to this principle.

5.5 The Organizational Structure of Administrative Tribunals

As was incidentally stated earlier, the organizational structure of administrative tribunals is different from jurisdiction to jurisdiction. In some countries like France, there are tribunals of general jurisdiction that are hierarchically organized in a way that corresponds to the three-tier ordinary court structure. But many other countries appear to form tribunals of special jurisdiction here and there to address specific problems. The Britain and Austrian models may be taken as a typical example. The subsequent subsections will devote to discussing these two models of administrative tribunals in turn and to appreciate whether or not the organizational structure of administrative tribunals in Ethiopia fits to any of such models.

5.5.1 France

As you may recall from the previous discussions, in French there is a clear demarcation between administrative law and private law on the one hand and between the institutions that interpret and apply these laws to resolve specific disputes, i.e., administrative courts/tribunals and ordinary/regular courts, respectively.

The French formed a three-tier administrative court system having general judicial jurisdiction on administrative matters. The structure of French administrative courts having general jurisdictions, just like the ordinary courts, has a pyramidal form. At the apex, there is one "Conseil D'Etat" (council of state) in Paris, below which are the seven intermidiary regional "Cours Administraives D'Appel"(administrative courts of appeal) followed by the thirty-five "Tribunaux Administratifs"(administrative tribunals) in metropolitan France. The Conseil D'Etat is the court of final resort on administrative matters. It exercises appellate and cassation powers over decisions of subordinate to administrative courts. It has also original jurisdiction on some administrative matters. The Cours Administratives D'Appel is the administrative counter part of the French high court. It entertains appellant jurisdiction over justiciable administrative disputes brought from lower administrative tribunals and original jurisdiction in certain matters reserved to it. The Tribunaux Administratifs is the administrative counter part of the French first instance courts. It hears

administrative disputes at the first instance level. That is, it is the court of the first instance on administrative matters.

In addition to these administrative courts of general jurisdiction, there are a number of other administrative tribunals exercising judicial functions in particular spheres. They are referred to as specialized jurisdiction tribunals that entertain administrative disputes in particular fields of administration. Decisions of these specialized tribunals may be reviewed by the Conseil D'Etat by way of appeal or cassation. In general, the Conseil D'Etat(Council of State) plays advisory and judicial role on administrative matters.

5.5.2 Britain and Australia

Unlike in France, there is no integrated administrative justice system in many countries following the common law tradition. In Britain, for example, there are numerous specialized jurisdiction tribunals that exercise jurisdiction in particular fields of the administration. Conversely speaking, there are no structured administrative courts of general jurisdiction. Rather, there are numerous specialized tribunals having specialized jurisdiction limited to particular sphere of the administrative fields of activity. Many tribunals/ adjudicating agencies having first instance jurisdiction over administrative disputes are found in almost all the particular spheres of the administration. There are also numerous specialized jurisdiction administrative review tribunals that are established to entertain cases appealed from lower adjudicating agencies or tribunals.

However, the system in Australia is a bit different from that of the Britain counter part. In addition to the several first instance and administrative review tribunals having specialized jurisdiction to entertain administrative disputes or to review administrative decisions in particular sphere like in the case of Britain, Australia has also established Administrative Appeal Tribunal (AAT) entrusted with a general jurisdiction to conduct merit review on administrative decisions and on the decisions of many of the specialized tribunals. After the time of the establishment of AAT in 1975, some existing specialized merit review tribunals were abolished and many

review procedures were subsumed in the new AAT structure. But there are still several specialized administrative merit review tribunals that operate alongside the AAT. This kind of arrangement is absent in Britain where there are thousands of specialized jurisdiction administrative tribunals that operate in particular sphere of the administration. In Australia, in addition to the multitudes of specialized jurisdiction tribunals like in the case of Britain, there is Administrative Appeal Tribunal (AAP) having a general jurisdiction to conduct merit review on administrative decisions. But there are also some specialized administrative review tribunals that operate side by side with AAP and whose decisions cannot be subjected to review by AAP. The Administrative Appeal Tribunal is the highest merit review court on administrative matters subjected to its jurisdiction. However, disputes on points of law can be appealed to the Federal Court of Australia and in exceptional circumstances upon special leave to the High Court of Australia, which is the highest court in the Australian judicial system. The striking feature of Australian administrative system is that, unlike in the French system, technical review of administrative decisions including the decisions of the AAT can be carried out by the Federal Court of Australia and in exceptional situations by the High Court of Australia.

5.5.3 Ethiopia

In Ethiopia, like in many common law countries, there is no integrated administrative justice system. There are some sector wise tribunal-like adjudicating agencies/ known by different names such as disciplinary committees, boards, commissions and so on that have the first instance (original) jurisdiction in particular aspects of the administration. There are also tribunals that exercise appellant jurisdiction in particular sphere of the administrative field. The Civil Service Commission Tribunal that assumes appellate jurisdiction on complaints of civil servants brought from the various government organs or bureaus governed by the civil service law, the Social Security Appellate Tribunal that entertains appellate jurisdiction on complaints related to social security benefits and the Tax Appeal Commission that hears tax related disputes on appeal are typical examples of the specialized jurisdiction administrative review tribunals. The Labor Relation Board that hears industrial/labor disputes of collective nature between employers and employees is another example of special

jurisdiction tribunal, although it may not fall within the technical definition of the term "administrative" tribunal as it is dealing with disputes between two or more individuals based on the ordinary substantive law of the country as contrasted to the administrative law. Under the draft of the Federal Administrative Procedure Proclamation No. 2001, an attempt was made to establish "Federal Administrative Grievances Appellate Court", which is a division within the Federal High Court that was intended to assume appellate jurisdiction over all final administrative decisions of all federal agencies. However, the document remained in the status of a draft for almost a decade. Regardless of whether such general jurisdiction administrative court/tribunal be established as a special division within or as an independent body outside the structure of ordinary courts, its existence would be quite important in developing standardized and integrated administrative justice system.

5.6 Qualification, Appointment and Dismissal of Administrative Judges

Needless to say, that competent and impartial tribunals are extremely important in promoting rule of law and good governance within the administrative system. Taking this fact into consideration, many countries formed administrative tribunals that are appropriate to their respective realities. As stated above, the organizational structure of the administrative tribunals varies from jurisdiction to jurisdiction. There are also differences concerning the qualification, composition, appointment and dismissal of the personnel of administrative tribunals from country to country. To appreciate the magnitude of the difference, comparisons are made below among three countries – France, Australia and Ethiopia.

France: As was discussed earlier, there is three-tier administrative justice system in France- the council of state at the apex, the administrative courts of appeal at the intermediary and administrative tribunals at the bottom of the pyramid. The council of state (Consel d'Etat) plays a double role both as an advisory body charged with advising ministers and the head of state on the drafting of legislation and regulations and on administrative matters generally, and as a judge of final resort of the administration. As the membership of the Conseil d'Etat, it is part of the French

administration and staffed entirely by civil servants. As to the manner of recruitment, there are two distinct avenues of access to the Conseil d'Etat: examination and invitation.

Most members of the Conseil d'Etat are recruited from the National School of Administration (l'Ecole Nationale d'Administration) which was founded by the Provisional Government of General de Gaulle in 1945 to serve as a graduate staff college for the higher ranks of the administration. Admission to l'Ecole Nationale Administration (l'ENA as it is popularly called) is by a stiff concours, or open competitive examination, one being conducted for recent graduates of universities and other comparable institutions (only a minority being law graduates), and a second for those who are already members of the civil service. After two years of intensive studies, the outgoing class is arranged in order of merit according to their performance in the final examination and over the course as a whole. Depending on this placement, each successful graduate from l'ENA then chooses from among the administrative posts which happen to be available at the time. The double sieve imposed by the concours on entry and the placing at the end of the course guarantees that entrants to the Conseil by way of l'ENA are necessarily of the highest intellectual quality. In addition, the nature and content of their strenuous course at l'ENA ensures that they have a thorough training (both theoretical and practical) in the field of public administration.

The other method of recruitment is by way of the 'active administration' or invitation. It is a long-standing practice to recruit about a quarter of the entrants to the Conseil d'Etat 'from outside', that is from the rank of those who have already distinguished themselves in the practice of public administration. Recruits of this second category will necessarily be considerably older than those in the first and will usually enter at the higher levels of Conseiller (the highest grade) or Maitre des requetes (the intermediate grade). Currently, one Conseiller out of every three and one Maire des requete out of every four must be recruited externally. This mixed system of entry provides the Conseil with a remarkable combination of young intellect and mature experience. It ensures that the Conseil has within its ranks both theoretical and practical expertise in public administration. Recruitment to the lower courts (*Cours*

Administrtives d'Appel and Tribunaux Administratifs) resembles *Conseil d'Etat* that tdiscussed above.

Membership of the *Conseil* is divided into three basic grades: Conseiller (the highest grade) Maitre des requetes (the intermediate grade) and the Auditeur (the lowest grade or 'Auditorat', which is in turn subdivided into Auditeur de premiere classe and Auditeur de seconde classe). There are also certain posts of special responsibility. Members of the Conseil are civil servants (fonctionnares) with the usual safeguards, which French law confers in matters of promotion and discipline. In matters of discipline, the reform of 1963 has provided a number of new safeguards, but members of the Conseil still lack that status of irremovability, although practically it is unthinkable that a member should be dismissed or otherwise disciplined by reason of political consideration. However, members of the lower tiers of administrative courts are conferred with the status of irremovability; they cannot be transferred to a new post without their consent, even by way of promotion.

Australia: The Australian Legal and Judicial System is based on the common law tradition. As discussed earlier, there are multitudes of the first instance jurisdiction and the second instance (appellate) jurisdiction specialized administrative tribunals on the one hand, and a merit review Administrative Appeal Tribunal (AAT) having general jurisdiction over the majority of cases decided by lower administrative tribunals and other similar administrative bodies, on the other hand. Decisions of the AAT related to the merit of the case are final. But disputes on points of law can be appealed to the Federal Court of Australia and upon leave further to the High Court of Australia, which is the court of highest judicial resort in the Australian Legal System.

The AAT of Australia is a federal merit review tribunal. Merits review is usually performed by tribunals set up explicitly for that purpose. The Federal tribunal is known as the Administrative Appeals Tribunal (the AAT) and its equivalent in NSW is the Administrative Decisions Tribunal (the ADT). Victoria also has an administrative tribunal known as the Victorian Civil and Administrative Tribunal (VCAT).

Members of the Tribunal consist of a president, presidential members (including

judges and deputy presidents), senior members and members. The President must be a judge of the Federal Court of Australia. Some presidential members are judges of the Federal Court or Family Court of Australia. All Deputy Presidents must be lawyers. Senior members may be lawyers or those who have special knowledge or skills relevant to the duties of a Senior Member. Members have expertise in areas such as accountancy, actuarial work, administration, aviation, engineering, environment, insurance, law, medicine, military affairs, social welfare, taxation and valuation.

A President, who must be a judge of the Federal Court of Australia, is appointed by the Attorney-General to head the Tribunal. Members are appointed for a term that extends up to seven years.

The NSW ADT has a similar structure and purpose, but it is concerned with government decisions made at the states rather than at the federal level. The expertise of non-judicial members can be of considerable value, particularly in technical areas where lawyers might not be the most appropriate decision-makers. Lawyers and judicial officers who sit on a tribunal are not performing a judicial role.

Ethiopia: As was discussed earlier, there are different tribunals and tribunal-like adjudicating agencies of special jurisdiction. In the Federal Democratic Republic of Ethiopia Many of the first instance jurisdictions adjudicating agencies are found within the umbrella of many different administrative heads known with different names such as disciplinary committees, boards, and so on.

There are also second instance (reviewing agencies/tribunals) that are formed by statutes to hear grievances on appeal in different areas of the administration activities. As indicated earlier, the Federal Civil Service Commission Appeal Tribunal, the Social Security Appeal Tribunal and the Tax Appeal Tribunal are the prominent ones. There are also regional tribunals that are operating in the respective regions of the federal units. There is no general requirement set governing the qualification, appointment, composition and tenure of the personnel of administrative tribunals in Ethiopia.

5.7 Inquiries

In this complex technological and democratic world, in addition to tribunals that investigate facts and apply laws to resolve specific administrative disputes, the formation of inquires that conduct fact and/or legal findings and provide recommendation to ministers or other agency heads to take policy considered action based on the findings of facts is becoming a paramount importance. Inquires are concerned with fact-finding directed towards making recommendations on questions of policy. The statutory inquiry is the standard device for giving a fair hearing to objectors before the final decision is made on some question of government policy affecting citizens' rights or interests.

Contrasting to the difference between tribunals and inquires, two joint authors noted as follows:

> *The typical tribunal finds facts and decides the case by applying legal rules laid down by statute or regulation. The typical inquiry hears evidence and finds facts, but the person conducting it finally makes a recommendation to a minister as to how should the minister act on some questions of policy, e.g. whether he should grant planning permission for some development scheme. The tribunal needs to look no further than the facts and the law, for the issue before it is self-contained. The inquiry is concerned with the local aspects of what will usually be a large issue involving public policy which cannot, when it comes to the final decision be resolved merely by applying law. Tribunals are normally employed where cases can be decided according to rules and there is no reason for the minister to be responsible for the decision. Inquires are employed where the decision will turn upon what the minister thinks is in the public interest, but where the minister, before he decides, needs to be fully informed and to give fair consideration to objections… Where an appeal has to be decided by a minister, he must necessarily appoint someone to hear the case and advise him (*Wade and Forsyth, 910-911).

In a nutshell, inquires, unlike tribunals, cannot pass binding decisions but, as their name indicates they inquire or search for facts by conducting preliminary fair hearing on objections raised against proposed administrative actions. Based on the results of the fact finding, the inquiry recommends the concerned minister or agency to take or not to take a certain course of action, although the latter may not be bound by the recommendation involving policy considerations.

5.7.1 Inquiries in Ethiopia

Having defined inquires as impartial fact finding devices that are established by law to assist decision makers, it deems now quite important to appreciate some of the statutory inquires operating in Ethiopia. Some inquires are event derived that have temporary existence that remain valid until accomplishing the specific fact finding assignment given to them by law. Examples of such inquires are the Inquiry Commission established under proclamation No.398/2004 to investigate the conflict occurred in Gambela Regional State on December 13,2003, and the inquiry commission established to investigate the proportionality of the measures taken by the Ethiopian security forces to control the post election crisis happened in 2005. These inquires were established by proclamation with specific mandate of fact-finding limited to space and time. Such type of inquires usually dissolve immediately after accomplishing their mandate in accordance with the terms of references.

There are also inquires that have permanent in nature. Inquires falling under this category, although they are usually with specific mandate, have permanent institutional existence. The following are prominent example of such inquires:

- The Council of constitutional inquiry established by proclamation no. 250/2001;
- The Human Rights Commission and the Institution of Ombudsman;
- Anti corruption commissions established at federal and regional levels.

Review Questions

1. What is agency/administrative adjudication?

2. Discuss the peculiar features of the adjudicative (judicial) powers of the administrative agencies.
3. Discuss the advantages and disadvantages of agency adjudication.
4. Explain the main differences between formal and informal agency adjudication.
5. What are administrative tribunals?
6. What makes tribunal adjudication preferable to adjudication by regular courts?
7. Discuss the similarities and differences between tribunals and inquiries.
8. Provide a list of administrative tribunals and inquiries operating under the federal level or in the region' to which you are familiar.

UNIT SIX CONTROLING MECHANISAMS OF GOVERNMENTAL POWERS

Introduction

So far we have thoroughly appreciated that the concern of administrative law is regulating the powers of administrative agencies lest abuse of such powers may cause prejudice to public interest in general and to individual interest in particular. In addition to creating various administrative agencies and empowering them with necessary power to carry on specific social, economic and political programs in the interest of the public, administrative law puts appropriate controlling mechanisms that restrain administrative agencies within the scope of the powers entrusted to them. So, this unit tries to outline the various modalities of controlling the powers of the administrative agencies. The discussion begins with the appreciation of the question why the need for controlling the powers of administrative agencies becomes of paramount importance. This unit also provides in-depth discussion on the various legal and institutional mechanisms that may be devised to control the powers of administrative agencies in various circumstances.

Objective**s**

At the end of this unit, the students are expected to:

- Appreciate the need for and the mechanisms of controlling governmental power.
- Explain the modalities used by the parliament controls the executive branch and administrative agencies- particularly in light of the F.D.R.E constitution
- Define Ombudsman and Human Rights Commission
- Appreciate the significance of the Ethiopian Human Rights Commission and Ombudsman in protecting human rights and promoting good governance.
- Identify the procedure of initiation and investigation of complaints by the Ombudsman and Human Right commission.
- Understand the meaning of maladministration and its scope in Ethiopia.

- Enumerate instances which could properly be categorized as cases of maladministration
- Evaluate the principles of impartiality, independency and accessibility, as applied to the Ethiopian Ombudsman Office and Human Rights Commission
- Indicate the remedy for an aggrieved party.

6.1 The Need for Controlling the Powers of Government

As it has been thoroughly discussed in the previous units, there are great possibilities that the three powers of government may be concentrated in the hands of many administrative agencies. The delegation of rulemaking and adjudicating powers to administrative agencies become an inevitable phenomenon of the complex technological world. In addition to the broad discretionary administrative powers originally entrusted to the executive organ and its agencies by the constitution, the delegation of rulemaking and adjudicating powers to these agencies, although may be justified by certain social and economic rationales, pose an inevitable threat on individual freedom and liberty. As propounded by the French political philosopher, Montesquieu, where the tripartite powers are merged in the same person, or in the same body, there can be no liberty as the life and liberty of the subject would be exposed to arbitrary control. So, the rational fear created by the concentration of the tripartite powers (administrative, legislative and judicial) in the hands of the same person or body of persons coupled with the discretionary nature of administrative powers which is susceptible to abuse, urges for devising legal and institutional devices that are important to control the arbitrary exercise of powers by administrative agencies.

The principle of separation of state power is proved to be an effective mechanism for controlling abuse of powers. It is founded on the presumption that the division of state power between the legislature, executive and the judiciary can best protect individual liberty and democracy. The purpose of the principle of separation of power is to prevent any single branch of the government from becoming too powerful, providing a series of checks and balances; it is to curve despotism and arbitrariness and to promote liberty, democracy and good governance by creating a system of check and

balance. As **James Madison** noted in the Federalist No. 47: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

However, the doctrine of separation of state power among the three branches of government should not be interpreted in its extremity. In reality, there is no move for the pure separation of state power as such in this contemporary world. Because of the various social, economic and political justifications discussed in the previous chapters, the delegation of rulemaking and adjudicating powers to administrative agencies is becoming an inevitable and blessing phenomenon in this technologically advanced and complicated world. Thus, acknowledging the inevitability and importance of the delegation of relatively broad discretionary powers to administrative agencies in this complex world; appreciating the resultant possibilities of concentration of tripartite powers in the hands of a government agency, and the possibility these powers may be abused unless checked, there comes the need to devise the mechanism for controlling the powers of these agencies. The existence of various checking mechanisms of power may induce administrative agencies to use the powers entrusted to them in the interest of the public. In relation to this issue, the Chief Justice of the Australian High Court, the Honourable AM Gleeson, quoted from an article written by the Chief Justice of Canada in 1998 that exposes the underlying philosophy of administrative law as follows:

> *"Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of rationality and fairness. Arbitrary decisions and rules are seen as illegitimate. Rule by fiat is unaccepted. But these standards do not just stand as abstract rules. Indeed, most importantly, the ability to call for such a justification as a precondition to the legitimate exercise of public power is regarded by citizens as their right, a right which only illegitimate institutions and laws venture to infringe. The prevalence of such a cultural expectation is, in my view, the definitive marker of a mature Rule of Law."*

No matter how fair and efficient a bureaucracy is, it will always require supervision. Abuses of power can never be entirely eliminated. Legitimate differences of opinion are bound to arise between honest bureaucrats and honest citizens. Moreover, the mere possibility of review helps ensure that the first-instance decisions are considered and rational.

6.2 Controlling Mechanisms

As the experience of many jurisdictions in the modern democratic world indicates, there are different devices that can be used to control the powers of administrative agencies. That is, there are different controlling mechanisms that can be set in parallel to supplementing each other in checking the powers of administrative agencies. Some of the commonly used controlling mechanisms are:

- Internal administrative review by superior officials;
- Parliamentary control;
- Political control;
- External administrative review by tribunals;
- External scrutiny and recommendations by Ombudsmen and other watchdog institutions and
- Judicial control

Most of these controlling mechanisms are introduced through legislation in many jurisdictions. The diversification of the controlling mechanisms is partly justified by the perceived inadequacies of each mechanism to check the ever increasing involvement of the government in matters that affect the interest of the citizens. They were designed to improve the quality of administrative decision-making by providing effective alternative checking mechanisms that would be appropriate under the given circumstance. Putting the appropriate controlling or checking mechanisms in place would promote the following benefits:

- Improves the quality, efficiency and effectiveness of government decision-making generally;
- Enables people to test the legality and merits of decisions that affect them;

- Provides mechanisms for ensuring that the government acts within its lawful powers;
- Provides mechanisms for achieving justice in individual cases and
- Contributes to the accountability system for government decision-making.

6.2.1 Internal control

The term internal control refers to the type of controlling mechanisms that are set within the organizational structure of the various administrative organs of the government. For administrative convenience, administrative agencies usually have internal structure. Formally or informally, original decisions of the authorities within the lower structure of the administrative hierarchy are subjected to review by those in the next upper hierarchy. Internal review is the process by which original agency decisions are reviewed on their merits within the responsible government agency. An internal review officer can usually substitute a new decision if the decision under review is found to be defective on matters of law, the merits or administrative process. In some areas of government administration, there is a formal system for the internal review of agency decisions. The internal review system in these areas is created and regulated by legislation, in the same way as other review methods. Even where there is no statutory requirement, it is common for an informal internal review system to be established on an administrative basis within government agencies.

In the parent act/ enabling legislation or an executive order as the case may be, a mechanism for internal review may be established. As stated above, an internal review is a process by which original agency decisions are reviewed on their merits within the responsible government agency. This type of review gives opportunity for agencies to reconsider their decisions and rectify the mistakes, if any. The enabling legislation or the executive order by which the agency is created may include, in that act, a formal system for the internal review of agency decisions. In the absence of such formal mode of controlling, the agency using its discretion can set informal controlling mechanisms in place.

6.2.2 External control

The term 'external control' in administrative law context refers to the various limitations imposed upon the powers of administrative agencies by other authorized bodies that are found outside the structure of such agencies. These types of controlling mechanisms include executive/political control, parliamentary/legislative control, control by administrative tribunals, judicial control, control by watchdog institutions and the mass media. Despite the difference in the mode and scope of these controlling mechanisms, all of them have positive contribution in promoting the principles of good governance.

6.2.3 Parliamentary Control

As was repeatedly stated earlier, while appreciating the importance of delegating powers to administrative agencies in promoting efficiency and effectiveness in the administration and implementation of public policies, it is equally important to take note that unless otherwise safeguards are put in place, such power may be abused and used to promote evil motives. Having appreciated the side effects of delegation of rulemaking powers to administrative agencies, the parliament can put effective checking mechanism in place. First and foremost, the parliament has to make sure that all necessary precautions are taken that the enabling legislation/parent act does not devolve wide delegated powers which may be difficult to control. These include attaching riders to agency appropriation bills, conducting oversight hearings, reducing agency budgets, and amending statutes. Of course, if the legislature is extremely dissatisfied with the performance of a particular agency, it may rewrite the statute that created the agency in the first instance. By amending the appropriate statute, the legislature may enlarge or contract the agency's jurisdiction as well as the nature and scope of its rulemaking authority**.** In this regard, it is quite important to appreciate the experience of Britain and United States together with Ethiopia for comparative purpose.

6.2.3.1 In Britain

From Cumper &Walters, Constitutional & Administrative Law pp. 26b-271.

There are different procedures for controlling delegated agency legislation. As with primary legislation there is an opportunity for the extent and purpose of the delegated legislation to be discussed, both in the parliament and at the committee stage. The usual procedures of both Houses may be employed (e.g., parliamentary question time, adjournment motions etc.). However, the very pressure on parliamentary time which in the first place necessitates delegation may actually prevent any really effective consideration at this stage in the first place. Instead, control may be exercised through procedural requirements for laying the instrument before the parliament, or through scrutiny by the Select Committee on Statutory Instruments.

Laying the Instrument before Parliament

Laying the Instrument before Parliament is a procedural requirement that the parliament may use to check the legality of an agency's delegated legislation at various stages. Whether or not an instrument must be laid before the parliament will depend on the provisions of Parent Act. An instrument is usually presented before both Houses, with the exception of financial matters, which are only laid before the Commons. As Cumper & Walters stated, laying before Parliament may take one of the following forms:

(a) **Laying simpliciter:** The Parent Act may do no more than make it obligatory for the instrument to be laid on the table of both Houses for the information of members. No resolution is necessary for the instrument to become effective.

(b) **Laying subject to negative resolution**

In this case, there are two types of procedures. The first is that the final instrument to be laid down before the parliament will automatically come into force after 40 days, unless before the expiry of that time either the House passes a resolution that the order be annulled. The second is that an order may also be laid in draft form subject to a similar resolution that no further proceedings is be taken – in effect a direction to the minister is not to make the instrument.

In both cases, no amendments can be made so it can only be accepted or rejected. The 40 days excludes any time during which the parliament is dissolved.Minister concerned will usually be able to count on a government majority, it is unlikely that such an instrument would be annulled.

(c) **Laying subject to an affirmative resolution**

By this procedure an instrument which is not approved within 40 days of its being laid before the House will not come into effect. Minister concerned must therefore, present the instrument for approval and government time must be found to deal with it. Usually amendments are not possible. An instrument may also be laid in draft subject to an affirmative resolution before it can be 'made'. The instrument can be laid down in one of the following three forms:

- Laying of draft instrument before the parliament and requiring affirmative resolution before instrument can be made;
- Laying instruments after it had been made to come into effect only when approved by affirmative resolution;
- Laying of instruments that take immediate effect but requires approval by affirmative resolution within a stated period as a condition for its continuance.

Scrutiny in Committee: This is another important controlling mechanism of agency rulemaking widely used in Britain. A joint committee of both Houses of the Parliament scrutinizes statutory instruments and draft instruments where appropriate. The Joint Select Committee on Statutory Instruments is required to consider whether the attention of each House should be drawn to the instrument. The department concerned should first be given the opportunity to forward its case. The committee consists of seven members of each House, Council to the speaker and Council to the Lord Chairman of Committees. It is a convention that the chairperson is from the opposition.

The most important aspect of the Joint Select Committee on Statutory Instruments is that it submits regulations for parliamentary debate and scrutiny. Government departments are aware of its 'critical eye'. Adverse reports from the Committee can lead to a prayer for annulment, or force a department to revoke, or amend a particular instrument.

In addition to the scrutiny of subordinate legislations by Parliament and the Joint Select Committee, there exists also 'political' control through the procedural requirements of consultation and publication. Acts of parliament sometimes provide that the Minister may or shall consult with interested bodies or advisory committees before issuing regulations. The Parent Act may, therefore, stipulate that there must be consultation in either general or specific terms. Consultation with interested parties is now common for the reasons of political expediency as well as legal necessity. Such bodies may be specified in the Act or chosen at the Minister's discretion but, while Ministers may be obliged to consult, they are not normally bound to follow the advice offered. As to the effect of publication, delegated legislation usually comes into force when it is made unless some other date is specified in the Parent Act. Twenty-one days are usually allowed from the date it was laid before the Parliament. Section 2 of the Statutory Instrument Act 1946 provides that after a statutory instrument has been made, it shall be sent to the Queen's Printer of Acts of Parliament. There it is printed, numbered and usually made available to the public at Her Majesty's Stationary Office as soon as possible. The basis of the requirement of the publication is that if every person is to be presumed to know the law, then the contents of the law must be accessible to him/her.

6.2.3.2 United States

From Aman & Mayton, Administrative Law (2nd ed.), PP. 565-612

The US Congress has a variety of ways of exercising its oversight functions. First, along with the executive branch, the Congress is involved in the appointment process. Agency heads and other "officers of the United States are appointed by the President with the approval of the Senate. The Congress also has the "power of the Purse" and agencies must regularly submit their operating budgets to the Congress. In addition, Congress may compel an agency to report to it regularly by means of committee or subcommittee hearings or more formal, field reports. These reports and hearings can also encourage informal contacts between agency and congressional staffs that provide another form of congressional feedback and oversight.

The Congress also exercises various forms of statutory control. The Congress delegates power to agencies by the statutes it drafts. An agency's enabling regulatory

statute defines the scope of the agency's authority and the Congress sets forth the procedures that an agency must use in exercising its authority and it establishes the agency's structure. The Congress can and does create a variety of agency forms and structures, each with different implications for the relationship of that agency to the Congress and the Executive Branch. Based on their organizational structure, administrative agencies can be classified into independent and dependent agencies. Independent agencies serve under the Congress and have been described as the agents of the Congress.

Political control of the agency's discretionary power is perhaps the other most visible and most effective means through which the Congress can exert influence over the administrative agencies through the appropriate process. Budgetary hearings in both of the Houses of the Congress are opportunities for members of the appropriation committee to review agency performance, and affect future agency policy by changing the levels of funds appropriate for certain purposes.

After passing the authorizing legislation for an agency and appropriating funds to it, the Congress can still monitor the performance of an agency through the process of the congressional oversight. Oversight is an important test of the political acceptability of the regulation. Statutory standards usually do not provide precise notice of the policy which will emerge from the agency so that many people who have never had the chance to affect the formulation of the legislation may be affected by its implementation. Many statutes specifically provide for periodic oversight hearing by the Congress. In addition, a congressional committee or subcommittee can call an oversight hearing at any time to enquire into a particular agency's policies and programs. Such hearings are particularly valuable to the members of the Congress because of the fact that they provide legislators a visible opportunity to press for regulatory initiatives which can affect the public interest. They are especially effective when undertaken by committees which focus on specific areas of policy. In addition to the formal oversight devices of a committee hearing, there exist less formal ways through which individual members of the Congress can exert influence over agency policymaking. One method used by every member of the Congress is intervention in matters pending before an administrative agency, usually those that made on behalf of the constituents. The nature of these inquiries made by members of the congress and

their staffs to agency personnel can range from status reports on an individual's request currently before the agency to complaints regarding the substance or procedure of the current regulatory scheme. While this type of activity will not usually lead to substantive changes in a particular agency's regulatory scheme, it can lead to an accelerated decision on a particular party's claim before the agency, or an informal review of procedures by agency officials who are aware of the potential power which an individual member of the congress may hold. It is proper for a member of the Congress to represent vigorously the interest of his or her constituents before an administrative agency engaged in general rulemaking so long as he or she does not frustrate the intent of the Congress as a whole or undermine the applicable procedural rules.

Another important mechanism that the US Congress controls Agency Discretion is through the Statutory Techniques. Over the years, the Congress has also passed numerous statutes which are designed to affect the substance of agency decisions through the implementation of generic procedural requirements. One of these statutes is that the National Environmental Policy Act of 1969 (NEPA). That Act was a response to a growing national concern over the state of the environment. It sets forth procedural requirements to assure that agencies will consider substantive environmental values in the formulation and implementation of policies. The core of the Act is a requirement that an agency must prepare on environmental impact assessment report before taking any major administrative action. This report must identify the possible effects of the proposed action on the environment, and must evaluate possible alternatives. Although NEPA does not say that all actions which are hazardous to the environment must be avoided, it has the effect of the increasing administrative awareness of the environment, and often fosters rethinking of government actions. Another statute through which the Congress is able to influence administrative policy through procedural means is the Regulatory Flexibility Act of 1980 (RFA), that also amended in 1996. Through out the mid of the sixteenth to late seventies the Congress became increasingly concerned with the impact that regulation, especially environmental and health regulation, upon small business. These regulations often had a disproportionately greater economic effect on small business, hurting their competitive positions. Under the RFA, an agency must study the economic effect which proposed actions will have on small businesses, as well as

review and reevaluate regulations. By requiring that agencies consider a rule's impact on small businesses, this statute effectively slows down the development of new initiatives and fosters the development of alternative actions.

The 1980 Regulatory Flexibility Act (RFA),that also amended in 1996, requires that whenever agencies engage in rulemaking they should consider special circumstances and problems of the small entities. In 1996, the Act was extended to Internal Revenue Service (IRS) interpretive rules that regulated information collection from small entities. Each time the agency promulgates an information collection rules, it must prepare a regulatory flexibility analysis that describes the likely effect of the rule on the small entities. The Unfunded Mandates Reform Act of 1995 also triggers regulatory review. This legislation requires the Congress and the federal agencies (except independent agencies) to give special consideration to all legislations and regulations likely to impose mandates on state, local, and tribal entities. Agencies in particular are required to prepare a regulatory analysis for any rulemaking likely to impose costs in excess of 100 US Dollars on the private sector.

Legislative Veto was the other mechanism through which the US Congress has been exerted control over agency rulemaking. Prior to the Supreme Court's decision in *INS v*. Chadha, one house and two house vetoes were common methods by which the the Congress sought to control agency rulemaking. Though the Court's opinion in *Chadha* dealt only with a one-house veto of the suspension of a deportation order by the Attorney General subsequent Supreme Court decisions have applied *Chadha* to two-house vetoes as well as agency rules. Various alternatives to the veto have become more popular. One of these alternatives is sunset legislation. Another is the use of joint resolution either to disapprove agency action or to conditionally approve them in advance. Similarly, the Congress can order agencies to "report and wait" before implementing new regulations, giving chances to the Congress to intervene with legislation, if it is needed. Given the demise of the legislative veto, the political, statutory and structured controls discussed above have now taken on even greater significance.

In 1996, a new chapter was added to Title 5 of the U.S. Code, and like the RFA and the Paperwork Reduction Act of 1980, Chapter 8 directly affected agency's

procedures. The title of the chapter is Congressional Review of Agency Rulemaking. Although the definition of the "rule" is broad, the focus of the legislation on the "major rules". A major rule is defined as one having a significant impact on the economy, particularly on those whose annual economic effect is likely to be more than 100 million US Dollars. Under the statute, agencies are required to submit to both the Houses of Congress and the Comptroller General, a report containing information that can be used to evaluate the proposed rule. This report includes a cost-benefit analysis of the rule, if any, a regulatory flexibility analysis, and an analysis pursuant to the Unfunded Mandates Reform Act of the 1995.

6.2.3.3 In Ethiopia

Like in the case of the countries mentioned above, the Parliament of the FDRE also has the power to control the discretionary power of the executive organ of the government including all the dependent agencies established under the umbrella of the executive and those independent agencies that fall outside the organizational structure of the executive organ of the government. As clearly stipulated under Article 50(3) of the FDRE Constitution, the respective legislatures of both of the Federal and the State governments are the highest authority of the respective governments. Being the highest organ of the government, the House of Peoples' Representative (hereinafter referred to as the legislature) has the power to exercise supervisory power over the administrative organs of the federal government. As clearly stated in Article 55(17) of the FDRE Constitution, the legislature "has the power to call and to question the Prime Minister and other Federal officials and to investigate the Executive's conduct and discharge of its responsibilities." Article 55(18) also dictates the legislature to discuss any matter pertaining to the powers of the executive "at the request of one-third of its members" and "to take decisions or measures it deems necessary." Furthermore, in accordance with Article 74(11) of the FDRE Constitution, the Prime Minister is required to submit periodic reports of the activities accomplished by the executive as well as its plans and proposals to the House of Peoples' Representatives.

In a similar vein, the cumulative reading of the relevant provisions of the FDRE House of Peoples' Representative Working Procedure and Members' Code of Conduct (Amendment) Proclamation No. 470/2005 under scored that the House of Peoples' Representative has the power to call and question the Prime Minister and other Federal officials with a view to oversight and check them whether or not their activities are carried out in accordance with the set rules and regulations. All this clearly indicates that the parliament has the power to hold discussion at the floor concerning the conduct of the executive and other federal officers and to take remedial measure thereof.

The parliament can also exert control over the behavior of the government through the budgetary processes. Usually the executive organ of the government and some of the other administrative agencies prepare and defend their budget before the parliament. When the parliament is not happy with the performance records of the past and /or the current fiscal year, it may resort to cutting off the proposed budget of the concerned agency for the next fiscal year. The Legislature has also the power to oversight the conduct of the executive and other federal officers through the instrumentality of its standing committees. The various standing committees of the parliament can visit the concerned institutions and offices to observe whether or not they are discharging their responsibilities to the level of their expectation in accordance with the law. Each standing committee of the parliament can bring to the attention of the parliament any act of the executive organ of the federal government and federal offices that necessitates parliamentary deliberation.

Many administrative agencies are formed by acts of the parliament (usually referred to as the parent act or enabling legislation). In the parent act, the legislature can specify the scope of the power entrusted to an agency and incorporate principles, guidelines and standards that regulate the decision-making process of the agency. In this regard, the legislature can play a great role in controlling the agencies by clearly defining their respective powers, procedures and structures. Where circumstances justify it, in addition to shrinking the activities of the agency by cutting off the budget in case of need, the legislature is also at liberty to demolish the agency by another legislative act.

However, in Ethiopia, unlike in the countries discussed above, there is no formal procedure by which the parliament can control the rulemaking power of the administrative agencies. For example, except for the regulations issued by the Council of Ministers at the Federal level and by the respective counter part federal units, there is no general formal requirement for other administrative rules to be published in the register (Negarit Gazette). An attempt was made to regulate the rulemaking process of the administrative agencies under the Draft Federal Administrative Procedure Proclamation No. 2001. Had the draft been adopted in the form of law, it would have been facilitated the so-called political control of rulemaking powers of the administrative agencies. Because the draft incorporated a number of requirements that ensure, among other things, public participation and publication of the rules adopted.

6.2.4 Executive Control

The executive organ of the government also has the power to oversight the activities of the various government offices in different modalities. As it was discussed somewhere else, there are possibilities whereby some administrative agencies may be formed by executive order without the blessing of the parliament. Those agencies or bureaus formed under the executive hierarchy (referred to as executive dependent agencies) are subject to the supervision of the executive organ of the government. So, the concerned ministry of the government can put different modalities of control to ensure whether or not the authorities formed under its hierarchy are acting within the bound of the law. In relation to this, Article 77 of the FDRE Constitution, which deals with the powers and functions of the Council of Ministers, in its sub-Article 2 states that the Council of Ministers "shall decide on the organizational structure of ministries and other organs of government responsible to it; it shall coordinate their activities and provide leadership."

The executive organ of the government may also exercise some indirect control over the so-called independent agencies that are accountable to the Legislative organ of the government. In this regard Article 74(7) of the FDRE Constitution is worth mentioning. It says "He [the Prime Minister]" as the chief executive has the power to select and submit "for approval to the House of Peoples' Representatives nominations

for posts of Commissioners …and Auditor General." This indicates that the executive organ of the government can have a sort of loose control over the independent agencies as well.

In many cases, there are also dual accountability systems. For example, as it can be inferred from Article 76(2) & (3) of the FDRE Constitution, the Council of Ministers are made jointly accountable to the Prime Minister and to the House of Peoples' Representatives, respectively. Thus, in the exercise of the powers entrusted to it by the constitution and other legislations, the executive organ of the government can oversee the activities of the various administrative agencies of the government responsible to it.

6.2.5 Control by Administrative Tribunals

The decisions of administrative agencies can also be subjected to the supervision of administrative tribunals. As it has been briefly discussed previously, administrative tribunals are the administrative counter part of ordinary courts. Technically speaking, administrative tribunals also referred to as administrative courts: courts that are established outside the organizational structure of ordinary/regular courts. In terms of function, administrative tribunals are similar to ordinary courts, as both are entrusted with judicial power. Having said this as a compliment to the previous discussion, let us briefly see the type of control administrative tribunals exercise over the administrative agencies.

Despite the differences in terms of appointment, composition, jurisdiction, and tenure and so on from one country to another country, administrative tribunals exercise important supervisory role over the decisions of administrative agencies. Administrative tribunals undertake merits review over the decision of administrative agencies falling under the former jurisdiction. The purpose of a merits review action, as explained by the Australian Administrative Review Council, is to decide whether the decision which is being challenged is 'correct and preferable' decision. The Council provided this explanation by making reference to the defect it observed in a leading case as follows:

> *In the leading authority on the role and function of the AAT [Administrative Appeal Tribunal] in undertaking merits review of decisions- the decision of the Full Federal Court in Drake v Minister for Immigration and Ethnic affairs (1979) 24 ALR 577- Chief Justice Bowen and Justice Deane said, at page 589, that the question for the determination of the AAT was whether the decision was the 'correct or preferable one' on the material before the Tribunal. In the Council's view, their Honours intended to convey the meaning that a decision must be legally correct, but that if there is a range of decisions that could be made, all of which would be correct, the decision-maker has a choice as to the preferable decision. However, the phrase 'correct or preferable' may give the impression that a decision may be the preferable decision, even though it is not correct. For this reason, the Council prefers the phrase 'correct and preferable'.*

In the Council's view, the overall objective of merits review system is to ensure that all administrative decisions of government are correct and preferable. As per the Council's interpretation, when the decision is not both correct and preferable, the tribunal can ordinarily substitute it by a new decision. The process of merits review will typically involve a review of all the facts that support a decision. That is, not only disputes on point of law but also those disputes on point of fact involving an administrative agency as a party may be subjected to the review of administrative tribunals.

Having appreciated the important roles that the administrative tribunals may play, many jurisdictions of the contemporary world have established tribunals that fit their respective realities.

6.2.6 Judicial Control

As was mentioned in the previous units, the principle of separation of state power among the three organs of the government (the legislature, the executive and the judiciary) has been blessed in many democratic jurisdictions of the modern world. The objective of the principle of the separation of powers is to promote the ideal of

law, liberty and democracy by controlling circumstances that give rise to tyranny and dictatorship. As was discussed earlier, the concentration of legislative, executive and judicial powers or any combination of these in the hands of one person or body of persons is the primary cause of tyranny and dictatorship. According to the advocates of this principle, tyranny and dictatorship cannot strive where power is divided amongst the three organs, and where there are effective checks and balances. Thus, the purpose of the principle of separation of state powers is not to create three empires, but to create an effective system for checking and balancing among the three organs of the government. In the previous sub-section, we have seen ways in which the legislature checks the powers of administrative agencies. This sub-section, in turn, discusses the modalities of judicial control of administrative agencies.

In line with the principle of separation of state powers and the need for checking and balancing, the FDRE Constitution, among other things, vests judicial power in the judiciary. Judicial power both at the Federal and State levels are vested in the judiciary. This means that the judiciary is made the final arbiter of disputes on point of law and facts. Thus, the judiciary is one of the most effective machineries in restraining administrative agencies within the bounds of their powers. Individuals aggrieved by agency decisions may seek court intervention in appropriate cases.

Broadly speaking, there are two modalities by which the judiciary can exercise supervisory role over the powers of administrative agencies. These are appeal and judicial review. The striking difference between appeal and judicial review is that the former is statutory in origin whereas the latter is the inherent power of courts. Concerning this, Cane writes:

> *It is important to understand the main difference between appeal and review. The first relates to the power of the court: in appeal proceedings the court has the power to substitute its decision on the matter in issue for that of the body appealed from…. In review proceedings, on the other hand, the court's basic power in relation to an illegal decision is to quash it, that is, to hold it to be invalid. If any of the matters in issue have to be decided again, this must be done by the original deciding authority and not by the supervising court. If the*

authority was under a duty to make a decision on the matters in issue between the parties, this duty will revive when the decision is quashed and it will then be for the authority to make a fresh decision. It is also open to the court, in appropriate cases, to issue an order requiring the authority to go through the decision-making process again.

Another course open to the …Court when it quashes the decision of a government body is to remit the matter to the agency with a direction to reconsider it in accordance with the findings of the …Court. The difference between this and the two previous outcomes is that under this procedure the agency does not have to go through the whole decision-making process again. For example, it might be that all the relevant facts have already been ascertained and the finding of the…Court only concerns their legal significance. In such a case a complete reconsideration of the case, including the taking of evidence and the findings of facts, would be a waste of time and money; so the court can remit the case and direct the authority to reconsider the facts in the light of the law as it has been held to be. This procedure differs from an appeal in only *a very formal sense. On the other hand, remission would not be appropriate where, for example, the authority is found to have been biased. Then a complete rehearing before a differently constituted body would be needed in order for justice to be seen to be done.*

The second main distinction between appeal and review relates to the subject matter of the court's jurisdiction. This distinction can be put briefly by saying that whereas an appellate court has power to decide whether the decision under appeal was 'right or wrong', a court exercising supervisory powers may only decide whether the decision under review was 'legal' or not. If the decision is illegal it can be quashed; otherwise the court cannot intervene, even if it thinks the decision to be wrong in some respect. ***(Cane, pp. 8-9)***

In a nutshell, the judiciary is an important organ of the state machinery in controlling the powers of administrative agencies through its supervisory power (judicial review) and appellate power. The supervisory power (reviewing) of the court is different from its appellate jurisdiction in terms of the source and the scope of the respective powers. In the common law tradition, judicial review is treated as the inherent power of ordinary courts. But the source of the appellate power of courts is legislation (statutory in origin). Judicial review is a technical review whereby the court tests whether an agency decisions are legal or illegal. An appellate court may substitute a new decision by overruling the decision of the lower body where the appeal was brought. Hence, it is a merits review.

6.2.7 Control by Human Rights Commission and Ombudsman

As it has been already indicated, different jurisdictions adopt various modalities for controlling the powers of administrative agencies which include parliamentary control, judicial control, and control by administrative tribunals. Each of these controlling mechanisms, however, has its own shortcomings. Individuals need to have other alternative forums that can be easily accessed, and devise speedy solutions to their administrative grievances. In many jurisdictions, watchdog institutions have been relied on as alternative forums for controlling administrative agencies, especially on administrative matters that are not suitable for parliamentary deliberation and adjudication. Appreciating the role of these institutions in promoting good governance, protecting and enforcing human rights, the FDRE Constitution under Sub- Articles 14 & 15 of Article 55 dictate the House of Peoples' Representatives to establish the Human Rights Commission and the institution of Ombudsman respectively. Accordingly, the House established the Human Rights Commission and the Institution of Ombudsman in Proclamations No. 210/2000 & 211/2000, respectively.

Human Rights Commission

As clearly provided under Article 5 of the Human Rights Establishment Proclamation No.210/2000, the objective of the Commission is "to educate the public be aware of human rights, see to it that human rights are protected, respected and fully enforced as well as to have the necessary measure taken where they are found to have been violated." In order to attain these objectives, great latitude of powers is entrusted to the Commission. Article 6 of the proclamation deals with the 'powers and duties' of the Commission: the following are among the powers and duties given to the commission:

- To ensure that the human rights and freedoms provided for under the Constitution of the Federal Democratic Republic of Ethiopia are respected by all citizens, organs of state, political organizations and other associations as well as by their respective officials;
- To ensure that laws, regulations and directives as well as government decisions and orders do not contravene the human rights of citizens guaranteed by the Constitution;
- To educate the public, using the mass media and other means, with a view to enhancing its tradition of respect for, and demand for enforcement of, rights upon acquiring sufficient awareness regarding human rights;
- To undertake investigation, upon complaint or its own initiation, in respect of human rights violation;
- To make recommendations for the revision of existing laws, enactment of new laws and formulation of policies;
- To provide consultancy services on matters of human rights;
- To forward its opinion on human rights reports to be submitted to international organs and
- To perform such other activities as may be necessary to attain its objectives.

From the above lists, we can infer that the Human Rights Commission has been entrusted with such a broad range of powers that are important for the attainment of its objectives in the promotion, protection and enforcement of human rights guaranteed under the FDRE Constitution. Up on receiving complaints or when

necessary on its own motion, the Commission may conduct investigation on alleged violations of human rights and is expected to make all the efforts to settle the complaint brought before it amicably. Although the Commission's recommendations are not binding, the reports it may issue manifesting human rights violations have far reaching moral and political overtone. What makes the commission very important is that it can receive complaints concerning allegations of human rights violations formally and informally via different mediums of communications; it can also investigate violations of said rights on its own motion.

Ombudsman

The Institution of Ombudsman is also one of the widely used important institutions for checking the powers of administrative agencies in the contemporary world. The word "ombudsman" which is Scandinavian in origin can be translated as citizen's defender or representative of the people. In its Swedish original conception, it is said that it is gender neutral that represents persons of either sex that represent the institution. According to in Rhodes' (1974:7) defines Ombudsman as follows: 'The Ombudsman: Understanding the Concept' at page 7, the 1974 Resolution of the International Bar Association, defined the

> *…an office provided for by the constitution or by action of the legislature or parliament and headed by an independent high level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against Government agencies, officials, and employees, or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.*

This definition seems that it is broad and all-inclusive. However, it has to be noted that it may not fit the situation across countries as there are differences related to the manner of establishment of the office and the legal weight of its recommendations from jurisdiction to jurisdiction.

By Proclamation No.211/2000, the Federal House (House of Peoples' Representatives) of Ethiopia proclaimed the establishment of the Institution of

Ombudsman. Nowhere is the term 'Ombudsman' defined under the proclamation. However, it is not difficult to understand the nature of this institution from the powers and duties entrusted to it and from the whole spirit of the proclamation. As can be inferred from the preamble of the above proclamation, there are fundamental premises that necessitate the establishment of the institution of Ombudsman. These are:

- It appreciates the ever increasing powers and functions of the executive organs of the government and the effect of their decisions on the daily lives and rights of the citizens;
- It takes a firm stand that unjust decisions and orders of the executive organs and officials that prejudices the lives and rights of citizens have to be rectified or prevented;
- It appreciates the possibility that citizens having suffered from maladministration may be left without redressing unless supported by an institution, which is easily accessible to them.

Thus, these are the core premises that necessitate the establishment of the institution of Ombudsman. The objective of the Institution, as clearly provided in Article 5 of the proclamation, is to bring about good governance that is of high quality, efficient and transparent, and are based on the rule of law, by way of ensuring that citizens rights and benefits provided for by law are respected by organs of the executive. In order to attain these objectives, in Article 6 of the proclamation, the Institution entrusted with a broad range of powers and duties. These are to:

- Supervise that administrative directives and decisions adopted by the executive organs and the practices thereof do not contravene the constitutional rights of citizens and the law as well;
- Receive and investigate complaints in respect of maladministration;
- Conduct supervision, with a view to ensuring that the executive carries out its functions in accordance with the law and to preventing maladministration;
- Seek remedies in case where it believes that maladministration has occurred;
- Undertake studies and research on ways and means of curbing maladministration;

- Making recommendations for the revision of existing laws, practices or directives and for the enactment of new laws and formulation of policies, with a view to bringing about better governance and
- Perform such other functions as are related to its objectives.

Thus, from these open ended broad range of powers entrusted to the Institution of Ombudsman, it can be safely said that this institution, considering that it maintains its institutional capacity and independence, would contribute a lot to the promotion of high quality good governance- a system of governance that renders efficient, effective and transparent service to the public without compromising the constitutionally guaranteed rights of the citizens. The primary jurisdiction of the institution of Ombudsman is to investigate an administrative actions or inactions following the lodging of complaints or on its own motion (initiation) with a view to ascertain whether there exist maladministration or not. The Institution is expected to resolve the complaints brought before it through a process of conciliation by bringing the parties together. Where the results of its investigation indicate the existence of maladministration, the institution is required to recommend the concerned agency to rectify the maladministration committed and to discontinue the act, practice, or directives having caused same.

The accessibility of the institution of ombudsman is an advantage, in addition to its broad jurisdiction to investigate cases of maladministration. The institution can receive complaints of maladministration in any form and can also conduct investigation upon its own motion. In this regard, it provides an accessible alternative to individuals who have no other necessary means to challenge the prejudice caused to their interest before court of law.

In short, ensuring high quality of good governance in the administration system is the ideal goal of the Institution of Ombudsman in Ethiopia. Its bottom line expectation is to exert utmost effort to curve maladministration by taking appropriate proactive measures that prevent and rectify administrative malpractices by providing easily accessible administrative forum to the citizens.

6.2.7.1 What is Maladministration?

In the preceding sub-section, the term maladministration was mentioned repeatedly. As clearly indicated in the provisions of the proclamation that established the institution of Ombudsman (proc. No.211/2000), fighting maladministration is among the primary duties that necessitates the establishment of the Institution of Ombudsman. So, The pertinent question in this sub-section is related to the concept of maladministration. In addition to establishing and empowering the Institution of Ombudsman in order to curve maladministration in the administration system, providing a working definition of the term maladministration may have paramount importance in helping the institution to carry out its responsibilities efficiently and effectively within the domain of its power. However, despite its importance, providing a clear-cut definition of the term maladministration has remained a difficult business for the lawmakers. Before discussing the definition provided under proclamation No. 211/2000, it seems very important to have a brief look at the definition given to the term maladministration by some authorities.

The term maladministration is a combination of two words: 'mal' and 'administration'. According to Black's Law Dictionary, the term "mal" is a "prefix meaning bad, wrong fraudulent." (Black's Law Dictionary, 6th Ed.) Thus, while prefixed with the term administration, it may give the meaning bad, wrong or fraudulent administration. However, the cycle of confusion is not still there; determination of the acts or practices that constitute bad administration is still another problem. Consensus may not be reached concerning the exact meaning of maladministration between different jurisdictions. Having regard to the level of their economic, socio-cultural and political realities, jurisdictions may have different understanding concerning the issue as to what constitutes maladministration or its antithesis good administration as the level of efficiency and effectiveness of the administration in turn may vary due to the differences in their human and physical resources both in terms of quality and quantity. However, providing a working definition or explanation of the term maladministration, may be of paramount importance at, least, for the purpose of this discussion.

Section 15(1) of the Australian '**Ombudsman Act 1976'** sets out the occasions that may give rise to the Ombudsman reporting action to the department or concerned authority. These occasions include circumstances in which the action:

-appears to be contrary to law

-was unreasonable, unjust, oppressive or improperly discriminatory;

-was in accordance with a rule of law but the rule is unreasonable, unjust, oppressive or improperly discriminatory;

-was based either wholly or partly on a mistake of law or of fact;

-was otherwise, in all the circumstances, wrong; or

In the course of taking the action, a discretionary power had been exercised for an improper purpose or on irrelevant grounds.

Sir William Reid, who was an English parliamentary ombudsperson until 2 January 1997, criticized the attempt to define the term maladministration in the 1993 annual report of the parliamentary commissioner for administration stating: "to define maladministration is to limit it. Such limitation could work to the disadvantage of individual complaints with justified grievances which did not fall within a given definition." Thus, instead of providing a single definition, the above quoted authority suggested the following 15 elements to be incorporated in maladministration:

- Rudeness (though that is a matter of degree)
- Unwillingness to treat the complaint as a person having rights
- Refusal to answer reasonable questions
- Neglecting to inform a complaint on request of his or her rights of entitlement
- Knowingly giving advice which is misleading or inadequate
- Ignoring valid advice or overruling considerations which would produce an uncomfortable result for the over ruler
- Offering no redress or manifestly disproportionate redress
- Showing bias whether because of color, sex or any other grounds
- Omission to notify those who thereby lose a right of appeal
- Refusal to inform adequately of the right to appeal
- Faulty procedures
- Failure by management to monitor compliance with adequate procedures
- Cavalier disregard of guidance, which is intended to be followed in the interest of equitable treatment of those who use a service
- Partiality and

- Failure to mitigate the effects of rigid adherence to the letter of the law that produces manifestly inequitable treatment.
  (http/www.gahooygle.com=maladministration.)

As contrasted to the broad definitions and explanations provided above, Article 2(5) of Proc. No.211/2000 defined the term narrowly as follows: "maladministration includes acts committed, or decisions given, by executive government organs, in contravention of administrative laws, the labour law or other laws relating to administration". Thus, in Ethiopia, the term maladministration is equated with violation of laws. But as can be inferred from the definitions and explanations given to the term maladministration in foreign jurisdictions, the term has a broad coverage beyond the mere violation of laws that involve the administration. Decisions contrary to reason and conscience, although may not contravene any formal law, are included within the domain of administrative law in the foreign jurisdictions mentioned above. In these countries, the term maladministration is broadly construed to include "any kind of administrative shortcomings". Hence, the term maladministration is a fluid concept which is amenable to time and the realities of each country.

6.2.8 Mass Media Control

The role of the mass media in controlling maladministration cannot be undermined. A strong media plays vital role in promoting the ideals of democracy and good governance. By bringing administrative malpractices and corrupt behaviors of the agencies to the attention of the public, the media may also exert moral and political pressure on the day-to-day activities of the administration. Media can serve as a forum for mobilizing public opinions concerning governmental activities. Thus, media can be regarded as one of the most effective informal controlling mechanisms of the powers of administrative agencies provided that freedom of the press is well guaranteed.

Review Questions

1. Discuss the following terminologies in administrative law context:
   - Internal control vs. external control
   - Parliamentary control vs. executive control

- Judicial control vs. control by watchdog institutions
- Maladministration

2. Discuss the difference between the powers of the Human Rights Commission and the Institution of Ombudsman.
3. Discuss the instances of maladministration prevailing in your locality.
4. What makes controlling agency power by watchdog institutions advantageous than by courts?
5. Distinguish the difference between judicial review and appeal.
6. What is the rational behind the need for controlling administrative agencies?

UNIT SEVEN: JUDICAL REVIEW

Introduction

As was stated earlier, judicial control of administrative agencies is one of the effective mechanisms for ensuring rule of law and improving the quality of decision-making in the administration. The judiciary, being the guardian and the ultimate arbiter of justice, can intervene to test the legality of administrative decisions either in its appellate or reviewing capacity. Thus, understanding the basic similarities and differences of these two important powers of the court will be given due consideration in this chapter. Particularly, this chapter tries to introduce you with the notion, the grounds, the scope and limitation of judicial review. Needless to say, courts do not have an outright power to monitor every administrative activity. The court's supervisory powers on administrative matters should be squared with the fundamental constitutional principle of separation of governmental powers among the three state organs. Having regard to this fundamental principle, courts are expected to play their supervisory roles only based on the accepted grounds. So, the rich experiences of some foreign jurisdictions in relation to judicial review will be given due attention during the course of the discussion in this unit.

Objectives:

At the end of this unit students are expected to:

- Understand the meaning of judicial review
- Differentiate been judicial review from merits review
- Identify the basis of judicial review power of courts
- Determine the proper scope of judicial review
- Identify the grounds in which courts may intervene in reviewing administrative action.
- Define and analyze ultra virus acts and abuse of power as grounds of judicial review.
- Distinguish been ultra virus act from jurisdictional error.
- Identify reviewable and justiciable matters under judicial review

- Identify procedural requirements for judicial review
- Define and understand the concepts of ripeness, exhaustion of remedies, and finality clause
- Analyze how the above concepts affect the availability of judicial review

7.1 The Meaning and Nature of Judicial Review

The term 'judicial review' has different meaning and scope in different jurisdictions. For example, in the United States, judicial review refers to the power of a court to review the actions of public sector bodies in terms of their lawfulness, or to review the constitutionality of a statute or treaty, or to review an administrative regulation for consistency with a statute, a treaty, or the Constitution itself. (http://www.en.wikpidedia.org/wiki/Judicial_review_in *the*_United_States.) Broadly speaking, the term judicial review may have the following two meanings: "Higher court's review of a lower court's (or an administrative body's) factual or legal findings" or "Supreme Court's power to decide whether a law enacted by the legislature is constitutional or not."
(http:/www.businessdictionary.com/definition/judicial-review.html accessed on 20 June 2008)

But in the United Kingdom's context, the term judicial review refers to the power of the judiciary to supervise the activities of governmental bodies on the basis of rules and principles of public law that define the grounds of judicial review. It is concerned with the power of judges to check and control the activities and decisions of governmental bodies, tribunals, inferior courts…. (Cumper, P.291.) Judicial review is a procedure in English Administrative Law by which English courts supervise the exercise of public power. A person who feels that an exercise of such power by, say, a government minister, the local council or a statutory tribunal, is unlawful, perhaps because it has violated his or her rights, may apply to the Administrative Court (a division of the High Court) for judicial review of the decision … Unlike the United States and some other jurisdictions, English law does not know judicial review of primary legislation (laws passed by Parliament), save in limited circumstances where primary legislation is contrary to the EU law.

Although the Courts can review primary legislation to determine its compatibility with the Human Rights Act 1998, they have no power to quash or suspend the operation of an enactment which is found to be incompatible with the European Convention of Human Rights- they can merely declare that they have found the enactment to be incompatible. (http://en.wikipedia.org/wiki/Judicial-review) The principle of Parliamentary supremacy in the UK implies that the Parliament can legislate on any matter. Thus, the principle of Parliamentary supremacy in the UK dictates that the judiciary cannot review a law enacted by the Parliament.

However, appreciating the differences concerning the meaning of judicial review among jurisdictions, for the purpose of this discussion, the term judicial review is taken in its narrow sense: it meant the power of the court to supervise/ control the legality of the powers of administrative agencies. Judicial review is the exercise of the court's inherent power to determine whether an agency's action is lawful or not and to award suitable relief. Judicial review is a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law (**Wade & Forsyth, PP. 33-34**) The primary purpose of judicial review is to keep government authorities within the bounds of their power.

7.2. Judicial review Vs. Merits Review

In terms of purpose and scope, merits review of an agency's decision is different from judicial review (technical review). As was stated somewhere else, the purpose of merits review action is to decide whether the decision which is being challenged was the 'correct and preferable' decision. If not, the reviewing body can overrule such decision and substitute it with a new decision it deems 'correct and preferable' under the given circumstance. The issue in merits review is to test whether decision complained is 'right or wrong'. The process of merits review will typically involve a review of all the facts that support a decision. Merits review is said to be the sole responsibility of the executive, because the person or tribunal conducting the review 'stands in the shoes" of the original administrative decision maker. Administrative tribunals are not bound by strict rules of evidence and seek to provide a less formal atmosphere than the courts. If the reviewing body would make a different decision,

then that decision will be substituted for the original decision. As practices of different countries indicate, the power to conduct merits review of an agency's decision may be conferred to a court (in the form of appeal), a special tribunal, or a general administrative tribunal

Whereas, judicial review is a technical review; while reviewing an agency's decision, the court is concerned with the legality or illegality of the decision under review. If the court finds out the decision is legal, it will not do anything on it even if the decision deems incorrect in terms of preference. But if the court finds out the decision against which review is sought is illegal or ultra vires, it can set it aside and order the concerned agency to reconsider the decision based on the directions of the court. The reviewing court does not substitute its own new decision in place of an agency's invalidated decision on account of illegality. In one case, the phrase judicial review was described in the follows terms:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative error or injustice, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone ((*Attorney-General (NSW) v Quin (1990) 170 CLR at 35-36 per Brenan J.*))

The fundamental principle of judicial review is that "all power has its limits," and when administrative decision-makers act outside of those limits, they may be restrained by the judiciary. Judicial review does not prevent wrong decisions; it, instead, prevents them from being made unjustly. It does not matter whether the judge who is reviewing the decision would himself or herself has arrived at a different conclusion to the administrative decision-maker. The decision will only be interfered if there was some illegality in the process by which it was made. The jurisdiction of the court is confined to quashing the decision and remitting the matter back to the original decision-maker for determination in accordance with the law. This may not always be satisfying- either for individual judges or for the party seeking relief- but it

is often unfairness in the making of a decision, rather than the decision itself, that causes people the greatest distress (**Justice Peter McClellan,** p.4)

Unlike merits review which is statutory in origin, the source of judicial power is not statute; statutory authority is not necessary the court is simply performing its ordinary functions in order to enforce the law. The basis of judicial review, therefore, is common law (**Wade & Forsyth**, P.34) However, it has to be noted here that, although a statutory empowerment may not be necessary to exercise judicial review, this power can be taken away from the court by a statute. For example, in French, regular/ordinary courts have no supervisory power over the activities of government agencies. That is, regular courts cannot claim inherent power of judicial review to challenge administrative acts. This is the mandate of the French administrative tribunals that are established outside the structure of the ordinary courts. There are also countries that confer statutory judicial review power to ordinary courts in order to supervise and ensure legality in administrative decision-making.

7.3 The Bases of the Power of Courts to Supervise Administrative Action

7.3.1. In General

Concerning the basis or the sources of the power of ordinary courts to supervise (review) administrative actions, there is no single universally applicable formula that is accepted by all jurisdictions. As indicated above, some authorities state that judicial review is the exercise of the court's inherent power to determine whether an action is lawful or not. According to these authorities, since the basis of judicial review is common law, no statutory authority is necessary: the court is simply performing its ordinary functions in order to enforce the law (**Wade & Forsyth**, P.34). But the practices in some other countries indicate that statutes may empower ordinary courts to review administrative acts based on defined criteria thereof. For example, Australia, appreciating the arcane and complications of the common law practice and procedures relating to judicial review, codified the principles of judicial review; reform the procedures for commencing a judicial review proceeding; confer supervisory jurisdiction upon a specialist Federal Court. These criteria are clearly

provided under section 5 of the *Administrative Decisions (Judicial Review) Act 1977 ('AD (JR) Act'.* The practice in Australia indicates that judicial review of administrative decisions is possible by other methods besides the AD (JR) Act, such as review by the High Court in its original jurisdiction conferred by section 75(v) of the Constitution, and review by the Federal Court under section 39B of the *Judiciary Act* 1903.

The system of judicial remedies is derived from two main sources. First, there is a group of statutes which establishes an agency and incorporates provisions for the review of its actions. Second, there is a branch of remedies which has been developed by the combined action of the common law and statutes consolidating, simplifying, or in some other ways reforming the common law remedies. These remedies are certiorari, mandamus, prohibition, habeas corpus, quo warranto (the so- called prerogative writs), damages suits, bill in equity, and defense to enforcement proceedings. To them, modern statutes have added the declaratory judgment procedure. These remedies are available where no specific review has been provided, or where the specific review provisions have been drafted in such a way as to make them unavailable for the review of certain decisions of the agency.

No two of these systems are identical. The same administrative action may be controlled in one state by a specific statutory provision, in another by certiorari, in another by mandamus, in a fourth by injunction, and in a fifth it may be doubtful whether it is subject to control at all. Assuming the availability of any relief, the remedies may be both complementary and supplementary. If certiorari is not available, mandamus may be, and if neither, the proper remedy may be injunction; and different questions relating to the same proceeding may have to be tested by different means. Nevertheless, all of the systems are based on the system developed by English judges and parliaments. (Jaffee From **Administrative Action,** pp. 152-196)

The English judges were the King's judges. As such they exercised his supreme plenary power of judicator. The King's Bench issued writs, the so-called prerogative writs, to all the inferior officers. The writ ordered the officer to demonstrate the legality of this order or determination. The King's courts also allowed actions for

damages against an officer who by exceeding his powers had injured the plaintiff. The theory was that public officers were subject to "the law" as were the private citizens, i.e., they were answerable in the regular courts of law. It was this latter phenomenon of damage suit which came to characterize the "rule of law,' though it is one aspect- and not the most impeared to exclude it. (**Jaffee, pp. 152-196).**

As can be inferred from the remarks made above, the basis of the power of the court to supervise (review) administrative decisions is either common law, or statute, or both as the case may be. However, the assertion that judicial review is the inherent power of the regular/ordinary courts may not always stand valid, as there are jurisdictions that do not allow judicial review of administrative decisions by regular courts at all. The French and other continental systems, for example, which follow the extreme version of separation of power doctrine, take away from the regular court the power of judicial review of administrative decisions; they have a system of administrative courts - the administrative counter part of regular courts within the administration is established to perform judicial function on administrative matters. But this does not mean that there is no judicial review in France and other continental law countries. It is to mean that this power is exercised by administrative courts not by regular courts, like in many common law jurisdictions.

In the United States, there is a different position. The US Federal Supreme court, as it is well known, not only has the power to review administrative decisions and subordinate legislations like in the case of United Kingdom, but also has the constitutionality of any act be it a parliamentary legislation or any act of the government administration. The US Supreme Court can render a primary legislation invalid on constitutionality ground. One may wonder concerning the source of this broad power of the court. There is no comparable common law practice expressly stated anywhere in the US Constitution. In a landmark case, *Marbury v. Madison,* the basis for the exercise of judicial review in the United States, is said to be an interpretation of the Constitution as applying to the law and policies of the government. This implies that the power of federal courts to consider or overturn any congressional and state legislation or other official governmental action is deemed inconsistent with the Constitution, Bill of Rights, or federal law.

The two important Articles incorporated under the US Constitution proponents of the doctrine often quoted are Article III and Article Six of the Constitution. In Article III, the Constitution says:

> *The judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish… The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution…*

Article Six of the US Constitution also dictates, "This Constitution and the Laws of the United States which shall be made in pursuance thereof…shall be the supreme Law of the Land…" From the wordings of this provision of the Constitution, proponents of the doctrine inferred the laws of the United States which are not in pursuance to the Constitution are not the supreme law of the land. So, even though nowhere the constitution explicitly authorizes the Supreme Court to challenge acts of congress on constitutional ground, by the cross reading of the two Articles mentioned above, the US Supreme Court maintained the power to interpret the Constitution.

To extend similar argument to other administrative matters, the federal and state courts in the United States exercise supervisory (judicial review) power over administrative decisions and subordinate legislations. In this regard, courts can test the legality of the decision or administrative act in question against the Parent Act, or they can question even the legality of the Parent Act and decisions passed under its cover against the Constitution.

7.3.2 In Ethiopia

Coming back to the status of judicial review in Ethiopia, there is no clearly defined jurisprudence on the evolution and status of the judicial review. Judicial review of administrative decision dwells inthe fundamental principle of separation of power among the three conventional organs of the state: the legislature, the judiciary and the executive. Judicial review could be meaningful only when judicial power is ultimately vested in the judiciary and when the principle of rule of law reigns. Thus, a brief discussion of the evolution of the separation of power and the rule of law in Ethiopia is of great help in understanding the status of judicial review in historical perspective.

During the Imperial regime, the principle of separation of power was absent. The 1931 Constitution conferred to the Emperor uncontested and boundless executive, legislative and judicial power. In this regard, an authority named Scholler cited an important remark made by a famous Ethiopian writer, Mahtama Slassie, concerning the power of the Emperor as follows:

> *The Ethiopian Emperor has an uncontested and boundless power over the territory he rules. He is both the temporal and spiritual ruler. With the supreme sovereignty vested in him, he appoints or dismisses government officials, he gives gifts or refuses to give them, he imprisons or releases, he sentences criminals to death or punishes them, and does many other things of similar nature*. (Scholler, p.35)

During the Imperial regime, the Emperor was the head of state and the government, the fountain of justice and equity, the supreme law giver. Emperor Haile Selassie I continued with this omnipotent power until he was demised by the military revolution of 1974. In short, the Emperor, during the period under discussion, was above the law. He was immune from any judicial procedure. Thus, the general opinion is that since ultimate judicial power was dwelling in the hands of the Emperor and the Emperor himself he was above the law of the empire. Thus, it would be nonsense to say that there was a meaningful room for judicial review during the Imperial regime of Ethiopia. Although the 1955 Revised Constitution of the Imperial Ethiopia, which was modelled under the U.S. Constitution, formally recognized the concept of judicial reviews. Since ultimate judicial power remained in the hands of the Emperor intact, it could not have practical meaning as such.

Following the downfall of the Monarchical regime by force in the 1974 the Provisional Military Administrative Council (PMAC) commonly known by the Amharic word 'Derg' overtook the political power. The Derg suspended the application of the 1955 Revised Constitution and ruled the country for almost thirteen years without having a constitution. After forming the Worker's Party of Ethiopia (WPE) in 1984, which was the only party with the political power, the Constitution of the People's Democratic Republic of Ethiopia (PDRE) was adopted in 1987. Article 62 of the Constitution vested supreme legislative power in the National Shango (assembly). The PDRE Constitution, as stated under Chapter XIV of the same, vested

judicial power in courts that were established by law. The highest judicial organ was the Supreme Court. It had the authority to supervise the judicial functions of all courts in the country.

An important question that may be raised here is that whether or not the principle of separation of state power was duly recognized under the PDRE Constitution. In addition to the discussion made above, having a brief look to the power of the executive organ of the PDRE government has paramount importance in answering this question. Chapter XI of the PDRE, Constitution outlined the powers and duties of the President. Accordingly, the President who was to be elected by the National Shango was the head of the state, representative of the Republic at home and abroad and was the Commander-in-Chief of the Armed Forces. He had vast power to supervise the activities of the various organs of the government. Article 86(c) and (e) of the Constitution, for instance, state that the President has the power, among other things, to ensure that the Council of Ministers, the **Supreme Court**, the Procurator General… carry out their responsibilities. The president had also the power to nominate the President and the Vice-President of the Supreme Curt for approval by the National Shango, and when compelling circumstances warrant it, he can between the sessions of the National Shango appoint and dismiss the same. The President had a wide opportunity to abuse his power since the National Shango was required to meet once a year unless emergency necessitates the calling of extra ordinary meeting. Although the Constitution required that the judges of the Supreme Court were to be elected and dismissed by the National Shango, since the Shango was in recess through out the year, the President had the opportunity to exercise his power in disguise.

The President and the Vice President of the PDRE were also the President and the Vice President of the Council of State, respectively. As stated under Article 82 of the PDRE Constitution, the Council of State had the power and duty to ensure the implementation of the Constitution and other laws, to interpret the Constitution and other laws, to revoke regulations and directives which do not conform to the Constitution Interpretation of laws during the Derg period was done not only by courts; state organs such as the National Shango, the Council of State and the General Procurator were also entrusted with such power.

From the facts provided above, one can understand that the PDRE Constitution not only vested supreme executive power in the hands of the Council of State, which was under the presidency of the PDRE President, but also judicial power such as interpretation of the Constitution and other laws as well as revocation of laws that contravene the constitution. Were also under the plisenderry of the PDRE President.It is also possible to say that the judiciary did not have administrative independency as the PDRE Constitution made the Supreme Court directly accountable to the President. Here is the paradox; he/she was the Chief-Executive and Head of the PDRE, the President whom the Constitution empowered to supervise the Supreme Court Judges in effect rendered judicial review non-existence during the Derg regime.

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) vested judicial powers both at federal and state levels in the courts. This is expressly stated under Article 79(1) of the Constitution. Thus, one may safely say that supreme judicial power under the FDRE is vested in the Judiciary. Being a final arbiter of the law, the judiciary can review and annul administrative decisions on grounds of legality. However, Ethiopian courts did not have the power to interpret the Constitution. This power was explicitly given to the House of the Federation in Article 62(1) of the FDRE Constitution. But this should not be construed to mean that courts could not invalidate an administrative decision or other subordinate legislation that contravened the clear words of the Constitution (in circumstances where there is no need for interpretation), provided that they have the very power of judicial review. So, an important question that should be raised here is that: Do Ethiopian courts have the power of judicial review? As was mentioned above, in some foreign jurisdictions like France, regular courts are prohibited from reviewing administrative decisions; France has full-fledged administrative tribunal systems that are established to resolve disputes on administrative matters in accordance with the principles and standards of administrative law. But, there is no such kind of institutional arrangement in Ethiopia, although technically speaking it seems possible. As can be inferred from Articles 37(1) and 78(4) of the FDRE Constitution, despite the existence of Article 79(1) of the same, judicial power is not exclusively vested in regular courts. Other bodies such as administrative courts can be established to assume judicial power on administrative matters. Thus, it may not be labeled unconstitutional if Ethiopia adopts the French

type model provided that it is preferable in terms of relevancy and feasibility having regard to the specific situations of the country.

However, having regard to the existing situation in Ethiopia, that is the absence of full-fledged administrative court system like the French counter part, it seems justifiable to argue that regular courts must have the power to test the legality of administrative decisions in the same manner as courts in the common law tradition do. The power of the court to review administrative decisions, thus, may be derived from the very principle of separation of power that vests judicial power in the judiciary and the doctrine of rule of law enshrined under the FDRE Constitution by way of interpretation just like the practice in the United States, at least, for the purpose of reviewing administrative decisions and subordinate legislations. There are also possibilities where the parent acts that create the respective agencies may also empower courts to review administrative decisions under specified conditions. Thus, one may plausibly argue that implied in the principles of separation of state power and the rule of law that are duly recognized under the FDRE Constitution is that the judiciary as the ultimate arbiter of justice has the power to test the legality of administrative acts. In the absence of a systematically devised administrative reviewing mechanism like that of the French one, precluding the ordinary courts to review administrative acts on technical grounds renders the doctrine of rule of law meaningless. However, practically speaking, the status of judicial review in Ethiopia lacks clear-cut jurisprudential evidence.

Wherever courts have the power to review administrative actions or inactions that tantamount to decisions, the prerequisites that they are expected to observe are discussed subsequently.

7.4 Grounds of Judicial Review

Needless to say that courts do not have an unlimited power to supervise the activities of administrative agencies. The principle of separation of powers dictates the various organs of the government to act within the scope of their respective sphere of powers and refrain from interfering on matters that are exclusively entrusted to others. So,

judicial review does not authorize the court an outright power to interfere on administrative matters. The rational behind the need for the determination of the justifiable grounds of judicial review is, thus, to delineate the boundary where judicial review may be available to challenge administrative decisions.

As was clearly stated in the foregoing sub-section, the purpose of judicial review is to test the lawfulness of government's decisions. Worth discussing point for this sub-section is, therefore, related to the determination of the grounds that may render an administrative decision unlawful/illegal. In order to delineate the boundaries in which judicial review may be called into operation, different jurisdictions crafted their own standards or criteria that may render administrative decisions unlawful or illegal. Australia can be taken as a good example in this regard. In Australia, an administrative decision is said to be unlawful if it breaks one of the criteria that are defined in section 5 of the Administrative Decision (Judicial Review) Act 1977 ('AD (JR) Act'). The grounds of judicial review as outlined in section 5 of the AD (JR) include the following:

- A breach of the rules of natural justice;
- A failure to observe the procedures that were required by law to be observed in connection with the making of the decision;
- The person who purported to make the decision did not have jurisdiction to make the decision;
- The decision was not authorized by the enactment in pursuance of which it was purported to be made and
- The making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made. An exercise of power may be improper if the relevant conduct involves:
    - Taking an irrelevant consideration into account in the exercise of a power;
    - Failing to take a relevant consideration into account in the exercise of a power;
    - An exercise of a power for a purpose other than a purpose for which the power is conferred;
    - An exercise of a discretionary power in bad faith;

- An exercise of a personal discretionary power at the direction or behest of another person;
- An exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
- An exercise of a power that is so unreasonable that no reasonable person could have so exercise the power;
- An exercise of a power in such a way that the result of the exercise of the power is uncertain; and
- Any other exercise of power in a way that constitutes abuse of the power;

- An error of law;
- The decision was induced or affected by fraud;
- There was no evidence or other material to justify the making of the decision, but only if:
  - The person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or
  - The person who made the decision based on the decision on the existence of a particular fact, and that fact did not exist and
- The decision was otherwise contrary to law.

The grounds of judicial review incorporated under the Australian Administrative Decision (Judicial Review), as listed above, have predominantly common law origin. But some of them are refined and reformed in a manner that fits the Australian situation. It does not mean, however, that these criteria are not used in the continental law world as grounds for reviewing administrative decisions. In France, for example, many of these criteria are receiving blessing as bases for reviewing administrative decisions by administrative tribunals. Having this general information in mind, it seems important to proceed with the details under the subsequent sub-sections.

7.4.1 Simple (Narrow) Ultra Vires

The simple proposition that a public authority may not act out side its powers (ultra vires) might fitly be called the central principle of administrative law. The juristic basis of judicial review is the doctrine of ultra vires (Wade & Forsyth, p.35). In its reviewing capacity the court is essentially looking at whether a decision- making body has acted 'ultra vires'or 'intra vires'. The term 'ultra vires' means 'without power', while 'intra vires' means 'within power.' If a decision-making body acts ultra vires the reviewing court has the discretion to intervene (Cumper, p.291.), From the opinions of the authorities cited above, one can infer that the term ultra vires in administrative law context refers to decisions passed by administrative authorities without having the requisite power or in excess of the limits of the power conferred upon them. An administrative decision may be rendered ultra vires due to substantive or procedural issues affecting the decision.

7.4.1.1 Substantive Ultra Vires

The term substantive ultra vires refers to the substantive defects of the decision as contrasted to the procedural irregularities. In the strictest sense of the term, an administrative decision is said to be ultra vires in terms of substance where the decision maker exceeds the power duly entrusted to him/her in the public interests or where the subject matter of the decision falls outside the jurisdictional limit of the decision-maker. This goes in line with the principle that says each power has its own legal limits. Thus, where the decision maker passes decisions on matters falling outside the boundary of his statutory powers, there comes what we call substantive ultra vires in the narrow sense of the term. The underlining principle behind substantive ultra vires is that every power entrusted in the public interest has its own limits. So, when the decision-maker renders a decision that exceeds the power conferred upon him, it can be attacked through the forum of judicial review.

7.4.1.2 Procedural Ultra Vires

Even if the decision-maker passes a decision within the scope of the statutory power conferred upon him, still the decision may be rendered ultra vire because of procedural irregularities affecting the decision. The phrase procedural ultra vires refers to a decision passed disregarding mandatory (formal) procedural requirements. Procedural requirements could be obligatory (need strict compliance) or directory (provide direction to the decision-maker to be followed in at the discretion of the decision-maker in appropriate cases). Where there is a statutory procedure that dictates a course of an administrative action to be taken based on the established mandatory formal requirements, non observance of these requirements rendered the decision procedurally refers to ultra vires.

Procedural illegalities, also known in the broader sense as procedural improprieties applly not only to non-observance of mandatory statutory procedural requirements, but also to situations where the decision-maker fails to observe the rules of natural justice or fail to act fairly. See section 4.2.1 of this material in order to appreciate the rules of natural justice and fair hearing.

7.4.1.3 Jurisdictional Error

As a general rule, errors of fact made by the primary decision-maker are not to be corrected by a court. They are accepted as errors within the jurisdiction of the administrative decision-maker, and as such he or she is entitled to make them. Factual issues are typically issues that go to the merits of a decision, not to its legality. Jurisdictional facts are different. Whether or not a decision-maker does or does not have jurisdiction to make, a decision is a question of law and open to judicial review. (McClellan, p.7) A decision-maker who erroneously interpreted the law as providing a power that did not exist was said to have made a ‘jurisdictional error of law’. An error of fact can also be challenged if the error is jurisdictional. A jurisdictional error of fact occurs where the existence of a particular state of affairs is a condition precedent to a decision-maker actually having jurisdiction, (Cumper, pp. 302-303)

As can be inferred from the above-cited opinions, jurisdictional error results where the decision maker assumes jurisdiction over a subject matter either due to the wrong interpretation of the law or the wrong appreciation of facts that are essential conditions precedent for assuming jurisdiction over a subject matter. Jurisdictional error of law arises when, due to the wrong interpretation of the law, the decision maker exercises a power over a subject matter that actually did not fall under his jurisdiction. But jurisdictional error of fact happens while the decision-maker assumes jurisdiction over a subject matter in the absence of a certain fact that is set as a condition precedent to assume such jurisdiction. In short, jurisdictional error is one of the species of ultra vires that may give rise to judicial review.

7.4.1.4 Error of Law

As was discussed somewhere else, judicial review is concerned with testing the legality of the administrative decisions. This means that courts are more expertise to review errors of law than errors of fact. Broadly speaking, errors of law can be classified into 'errors going to jurisdiction' (jurisdictional errors of law) and errors of law 'within jurisdiction'. According to Cumper, prior to the case *Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 14*, there was an important distinction between errors of law 'going to jurisdiction' (jurisdictional errors of law) and errors of law 'within jurisdiction' (errors of law on the face of the record). As was stated in the preceding sub-section, jurisdictional error of law refers to a decision made without power (ultra vires) due to the wrong interpretation of the law. But an error of law 'within the jurisdiction' is the type of error made by a decision-maker who errs in law whilst exercising powers which have been conferred on him/her. This type of error will not automatically render the decision *ultra vires*. The courts have discretion to intervene if the error of law appeared on the record of the decision. However, in *Anisminic Ltd v foreign compensation*, the House *of* Lords decision renders the distinction unnecessary in most cases. Their lordship decided that errors of law could be treated as going to jurisdiction, even when there had been an error made in the process of exercising power conferred, rather than an error in deciding whether the power had actually existed.

According to Cumper, following the decision in *Anisminic* case, the distinction between errors of law on the face of the record and jurisdictional errors of law is probably rendered obsolete. However, the House of Lords in this case did leave open the possibility of a decision-maker making an error of law within jurisdiction. As mentioned above, judicial review may be available where a body is acting within its powers but has erred in law whilst doing so and that error appears on the record relating to the decision. Cumper cited an important case related to the error of law on the face of the record as follows:

> *In R v Northumberland Compensation Appeal Tribunal, ex parte shaw [1952] 1 KB 388, a statute provided that all hospital employees who had been made redundant should be paid compensation. The amount of compensation was to be calculated not merely on the basis of the length of service in a particular hospital, but it was also to include periods of employment in any other local government service. The amount of compensation awarded by the Appeal Tribunal in this case reflected only the period of employment in the hospital and ignored previous service in other local government departments. The basis of the calculation was included on the record of the tribunal's decision. The decision was therefore quashed*. (Id., pp.302-303)

7.4.1.5 Failure to Discharge Statutory Duty

The grounds of judicial review are not limited to ultra vires acts in the positive sense. An agency's failure to discharge a statutory duty towards the designated beneficiaries can also give rise to judicial review. For example, in the area of pension and social security, where the concerned organ of the government persistently fails to provide the benefit to the statutorily designated beneficiaries, the latter can invoke judicial review seeking mandamus (compelling court order). That is, an authority's forbearance to discharge a statutory duty towards the beneficiaries without any strong reason can give rise to judicial review. The remedy that may be granted by the reviewing court in this case will be discussed in the last chapter.

7.4.2 Abuse of Power (Broad Ultra Vires)

For the purpose of judicial review, an ultra vires act can be liberally construed to include not only those decisions of an authority that are rendered with no power, in excess of power, or contrary to mandatory statutory procedural requirements such as discussed above; but it may also include those administrative decisions, although fall within the wide discretionary power of the decision-maker, may be found to be defective on the grounds of manifest unreasonableness, disproportionality, irrationality and other grounds that shall be appreciated in the subsequent sub-sections in turn.

7.4.2.1 Unreasonableness

Although there are critics labeled against conferring discretionary powers to administrative agencies for fear that such agencies may abuse such unrestrained powers, still it remains the hallmark in the science of administration. As Cane pointed out, discretion is a feature not only of a policy decision but also of decisions on questions of fact and law, which often have no 'right answer' but more than one 'reasonable answer' from which the decision-maker must choose. Discretion, as to procedure to be followed in making a decision, can also have an important impact on the decision itself, (**Cane,** p.133). Drawing a sharp contrast between discretion and 'duty', Cane further noted on the ways discretionary powers may be limited as follows:

> *The essence of discretion is choice; the antithesis of discretion is duty. The idea of 'decision-making' implies an element of choice: duty does away with the need to make decisions. Duty removes discretion; but discretion may also be limited without being entirely removed, by standards or guidelines or criteria which the decision-maker is to take into account in exercising discretion.* (Id. Pp.133-134)

The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold different opinions as to which is to be preferred, (Lor Diplock cited in Wade and Forsyth, 365.) As expounded by the 19th centaury jurist Dicey, discretionary power

should be controlled: uncontrolled (absolute) discretion is an evil to be avoided in most contexts. But according to Cane, discretion has both advantages and disadvantages and the purpose of controlling discretion should be to preserve the advantages to the greatest degree consistent with minimizing the disadvantages. Discretion has the advantage of flexibility; it allows the merits of individual cases to be taken into account. Discretion is concerned with the spirit, not the letter of the law, and it may allow government policies to be more effectively implemented by giving administrators freedom to adapt their methods of working in the light of experience. It is useful, in new areas of government activity as it enables administrators, to deal with novel and, perhaps, unforeseen circumstances as they arise. On the other hand, discretion puts the citizen in much more at the mercy of the administrator, especially if the latter is not required to tell the citizen the reason why the discretion was exercised in the particular way it was. Discretion also opens the way for inconsistent decisions, and demands a much higher level of care and attention on the part of the administrator exercising it (Ibid. P.135)

Discretion may be structured by providing that it should be exercised 'reasonably' –this gives the decision-maker a degree of freedom because people may fairly disagree about what is reasonable, but it rules out certain results as unacceptable. (Id.) Despite the difficulties to demarcate the line between reasonable decision and its antithesis- unreasonable, there is a consensus in the common law world that when a decision-maker reaches a decision that no reasonable person would have made, it can be well taken as a ground for judicial review. In R v Greenwich London Borough Council, ex parte Cedar Holdings [1983] RA 17 it was held that a decision is unreasonable if it is the kind of decision that is so outrageous that no right thinking person would support it.

In Wednesbury case, a case involving a decision to deny access to a movie theatre to youngsters on Sunday, presumably to preserve their moral health, in refusing to interfere with the decision, Lord Greene MR noted that there was considerable overlap between many of the grounds of review that fell within the rubric of "unreasonableness." In words which have been repeated by countless judges on many occasions his Lordship said:

*It is true that the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably.' Similarly, there may be something so absurd, that no sensible person could ever dream that it lay within the power of the authority. Warrington LJ in Short v Poole Corporation [1926] Ch 66 at 90,91 gave the example of the red-haired teacher dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration an extraneous matter. It is so unreasonable that it may be described as being done in bad faith; and, in fact, all these things run into one another. (*Associated *Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 p. 229)*

This ground came to be known as Wednesbury unreasonableness. It is important to emphasis Lord Green's words that state "something so absurd that no sensible person could ever dream that it lay within the power of the authority." Lord Green stated further: "It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, is quite right; but to prove a case of that kind would require something overwhelming…" (Id. P.230)

In the effort to delineate the border between legality and merits, McClellan quoted the opinion of courts from different cases as follows:

Courts have repeatedly emphasized that the "unreasonableness" ground "must not be allowed to open the gate to judicial review of the merits of a decision or action taken within power." Minister for Urban Affairs and

Planning v Rosemount Estates Pty Ltd (1996) 91 LGERA 31 at 42.) The requirement of "something overwhelming" has by and large been taken seriously by judicial decision-makers, so that a decision cannot be interfered with unless it is so unreasonable that it is "obvious" that the decision-maker "is acting perversely," (Puhlhofer v Hillingdon London Borough Council [1986] AC 484 at 518.) or it is so unreasonable that the decision is one "for which no logical basis can be discerned" (Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611 at 626.) or one that "amount[s] to an abuse of power." (Attorney-General v Quin (1990) 170 CLR 1 at 36.)…

An authority has listed the following other types of cases where administrative decisions have been set aside for Wednesbury unreasonableness:

- Where a decision is devoid of plausible justification.
- Where a decision-maker has made an erroneous finding of fact on a point that is fundamentally important in the case.
- Where the decision-maker has failed to have regard to departmental policy or representation.
- Where the effect of the decision is unnecessarily harsh.
- When the decision-maker has failed to give genuine, proper or realistic consideration to a matter. (Beazley, "The Scope of Judicial Review", cited in McClellan, Id.)
- Where there are demonstrable inconsistencies with other decisions.
- Where there is discrimination without a rational distinction.

7.4.2.2 Proportionality

Wade & Forsyth stated that in the law of a number of European countries there is a 'principle proportionality', which ordains that administrative measures must not be more drastic than it is necessary for attaining the desired result (**Wade & Forsyth**, p.366). According to these authorities, the principle of reasonableness and proportionality cover a great deal of common grounds. A sever penalty for a small offence may be challenged based on the principle of proportionality or reasonableness. They cited further Lord Hoffmann as follows: "it is not possible to

see daylight between them." Nevertheless a clear difference has emerged and has been corroborated by the House of Lords. Proportionality, requires the court the action taken was really needed as whether it was within the range of course of action that could reasonably be followed.

The concept of proportionality has its origin in the civil law of continental Europe. It takes whether:
(i) The legislative objective is sufficiently important to justify limiting a fundamental right;
(ii) The measures designed to meet the legislative objective are rationally connected to it; and
(iii) The means used to impair the right or freedom are no more than is necessary to accomplish the objective (*de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80).

Proportionality was first adopted in England as an independent ground of judicial review in *R v Home Secretary; Ex parte Daly* [2001] 2 AC 532. It was accepted that while there was considerable overlapping between proportionality and the traditional grounds of judicial review (especially Wednesbury unreasonableness), the test of proportionality led to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision plays a much greater role (**McClellan,** p.16.), As McClellan further quote from the case cited above, there are three significant differences between proportionality and the traditional grounds of review that may lead to different outcomes in some cases:

> *First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly…the intensity of the review…is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and*

the question whether the interference was really proportionate to the legitimate aim being pursued.

The adoption of proportionality as an independent ground of review is not without any problem. It may let courts interfere on the merits of an administrative decision which is not within the purview of judicial review. Appreciating this problem, McClellan writes*:*

> *The adoption in England of proportionality as an independent ground of review, and the shift towards examining the merits that this involves, represents a significant departure from the strict observance of the distinction between legality and merits that still prevail in Australi. Proportionality has been accepted by the High Court of Australia as a test of constitutional validity in relation to certain heads of power. However, it has not been endorsed as an independent test for the validity of subordinate legislation.)*

Concerning the role of proportionality in the context of judicial review of administrative decisions in NSW [New South Wales], McClellan quoting the explanation made by Spigelman writes:

> *It can be accepted that a complete lack of proportion between the consequences of a decision and the conduct upon which it operates may manifest unreasonableness in [wednesbury] sense. However, the plaintiff also invoked "proportionality" as a new and separate ground of review.*
>
> *Proportionality has not been adopted as a separate ground for review in the context of judicial review of administrative action, notwithstanding a considerable body of advocacy that it be adopted. The concept of proportionality is primarily more susceptible of permitting a court to trammel upon the merits of a decision than Wednesbury unreasonableness. This is not the occasion to take such a step in the development [of] administrative law, if it is to be taken at all. (Bruce v Cole and Ors (1998) 45 NSWLR 163 at 185)*

As can be inferred from the above, proportionality can be invoked as an independent ground of judicial review in England, where as in Australia, it cannot be invoked as an independent ground of judicial review, but only within the spectrum of the classical Wednesbury unreasonableness. In short, the notion of proportionality has received increasing importance in recent years. This requires a certain proportion or balance between the administrative measure to be taken and the end to be achieved. In France, too, disproportionality of the administrative measure may be invoked as a ground for reviewing the decision by administrative courts.

7.4.2.3 Irrationality

The distinction between irrationality and unreasonableness is not as such clear; some authorities appear to use both as separate grounds of judicial review, whereas some use 'unreasonableness' as one of the typologies of 'irrationality'. Cane, for example, write, "'Irrationality' is more often referred to as 'unreasonableness' So, for writers like are the expounding of what constitutes unreasonable decision is a manifestation of its irrationality and vice versa. However, which include, writers like Cumper provide a list of the species of irrationality:

- Failure to exercise discretion properly: where the decision-maker either did not exercise discretion sufficiently free from outside influences, or abused the discretion;
- Acting as though limited by external authorities: where the decision-maker fails to exercise any discretion at all, believing himself or herself to be bound by external rule;
- An authorized delegation
- Decision-maker applies policy without flexibility: where the decision-maker who is conferred with discretionary powers is expected to consider each case on its own facts and merits but renders a decision rigidly without considering whether the particular case has extenuating factors which would necessitate them making an exception;
- Abuse of discretion: where the decision-maker uses power for an improper purpose or frustrates the legislative purpose; makes a decision on the basis of irrelevant factors or fails to take account of relevant factors; reaches a decision that is unreasonable in itself; reaches a decision that is unreasonable itself;

- Uses of power for an improper purpose or to frustrate the legislative purpose;
- Forming decision on basis of irrelevancies or ignoring relevant factors;
- And unreasonableness.

7.4.2.4 Relevant and Irrelevant Considerations

As provided in the preceding sub-section, reaching at a decision on the basis of irrelevant considerations, or by disregarding relevant considerations, is one of the manifestations of irrationality. So, as stated in the case *R v Secretary of State for Social Services, ex parte* Wellcome Foundation Ltd [1987] 1 WLR 1166, it is a reviewable error either to take account of irrelevant considerations or to ignore relevant ones, provided that if the relevant matter has been considered or the irrelevant one is ignored, a different decision or rule might (but not necessarily would) have been made. According to Cane, many errors of law and fact involve ignoring relevant matters or taking in to account of irrelevant ones. Ignoring relevant considerations or taking account of irrelevant ones may make a decision, or rule unreasonable in accordance with statutory policy.

As Cooke J pointed out in the case *Ashby v. Minister of Immigration [1981] 1 NZLR 222 at 224*, considerations may be obligatory i.e. those which the Act expressly or impliedly requires the Minister to take into account and permissible considerations i.e. those which can properly be taken into account, but do not have to be (Cited in Wade & Forsyth, p.381.) Where the decision-maker fails to consider those obligatory considerations expressed or implied in the Act, the decision has to be invalidated. Whereas, in the case of permissive considerations, the decision-maker is not required to strictly abide to such considerations. Rather, the decision-maker is left at discretion to take the relevant considerations having regard to the particular circumstances of the case by ignoring those irrelevant ones from consideration. According to Cane, the number and scope of the considerations relevant to any particular decision or rule will depend very much on the nature of the decision or rule. Citing the opinions of different authorities he writes:

> *For example, licensing authorities are normally required to consider not only the interests of the applicant and of any objectors but also of the wider public. By contrast, for example,*

> *decisions about individual applications for social security benefits are usually to be made solely on the basis of considerations personal to the applicant. (D. Galligan, Discretionary Powers (1986), 188-195).) It should be noted, however, that the courts do not, under this ground of review, engage in 'hard-look' review (as it is called in the United States [Id. P 314-420]); they do not require decision-makers to show that they have considered all relevant available evidence and that the decision made is in the light of that evidence, a rational way of achieving desired policy goals. All that the courts do is to decide whether the particular consideration(s) specified by the complainant ought or ought not to have been taken into account. (Cannock Chase DC v Kelly [1978] 1 All ER 152.) In effect, under this head the courts only require the decision-maker to show that specified considerations were or were not adverted to. In technical terms, the burden of proof is on the applicant, but the respondent will have to provide a greater or less amount of evidence as to what factors were or were not considered and how they affected the decision. A mere catalogue of factors ignored or considered may not be enough: R v Lancashire CC, ex parte Huddleston [1986] 2 All ER 941.) Decision-makers are not required to conduct comprehensive pre-decision inquiries or to justify the decision made in the light of the relevant and available material. Some academics argue strongly that English courts should follow something like the hard-look approach, but judges are unlikely to do so for fear of being seen to be interfering unduly with the policy choices of decision-makers.*

It is suffice to say that where the decision-maker fails to take relevant considerations into account but takes those irrelevant ones, there is high probability that the outcome of the decision may be affected by defects than not. So, the interference of the court to review such kind of decisions seems justifiable.

7.4.2.5 Bad Faith

It is that administrators have a general duty to exercise their powers in good faith to achieve the purposes for which those powers are entrusted to them according to the interest of the public. Although it is difficult to discern the constituting elements of all decisions rendered in bad faith, one can safely say that it indicates lack of good faith on the part of the decision-maker. Contrasting bad faith with dishonesty, Wade & Forsyth states:

> *It is extremely rare for public authorities to be found guilty of intentional dishonesty: normally they are found to have erred, if at all, by ignorance or misunderstanding. Yet the courts constantly accuse them of bad faith merely because they have acted unreasonably or on improper grounds. Again and again it is laid down that powers must be exercised reasonably and in good faith. But in this context 'in good faith' means merely 'for legitimate reasons'. Contrary to the natural sense of the words, they impute no moral obliquity* (p. 416.)

In the Wednesbury case cited earlier, Lord Green MR, used the term 'bad faith' interchangeably with unreasonableness and extraneous considerations as follows:

> *It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v. Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hairs. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.*

Appreciating the interconnection between the other grounds of judicial review such as unreasonableness, irrationality and the consideration of irrelevant matters or ignoring relevant matters, Wade and Forsyth say:

> *Bad faith scarcely has an independent existence as a distinct ground of invalidity. Any attempt to discuss it as such would merely lead back over the ground already surveyed. But a few examples will illustrate it in its customary conjunction with unreasonableness and improper purposes. If a local authority were to use its power to erect urinals in order to place one 'in front of any gentleman's house', then 'it would be impossible to hold that to be a bona fide exercise of the powers given by the statute'. If they wish to acquire land, their powers are 'to be used bona fide for the statutory purpose and for none other'. If they refer numerous cases en masse to a rent tribunal without proper consideration, this is not 'a valid and bona fide exercise of the powers'. If a liquor license is cancelled for political reasons, the minister who brought this about is guilty of 'a departure from good faith'. Such instances could be multiplied indefinitely. Cases of misfeasance in public office, where the misfeasor knows that he is acting outside his powers, could be added to the collection.*

The out come of a decision may be affected due to the existence of bad faith on the part of the decision-maker. The unreasonableness or irrationality of a decision may result from a decision that is induced by bad faith on the part of the decision maker. But the reverse may not be always true. That is, unreasonable decision may be passed in good faith due to the erroneous bona fide appreciation of matters. So, as the interrelation between unreasonableness and bad faith is not as such overlapping, the existence of the former may not help us to infer the existence of bad faith on the part of the decision-maker. As discussed earlier, where a decision is found manifestly unreasonable, judicial review can be invoked against such decision regardless of whether the decision is passed in good faith or its antithesis bad faith. But it is difficult to expect reasonable decision, where the decision is induced by bad faith or extraneous factors. Thus, it is possible to treat bad faith within the spectrum of the various grounds of judicial review discussed earlier.

7.5 Limitations on Judicial Review

The preceding sections have thoroughly discussed the grounds that give rise to judicial review. This section shall further appreciate some of the most important procedural and substantive constraints of judicial review. Issues related to the determination of the parties to a judicial review, the availability, timing and scope of judicial review and other preliminary hurdles, if any, are the main concerns of this section.

According to Cumper (**Cumpe**r PP.292-293.), in determining whether a particular issue is appropriate or not for judicial review, a court [in England] will often consider the following factors, by asking:

- Is the decision in question a public law matter and thereby subject to judicial review?
- Has the right to judicial review been expressly excluded, say in a statute?
- Has the applicant sufficient interest in the issue (locus standi)?
- Has the applicant sought permission for judicial review within 3 months of the actual reason for bringing the application?
- Do specific grounds for judicial review exist?

But these are not the only questions that the court may ask in determining whether the decision complained of is appropriate for judicial review or not. The following questions must be added to the above questions:

- Are internal avenues exhausted?
- Is the decision in question ripe for judicial review?

Since many of these questions are appreciated in the previous chapters of this module, the discussion in the subsequent sub-sections will give due attention to some selected issues.

Is the decision in question a public law matter and thereby subject to judicial review? As you may recall from the discussion in the previous units, administrative law, as a branch of public law, concerns with the behavior of the various administrative organs of the government in their relation with citizens and the interrelation among themselves. In principle, only decisions of administrative bodies passed in their official capacity (decisions of governmental nature) can be subjected to judicial review. this means that for acts or decisions falling outside the purview of administrative law, the complainant cannot invoke judicial review.

Do specific grounds for judicial review exist? The grounds or conditions that justify judicial intervention/review are thoroughly discussed in the preceding section. The point that should be made clear here is that the reviewing court does not have unlimited power to test the decisions of administrative agencies. The power of the court is limited to test the legality of the decision complained of. So while the court determines to review the decision of an agency, it has to make sure that any of the specific grounds/conditions justifying judicial review as discussed earlier are met.

The other important point included in the above list, although it may necessarily be taken as a mandatory requirement by all jurisdictions, is related to seeking permission for judicial review. For example, in England, if an aggrieved person wants to invoke judicial review, s/he must first seek permission to apply for judicial review. Without securing permission upon application from the concerned court, within the statutory time limit of three months, an aggrieved person cannot invoke judicial review. The rational behind putting this procedural requirement is said to be the need to filter out those cases which are not amenable to judicial review. So, in determining whether a particular issue is suitable for judicial review, the court is expected to consider all the factors listed above.

7.5.1 Standing

As was provided in the above lists, in order to obtain leave/permission to bring an action for judicial review, the applicant must have **sufficient interest** in the matter to which the application relates. A worth discussing point here is related to the nature of the interest affected. What is a 'sufficient interest'? In answering this question, C**ane** gave a frequently quoted remark as follows:

> The guidance given in the *Fleet Street Casuals case as to the meaning of the term 'sufficient interest' is very abstract. Can anything more concrete be said on this topic? In answering this question, we need to distinguish between personal interests and public interests. An applicant would obviously have a sufficient personal interest in a decision which adversely affected the applicant's health or safety. A person would also have a sufficient interest in a*

decision which affected his or her property or financial well-being. For instance, neighbours have sufficient interest to challenge planning decisions in respect of neighbouring land. Producers and traders have standing to challenge the grant of a license or other benefit to a competitor, and a taxpayer might have standing to complain about the favourable treatment of a competitor by the revenue. The expenditure of time, energy and skill in caring for a particular species of wildlife or some feature of the natural environment could give a person a sufficient interest in a decision adversely affecting that species or feature. An aesthetic interest in the built environment may also generate a sufficient interest.

What about public interest? It seems clear that the public has a sufficient interest in the observance of basic constitutional principles such as 'no taxation or expenditure without parliamentary approval'. The public also has an interest that governmental powers such as that to ratify treaties or to set up a non-statutory compensation scheme (**Cane**, pp. 57-58.)

An important case is Inland Revenue Commissioners v National Federation of Self-Employed and Small business Ltd [1982] AC 617 – commonly known as Lords held that NFSSB did not have locus standi to challenge the Revenue's decision the Fleet Street casuals case. The NFSSB was attempting to challenge the Revenue's grant of a tax amnesty to Fleet Street casual workers on the grounds that it was illegal. The House of Lords held that NFSSB did not have locus standi to challenge the Revenue's decision with regard to another group of taxpayers. According to ***Cumper****, the House of Lords stated that the question of locus standi should be looked at in two stages:*

- *At the application for leave for judicial review; and*
- *At the hearing it self*

At the first stage, only cases where the applicant clearly does not have sufficient interest would be rejected. At the second stage, however, a more detailed look at the applicant's 'standing' should take place- it then becomes important to examine the merits of the case if the applicants have strong grounds for review, it is more likely that they will be deemed to have the necessary locus standi *(**Cumper**, p. 297.)*

In determining whether or not the applicant has sufficient interest (locus standi) for judicial review, the general opinion is that the legal and factual circumstances of each case need to be

considered critically. However, Cane suggested the following guidelines need to be considered*:*

- *Examining the case law: the question of sufficient interest is partly a question of legal principle –what do earlier cases say about standing? – and partly a question of fact to be decided in the light of circumstances of the case before the court. So it will often be impossible to be entirely sure, in advance of litigation, whether any particular applicant has a sufficient interest.*
- *Look at the relevant statute: the question of sufficient interest has to be judged in the light of the relevant statutory provisions – what do they say, or suggest about who is to be allowed to challenge decisions made under the statute.*
- *Consider the nature of the applicant's complaint: having look at the substance of the complaint may patently show that the applicant has or does not have sufficient interest.*
- *The seriousness of the alleged wrong: whether the applicant's interest is sufficient depends to some extent on the seriousness of the alleged illegality.* Standing is a preliminary question, separate from that of the substance and merits of the applicant's case: standing rules determine entitlement to raise and argue the issue of illegality, and it makes little sense to say that entitlement to argue the merits of the case depends on whether one has a good case on the merits. Only if the chance of failure at the end of the day approaches certainty should the likely outcome affect the question of access to the court.

*Courts dislike the possibility of there being a lacuna in the legal system – if there is a chance that an aggrieved person will not have an alternative means of challenging the decision in question, it increases the likelihood that the applicant will satisfy the locus standi requiremen. (***Cane,** *pp. 49-50.).*

Concerning the function/purpose of standing rules, Cane further states:

> *In general terms, it is to strict access to judicial review. But why restrict access? One suggested reason is to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the government…. Other reasons for restricting access have been suggested: to prevent the*

> *conduct of government business being unduly hampered and delayed by 'excessive' litigation; to reduce the risk that civil servants will behave in over-cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merits is presented in the best possible way and by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in the affairs of other* (pp.59-60).

In short, the purpose of the standing requirements is simply to 'filter out' unmeritorious, frivolous or trivial applications, and thereby to save the court time (Cumper, p.298). The general requirement of standing dictates that in order to invoke judicial review, the complainant must show that the decision in question is one injurious to his/her interest. According to Brown & Bell, "this requirement creates no difficulty in proceedings against the administration for damages. It is rather in proceedings to annul an administrative act that the rules governing the plaintiff's *locus standi*…have been worked out in considerable detail.

Then, who would be the applicants for judicial review? According to Cane, judicial review is available not only to citizens (individuals, corporations, trusts and so on) with grievances against government, but also to government bodies with a grievance against another government body. To be entitled to seek a remedy by way of judicial review an applicant must have sufficient standing (locus stander P. 420). Dwelling on this principle, the House of Lords in the *Fleet Street* casuals case cited above rejected the application of the National Federation of Self-Employed and Small Business Ltd that was attempting to challenge the Revenue's grant of a tax amnesty to Fleet Street casual workers on the grounds that it was illegal. The principle dictates that only individuals or a group of individuals whose interest is substantially affected may invoke judicial review.

Concerning application for judicial review by pressure groups, there is no consistent practice among jurisdictions. Some countries allow action by pressure groups such as associations to invoke judicial review on behalf of their members. Even the case laws of England, shows us lack of inconsistency: some pressure groups are denied access to judicial review on the grounds of standing, but some others have been shown successfully appearing before the

court of review representing others. Some countries like India also allow public interest litigation – where any individual is allowed to seek judicial review of an agency's action on matters that affect the interest of the general public.

Coming back to the issue of standing in Ethiopia, the FDRE Constitution in Article 37 stipulates that:

"(1) *Every one has the right to bring justiciable matters to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.*

(2) The decision or judgment referred to under sub-Article 1 of this Article may also be sought by:

(a) Any association representing the collective or individual interest of its members; or

(b) Any group or person who is a member of, or represents a group with similar interests.

As clearly stated in the above provisions of the constitution, any one whose interest is sufficiently at stake, any association on behalf of the collective interest of its members or on behalf of the individual interest of its members, any group of individuals with similar interests or any member of such identifiable group on such matters of common interest can apply for judicial review provided that the matter is justiciable and the avenue of judicial review is there. However, the provisions of the constitution stated above are not clear enough whether or not they give room for public interest litigation on matters that concern the general public. Of course, there appear under the constitution a departure from the rigid requirements of locus standi provided under our civil procedure code that restricts the right of standing only to those persons whose interest is directly and sufficiently at stake. But on matters related to environmental Pollution, the Environmental pollution Control Proclamation authorizes any one to institute a complaint before the concerned organ of the government without the need for showing locus standing.

7.5.2 Justiciability

The other limitation on the availability of judicial review is related to the justiciability of the decision in question. Broadly speaking, administrative controversies can be classified into justiciable and non-justiciable. "Justiciable controversy" as defined in Black's Law Dictionary, "is a controversy in which a present and fixed claim of right is asserted against

one who has an interest in contesting; rights must be declared upon existing state of facts and not upon state of facts that may or may not arise in future."

The genesis of the doctrine of justiciability is traced back to the U.S.A. Constitution. Under Art III of the U.S.A. Constitution, matters not to be precluded as being 'nonjusticiable' need to pass the screening test of "case of controversy" doctrine. Courts require that litigation be presented in an adversary form and be capable of judicial determination with out leading to violation of the principle of separation of powers (Destaw Andarge, [Addis Ababa University Facilty of Law (unpublished)].) The justiciability of the controversy refers to the capability of the disputed state of fact to be resolved by the application or interpretation of existing laws. Courts are expected to entertain only issues that can be legitimately judicialized (justiciable issue) – issues that can be conclusively resolved through the application or interpretation of laws in force.

The classification of the disputed issues into justiciable and nonjusticiable has a far-reaching implication on the courts judicial power in general and reviewing power in particular. Only justiciable matters are said to be suitable or appropriate for judicial appreciation. As courts are experts in law, it is justifiable to make them the final arbiters of law. But on nonjusticiable controversies – controversies that are not capable of being resolved through the application or interpretation of existing laws, for example, political/ministerial decisions or purely administrative/managerial decisions are not suitable for judicial consideration. As was discussed somewhere else, the scope of judicial review is limited to testing the legality or illegality of the decision contested. The reviewing court does not concern with the merits of the decision. Courts are not expected to have better expertise on the merits of the decision than the concerned administrative agencies. Rather, the bureaucracies that are composed of experts from different walks of the profession are said to have better expertise on administrative matters. Extending judicial review to nonjusticiable controversies is not only inappropriate for the court's business; it may also be against the principle of separation of powers. The principle of separation of state power dictates that each organ of the government shall refrain from interfering in the affairs of the others. This means, inter alia, that the judiciary should refrain from unduly interfering in matters that are exclusively entrusted to the other organs of the government. Particularly important to the discussion in hand is that the judiciary should not interfere in matters that are exclusively reserved to the administrative organ of the government such as political and purely administrative or ministerial issues.

Hence, where an application seeking permission for judicial review is brought to the competent court, it is advisable to check whether the decision contested is justiciable or otherwise before hand.

7.5.3 *Exhaustion* and Ripeness

Judicial review is the last resort that can be invoked by a party aggrieved by the decision of an administrative body after exhausting all the avenues available in the concerned agency. Being the last resort, the party aggrieved must go first through the internal agency avenues. Thus, a party seeking judicial review will usually be required, as a condition precedent to challenge the validity of the administrative action, to exhaust all the remedies or avenues available in the administrative channels. The basic tenet behind this rule is that agencies must be given the opportunity to rectify their mistakes and resolve matters in light of their own policy objectives and priorities before judicial intervention. As was discussed earlier, depending upon their administrative organization, agencies may have their own internal grievance/complaint handling avenues. These agency avenues have to be exhausted before judicial review is sought. Where, for example, there is a statutory right to appeal against the decision in question before a body within/outside the agency or before a regular court, judicial review cannot be invoked. Normally, an aggrieved party may not invoke judicial review before looking for agency internal remedies. But the doctrine of exhaustion of internal remedies may be successfully raised as a defense at the hearing stage by the concerned agency. The agency raising defense must prove, of course, the existence of a suitable internal avenue that ought to have been used by the complainant. However, in case where there is an excessive delay on the part of the administrative agency or where there is a great possibility that the complainant will incur an irreparable injury awaiting agency review, the applicant may be dispensed from the requirement of exhaustion of internal remedy.

The doctrine of exhaustion of internal remedies, in addition to giving agencies the opportunity to rectify their mistakes in their own avenues in the light of their policies, also avoids premature intervention of the court on administrative matters and relieves the court from seized by over flooding administrative complaints.

The other important limitation on the availability of judicial review is ‘ripeness’. In order to invoke judicial review, the case complained of must be ‘ripe for review’. The requirement of

'ripeness' shares some common features with the doctrine of exhaustion of internal remedy. It requires the complainant to wait until the concerned agency has passed its final decision. Before the concerned agency passes its final decision over the subject matter, a party cannot invoke judicial review against a speculated or hypothetical future decision. Until the concerned agency gives its decision on the subject matter, as a rule, judicial review may not be invoked.

The requirements of finality and ripeness are designated to prevent premature court intervention in the administration process, before the administrative action has been finally considered, and before the legal disputes have been brought into focus. However, in some cases where the claim has urgent character that on delay itself may inflict irreparable injury, the controversy would be as ripe for judicial review consideration as it calls ever be. The question in such cases is whether administrative inaction is equivalent to denying relief'. So, where an agency excessively or unreasonably delays or withholds action/decision altogether, although no final decision has been made, judicial review can be invoked seeking appropriate remedy. In this case, the requirement of ripeness (finality) may not stand valid to preclude judicial review. In this regard, it deems important to cite as a closing remark the following note concerning the practice in French:

> *It [the requirement of prior decision or ripeness], cannot, however, be used as a device on the part of the administration to deny the victim justice; thus, the silence of the administration when faced with the question for compensation is, by special statutory provision, treated as an implied rejection of the request after the lapse of four months. (***Brown & Bell**, p.157*).*

7.5.4 Finality Clause

As it has been already stated in the previous units of this module, judicial review (the supervisory power of the court) is treated, especially in the common law world as the inherent power of regular courts. Since courts are the ultimate arbiters of the law, it is argued that they have an inherent power to review any administrative decision where any of the grounds for review are there. The term 'inherent' in this context implies that the source of the reviewing power of the court is not statute; but it is inherent in the very fundamental principle

of division of state power among the three organs of the government where by judicial power is ultimately vested in the regular courts.

Despite the fact that statutes are not the source of the supervisory power of courts, it is not uncommon to exclude this power of the court by statutes. There are occasions where a statute may exclude judicial review of agency decisions expressly, or impliedly.

While delegating rulemaking and/or judicial powers to an agency, the legislature may in the parent act expressly preclude the power of regular courts to review decisions of the agency passed in such capacity. That means although the source of the reviewing power of the court is not statute, such power can be excluded by incorporating a finality clause in a statute (the Parent Act). However, such exclusion has to be expressly stated if it is needed to have effect in limiting or eliminating the inherent power of the court. For example, where the Parent Act incorporates a provision stating that the findings or decisions of the agency on such and such matters 'shall not be called into question' or 'shall be final', what does this finality clause imply? Is the intention of the parliament here to exclude the right to appeal or to deny any access to court to challenge any decision made under the Act? Authorities suggest that unless otherwise the finality clause incorporated in an Act expressly and clearly excludes judicial review of a decision passed under the Act, it has to be interpreted restrictively to mean no appeal can be lodged against the decision. Cane, for example, stated: "judicial review is seen as a basic right of citizens which the legislature will be taken to have excluded only by the very clearest words. This attitude seems to be the result of viewing judicial review as chiefly designed to protect the rights of the individual from unlawful interference by government." (p.81). There are similar arguments in case laws. In this regard it is important to reproduce the following landmark cases cited in Cumper's work:
Some attempts at exclusion, however, will never oust the court's jurisdiction. For example, in *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574, the Court of Appeal held that a clause stating that a decision of the Tribunal 'shall be final' would not exclude the court's jurisdiction to review. Lord Denning stated that 'the remedy by certiorari is never to be taken away by statute except by the most clear and explicit words' and that the word 'final' only means "without appeal" and not without recourse to certiorari." Similarly, in Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147, the Court of Appeal held that a clause in a statute stating that a decision of the FCC 'shall not be questioned in any court of law' would not exclude the court's jurisdiction to review where the decision-

maker had made an error of law which affected his/her power to decide. In asserting the court's right to retain the power of judicial review, Lord Wilberforce noted: "What would be the purpose of defining by statute the limit of a tribunal's powers, if by means of a clause inserted in the instrument of definition, those limits could safely be passe." (**Cumper**, pp. 295-296).

At this juncture, an important question may be raised: What will happen where there is no express statutory exclusion on judicial review? Concerning this issue, **Cumper** states the following remark:

> *On occasions where there has been no express attempt in a statute to exclude judicial review, the courts may decide that they have been impliedly excluded because an alternative remedy exists. However, the court will retain discretion to review, even where there is an alternative remedy available, if the case involves (inter alia) serious illegalities or to not intervene would lead to a serious delay or an unsatisfactory outcome for the applicant* (P. 296).

However, the implied exclusion is indicated here has a provisional nature. As discussed in the preceding sub-section, until after the alternative remedies are exhausted by the complainant, in line with the principle of the doctrine of exhaustion of internal remedies, the court is required to refrain from prematurely interfering in administrative matters. For detail, refer to the discussion in the previous section.

Another important question may be raised here. What about in case the legality of the finality clause that prohibits judicial review is questionable? In the United States, no problem as the US Supreme Court has the power to interpret the Constitution; it can automatically invalidate the statute that incorporates such unconstitutional finality clause. But, the answer may be different in the United Kingdom. As was discussed somewhere else, the UK Parliament is sovereign. It can promulgate any law whatsoever. In this regard, the court cannot question the status of the law enacted by the Parliament. So, where in a statute the UK parliament incorporates a finality clause that expressly precludes the court to review administrative decision on a certain subject matter, the court will not do any thing even if the legality of such clause or the administrative decision passed under its cover is questionable. In this regard, it is important to see the French experience that is closely similar to that of the situation in Ethiopia. The French parliament is sovereign in the sense that statutes

promulgated by the parliament cannot be subjected to judicial review (by administrative or civil court) for reasons of unconstitutionality. This is the exclusive power of the Constitutional council. Dwelling upon this constitutional theory, one can say that French courts, be it administrative or civil court, cannot bypass the "sufficiently categorical words of exclusion in a statute" that excludes the jurisdiction of administrative courts to review some administrative decisions. However, the paradox is noted as follows:

> *It is a striking fact, however, that there is no recorded instance of this [exclusion of jurisdiction] having occurred. Judicial review of administrative action has become so much part and parcel of the basic republican tradition which underlies all constitutions since 1875 that it is inconceivable in the present temper of French politics that any parliament would be willing, or any government would venture, to break with that tradition (***Brown & Bell***, p. 164).*

Thus, as it can be inferred from the opinion cited above, French administrative courts have, from their rich experience, developed a sort of unwritten 'general principle of law' as a kind of basic legal framework into which the statute must somehow be fitted. Thus, the presumption in France is in favour of judicial review of administrative actions.

However, in Ethiopia, wherever there appears finality clause incorporated in a statute the constitutionality of which is questionable, or where an illegal administrative decision is passed under the cover of such finality clause be itself constitutional or unconstitutional, what can the court do? Obviously, where the constitutionality of the finality clause is a matter of interpretation, this is exclusively the power of the House of Federation. It has to be referred to the House. But, where the finality clause as a plain fact contravenes any fundamental principle of the constitution, or even if the finality clause is presumed as if it were constitutional, but the administrative decision passed under its cover as a plain fact contravenes any higher law, it seems that it is a matter of policy advisable for the court to challenge the decision. After all, the intention of the finality clause is not to galvanize illegal acts of the administration, but to achieve certain intended objectives. But where things go contrary to what was intended for, why should such clause be observed to shield the corrupt administrator's act?

Review Questions

1. **Discuss the differences between judicial review and merit reviews.**
2. What are the grounds for judicial review?
3. Discuss the prerequisites of judicial review.
4. Explain the following terminologies:
    - Exhaustion of alternative/internal remedies
    - Ripeness
    - Finality clause
    - Justiciability
    - Technical review
    - Merit review
5. What does the requirement of standing (locus standi) imply? Discuss the requirement of standing under the Civil Procedure Code in line with Article 37(2) of the FDRE Constitution.
6. What does the principle of proportionality connote in the administrative law context?

UNIT EIGHT: REMEDIES ANS GOVERMENT (ADMINISTRATIVE) LIABILITY

Introduction

Remedies and rights have important correlation. Whenever rights are threatened or violated, people usually need the intervention of the law. It is the law that provides appropriate remedies proactively, or retrospectively. Administrative law is one of the most important laws that regulate the relationship between the strong-armed administrative bodies and week individuals. In addition to providing general principles and standards of behavior regarding the administration, this law tries also to devise mechanisms for rectifying administrative illegality. So, this unit, as a logical sequence of the previous units that deal with judicial review of administrative decisions, tries to explore various types of remedies that may be granted by the reviewing court in appropriate circumstances. Since the very purpose of judicial review is to provide appropriate remedies to ultra vires acts, understanding of the nature of the various types of remedies that may be granted and the difference and interrelation among them will be of paramount significance. Thus, this chapter gives due attention to these and related issues.

Objectives

At the end of this unit, students are expected to:

- Distinguish private law from public law remedies;
- Identify remedies available to an aggrieved party under private law;
- Define and identify public law remedies;
- Distinguish differences between the write of certiorari and prohibition;
- Discuss the circumstances under which the remedies of mandamus; and declaration and quo warranto may be granted;
- Define and discuss the remedy of habeas corpus;
- Apply their knowledge to solve practical cases;

8.1 Remedies

The term remedy in this context refers to the varieties of awards/relieves that may be granted by the reviewing court following an application for judicial review. As a general rule, where any of the grounds justifying judicial review are there, a person complained against the agency decision has to include in his or her application for judicial review the type(s) of order or redress he or she sought from the reviewing court. Thus, the relief that the applicant seeks from the reviewing court is what we call remedy.

For technical and historical reasons, remedies are broadly classified into public law remedies and private law remedies. Those included within the category of public law remedies also known as prerogative orders are certiorari (a quashing order), prohibition (prohibiting order), mandamus (mandatory order), Quo Warrant, and Habeas Corpus, whereas private law remedies include injunction, declaration and damages. Despite the classification of these remedies into public law and private law remedies, due to technical and historical reasons, both types of remedies have been now used in many common law jurisdictions as remedies in public law. At the outset, it has to be noted that each of the remedies listed above are not mutually exclusive. Appreciating this fact, Cane writes:

> *Leaving damages aside, these remedies perform four main functions: the mandatory function of ordering something to be done is performed by mandamus and the injunction; the prohibiting function of ordering that something not be done is performed by prohibition and the injunction; the quashing function of depriving a decision of legal effect is performed by certiorari; and the declaratory function of stating legal rights or obligations is performed by the declaration. The use of more than one remedy to perform two of these functions involves unnecessary duplication and produces undesirable complications in the law* (**Cane**, p.62.)

Having said this as introductory remark, let us proceed to the detail in the subsequent sub-sections in turn.

8.1.1. Public Law Remedies

As it has been discussed in the previous chapters, the primary purpose of judicial supervision of the administration is to restrain the latter from operating within the bounds of the law. So, public law or prerogative remedies of public law, in the English tradition, have primarily been used to ensure whether or not the government machinery operates properly. Due to this fact, it is said that these remedies are more liberally granted than the private law remedies that are mainly concerned with the enforcement of private rights. Brief mentions of the typical public law remedies that are widely used to rectify administrative wrongs through the process of judicial review are discussed below.

8.1.1.1 Certiorari

The writ of certiorari, also referred to as quashing order, is a procedure through which the reviewing court investigates the legality of an agency's decision complained of, and will quash or nullify where the decision in question is found to be ultra vires. According to Cane, "In its term, an order of certiorari instructs the person or body whose decision is challenged to deliver the record of the decision to the office of the Queen's Bench Division to be quashed (deprived of legal effect). Concerning the theoretical and practical effect of certiorari Cane makes important remark as follows:

> *There is a theoretical problem here because a decision which is illegal in the public law sense is usually said to be void or a nullity in the sense that the decision is treated as never having had any legal effect. A decision which has never had any legal effect cannot be deprived of legal effect. On this view, when we say the certiorari quashes an illegal decision, what we really mean is that the order formally declares that from the moment it was purportedly made ('ab initio') the decision had no effect in law. Thus, anything done in execution of it is illegal. This is the declaratory view of certiorari. An alternative view is that an illegal decision is valid until a court decides that it is illegal, at which point it can quash it with retrospective effect. On this view, certiorari has a constitutive effect rather than a purely declaratory effect.*

> *Even if the declaratory view of certiorari is theoretically correct, however, and illegal decisions never have legal effect, it may not be possible or wise for a person just to ignore such a decision, especially if it authorizes the government to act to that person's detriment. Apart from the fact that it is often unclear, as a matter of law, whether a decision is illegal or not (and so it would be unsafe just to ignore it), it is not the case that a void decision is forever void. However, illogical it may seem, a void decision will become valid unless it is challenged within any time limit for challenges, by an applicant with standing, and unless a court exercises its discretion to award a remedy to the applicant. Once the decision 'matures into validity' as it were, acts already done in execution of it also mature into legality because maturity is retrospective. So, whatever the position in theory, in practice, certiorari is not just declaratory in effect (**Cane**,* pp.63-63.)

Thus, if a person feels aggrieved because of ultra vires administrative acts affecting his interest, it is advisable for him or her to invoke judicial review within the allowable period of time lest the illegal administrative decision may be turned to legality (or to use Cane's word 'maturity') after the expiry of the statutory period fixed for filing application for judicial review. Normally, where certiorari is granted by the reviewing court, the parties have to be returned to their original pre-decision position.

8.1.1.2 Prohibition

The prerogative order of prohibition, as its name implies, performs the function of ordering a body amenable to it to refrain from illegal action. It is an order issued by a higher court to prevent an inferior tribunal or administrative authority from exceeding or from continuing to exceed its authority, or from behaving ultra virally while dealing on matters that affect the interest of the complainant. The striking contrast between certiorari and prohibition is that, while certiorari quashes what has been already done, ultra virally restrains a government body from taking a certain course of ultra vires action. Thus, certiorari has retrospective effect - nullifying an already made illegal or ultra vires act, whereas prohibition has a prospective effect - it stops the continuity of an ongoing course of action or restrains the

execution of an already made decision beforehand. Thus, while certiorari has nullifying effect, prohibition has preventive effect.

The applicant may, in appropriate cases, seek both certiorari (quashing order) and prohibition (prohibiting order) in conjunction; for example, certiorari to quash the decision in question and prohibition to prevent the execution of the nullified decision or the taking of other particular action.

8.1.1.3 Mandamus

Mandamus (mandatory order) is the other important public law remedy that deals with agency inaction. According to Cane, certiorari and prohibition are concerned with control of the exercise of discretionary powers, whereas the prerogative order of mandamus is designed to enforce the performance by governmental bodies of their duties. However, as case laws indicate, this comparison does not hold always true. According to Cumper, mandamus may also be used to compel the decision-maker to exercise his/her discretion properly. Cumper,(320) cited two important cases to substantiate his opinion as follows:

> *Thus, it [mandamus] may force a decision-maker to take relevant considerations into account (R v Birmingham Licensing Planning Committee, ex parte Kennedy [1972] 2 QB 140) and not to abuse power which has been conferred (Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997). Mandamus (a mandatory order is often applied for in conjunction with certiorari (a quashing order). For example, where there has been a breach of the rules of natural justice, certiorari (a quashing order) will quash the decision and mandamus (mandatory order) will compel a rehearing*.

Concerning the legal consequences that breaching statutory duties may entail to the decision-maker, **Cane**:

> *Breach of statutory duty can take the form either of non-feasance (i.e. failure to perform the duty) or misfeasance (i.e. bad performance). In certain circumstances a person who suffers damage as a result of a breach of statutory duty by a public authority can bring an action in tort for damages or an injunction. Public authorities can also be*

*attacked for nob-feasonce by being required to perform their duty. Mandamus (or an injunction in lieu) is the remedy for this purpose. Mandamus sometimes issues in conjunction with certiorari to require a body whose decision has been quashed to go through the decision-making process again. In this type of case the duty which mandamus enforces is often not a statutory one but the common law duty, which every power-holder has, to give proper consideration to the question of whether or not to exercise the power(*p64).

8.1.1.4. Quo Warranto

From Wade & Forsyth, Administrative Law (7th ed., 2000), pp. 567-568

Quo warrant was originally a prerogative writ which the Crown [in the United Kingdom] could use to inquire into the title to any office or franchise claimed by the subject. It fell out of use in the sixteenth century and was replaced by the information in the nature of quo warranto, which in form was a criminal proceeding instituted in the name of the Crown by the attorney general or by a private prosecutor. Since 1938, the information was replaced by the Administration of Justice (Miscellaneous Provision).Since then, the injunction has been made available by statute to prohibit the usurpation of public office, in place of the former proceeding known as quo warranto. The Miscellaneous Provisions Act 1938, in turn, was replaced by the Supreme Court Act, of 1981, which provided that, where any person acts in an office to which he is not entitled and an information would previously have lain against him, the High Court may restrain him by injunction and may declare the office to be vacant if may need be; and no such proceedings shall be taken by a person who would not previously have been entitled to apply for information. Consequently, the old law of quo warranto is still operative, but the remedy is now injunction and declaration. The procedure is similar to that of the prerogative remedies, and it is must now be by 'application for judicial review'.

The old procedure by information was available to private persons subject to the discretion of the court. A private prosecutor brought the best-known modern case, in which it was unsuccessfully claimed that two foreign born Privy Councilors were disqualified from membership, the courts held that the Naturalization Act 1870 had repealed the disqualification imposed by the Act of settlement 1700. The modern tendency has been to

extend the remedy, subject to the discretion of the court to refuse it to a private prosecutor; for example, if he has delayed unduly. A private prosecutor acting on public grounds may expect the assistance of the court. He is sometimes called the relator, although he does not have to obtain the leave of the General-Attorney.

The remedy as now defined applies to usurpation of 'any substantive office of a public nature and permanent character which is held under the Crown or which has been created by any statutory provision or royal charter. But it must not be a case of 'merely the function or employment of the deputy or servant held at the will and pleasure of others'. Here, once again, we meet the difference between office and mere contractual employment. The procedure was typically used to challenge the right to such office as those of freeman or burgess of a borough, mayor, town councilor, sheriff, justice of the peace, county court judge, chief constable or member of the General Medical Council. But the alleged usurper had to be in possession of the office and to have acted in it.

For challenging the qualification of a member of a local authority, there are special statutory provisions under the Local Government Act 1972. Proceedings may be instituted in the High Court or a magistrates' court, but only by a local government elector for the area concerned, and only within six months of the defendant having acted as a member; if the defendant merely claims to be entitled to act, proceedings lie in the High Court only. The various remedies include declarations, injunctions and financial penalties.

An inference can be made from the explanation of the authorities stated above that quo warranto is a prerogative writ, which falls within the category of public law remedies. It has been used for a long period of time in England as a process to challenge the legitimacy of titles assumed by government officials, and now it is also applicable to challenge the usurpation of offices assumed in the interest of the public. The prerogative writ of quo warranto is sanctioned by declaration, injunction and financial penalties.

8.1.1.5 Habeas Corpus

The writ of habeas corpus (produce the body) is used to obtain the release of someone who has been unlawfully detained, e.g., wrongfully arrested. It is a procedure through which an

illegally detained person applies to the court requesting an order for his physical release. It serves as a modality for securing the liberty of a person by affording an effective means of immediate release from unlawful or unjustified detention. Habeas corpus referred to as the "Great Writ" in common law, has traditionally maintained high reputation as a safeguard of personal liberty. Currently, it is an attempt to measure up to the standards of human rights and fundamental freedoms which entitle the detainee to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered, if the detention is found to be unlawful.

The writ of Habeas Corpus has received blessing in many jurisdictions, and is being used as a vital instrument for protecting the fundamental human rights of individuals to their liberty. Currently in Ethiopia, too, it has received the blessing of the FDRE Constitution. In chapter three of the constitution that deals with 'fundamental rights and freedoms', Article 19 particularly deals with the right of arrested persons stated that in its sub-Article 4 as follows: "All persons have an inalienable right to petition the court to order their physical release where the arresting police officer or the law enforcer fails to bring them before a court within the prescribed time and to provide reasons for their arrest…." Authorities assert that the public law remedies are privileges that can be granted at the court's discretion. this means that, unlike in the case of appeal, individuals, as of right, cannot invoke judicial review. However, although the Writ of Habeas Corpus falls within the traditional category of public law remedies, it is recognized under our constitution as inalienable right conferred to all persons detained. This right can be denied only on its merit where the detention has justifiable ground; but there is no need for leave for judicial review like the other public law remedies discussed above.

8.2.1 Private (Ordinary) Law Remedies

As stated earlier, the basis of the classification of the public law and private law is mainly historical. According to Cane, the private law remedies are so-called because they were originally used only in private law but later came to be used in public law (**Cane**, p. 66). Many of these remedies, for example in England, are used in conjunction or as alternatives to the other public law remedies. So, classification between private and public law remedies is merely historical and technical. Technically speaking, prerogative remedies may be invoked

by an application for leave for judicial review but this is not the case in most private law remedies.

8.2.1.1 Injunction

An injunction in the common law tradition is known as an equitable remedy, which means that it is in the discretion of the court whether or not to grant it. It is a court order, which in the majority of cases that orders the party to whom it is addressed not to do a particular act. But broadly speaking, it can be negative (i.e., forbidding a decision-maker from doing something), or mandatory (i.e., ordering a decision-maker to do something). In public law, injunctions tend to be negative in nature, because mandamus will normally be sought in order to compel a decision-maker to carry out a duty (**Cumper**, pp. 320-321.) In a similar vein, Cane also stated that injunction may be granted in lieu of prohibition (prohibiting order) or mandamus (mandatory order). This remedy found its way into public law partly as a means of enforcing public law principles, especially the rules of natural justice, against non-governmental regulatory bodies which derived their powers from contract and so were not amenable to orders of prohibition or mandamus **Cane**, p.66).

Injunction can be granted in both public and private law as an interim or final relief. An interim injunction (also referred to as interlocutory injunction) is a provisional remedy that may be granted at the court's discretion at the interlocutory proceedings pending the hearing of the case. Its purpose is to prevent a party from continuing the actions complained of until a full hearing of the case. As a rule, an interim injunction has to be granted where there is imminent danger of irreparable injury and damages would not be an adequate remedy. There are also cases where injunction may be granted as a final relief in public matters both in the positive and negative sense in lieu of mandamus and prohibition, respectively.

8.2.1.2 Declaration

This is simply asking the court to make a ruling on what the law is. It is used in both public and private laws and is available in wider circumstances than the prerogative orders. (Blakemore & Greene, p.122.) Another authority noted concerning the meaning of declaration in England as follows :

> *A declaration, or declaratory judgment is a remedy which was used in the crown of chancery and also in the common law Court of Exchequer. It declares what the legal rights of the parties to the action are and differs from other judicial remedies in that it declares the law without any sanction and has no coercive effect. The reason for this is that it was always sought in conjunction with remedies, which the court could enforce. Now in England, a declaration may be sought in public law case along with one or more of the prerogative orders as well as with an injunction and/or an award of damages.*

Although it is a private law remedy in its origin, declaration is now widely in use as a remedy in both private and public law cases. Its main purpose is to determine or ascertain what the law says without changing the legal position or rights of the parties. It declares what the law is or says in relation to a certain uncontested fact.

8.2.1.3 Damages

In legal parlance, the term damages is usually used interchangeably with the term compensation. The purpose of awarding damages in this context is to repair the pecuniary or non-pecuniary harm inflicted upon the complainant because of administrative wrongs. The worthmentioning point here is that damages may not be awarded to the complainant on the mere ground that s/he has suffered some sort of compensable injury due to the act of an administrative body, which is found to be ultra vires in a judicial review. This means, the fact that an administrative action is successfully attacked in judicial review does not necessarily entitle the victim of that act a right to claim compensation.

Damages are purely a private law remedy that can be claimed by the victim of a wrongful act in accordance with the dicta of private law. As in *Cooper v Board of Works for the Wands worth District* (1836), damages may also be awarded in judicial review but only if the applicant also has private law rights. (**Cumper**, p. 321.) In this regard, Cane gave an elaborative remark as follows:

> *Unlike declaration and injunction, which are private law remedies (remedies for the redress of private law wrongs) which have been extended to redress public law illegality, damages are purely private law remedy. In other words, in order to obtain an award of damages it is necessary to show a private law wrong; damages cannot be awarded simply on the basis that a government body has acted illegally. The relevance of the remedy in public law is that public bodies can commit private law wrongs, and so damages are a remedy available against public bodies. For example, damages for breach of contract can be obtained against a government department. Conversely, whereas a declaration or injunction is available to restrain a breach of natural justice or to declare the invalidity of a decision made in breach of the rules of natural justice, damages are not available for breach of natural justice as such, because this is a wrong recognized only in public law. If a breach of natural justice also amounted to a breach of contract, damages might be available for the breach* (p.73).

As can be inferred from the above-mentioned authorities, a claim for award of damages can be filed before the reviewing court, but the granting of the award depends on whether or not the decision rendered is invalid on the grounds of the public law principles at the same time constitutes a civil wrong in private law such as torts and contract and whether or not the applicant suffers a compensable injury due to such private wrong. So the award of damages in judicial review is a matter of coincidence. That is, when the grounds justifying judicial review at the same time constitutes private wrongs, damages may be awarded to the applicant provided that s/he proved a compensable injury caused to her/his interest as per the governing private laws.

7.2 Liability of the Administration

As was stated above, the awarding of damages belongs to the private law remedies. In addition to, or apart from applying for either of the public law remedies such as certiorari, prohibition, mandamus, or the private remedy- injunction, where the applicant suffers a compensable injury due to administrative wrong, s/he may also claim damages in the form of pecuniary compensation or in the form of other appropriate compensatory remedies. Thus,

there is a possibility for suing the state, its administrative units, and servants for damages based on extra contractual wrongs or for breaches of contractual obligations. The term administrative liability, here, is preferred to state or governmental liability since this principle of liability in many jurisdictions including Ethiopia is extended to all public authorities.

In the common law tradition, the reviewing court may award damages, in addition to granting either of the prerogative remedies or injunction, where the decision in question constitutes a wrong under the governing private law, that is, law of torts or contract. Where the reviewing court rejects the application for judicial review for one or aother reason, it cannot award damages even if the administrative conduct complained of constitutes a manifest extra contractual or contractual wrong. Thus, the award of damages, for example, in the United Kingdom is conditioned on the grant of any of the prerogative remedies mentioned above. But it does not mean that, whenever there is judicial review, there is always award of damages; as factors justifying judicial review may not sometimes completely overlap with those of constituting civil wrong. In the United Kingdom, for example, since the adoption of the Crown Proceedings Act 1947, the liability of the Crown and other public authorities is generally accepted, so that the citizens are able to sue them for damages in tort or contract which is applied to public authorities as to private individuals (Brown & Bell, p.173) In fact, because of the nature of the special relation the administration has with individuals, it may incur special civil liabilities But in the majority of cases, the administration in England is held civilly liable in the same manner as individuals in their private relation.

However, in France, which is a typical model of the continental law system, there is a different practice. As was discussed some where else, in France, there is a clear divorce between public law and private law, On one hand there are administrative courts and on the other hand they are civil courts. The French administrative courts have the power, among other things, to litigate administrative legality and liability in accordance with the governing principles of the administrative law. The rules governing administrative liability are different in many respects from those found in the droit civil (civil code) and applied by the civil courts in suits against private individuals. In a very real sense, therefore, there co-exist in France two laws of tort, two laws of contract, the one private and the other public or administrative. French administrative courts/tribunals are entrusted with the power to entertain not only disputes related to the legality of administrative decisions but also those related to the liability of the state and its servants to the victims of administrative wrong, be it

tortuous or contractual wrong. In France, the administration is liable to compensate a citizen who is harmed through the decisions or activities of the administration, which need not be unlawful in all cases (Brown & Bell, p. 173). Thus, the French administration is normally held vicariously liable for civil harms caused due to faults committed by its servants in relation to public service and also in exceptional cases for those harms caused without fault due to the danger or risk associated activities the state operates.

The practice in Ethiopia fits neither the English nor that of t the French in absolute terms. Like the practice in English, but unlike the French one, the tortuous liability of the administration (the state and its servants) in Ethiopia is governed by the ordinary law of the country. And like the French practice, but unlike the English one, the tortuous liability of the state and its servants in Ethiopia is not limited to fault based liabilities. There are cases where the state or its administrative sub-units may be held strictly and vicariously liable for the injury caused to third parties because of the dangerous activities it operated, or due to the official fault committed by its employees or servants during discharging their duties.

Concerning the contractual liability of the state, too, the practice in Ethiopia neither fits the common law nor the continental law counter parts. Normally, the state is contractually liable for damages it caused to a contracting party due to breach of its contractual obligation. Special provisions that particularly deal with administrative contract are incorporated under the Ethiopian Civil Code. These provisions reserve many exceptional powers to the administration in the interest of the public. So, appreciating, on the one hand, the interest of the public at stake and on the other hand, the prejudices that may be caused to the legitimate expectation of a party to the contract due to the unilateral act of the administration, the special provisions of administrative contract provide certain protections to the contracting individual. In this regard, there is a similarity with that of the French. However, the ordinary principles of contract, in general, are still applicable to administrative contract in Ethiopia unless otherwise stipulated to the contrary in the special provisions of administrative contract. But regular courts determine the contractual liability of the state and its administrative units in Ethiopia, like the common law counter parts; but unlike the practice in French where administrative courts entertain jurisdiction on disputes related to administrative contract.

In short, the administration is civilly liable to compensate the injuries it causes to individuals during the course of its administrative interaction with them. In Ethiopia, there are provisions that deal with the extra contractual liability of the administration specifically. As per Article

2126(2) cum Article 2157(2) of the civil code, the administration is vicariously liable for the torts committed due to the official fault of its servants or employees. If the fault is personal as contrasted to official fault, the person who committed the fault is personally liable to compensate the victim.

In this regard, the extra contractual liability of the administration in Ethiopia is modeled after the French counter part despite minor differences. For example, in the French counter part, torts occasioned by the faults of state servants are classified into service fault (faute de service) and personal fault (faute personelle) that corresponds to the Ethiopian classification into official fault and personal fault. Concerning the meaning and implication of the classification of faults into service and personal faults, it is noted as follows:

There is said to be faute personelle where there is some personal fault on the part of the official, that is, a fault 'which is not linked to the public service but reveals the man with his weaknesses, his passions, his imprudence'…Where such personal fault is present, the official can be sued personally in the ordinary courts. On the other hand, where there is simply a faute de service (one which is linked with the service), the official preserves his immunity by reason of the principle of separation of powers, which prohibits the ordinary courts receiving actions against the administration or its officials. But the injured party must sue the administration before the administrative court. (Brown & Bell, p.177)

But in terms of scope, the term faute de service (service fault) in France has broader meaning and application than the term official fault in Ethiopia. The other striking difference in this regard is that, in France, once the fault is categorized as faute de service, liability exclusively goes to the administration the servant is immune from personal liability. But as clearly stated in Article 2126(1) of the civil code, this is not the case in Ethiopia. Even if the fault is an official fault, the "servant or government employee is in every case liable to make good the damage he causes to another by his fault." The term official fault mentioned in sub-Article 2 of Article 2126 does not immune the public servant or government employee from personal liability; it merely gives the victim an option to sue the administration for compensation jointly and severally with the public servant or government employee. As expressly stated in sub-Article 2 of Article 2157 cum Article 2158(1) of the civil code, as a matter of discretion, where the fault consists of an official, the court may decide that the liability shall be ultimately borne by the administration wholly or partly having regard to the gravity of the fault committed. This indicates that, even if the fault is an official fault, the public servant or

government employee is personally liable to compensate the victim, unless the court is willing to exercise its discretion in shifting the liability to the administration (the state, its territorial sub-divisions or the public service concerned.)

In Ethiopia, only specific categories of officials are immune from being sued for extra contractual liability. The first provision that deals with sovereign immunity is Article 2137 of the civil code. Accordingly, "No action for liability based on a fault committed by him may be brought against His Majesty, the Emperor of Ethiopia." This provision reflects the prevailing situation at the time of its enactment. First, sovereignty was in the hand of the then Emperor. Having anointed himself as the elect of God, he was not subject himself to the rule of land law, but only to his conscience and ordain of God. Thus, the rational behind this immunity could be any of the two classical common laws dicta, "The King cannot do wrong" or "The King cannot be sued in His Courts."

The other immunity is given to ministers, members of the parliament, and judges. As clearly stated in Article 2138 of the code, members of the Imperial Ethiopian Government, members of the Ethiopian Parliament and judges of the Ethiopian courts are immune from being sued for liability in connection with their office. First of all, this provision has to be construed in line with the current FDRE Government structure. Hence, the then members of the Imperial Government may be equated with the ministers, commissions and others constituting members of the Council of Ministers at the Federal level, on the one hand and, the respective regional counter parts, on the other hand. The same line of interpretation should go to members of the parliament and judges. But the immunity given to these officials is not an absolute immunity like the one given to the Emperor. It is an immunity given to them only for civil liabilities they incur in connection with their respective official duties. They are liable for torts they committed in their private capacity (while enjoying private life like any citizen). Even in matters related to their official duty, where the fault they committed constitutes an offence under the penal law and are convicted to such effect, any one who suffers civil injury due to such faults can sue the wrongdoer.

The purpose of the immunity granted to those officials mentioned above is not to render the victim helpless. In this case, the victim should be compensated by the concerned administration. Of course, to make those officials personally liable for the civil injuries they caused to third parties might have futile consequences. Intimidated by the threat of actions for

civil liabilities, individuals may not be willing to assume such positions, and even when they assume it by any magic of miracle they may lack the requisite courage in exercising their discretion in order to reach at a sound decision within the reasonable time bound. So, while providing immunity to them in this regard seems acceptable from policy perspective, it should not be done at the expense of individual victims. In this regard, it seems important to see the French experience. The French administrative law jurisprudence developed an alternative principle that connects liability of the administration with the fundamental principle of the equality of all citizens in bearing public burdens. Brown & Bell jointly cited an important remark from Duguit as follows:

[T]he activity of the state is carried on in the interest of the entire community; the burdens that it entails should not weight more heavily on some than on others. If then state action results in individual damage to particular citizens, the state should make redress, whether or not there be a fault committed by the public officers concerned. The state is, in some ways, an insurer of what is often called social risk… (Brown & Bell, p.184). Here French is basing liability on the principle that what is done in the general interest, even if it is done lawfully, may still give rise to a right to compensation when the burden falls on one particular person.

Another worth mentioning point on extra contractual liability of the administration is related to the strict liability for dangerous or abnormal risk associated administrative ventures. Like in the case of France, in Ethiopia, where the state causes injury to third parties while pursuing dangerous activities or abnormal risk associated ventures in the manner stated in Article 2069(1) of the civil code, it will be held strictly liable to compensate the victim in accordance with sub-Article 2 of same.

Review Questions

1. Discuss the various types of public law remedies and private law remedies.

2. What are the bases of the classification between public and private remedies?

3. Provide short explanations that illustrate the circumstances in which each of the public and private remedies may be sought by the aggrieved party.

4. Compare and contrast injunctions with mandamus and prohibition.

5. What is administrative liability?

6. Compare and contrast the extra contractual liability of the administration in Ethiopia with that of the French counter part.

7. What is the rational behind administrative strict civil liability?

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SYLLABUS

Cr.P.C.I973 (Sns.l to 484)

1. Definitions: Bailable and Non-bailable offences, Cognisable and Non-cognisable offences, Charge, Complaint, Inquiry, Investi -gation and trial, Offence, Summons Case, Warrant Case, Proclaimed Offender.
2. -Constitution of Criminal Courts and Offices.
3. Powers of the Court.
4. Superior Police Officers and Duties of Public.
5. Arrest of Persons: (i) Arrest without Warrant, (ii) Arrest by private persons, (iii) Arrest how made- Power to seize etc.
6. Processes: Summons; Warrant of Arrest; Proclamation and attachment.
7. Summons to produce documents or things. Search Warrants-Search how made-seizure.
8. Security for keeping the peace and' for good behavior.
9. Maintenance of Wife and Children (sn.125).
10. Maintenance of Public Order and Tranquility.

    Sn. 144: Urgent Cases of Nuisance.

    Sn.145: Disputes as to immovable property.

11. Preventive action by police.

12. Information to Police-powers to Investigate (Sn.154 to 176);

13 Confession (Sn. 164)

14 Jurisdiction of Criminal Courts in inquires

15 Trials. Complaints to Magistrates. Commencement of proceedings- before Magistrate.

16. 'Charge', 'Joinder of charges'.
17. (i) Sessions Trials (ii) Warrant Case Trial (iii) Summons Case
    Trial (iv) Summary Trial.
18. Commissions.
19. Appeal, reference and revision, Transfer of Criminal Cases.
20. Death Sentence, Imprisonment, Fine etc.
21. Bail and Bonds.

22. Irregular Proceedings.

23. Period of limitation to take Cognisance of some offences.

24. Trials before High Courts [.First and Second Schedule.]

QUESTIONS BANK

1. Write explanatory notes on: .

(a) F.I.R. (b) Bailable and non-bailable offences (c) Cognisable and Non-cognisable offences (d) Complaint (e) Compoundable offences (f) Executive Magistrate (g) Public Prosecutor (h) Police Diary, (i) Irregular Proceedings.

2. Explain the provisions relating to the speedy remedy provided for, to claim maintenance by wife and children.

3. What is confession? How is it recorded?

4. Explain the concept of Double jeopardy with reference to Sn.300 Cr.P.C. Refer to exceptions.

5. What are the powers and duties of a Police Officer in charge of Police Station on receipt of information relating to the commission of a Cognisable offence or a Non-cognisable offence.

6. Explain:

(a) First Offenders (b) Habitual Offenders

(c) Write a note on Summons-case trial and Summary trial.

9. (a) What is a Search Warrant ? How is search made ?

(b) When can a Police Officer arrest without Warrant. How is arrest made ?

10. (a) How are urgent cases of Nuisance dealt with under Sn.144. Cr.P.C.

(b) Detail the measures contemplated by the Cr.P.C. with reference to disputes as to a right in respect of land or water. (**Sn.145).**

11. (a) What is a bail ? How is a bail granted ?

(b) Can a bail be granted in non-bailable offences ?

(c) Explain Anticipatory bail.

(d) What is a Bond? Now is it executed?

12. What is a Charge ? What are its contents ? Explain "joinder of charges".

13. What is the significance in Cr.P.C. of the period of limitation?

14. Write short notes on:

(a) Remand

(b) Death Sentence

(c) Revisional Powers of the High Court and the Session Court.

(d) Processes of Courts

(e) Security for good behaviour.

(f) Security for keeping the peace

(g) Accused as a defence witness

(h) Prosecution of public servant

(i) Prevention of Nuisance.

(h) Proclamation of attachment

(i) Appeal ,Revision and reference.

15. Distinguish between.

(a) Summons Case and Warrant Case.

(b) Investigation, inquiry and trial.

(c) Discharge and Acquittal.

16. State the exceptions to the rule that any person may set the Criminal Law in motion. (Sns. 195 to 199).

17 Detail a Sessions Trial.

18.What is a Warrant Case? Detail its procedure.

CHAPTER 1 DEFINITIONS

Ch.l .l. First Information Report:

(i) Communication of information of a cognisable or a non-cognisable offence to the Police Officer in writing is called F.I.R. Infact, it is the information first in point of time which sets the Criminal Law in motion. Subsequent information received is not F.I.R.

(a) In non-cognisable offences, when the information is given to the Police Officer (Sub-Inspector), he should enter the substance of information in the "Police Diary" and refer the informant to the Magistrate.

(b) He should not start the investigation without the orders of the concerned Magistrate. But, on receiving such an order, he may exercise the same powers in investigating as in cognisable cases. However, he should not arrest or search without warrant. If the Police Officer makes an investigation without orders then his report itself will be construed as a complaint and the Police Officer is deemed to be the "Complainant".

(c) In Congnisable Offences, according to Sn.154 Cr.P.C, the F.I.R. is recorded by the Police Officer.

If it is oral, it is reduced to writing, read over to the informant and is signed by the informant. Information is in writing it is signed by the informant. The substance of the F.I.R. is recorded in the prescribed book (Police Diary).

A copy of the F.I.R. should be given to the informant.

A telephone message received by the Sub-Inspector and recorded by him in his Diary is a F.I.R.

(ii) If the Police officer refuses to record the F'.I.R. the informant may send the substance of such information to the S.P. by post, who may take the necessary action; He may provide for investigation.

F.I.R. should be lodged at the earliest point of time. The object of F.I.R. is to receive information and to record the circumstances before the person forgets to establish the information.

(iii) Probative Value:- According to the Supreme Court F.I.R. is not a substantive evidence. It is used to contradict or to corroborate the informant.

Ch.1,2. Bailable and Non-Bailable Offences: Sn.2(a) **Cr.P.C**

The Cr.P.C. classifies offences into bailable and non-bailable. Schedule I to Cr.P.C. specifies in detail.

Eg.: Counterfeit of coin, Robbery, Murder etc., are non-bailable But Mischief, House trespass etc. are bailable.

In bailable offences bail is a matter of course. Police Officers, Courts, Magistrates, Sessions Judge, High Court may release a person on bail.

In non-bailable cases, bail is not allowed, but a person may be released on bail (Sn.437). In offences punishable with death or imprisonment for life there is no bail. In Murder, counterfeit, Sedition etc. no bail is granted.

The bail amount should not be excessive and should be fixed taking into consideration the circumstances of each case. The accused should execute a bond, with or without sureties as the case may be, thereupon he is released.

Exemption: In non-bailable offences, a person under 16, or any woman under any case or any sick or infirm person may be released on bail even if punishable with death or imprisonment for life.

Ch.1.3. Cognisable and Non-cognisable Offences : Sn.2(c) **Cr.P.C.**

Offences may be classified into Cognisable and Non-Cognisable. A Non-Cognisable offence is one in which a police officer may not arrest without warrant. In cognisable offences, he may arrest without warrant. The Cr.P.C. has mentioned these offences in the schedule. The Police Officers are guided by the above classification, and the I Schedule.

Sn.41 Cr.P.C. enumerates various categories under which the Police Officer may arrest without warrant, that is:

(a) Cognisable Offences.

(b) Proclaimed Offender.

(c) Extraditable Offence.

(d) Deserter of Army.

(e) Released Convict.

(f) Person with House-breaking tool or stolen property etc.

Ch. 1.4. Complaint: Sn.2(d) **Cr.P.C.**

A complaint is an allegation made by a person called the complainant, orally or in writing, to a Magistrate, with view to his taking action under Cr.P.C., that some person (known or unknown) has committed an offence.

In Cognisable offences, the police officer proceeds to directly investigate. But, in non-cognisable offences, he can investigate on the orders of the Magistrate. The New Cr.P.C. provides a remedy, where

the police officer has made an investigation in non-cognisable cases, without the orders of the magistrate. According to it, a police report made by a police officer, in a case which discloses, (after investigation) the commission of a non-cognisable offence, shall be deemed to be a complaint. Further, the police officer who prepared such a report is deemed to be the complainant.

A complaint is made to the Magistrate only. What is given to the Police is only a report. It is not necessary that the name of the alleged offender must have been mentioned. It may not clearly specify or even wrongly specify the nature of the offence.

On the basis of the complaint the Magistrate takes cognisance of the case and proceeds with the examination of the complainant.

Complaint by an idiot or lunatic:

In this case the complaint may be made by any other person called 'next friend', with the permission of the court. Hence though the lunatic cannot make a complaint, the next friend can make on his behalf.

Ch.1.5. Compoundable offences : Sn.320 Cr.P.C.

Offences are grouped into compoundable and non-compoundable. Compounding means 'making a compromise'. Compromise may be made (i) with the permission of the court or (ii) without the permission of the court.

Compounding is allowed because the complainant and the accused may make some compromise within themselves, i.e., they agree to settle their differences mutually.

Compromise once made cannot be withdrawn. It can be made at any time before the sentence is pronounced by the court.

The Cr.P.C. has provided the table mentioning the offences which are to be compounded with the permission of the court.

Ex.: (i) Theft (value below Rs.250/-)

(ii) Cheating.

(iii) Cheating by personation.

(iv) Bigamy.

(v) Insulting the modesty of a woman etc.

The composition is as good as the acquittal of the accused.

Compounding without the permission of Court:

In cases of hurt, assault, Cr. trespass, defamation etc., mentioned in the Cr.P.C. the offences are compoundable without the permission of the Court. The new Cr.P.C. has added a few more offences to the above list.

Ch.1.6. Police Station, Police Report, Police Diary:

Police Station: Means any place (or post) declared generally or specifically by the State Government to be a Police Station and includes any local area specified by the State Govt. in this behalf.

Police Report: This is report forwarded by a Police Officer to a Magistrate under Sn. 173(2).

Under Sn.173, investigation is to be completed without any delay. On completion he prepares a report containing:

(i) Name of the parties.

(ii) Nature of information.

(iii) Names of Prosecution Witnesses(PWs.)

(iv) Whether any offence is committed and if so by whom.

(v) Whether the accused is arrested etc.

He also forwards:

(i) All documents and all exhibits.

(ii) Statements of witnesses etc.

With the submission of completion report, the duty of the Police Officer ends, and, the duty of the Magistrate begins.

Police Diary: Every investigation Police Officer should maintain a Diary (Station House Diary or Police Diary). He should enter his day to day proceedings in it. He shall mention the time of receipt of information, when investigation started and when closed, places visited etc. and a statement of circumstances.

The diary may be called for, by the Criminal Courts. This is not used as evidence.

The accused has no right to get into the diary. The Police Officer may use it as aid to memory (Aide memorie), in such a case, the accused has a right to get into the diary.

CHAPTER 2

CRIMINAL COURTS

Ch.2.1. Classes of Criminal Courts: Sn.6. Cr.P.C.

Below the High Court, the following Criminal Courts are constituted.

(i) Sessions Court (ii) I class Judicial Magistrate,

(iii) II Class Judicial Magistrate (iv) Executive Magistrate.

The III class Magistrates have been abolished.

The Judicial Magistrates and Executive Magistrates are given different and distinct functions and powers under the Cr.P.C.

Ch.2.2. Executive Magistrates:

The State Government may appoint Executive Magistrates in each district and one of them as District Magistrate and if need be another as Additional District Magistrate. A Commissioner of Police may be vested with the powers of an Executive Magistrate.

Executive Magistrates have jurisdiction in various cases: (i) Sn.107 Order to execute bond for keeping peace, (ii) Sn. 129 Dispersal of assembly by use of Civil force, (iii) Sn.144 Urgent cases of Nuisance etc. (iv) Sn.145 Disputes as to Possession of immovable property.

Ch.2.3. Public Prosecutor and A.P.P.

The State Government has the power under Cr.P.C. to appoint Public Prosecutors at the High Court level and at district level is consultation with the High Court and the Sessions Court.

The District Magistrate prepares a panel of names who are fit to be appointed as Public Prosecutors.

The minimum qualifications is at least 7 years practice as an Advocate. The Public Prosecutor is a public servant.

Asst. Public Prosecutors are appointed by State Govt. in each district for conducting prosecution in Magistrates Courts. No Public Officer below the rank of a Police Inspector and who has made investigation in the case can be appointed as A.P.P.

Office of the A.P.P. is the creation of the new Cr.P.C. A.P.P. may appear before Magistrates court. He is not under the control of the Police Department.

CHAPTER 3

MAINTENANCE OF WIFE AND CHILDREN

Ch.3. Maintenance of Wife, Children and Parents:

Sn.125 Cr.P.C. deals with the provisions relating to maintenance of wife, children and parents. One essential duty of the husband is to maintain his wife and children if they are not in a position to maintain themselves. The Cr.P.C. provides for a speedy remedy. The details are provided for in Sn.125 Cr.P.C.

Changes made in the Cr.P.C.1973:

The Joint Committee appointed by the Parliament had made certain observations. On the basis of these, some changes have been introduced in Sn.125 Cr.P.C.

(i) The Magistrate may make an order if the wife is unable to maintain herself.

(ii) The benefit is available to the parents also.

(iii) The benefit is available to a divorced wife so long as she does not remarry. This secures social justice to women.

(iv) In respect of children, maintenance benefit is available up to 18 years. After that there is maintenance, only if the child is under a physical or mental abnormality or injury unable to maintain itself.

A husband having sufficient means, may neglect to maintain his wife and children and parents. The Children may be legitimate or illegitimate. The wife and children and father and mother if they are unable to maintain themselves may move an application before the concerned Magistrate. If the Magistrate is satisfied about negligence or refusal of the husband to maintain his wife, children or parents he may make an order against the husband for payment of a monthly allowance. Such amount shall not exceed Rs.500/- per month. The Magistrate may order the payment to the applicant.

The amount becomes payable from the date of the order or from the date of the application by the wife. This is decided by the Magistrate.

Enforcement of the Order:

The Magistrate, if he finds that the husband though he had sufficient means has failed to comply with the order, without any reason, may for every such breach, issue a warrant and may sentence the person to imprisonment for a month or until the amount is paid. The husband may offer to maintain his wife, if she is willing to live with him. But if the wife refuses on the ground that the husband has married another wife or has kept a mistress then it is a valid ground for her to refuse to live with him and to live separately.

Limitations:

i) The amount should be claimed by the wife within a year from the date of the order of the Magistrate.

ii) The wife is not entitled to receive maintenance if she is living in adultery.

iii) She cannot get maintenance if, without proper reason, she refuses to live with the husband.

iv) She cannot get maintenance if she is living separately with mutual consent.

If the above grounds are shown, the Magistrate may cancel the order of the maintenance.

Recording of Evidence:

The Magistrate shall record the evidence in the presence of the husband or his advocate. He shall follow the procedure of a summons case trial. He can also proceed Ex-parte (absence of the husband) if the husband wilfully neglects to attend the court. The ex-parte order can be cancelled within three months if there is a strong reason.

Scope of the Order:

The monthly allowance may be increased if there are sufficient reasons. However the maximum is Rs.500/- per month. The Magistrate shall give a copy of the order to the wife and such an order may be enforced by any Magistrate in any place in India where the husband may live. Such Magistrate has the same powers to enforce the order, as the Magistrate who made the order for maintenance.

CHAPTER 4

CONFESSION

Confession: Sn.164 Cr.P.C.

Confession means admission by the accused of his guilt. The Magistrate may record a statement of confession made:

i) In the course of investigation OR

ii) At any time before the commencement of the trial. No confession can be recorded by the Police Officer. If recorded it is not admissible.

The Magistrate records the confession in the same manner as he records evidence.

In the Evidence Act Sn.27 and 28 deal with confession. Accordingly, confession must be recorded by the Magistrate only. Accused 'A' makes a statement. 'I have thrown the dagger in a well. I have killed 'D' with it" Here, if in persuance of the statement, the Police Officer discovers, the dagger, the fact that it was discovered is admissible in evidence. But the statement I have killed 'D' with it, is not allowed.

Confession is not to be used as substantive evidence.

Procedure:

Before recording the confession, the Magistrate explains to the person making it that he is not bound to make it and that it may be used as evidence against him. The Magistrate records only if the statement is made by the person voluntarily. He must be fully convinced about the truth or the veracity of the statement. Even if there is an iota of suspicion about the truth, the Magistrate may refuse to record the confession.

Recording:

When recording, he makes a memorandum, explains to the accused that:

The accused is not bound to make a Confession, that if. made, his statement may be used against him as evidence. He must certify that the statement was voluntary, that it was done in his presence and hearing, that it was read over to him and admitted by him to be correct and that it contained a full and true account of the statement made by him.

At the foot of the memorandum, the Magistrate shall sign, seal and put the date.

Contents of the Memorandum:

The contents should be to the following effect:

"I have explained to the accused Sri ..... that he is

not bound to make a confession; If he does so, same may be sued against him I further certify that the confession was voluntary, it was taken in his presence and hearing, that I read it over to him, that he admitted as correct that is was a full and true account of the confession made"

Signature of Magistrate with Seal and Date.

Evidentary Value:

In Ram Kishan V. Harmit Kaur, the Supreme Court has held that the confession statement is not 'substantive evidence'. It can be used to corroborate the evidence of a witness or to contradict him.

A Magistrate who has no jurisdiction is also empowered to record the confession but then the records are to be sent to the Magistrate who conducts the trial. (Brij Bhushan V.King).

In order to ensure that the confession is voluntary, it prohibits the detention of the accused in police custody, (when he is unwilling to make a confession before the Magistrate).

CHAPTERS DOUBLE

JEOPARDY

Ch. 5 Double Jeopardy : Sn.300 Cr.P.C.

One fundamental principle of Criminal Law is that no person who has been accused of an offence should be prosecuted and punished for the same offence more than once. This principle is contained in Art.20(2) of the Constitution and also in S.300 Cr.P.C.

The origin of this is in the English Law 'Nemo debet Bis Vexari' (no one shall be vexed twice). This has two cordinal rules, namely:

(a) Autre fois acquit (previous acquittal)

(b) Autre fois convict (previous conviction)

According to this if a person has been prosecuted and either convicted or acquitted, then the accused should not be tried again by any Court in India, for the same offence.

In Venkata Raman Vs. Union of India, Venkataraman was subjected to a departmental inquiry and was dismissed from Central Government services on grounds of bribery. The police arrested him under 161IPC. for bribery. He contended that he should not be tried again. The Supreme Court held that the departmental proceedings was not a prosecution and therefore he cannot get the benefit.

In Maqbul Hussain Vs. State of Bombay-M was subject to an inquiry by the custom authorities who confiscated gold from him and also fined him. Held Custom proceedings were not prosecutions.

According to the Supreme Court, prosecution and punishment must be read in a conjunctive sense. That is, if a person is prosecuted and punished, he should not be tried again. Hence if a person is prosecuted and acquitted, the Constitution is silent about this. But Sn.300 Cr.P.C. provides that if a person is prosecuted and convicted or acquitted he should not be tried again for the same offence.

Exceptions:

Sn.300 provides for the following exceptions:

(i) If the lower court has no jurisdiction at all, then the rule does not apply. The accused can be tried again.

(ii) If a person is tried for a distinct and separate offence, then the rule does not apply and, with the consent of the State Government he may be tried for a separate charge which he could have been tried in the former trial.

Ex. (a) Servant 'A' is tried on a charge of theft and is acquitted. He cannot be tried again for theft or criminal breach of trust.

(b) A is tried on a charge of murder and acquitted. It appears

that there was robbery also before murder. A may be tried for robbery.

(iii) If a person is tried for an offence but subsequently if it turns out that the consequences of the act resulted in a different offence a together, the person may be tried.

Ex. (a) A causes grievous hurt and is convicted. The injured rson dies in the hospital. A may be tried for culpable homicide.

(b) A is tired for culpable homicide and convicted. HE cannot tried again on the same facts for murder.

Scope:

Double jeopardy benefit does not apply to execution proceedings.

(i) What is barred is the second prosecution for the same offence on the same facts. (Sn.22l)

CHAPTER 6

INVESTIGATION

Chl6.1. Investigation, Inquiry and Trial:

Sn.2(h): "Investigation"includes all the proceedings under the Cr.P.C. for the collection of evidence conducted by a police officer or

person authorised by the Magistrate.

Sn.2 (g): Inquiry means every inquiry, other than a trial, conducted by a Magistrate or Court under Cr.P.C.

Investigation, inquiry and trial denote the three successive stages in the Criminal proceedings.

(i) **Investigation:** is conducted by the Police Officer. The objective is to collect evidence in respect of the case on hand. It starts witjh the F.I.R.

It includes: Proceeding to the spot, getting the facts and circumstances, collecting all the evidence available, examining perjsons, arresting the accused, making the search, seizing materials etc He submits a report to the Magistrate in the **prescribe form**.

(ii) **Inquiry** : The end of investigation is the beginning of the inquiry. This is a proceeding of the Magistrate or Court prior to trial. The objective is to find the truth or falsity of the facts to proceed further, to take action.

If there is any truth, there will be a trial otherwise the accused is discharged. Enquiry may be judicial, non-judicial, local or preliminary. Examples are: proceedings for maintenance of wife a children, enquiring for keeping the peace. Proceeding under Sn.145 Cr.P.C. is an inquiry.

(iii) **Trial:** The essence of this is that the Proceeding ends in conviction or acquittal. An inquiry is not a trial. The sessions trial and the warrant case trial are examples. (In a summons case, there is no formal charge or inquiry).

Ch.6.2. Powers and duties of a Police Officer on receipt of F.l.R.: Sns.154 to 175 Cr.P.C.

Information:

Information relating to cognisable offence, may be given by any person to the Police Officer. It may be oral or in writing. If it is oral it is reduced to writing, read over to the informant, signed by him. The substance of it is entered in the Police Diary. If the information is in writing it is signed by the informant and the substance is entered in the police diary. This information is F.l.R. A copy of this shall be given free of cost to the informant.

If the information is in respect of a non-cognisable offence, the police officer cannot directly investigate. He refers the information to the Magistrate. If the Magistrate orders, then only the Sub-Inspector may investigate.

If the officer refuses to record in cognisable case, the informant may by post send the substance of information to the S.P. concerned, *ivho* may direct investigation in suitable cases.

Spot Investigation:

The Police Officer informs the Magistrate and proceeds to the pot for investigation and for collecting the facts and circumstances of the case. He also takes steps to arrest the accused.

On arriving he calls a few respectable persons of the locality and in their presence he conducts the Mahazar. These persons are panchanamas (witnesses).he will draws up a report. In case of murder, he examines the bruises, wounds etc. Weapons ,if any, are seized and sealed. Blood, stained clothes and other things found are sealed as 'Exhibits'. The dead body is then sent to postmortem. The Police Officer draws up the report and it is signed by the panchanamas. This is called the mahazar report

The Police Officer may require the attendance of persons acquainted with the circumstances of the case. **Male below 15, and a female of any age** may not be called to the Police Station. He examines them orally.

Statements made during investigation may be reduced to writing. They need not be signed. He should not use force .or induce them. Such a statement may not be used in a trial. He is empowered to 'Search' (Sn.165).

The accused may be arrested without warrant in cognisable cases. He must be produced before the Magistrate within 24 hours of the arrest. He may be kept in custody under the order of the Magis-

trate. The maximum period is 15 days (Remand). But according to the new Act, this may be extended if the Magistrate is satisfied that there are adequate grounds. The maximum period of detention shall be 60 days. Thereafter, he shall be released on bail. Remand should be made, only after the accused is produced before the Magistrate. The Magistrate shall record the reasons for Remanding.

Police Diary

The Police Officer should maintain a diary and record.

(i) The time of reception of F.I.R.

(ii) The time of beginning and closing of investigation.

(iii) Place visited,

(iv) A statement of circumstances. The Criminal Courts may call for the diary. The accused cannot call on it, except when it is used by the Police Officer to refresh his memory.

The Police Officer submits a **final report** to the Magistrate setting forth:

(i) The names of the parties.

(ii) Nature of information.

(iii) Names of persons concerned with the case.

(iv) The accused- whether he is in custody or not.

(v) Post Mortem Report, etc.

With the final report the investigation comes to an end.

CHAPTER - 7

OFFENDERS

Ch.7.1. Approver: Sn.306 Cr. P.C.

An associate in a crime is called an accomplice. No doubt he is a guilty associate, but pardon is granted to him. He is called the 'Approver'. He is granted pardon:

(i) To obtain evidence relating to the case and

(ii) To use evidence against the other accused. To this end, he is given an assurance by the Magistrate, that no action will be taken against him. He is examined as a witness for the prosecution. Pardon may be granted in the following offences:

(a) Cases triable by Sessions Court,

(b) Offences punishable with 7 years imprisonment or more.

Pardon

Pardon may be granted by the District Magistrate, 1 Class Magistrate at any stage from investigation upto trial, but before judgement. Pardon may also be granted by Court of Sessions and High Court.

The pardon is granted on condition that as a return for the pardon, the approver should make a full and true disclosure of the circumstances known to him.

The Magistrate shall record his reasons for granting pardon.

Pardon is given because there will be no other better evidence available in the absence of the approver's disclosure.

Ex.:- In Belur Srinivas lyengar Murder Case, Bangalore, Channa became an approver and assisted the prosecution to arrest Krishna, Muniswamy and Govinda Reddy. Channa had made a complete disclosure of the conspiracy and the other circumstances of the case.

Breach of promise

If the approver does not disclose fully and truly, the circumstances and the facts of the case, then, he has committed a breach of his promise. In such a case, the Magistrate may try him for so much of the offence as is disclosed by him to the court.

Protection

The approver gets full protection only when he has fully and truly disclosed all the relevant facts necessary for investigation.

The evidence given by the approver is admissible, but the universal practice of **the courts is not to convict the accused on**

the uncorroborated evidence of the Approver.

The reason is that the Approver is 'Participes Criminis' (participate in the crime) He will have a motive to put the blame on the accused or to shift the guilt from himself. (Sn. 133 Evidence Act).

Ch.7.2. First Offenders:- Sn. 360 Cr.P.C.

Provisions are made in Cr.P.C. for those who commit offences for the first time. This is a benevolent legislation. It enables the court to release the accused instead of sending him to the prison. The release is on probation of good conduct.

The object is to avoid the sending of first offender to the prison and of running the risk of turning him into a regular criminal.

When a person above 21 is convicted for 7 years or with fine only or when a person below 21, or a woman is convicted for less than life imprisonment, and no previous conviction is there, the court having regard to the age, character or antecedents and circumstances, may release him on bond, instead of sentencing him.

He must appeal within 3 years when called upon, and, in the meantime he must keep the peace and be of good behaviour.

Scope:

This section applies to the accused who is convicted of theft, dishonest misappropriation, cheating or any offence punishable with 2 years imprisonment or with fine only.

There must be **no previous conviction** against the accused.

The court will take into consideration the age, character, antecedents or any extenuating circumstances and instead of sentencing him, releases him on admonition.

The Sessions Court, or any Appellate Court or the High Court may pass an order under this provision.

If the accused fails to observe the conditions imposed by the Court, he may be arrested and sentenced by the Court.

The order issued under this section is in substitution of the punishment,

Ch. 7.3. Habitual Offender: Sn. 110 Cr.P.C.

According to the Cr.P.C. special provisions are made in respect of habitual offenders and desperate characters. The object is to prevent the commission of an offence by such persons, and of securing future good behaviour from them.

Habitual offender means

(i) Habitual robber, house breaker, thief or forgerer.

(ii) Habitual receiver of stolen property or harbourer of thieves,

(iii) Habitual Kidnapper, extortioner abductor or cheat or peace violator

(iv) Habitual violator committing offences under

(a) Drugs & Cosmetics Act. (b) Foreign Exchange Regulations Act. (c) Food Adulteration Act. (d) Custom Act etc.

(v) Habitual offender of hoarding, profiteering and adulteration and

(vi) A person so dangerous and desperate to be a hazard to the community.

The I Class Magistrate, who receives information about such a person, is within his jurisdiction, may require him to execute a bond (with sureties) for his good behaviour for a period not above 3 years.

The Magistrate must give a show cause notice giving all details about the information, value of the bond etc.

Ch.7.4. Juvenile Offenders: Sn.27 **Cr.P.C.**

Certain benevolent provisions have been made in the Cr.P.C. to meet the Juvenile (Youthful) offenders.

A person under the age of 16 (as on the date he is produced before the Court), accused of an offence not punishable with death or imprisonment for life is a' juvenile' and he may be tried by the Chief Judicial Magistrate or by a Court empowered under the Children Act 1960 or under any law, which provides for treatment, training and rehabilitation.

The objective is to save juvenile offenders from the company of convicted criminals in the jail, and alsp to give them suitable training and to rehabilitate them.

Ch.7.5. Proclaimed Offender: Sns.40(2), 82 **and** 83.

He is any person proclaimed by the court as an offender who is.

accused of an offence punishable under Sns.302 (murder) 304 (Culpable Homicide), 392 (Robbery) etc. as stated in the Or.P.C

The court must have issued a warrant against him.

He must have absconded or concealed himself.

The proclamation in writing is to be published requiring him to appear within 30 days.

Publication means reading publicity in some conspicuous place, affixing a copy to some conspicuous part of the house of the accused and the court. It may be published in newspapers.

Attachment of property: After issuing the Proclaimation the Court may proceed to attach his property. If the proclaimecd offender appears within 30 days, the court may make an order releasing the property. If he does not appear, the property shall be at the disposal of the government. It may sell after six months.

If the offender has not absconded and if he did not know the Proclamation he may appear before the Court within 2years.

CHAPTER 8

SEARCH & ARREST

Ch.8.1. Search Warrant: How search is to be made:

A search-warrant, is a warrant (order) issued by the Magistrate to the Police Officer to search a particular place or places and to seize the thing or things or to discover persons who are wrongfully confined (The II schedule to Cr.P.C. has given the pro forma of the search warrants).

A Search-Warrant may be issued for :-(i)

The production of a document or thing.

(ii) Search of a place suspected to contain any stolen property, forged documents etc.

(iii) Seizure of any forfeited publications and

(iv) To discover any person who has been wrongfully confined.

The Search Warrant authorises Police Officer to enter and search the place to seize any article, thing, document which is required under the Warrant, to convey that to the Magistrate. It also authorises him to arrest and produce before the Magistrate any person found therein who is privy to the offence. In case of a confined person, after search and discovery, the person must be produced before the Magistrate.

PROFORMA

Form No.ll (Sn.94 Cr.P.C.)

To

The Police Officer.....

Station.....

Whereas information has been laid before me.....that the house no ..... address .....

is used as a place for the deposit of..... goods ..... (stolen property etc).

This is to authorise and require you to enter the said place.....and to use, if necessary reasonable force for that purpose and to search every part of the said place and to seize or take possession of any property (which the case requires), and to forthwith bring before this court ....returing this warrant with an endorsement certifying what you have done under it, immediately upon its execution.

Date .....

Seal of the Court Signature of the Magistrate.

Ch.8.2. Search how made:

The Police Officer who is duly authorised to make the search may enter the place or places concerned, and the persons in charge of the place or house or closed place (godown etc), must allow free ingress and egress to him.

The Police Officer must conduct a mahajar. He must call 2 or more respectable persons of the locality, make the search in their presence prepare a list of items seized.

If the person is a woman, search shall be made by a lady police or any woman with strict regard to decency.

The Panchanamas shall sign the Mahajar. The Police Officer produces the items seized and the Mahajar-report before the Magistrate.

The person arrested (or discovered) is also produced before the Magistrate. He also submits his report, thereof, to the Magistrate.

Ch.8.3 Arrest without Warrant:Sri. 41.

A Police Officer may arrest a person without a Warrant in the following circumstances:

(i) Person concerned with a cognisable offence.

(ii) A proclaimed offender.

(iii) A person concerned with an extraditable crime.

(iv) Deserter of Army.

(v) Released convict.

(vi) Person with house-breaking tool or with stolen property.

(vii) (i) Habitual Offender.

(ii) Any person who commits a non-cognisable offence before the Police Officer and who refuses to give his name, address etc.

(iii) Any person who is designing to commit a cognisable offence.

Ch.8.4. Arrest by a Private Person:

A Private person may arrest a person who is committing in his presence, a non-bailable and cognisable offence or a proclaimed offender. But, without delay, he must make him over to the Police Officer.

Ch.8.5. Arrest how made: Sn 46

The Police Officer is empowered to arrest in cognisable cases. But, he may arrest with a Warrant in non-cognisable cases. In so arresting he may touch or confine the accused unless he submits to the arrest.

He may use force if the accused forcibly resists or attempts to evade the arrest.

He has no powers to kill except in extreme cases of escape and if accused of offences punishable with death or life imprisonment.

He is entitled to free ingress or egress and hence may break open any closed door or window. But, he should not enter a zanana but should give due notice of his entry. Decency is expected of the officer in such cases.

The accused after arrest should not be put to unnecessary re-straint.

The Police Officer **should inform him the grounds of his arrest** and to bail him in case of bailable offences.

He should search the person and seize all articles, expect wearing apparel.

The search of a woman must be made by a woman police or by another woman.

Amendment 2005 *Sub-section (4) has been added to prohibit arrest of a woman after sunset and before sunrise except in exceptional circumstances and where such circumstances exist the prior permission of the Judicial Magistrate of the first class is to be obtained*

Weapons if any are also seized.

The arrested person and exhibits are to be produced before the Magistrate, with a report thereof.

CHAPTER 9

PREVENTIVE PROVISIONS

Ch.9.1. Urgent cases of Nuisance: Sn.144.

One of the preventive measures provided for by the Cr.P.C. to meet emergent cases, is to **dispense with the usual formalities** followed by the Magistrate and, to empower him to take measures by making ex parte order, if need be.

The details are provided in Sn.144.

Conditions and Procedure:

(i) The Magistrate must be satisfied that there is sufficient ground to proceed under this section, and that a speedy remedy is desirable.

(ii) He may issue a written order stating the facts of the case. It must be served as a Summons.

(iii) **The order must direct.**

(a) to abstain a person from doing an act.

(b) to take the order with certain property under his manage ment or possession.

(iv) The objective of the order is to

(a) Prevent obstruction, annoyance or injury to any lawfully employed person.

(b) Prevent danger to human life, health or safety.

(c) Prevent disturbance of public tranquility, riot or an affray.

(**v) If the situation warrants, the order may be made ex parte**. This means, it may be directed against any particular individual, or to a group residing in a specific area, or to the public generally, in a particular place.

(vi) **The order may be altered suo motu by** the Magistrate. It may be rescinded. Any person aggrieved may make an application to the Magistrate who shall hear and direct suitably.

(vii) **The maximum duration of the order is 2 months from the date of making it**.

Order: (Examples):

(1) To abstain from interfering with a temple or its properties.

(2) To abstain from interfering with a natural Easement right of way in a village-are examples.

(3) In cases of apprehended danger or riot, an order to the pub lic of a locality not to assemble in groups of 4 or more persons is an order under this section.

(4) The duration should also be specified.

Ch.9.2. Disputes as to land or water: Sn.145 Cr.P.C.

One of the preventive measures provided for by the Cr.P.C is with reference to disputes as to land or water.

The object is to prevent any **breach of the peace relating to** any land or right to water, but taking the subject out of the hands of the disputants and to make one of them the custodians. (Any other person may be made the custodian).

The disputes may not affect the public at large, but are fraught with dangerous consequences.

Hence, **the preventive relief under** Sn.145.

Conditions and Procedures:

(i) There should be a dispute regarding possession or right of use or of land or water or its boundaries. This include buildings, markets, fisheries, crops and rents and profits of such property.

(ii) The dispute must be of such a nature as is likely to cause a breach of the peace.

(iii) Initiation:

On police report or other information.

The Magistrate must be satisfied about the above two conditions. He may summon the parties
to the court to submit in writing their claims in respect of possession

of the subject matter. One copy of the summons shall be affixed in some prominent place of the subject matter.

(iv) **Inquiry:**

The Magistrate must peruse their statements, hear them and receive all other evidence available and shall decide who was in possession of the property.

If he finds that one party ' A', has wrongfully dispossessed 'B' and taken possession within 2 months next before receipt of information, he may treat 'B' as in possession and proceed. This order is final unless there is any evidence to prove possession until evicted in due course of law.

(v) **Perishables:**

If the subject matter of dispute is any crop or other produce of property and is subject to speedy decay, he may make an order for proper custody and sale and make suitable orders.

(vi) **Title:**

The Magistrate does not enquire into the merits or to the title of the parties.

This is to be decided by the Civil Court. It is only when the Civil Court decides the title that the Magistrate may revise his order if need be.

(vii) **No Revision:** The High Court has no Revisional power .

CHAPTER 10

BAIL AND BOND

Ch. 10.1 Bail

Bail is basically a security for the appearance of the accused before the court as and when called upon. There is the release of the accused from legal custody, but, it presupposes that he is in custody. Hence, if his conduct is prejudicial to a fair trial, he forfeits his right and he may be arrested and sent to custody.

If the accused binds himself it is a personal bond, but if a surety guarantees the securing of the person before the court it is a bail.

BOND

I, ... having been arrested under a cognisable offence by the Police Officer of..... Police Station and brought before the..... Magistrate, charged with the offence under Sn .....and required to give security for my attendance before the court on condition that I shall attend the court on the days of trial and in case of my default, I bind myself to forfeit to the Govt. a sum of Rupees.....

Date ..... Signature of Accused.

BAIL

1 .....hereby declare myself surety for the accused,.....that he shall attend the court etc.....and that in case of his making default 1 hereby bind myself to forfeit to the Govt. a sum of Rupees.....

Date ..... Signature of Surety.

If the accused does not appear before the court, the surety forfeits the bail amount and a warrant may be issued to arrest the accused.

Ch.10.2 Bail in Non-bailable cases:

(i) Add Ch.1-2 material of this e-book.

(ii) If the Police Officer during investigation and the Court in a trial of a non-bailable case, finds that there are no reasonable grounds to believe that the accused has committed a non-bailable offence, he may be released on bail. Reasons are to be recorded.

(iii) In case of:

(a) Offence punishable with imprisonment for 7 years or more.

(b) Offence against State etc.

(c) Abatement of the above offence etc.

-the accused may be released on bail by imposing conditions to ensure his attendance and of not committing similar offence or in the interests of justice.

(iv) If the trial of non-bailable offence is not concluded in 60 days from the first day of hearing, the accused may be released on bail.

Ch.10.3. Anticipatory Bail: Sn 438

Accepting the Law Commission Report, a new provision was made for 'Anticipatory bail' in the Cr.P.C. 1973.

The condition for bail according to the courts is that the accused must be in legal custody. Hence, if a person is not in custody but is implicated under false cases, he cannot get a bail at all. To meet this situation, the **'Anticipatory bail' was invented**.

The Law Commission stated that if some influential people implicit false charges against their rival 'A', with a view to disgracing him and getting him put in jail, then-'A' must have a way out.

If 'A' is not likely to abscond or misuse his liberty, there is no justification why he should be arrested, detained and then released on bail.

Hence, looking to his character, his antecedents the courts may grant in advance an anticipatory bail. Sn.438 provides for such a bail.

Conditions and Procedure:

(i) The bail may be granted by the High Court or the Sessions Court.

(ii) The person must apply to the court stating that he apprehends that he may be arrested on accusation of a non-bailable offence; he, must request the court to direct that in such an event of an arrest, he may be released.

(iii) The court, may give directions imposing conditions as it thinks fit.

(a) That he must be available for police interrogation.

(b) That he should not interfere with or use any threat, promise or inducement to any person giving evidence.

(c) That he should not leave India without permission.

(d) Any other condition of ordinary bails as the court thinks fit.

(iv)**-Utility**:

If such a person is arrested on such accusation, the Police Officer as per the above direction should release the person on bail.

If any Warrant is to be issued, the Magistrate must issue bailable warrant.

CHAPTER 11

CHARGE

Ch.11.1. Charge:

(i) Sn. 2(b) defines Charge. It includes any head of charge when the charge contains more heads than one.

(ii) Every charge should state the offence, should be clear and specific, refer to the Specific Sections of the I.P.C. (or any other law) or any part of the section, and should be in the language of the Court.

Previous convictions if any must be set out.. The reason is to make him liable for enhanced punishment.

CHARGE

I, ... Magistrate, hereby charge you .....(the accused) as follows:

That you on ..... at ..... committed Culpable homicide not amounting to murder causing the death of ..... and thereby committed an offence under Sn.304 I.P.C. and within the congnisance of this Court.

(Hi) The charge should give sufficient notice of the nature of the offence charged. The manner of committing the same need not be given except when the charge is insufficient to give the meaning of the offence charged.

e.g.: A is accused of theft of a radio on 1-1-97 at Mysore. The charge need not state the manner of commission of theft.

(iv) Alteration: Any charge may be altered or changed by the Court at any time before judgment is pronounced.

Ch.11.2. Joinder of Charges:

(i) Separate charge:

The rule is that there must be a separate and distinct charge for every offence and that there should be a separate trial.

e.g.: A is accused of theft on one occasion and of causing grievous hurt an occasion. A must be separately charged and separately tried.

(ii) Three offences together:

A maximum of three offences of the same kind committed within one year may be tried together. He may be tried separately for other offences.

In Subramanya Aiyers Case, the accused had been charged with

41 offences spread over 2 years. The Privy Council held that this was prohibited.

(iii) In one series of acts so connected as to form the same transaction, two or more offences are committed by the same person, he may charged and tried in one trial.

A has committed House trespass. Lurking house trespass and grievous hurt in one transaction. He may be charged together.

(iv) When the offence comes within the definition of two or more Acts, he may be tried together.

A commits robbery on B, and in doing so voluntarily causes hurt to him. A may be separately charged with and convicted of offences under Sn.323. Voluntarily causing hurt, Sn.392; Robbery and Sn.394 causing hurt voluntarily while committing robbery.

CHAPTER 12

TRIALS

Ch.12.1 The trials provided for in the Cr.P.C. are:

(i) Sessions Trial,

(ii) Warrant Case Trial,

(iii) Summons Case Trial,

(iv) Summary Trial.

Ch.12.2 Sessions Trial: Sn.225 to 237 Cr.P.C.

(i) **Sessions Court:**

The Sessions Court is the highest court in the District and has jurisdiction to conduct trials of offences including murder (302), culpable Homicide not amounting to murder Sn.304 etc. as per the First Schedule to Cr.P.C. These offences specified therein [in the Schedule] are triable exclusively by the Sessions Court.

(ii) **Committing the accused:**

In a case initiated on a police report, if the offence is one triable by the Sessions,

the Magistrate.

(a) Should commit the accused to the Sessions (No elaborate preliminary enquiry is necessary).

(b) He may remand him to custody or release him on bail.

(c) He should send all the record and documents and exhibits to that court.

(d) He should notify the Public Prosecutor of the commitment of the case to the Sessions. All the necessary documents (copies) are to be given to the accused.

(iii) **Opening of Sessions:**

The trial is conducted by the Public Prosecutor. He opens the case by reading out the charge and stating by what evidence he proposes to prove the guilt of the accused. The Judge, on consideration of the records and documents and hearing the prosecutor and the accused, may discharge if there are no sufficient grounds. He records his reasons for the discharge.

(iv) **Framing of charges:**

If he finds that there are sufficient grounds he frames the charges, reads and explains to the accused and asks him whether he pleads guilty or claims a trial. If he pleads guilty, he may be convicted.

(v) Examination of witnesses:

If he does not please guilty or refuses to plead, the Judge fixes a date for examination of witnesses. The witnesses may be examined in chief and cross-examined. Their depositions are recorded. If after the prosecution evidence, examination of the accused and hearing the prosecution and the defence, the Judge considers that there is no evidence, he records his reasons and acquits him.

(vi**) Defence:**

If not acquitted as above, he calls on the accused to enter his defence. The Judge files the written statement, if any, put forward by the accused. He issues summons to his witnesses etc. The witnesses are examined and cross examined. Their depositions are recorded.

(vii**) Arguments:**

The public Prosecutor sums up his case and the defence gives its reply. If the defence put forward any point of law, the prosecutor answers with the permission of the court.

(viii) **Judgment:**

After hearing the arguments, and the points of law, the Judge delivers the judgement.

In case of conviction , he hears the accused on the sentence and passes the sentence on him.

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(ix) **Appeal:**

Appeals are allowed from the sessions to the High Court, within the period of limitation. In case of death penalty: 30 days ; in case of any other penalty: 60 days.

Ch.12.3. Warrant Case Trial:

Warrant case means **a case relating to an offence punishable with death/imprisonment for life or imprisonment for a term exceeding 2 years**

. The schedule to Cr.P.C. has specified these.

Trial:

Case may be instituted on a Police Report

(or may be instituted otherwise than on police Report by complaint).

In a case instituted on a Police Report the following procedure is followed:

(i) The Magistrate must satisfy himself that the documents of the case have been furnished to the accused. If, after considering the above documents, and after hearing the prosecution and the accused, he finds that the charge is groundless, he shall discharge him.

(ii) If the Magistrate forms the opinion that the accused has committed an offence, he shall frame a charge. The charge shall be read and explained to the accused and he shall be asked whether he is guilty or claims to be tried,

If the accused pleade guilty, the Magistrate shall record the plea and convict him.

(iii) If he refuses to plead or claims to be tried, the Magistrate shall fix a date for the examination of the witnesses. He shall take the evidence produced by the Prosecution. The Prosecutor may examine his witnesses. The defence counsel may cross-examine the witnesses of prosecution. The prosecutor may re-examine them.-He sums up his arguments.

(iv) The accused now enters on his defence and produces his evidence. His witnesses are examined; they may be cross-examined by the prosecutor.(They may be re-examined by the defence counsel).

(v) The Defence Counsel sums up his argument. The prosecutor may reply. If the Magistrate finds that the accused is not guilty he shall acquit him. If he finds him guilty, he shall pass sentence according to law i.e., he shall convict him.

[If a previous conviction is charged and the accused does not admit, the Magistrate may take evidence in respect of previous conviction and shall record his finding].

Ch.12.4 Summons Case Trial: Sns. 251 to 259.

A 'Summons Case' means a case relating to an offence punishable with a term less than 2 years.

In summons case, the accused appears before the magistrate or is brought before him. The Magistrate tells him the accusation and asks whether he is guilty or desires to defend.

No formal charge is framed.

If he pleads guilty, it is recorded in the same words as possible, and the Magistrate may, convict him, in his discretion.

If he refuses to plead or claims to be tried, the Magistrate shall fix a date for the examination of the witnesses.

He shall take the evidence produced by the Prosecution. The Prosecutor may examine his witnesses. The defence counsel may cross-examine the witnesses of prosecution. The prosecutor may re-examine them. He sums up his arguments.

The accused now enters on his defence and produces his evidence. His witnesses are examined; they may be cross-examined by the prosecutor.(They may be re-examined by the defence counsel)

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(v) The Defence Counsel sums up his argument. The prosecutor may reply. If the Magistrate finds that the accused is not guilty he shall acquit him. If he finds him guilty, he shall pass sentence according to law i.e., he shall convict him.

Ch.l2.5.Summary Trials: Sn.260 to 265.

(i) **Summary trials aim at a speedy disposal of cases**.

The detailed procedures of other trials are dispensed with in view of the petty nature or lesser gravity of the offence.

In these trials only a record, sufficient for the purpose of justice, is made and summons case procedure is followed.

No charge is framed.

(ii) The First Class Magistrate; the Chief Judicial Magistrate may try the case.

(iii) Offences : These are enumerated in Sn.260.

e.g.: (a) Theft of property worth less than Rs.250.

(b) Receiving stolen property of worth less than Rs.250.

(c) Offences under Cattle Trespass Act.

To the accused, the Magistrate tells the accusation and asks him whether he is guilty or not. If he pleads guilty he is convicted. If not he hears the prosecution and its evidence, and then the accused and his evidence. If he finds not guilty he acquits, otherwise he convicts him.

(iv) **Special features**:

(a) The sentence should not exceed 3 months.

(b) Record:

He records the serial number of the case, date of its commission, date of report or commission, date of report or complaint, name of complainant, name parentage and residence of the accused,
the offence complained and proved if any

. A summary of the plea of the accused and his examination.
The Magistrate records his findings
and the order and the date of termination of the trial.

(c) Only the substance of the evidence is recorded.

(d) The judgment contains briefly the reasons.

Ch.12.6. Irregular Proceedings:

The Cr.P.C. has divided Irregular Proceedings into two classes

.(i) those which vitiate proceedings and

(ii) those which do not vitiate proceedings.

(i) A Magistrate, not empowered, may do any of the specified things erroneously but in good faith.

Eg.: Issuing a Search-Warrant, issuing orders to investigate, transfer of a case etc.

In such a case though there is technically an irregularity , the order of the Magistrate is not to be set aside.

(ii) A magistrate, if **not so empowered** to do certain things, does them, the proceedings are void and hence set aside on appeal.

(a) Demanding security to keep the peace.

(b) Demands security for good behaviour.

(c) Tries an offender summarily etc.

Error, omission or irregularity in framing charge, by itself will not be set aside unless this results in grave injustice to the accused.

Ch.12.7. Do Novo Trial:

There is no provision for this in the Cr.P.C. 1973.

De Novo Trial means the new trial.

When a Magistrate who, in an inquiry or trial, party conducts it and then is transferred to a different pace or assigned to exercise a different jurisdiction, the new Magistrate (Successor) will take over.

Such a Successor could act on the evidence already recorded by his predecessor.

This is subjected to an exception.

If the Magistrate is of the opinion that the evidence of any person already recorded is necessary in the interest of justice, he may re-summon such witness and examine him on oath.

De Novo Trail gives right to the Magistrate and to the accused. Hence the accused may ask for the De Novo Trial. '

The Cr.P.C. **1973 has omitted this Provision.**

Ch.12.8 Summons Case and Warrant Case:

These are defined in Sn .2 Cr.P.C.

A Warrant case is a case relating to an offence punishable with death, life imprisonment or imprisonment exceeding two years.

A case relating to an offence punishable for a term below two years is a Summons Case. The distinction is based on punishment.

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Summons Case	**Warrant Case**
(a) It is initiated on a Complaint	(a) It is initiated on Police report of complaint.
(b) No formal charge is necessary.	(b) Charge is essential.
(c) The complainant may withdraw the case. The accused is released.	(c) The Magistrate must proceed when he finds some elements of offence. He may either discharge, acquit or convict The accused.

*

Ch.12.9.Dscharge and Acquittal distinguished:

A; person is said to have been discharged when he is relieved from proceedings, by an order of the court. The order is not a judgment.

There may be discharge, after a preliminary enquiry. If there is no prima facie case against the accused, and if he has not been called *to defend himself he is to be discharged*

A person discharged may be again subject to proceedings if there is evidence

A person acquitted is protected under Sn. 300 and, he cannot be tried again for the same offence.

An acquittal is the judgment of the person charged, that is he must be either acquitted or convicted .There is no discharge of the accused.

CHAPTER 13

LIMITATION

Ch.l3.Period of Limitation:

(i) This is an innovation. Certain offences are not to be taken cognisance after the lapse of a prescribed period by the criminal court and the case is to be dismissed.

Offence	Period	Period when starts
(a) Punishable with fine only.	6 months	Date of the offence,
(b) Punishable for 1 year	1 year	Date of commission or Date when it became known to the police officer.
(c) Punishable upto 3 years	3 years	-do-

(ii) The period of limitation is not to be calculated in the following:-

(a) Prosecuting in another court in good faith.

(b) Period of stay of prosecution , if any.

(c) Offender's absence from India.

(d) Period of sanction wherever necessary.

(e) Period when the accused is absconding or concealing himself.

(iii) If there is a valid reason for the delay and if the court feels that in the interest of justice, the case is to be taken up, the time may be extended by the Court.

CHAPTER 14

ADDITIONAL TOPICS

Ch. 14.1. Exceptions to the rule that any person may set criminal law in motion:

One of the general principles of Criminal Law is, that any person, who **has the knowledge of the commission of an offence, may set the criminal law in motion,** by making a complaint, even though, he is not personally interested in the case.

The objective is to bring the offenders to book.

This rule, though general, is subject to certain exceptions as provided for in Sns.195 to 199 of Cr.P.C.

In these circumstances, the criminal courts will not take cognisance of an offence, unless the complaint is initiated by the public servant, or the court or the affected person or with the previous sanction of the Central or State Government as the case may be.

The reason is to prevent private individuals from wreaking vengeance by misusing the machinery of the administration of justice.

For examples in cases where the allegations are inspired by vengence, against a judge or a magistrate, for acts done in the discharge of his official functions, the previous sanction of the Govt. is essential.

The prestige and the dignity of the courts should not be left to the whimsies or passions of private individuals.

Scope of Exceptions:

The exceptions apply to particular offences specified in Sns.195 to 199 Cr.P.C. and do not apply to others.

For example, no sanction is required when a public servant is to be prosecuted for bribery under Sn.161 (I.P.C.)

Exceptions:

(i) In respect of offences relating to contempt of legal authority (Sns. 172 to 188 l.P.C. example, obstructing a public servant Sn.186, or abatement or conspiracy thereof) no court should take cognisance of the case, **unless the complaint is made in writing by the concerned public servant or his superior**.

(ii) In respect of offences against public justice punishable under l.P.C. (giving false evidence, fabricating false evidence etc.) (193-196, 199, 200, 205-211 & 228, l.P.C.) the complaint must be from the concerned court.

(iii) In respect of offences concerning documents given in evidence (Sn. 463, Forgery etc.) the complaint must be from the concerned court. (Court includes civil, criminal, revenue court or tribunal).

(iv) In respect of offences, against the State, Sns 153 A & B, 295 A or 505 (spreading rumours to disturb public peace), or for criminal conspiracy, (120 B) the sanction of the State Government is necessary.

(v) In respect of offences committed by (a) Judge, (b) Magistrate (c) Public servant, acting in the official capacity, the previous sanction of the Central or State Government as the case may be, is necessary for instituting a case against them.

(vi) In respect of offences committed by Armed Forces, purporting to be done in the discharge of official duties, the sanction of the Central Government is necessary.

(vii) In respect of offences, relating to marriage (Bigamy Sn.494 Adultery Sn.497 etc.), the complaint must be by the aggrieved person.

Where the wife is the aggrieved party as in Bigamy, she may make a complaint, or on her behalf, her father, mother, brother, sister, son, daughter or her father's son mother's sister or brother may file a complaint.

In adultery, the husband may file a complaint or with the permission of the court, any person who had the care of the woman may file a complaint.

(viii) For offences of defamation:

The aggrieved person may file a complaint. But if he is an idiot, lunatic, pardanishan lady or under 18 years of age, any person, with the permission of the court may file a case on his behalf.

(ix) Defamation of public servant (Sn.199) Where a person commits an offence of defamation against the President, Vice-President, Governor, Administrator, a Minister or any public servant the sessions court may take cognisance of a complaint made by the public prosecutor. But, the previous sanction of the Central or State Government is necessary before filing a complaint. The period of limitation is 6 months to file the complaint. (The defamed person may himself complain to the magistrate).,

Ch.14.2 Remand (S.167):

The Cr.P.C. deals with Remand to police custody in Sn.167 and remand to jail custody in Sn.309.

Remand to Police Custody:

When a person is arrested and detained by a police officer and if the officer finds that .investigation cannot be completed within 24 hours, and that the information is well founded then he should produce the accused before the magistrate, within 24 hours of the arrest. He must, also submit a copy of his diary to the Magistrate.

The Magistrate whether he has jurisdiction or not may remand the accused to the police custody for a period not exceeding 15 days in the whole, recording his reasons.

The Magistrate who has jurisdiction may authorise the detention of the accused beyond 15 days, in jail custody for a maximum period of 60 days from the date of arrest.

After this period, the accused is entitled to be released on bail. But, if the accused refuses the bail, or is unable to furnish bail, the detention will continue under a fresh remand order.

Jail Custody:

When the investigation is completed and the police report is submitted, the magistrate takes cognisance of the case against the accused.

If the accused is in custody, then the magistrate may, by a warrant addressed to the jail superintendent, remand the accused to jail custody recording his reasons, for a period not exceeding 15 days at a time.

The Supreme Court has laid down that 'once the inquiry or trial begins, it is not proper to let the accused remain under police influence. He is an under trial prisoner.

Ch.14.3 Security for keeping the peace and for good behavior:

Chapter VIII of the Cr.P.C. deals with the preventive provisions to prevent breach of the peace or tranquility.

The objective is to prevent any potential danger to the public.

Security for keeping the peace, and security for good behavior are inter alia two such provisions which are made in public interest to preserve public order.

Security for keeping the peace:

There are two provisions:

(i) On conviction: (Sn. 106) If the sessions court, or the first

class magistrate is of the opinion, that the convicted accused should execute a bond for keeping the peace, it may, at any time of passing sentence, order him to execute such a bond. This may be with or without sureties.

The maximum duration is 3 years. But, if the conviction is set aside, the bond becomes void.

The offences for which the accused is convicted may be:

i) Those affecting the public tranquility

ii) Assault

iii) Criminal intimidation

iv) breach of the peace or

v) abatement of these offences.

ii) **In other cases (Sn.107):**

When the executive magistrate is informed that any person is likely to commit a breach of the peace or public tranquility or any wrongful act, to that end such magistrate may issue a show cause notice to such a person, as to why he should not be ordered to execute a bond. The maximum period of the bond is one year.

The order must be in writing setting forth the substance of the information, amount of bond, the period and the nature of sureties required.

The magistrate inquires into the truth of the information as in summons cases. This must be completed within 6 months.

If he finds proof he orders to execute a bond, he asks the order to do so. If he finds no evidence, he may discharge the accused.

If after executing the bond, for keeping good behavior, the person commits an offence or attempts or abets, then there is a breach of the bond.

The magistrate, on holding an enquiry may refuse to accept the sureties and demand for new sureties or commit the person to prison.

ii) Security for good behavior (Sn. **108, 109 & 110)**

The security for the good behavior of a person can be taken from the following classes of persons:

a) Sn.108:

Persons disseminating seditious matter, (Sn.l24A, I.P.C.), promoting enmity between classes (SN. 153A, IPC), out ranging religious feelings (Sn.295,1.P.C) etc.,

b) Sn. 109:

Suspected person who is trying to conceal himself.

c) Sn.110:

Habitual robber, house-breaker, thief, forger, receiver of stolen property, habitual offender under any law relating to offences in adulteration of Drugs, profiteering, hoarding etc.,

or a person who is desperate and dangerous to the community.

The magistrate may issue an order to show cause why he should not be ordered to execute a bond with or without sureties.

The period of the bond is one year under Sns.108 & 109 and it is 3 years under Sn.110.

The order must be in writing, and must set forth the substance of the information, the amount of bond, the nature of the sureties etc.

The magistrate conducts an inquiry, and, if he finds proof, he may order the accused person to execute the bond. If there is no proof he discharges the accused.

Bond for keeping the peace or for good behavior:

Whereas I,..... .....residing at.....have been called upon to enter into a bond to keep the peace or be of good behavior to Govt. and all the citizens of Indian for a term of ..... year/s.

I hereby bind myself to be of good behavior/to keep the peace and on making default, I bind myself to forfeit Rs.....to the Govt.

Date:

Place: Signature

Ch.14.4 Death Sentence:

i) Confirmation:

According to Cr.P.C. when the session judge passes a sentence of death, he should submit the proceedings to the High Court. The sessions judge should not execute his sentence unless it is confirmed by the High Court. He should commit the convicted person to jail custody under a warrant.

ii) Inquiry:

On such a reference, the High Court may, in its discretion, make

an inquiry on any point bearing on the guilt or innocence of the convicted person. It may direct the Sessions Court to conduct the enquiry if it so decides. The presence of the accused is not necessary in such an enquiry, if the High Court so decides.

(iii) High Court's powers:

The High Court, may confirm the sentence passed by the Sessions Court, or any other sentence or may annul the conviction; and pass any other sentence; it may acquit the accused.

When, it confirms, the officer of the High Court shall send a copy of the order to the Sessions Court, duly attested and sealed.

This procedure of confirmation (Sn.306) will not apply, when the convicted person himself prefers an appeal or revision to the High Court from the Sessions Court.

(iv) **Execution:**

When the Sessions Court receives the order of confirmation, or order of sentence of death, it should execute the same by issuing a warrant. If the convicted person prefers an appeal to the Supreme Court, the execution shall be stayed until the case is disposed of by that Court.

Ch.14.5 Reference (Sn.395):

When any court, (subordinated to the High Court) is satisfied that a case before it involves a question of the validity of any Act, Ordinance or Regulation, and that there is necessity it may refer the same to the High Court.

The lower Court must be of the opinion that the said Act, Ordinance etc. is invalid, but not so declared by the High Court or by the Supreme Court, The court must set out its opinion and the reasons thereof in its reference to the court. During, this period, the

accused may be remanded to jail custody or bailed out as the case may be.

The High Court shall pass such order as it thinks fit, and shall send a copy of the order to the referring court.

Ch.14.6. Revision (Sn.397 Cr.P.C.)

This is the exclusive power of the High Court to call for and to examine the record of any proceeding before any court lower to it. This is to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order; the court may direct the Lower Court to suspend the execution of any sentence.

This power does not apply to interlocutory orders passed in any appeal, enquiry, trial or other proceeding.

On examining the records, the court may direct any Magistrate to make or direct a "further enquiry"; into any complaint, dismissed already.

Restrictions: i) No order should be made without giving an opportunity to the accused of being heard.

ii) A finding of acquittal cannot be converted into one of conviction.

iii) Where appeal is available, revision jurisdiction cannot be exercised.

vi) In suitable cases, the High Court may treat revision petition as an appeal.

Ch.14.7. Accused as a defence witness (Sn.315):

According to Cr.P.C. (Sn.315), the accused is a competent .witness for his defence and like any other witness; he is entitled to give evidence on oath. He may give evidence to disprove the charges against himself or any co-accused.

Limitations:

1) The accused cannot be called as a witness, unless he requests in writing.

2) His failure to give evidence should not be used to draw any adverse inference against him.

3) This section applies to cases, specified in Cr.P.C. in Sn.315.

4) No influence, promise or threat should be used against the accused, to induce him to disclose or withhold any matter.

THE END

REFERENCE SECTION

SELECTED SECTIONS

Criminal Procedure Code 1973

Sn 39. Public to give information of certain offences.

(1) Every person, aware of the Commission of, or of the intention of any other person to commit, any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely :-

(i) sections 121 to 126, both inclusive, and section 130 (that is to say offences against the State specified in Chapter VI of the said Code);

(ii) sections 143, 144, 145, 147 and 148 (that is to say, offences against the public tranquillity specified in Chapter VIII of the said Code);

(iii) sections 161 to 165A, both inclusive (that is to say, offences relating to illegal gratification);

(iv). sections 272 to 278, both inclusive (that is to say, offences relating to adulteration of food and drugs, etc.);

(v) sections 302, 303 and 304 (that is to say, offences affecting life);

[1][(va) section 364A (that is to say, offence relating to kidnapping for ransom, etc);]

(vi) section 382 (that is to say., offence of theft after preparation made for causing, death, hurt or restraint in order to the committing of the theft);

(Vii) sections 392 to 399, both inclusive, and section 402 (that is to say, offences of robbery and dacoity);

(viii) section 409 (that is to say, offence relating to criminal breach of trust by public servant, etc.);

(ix) sections 431 to 439, both inclusive (that is to say, offence of mischief against property);

(x) sections 449 and 450 (that is to say, offence of house-trespass);

(xi) sections 456 to 460, both inclusive (that is to say, offences of lurking house trespass); and

(xii) sections 489A to 489E, both inclusive (that is to say, offences relating to currency notes and bank notes).

Shall, in the abstence of any reasonable excuse, the burden of proving which excuse shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer of such Commission or intention; 2) For the purposes of this section, the term "offence" includes any act committed at any place out of India, which would constitute an offence if committed in India.

41. When police may arrest without warrant.

(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person :-

(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or

(b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; or

(c)who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonable suspected of being a deserter from any of the Armed Forces of the Union; or(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under subsection (5) of section 356; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the

requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears there from that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of person specified in section 109 or section 110.

42. Arrest on refusal to give name and residence.

(1) When any person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required: Provided that, if such person is not resident in India, the bond shall be secured by a surety or sureties resident in India

(3) Should the true name and residence of such person not be ascertained within twenty-four hours from the time of arrest or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

43. Arrest by private person and procedure on such arrest.

(1) Any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over or cause to be made over any person so arrested to a police officer, or, in the absence of a police officer, take such person or cause him to be taken in custody to the nearest police station.

(2) If there is reason to believe that such person comes under the provisions of section 41, a police officer shall re-arrest him.

(3) If there is reason to believe that he has committed a non-cognizable offence, and he refuses on the demand of a police officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 42; but if there is no sufficient reason to believe that he has committed any offence, he shall be at once released.

44. Arrests by Magistrate.

(1) When any offence is committed in the presence of a Magistrate, whether Executive or Judicial, within his local jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.

(2) Any Magistrate, whether Executive or Judicial, may at any time arrest or direct the arrest, in his presence, within his local jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

46. Arrest how made.(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

1[(4) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made.]

47. Search of place entered by person sought to be arrested.

(1) If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, any person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such police officer, allow him such free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress to such place cannot be obtained under sub-section (1), it shall be lawful in any case for a person acting under a warrant and in any case in which a warrant may issue, but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police officer to enter such place and search therein, and in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other

person, if after notification of his authority and purposes, and demand of admittance duly made, he cannot otherwise obtain admittance

Provided that, if any such place is an apartment in the actual occupancy of a female (not being the person to be arrested) who, according to custom, does not appear in public, such person or police officer shall, before entering such apartment, give notice to such female that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and enter it.

(3) Any police officer or other person authorised to make an arrest may break open any outer or inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.

49. No unnecessary restraint.

The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

50. Person arrested to be informed of grounds of arrest and of right to bail.

(1) Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.

(2) Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

50A. Obligation of person making arrest to inform about the arrest, etc. to a nominated person.

(1) Every police officer or other person making any under this Code shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons as may as may be disclosed or nominated by the arrested person for the purpose of giving such information.

(2) The police officer shall inform the arrested person of his rights under sub-section (1) as soon as he is brought to the police station.

(3) An entry of the fact as to who has been informed of the arrest

of such person shall be made in a book to be kept in the police station insuch form as may be prescribed in this behalf by the State Government.

(4) It shall be the duty of the magistrate before whom such arrested person is produced to satisfy himself that the requirements of sub-section (2) and sub-section (3) have been complied within respect of such arrested person.

51. Search of arrested persons.

(1) Whenever a person is arrested by a police officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail, and whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to, furnish bail.

The officer making the arrests or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested, may search such person, and place in safe Custody all articles, other than necessary wearing-apparel, found upon him and where any article is seized from the arrested person, a receipt showing the articles taken in possession by the police officer shall be given to such person.

(2). Whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency

52. Power to seize offensive weapons.

The officer or other person making any arrest under this Code may take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested.

53. Examination of accused by medical practitioner at the request of police officer.

1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting, at the request of a police officer not below the rank of sub-inspector, and for- any person acting in good faith in his aid and -under his direction, to make such all examination of the person arrested as is reasonably necessary in

order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

1[Explanation (a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

53A. Examination of person accused of rape by medical practitioner.

53 A. Examination of person accused of rape by medical practitioner. – (1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of this person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:-(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and".

(v) other material particulars in reasonable detail. (3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.]

57. Person arrested not to be detained more than twenty-four hours

No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court

125. Order for maintenance of wives, children and parents,

(1) If any person having sufficient means neglects or refuses to maintain—
(a) his wife, unable to maintain herself, or
(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority,
where such child is, by reason of any physical or mental abnormality or injury unable to maintain
itself, or
(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may ,upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:
Provided that the Magistrate may order the father of a minor female child referred to in
clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means
Explanation—For the purposes of this Chapter—
(a) "**minor**" means a person who, under the provisions of the Indian Majority Act, 1875
(9 of 1875) is deemed not to have attained his majority;
(b) "**wife**" includes a woman who has been divorced by, or has obtained a divorce from,
her husband and has not remarried
(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance
(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach

of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any port of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:
Provided that no warrant shall be issued for the recovery of any amount due under this
section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:
Provided further that if such person offers to maintain his wife on condition of her living
with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing
Explanation—If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him
(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her, husband, or if they are living separately by mutual consent
(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order

126. Procedure

(1) Proceedings under section 125 may be taken against any person in any district—
(a) where he is, or
(b) where he or his wife resides, or
(c) where he last resided with his wife, or as the case may be, with the mother of the
illegitimate child
(2) All evidence to such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases:
Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex parte and any order so made may be set aside for good cause shown on an application made within three months from the

date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper

(3) The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just

127. Alteration in allowance

(1) On proof of a change in the circumstances of any person, receiving, under section 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father of mother, as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit:

Provided that if he increases the allowance, the monthly rate of five hundred rupees in the whole shall not be exceeded

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that—

(a) the woman has, after the date of such divorce, remarried, cancel such order as from
the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether
before or after the date of the said order, the whole of the sum which, under any
customary or personal law applicable to the parties, was payable on such divorce, cancel such order—

(i) in the case where such sum was paid before such order, from the date on which
such order was made,

(ii) in any other case, from the date of expiry of the period, if any, for which
maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily
surrendered her rights to maintenance after her divorce, cancel the order from the date
thereof

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a monthly allowance has been ordered to be paid under section 125, the civil Court shall take into account the sum which has been paid to, or recovered by, such person as monthly allowance in pursuance of the said order

128. Enforcement of order of maintenance
A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the nonpayment of the allowance due.

Public Nuisance

133. Conditional order for removal of nuisance -
(1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive
Magistrate specially empowered in this behalf by the State Government on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers—
(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or
(b) that the conduct of any trade or occupation or the keeping of any goods or
merchandise; is injurious to the health or physical comfort of the community, and that in
consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or
(c) that the construction of any building, or the disposal of any substance, as is likely to
occasion conflagration or explosion, should be prevented or stopped; or
(d) that any building, tent or structure, or any tree is in such a condition that it is likely to
fall and thereby cause injury to persons living or carrying on business in the
neighbourhood or passing by, and that in consequence the removal, repair or support of
such building, tent or structure, or the removal or support of such tree, is necessary; or
(e) that any tank, well or excavation adjacent to any such way or public place should be
fenced in such manner as to prevent danger arising to the public;

or
(f) that any dangerous animal should be destroyed, confined or otherwise disposed of,
such Magistrate may make a conditional order requiring the person causing such
obstruction or nuisance, or carrying on such trade or occupation, or keeping any such
goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order—
(i) to remove such obstruction or nuisance; or
(ii) to desist from carrying on, or to remove or regulate in such manner as may be
directed, such trade or occupation, or to remove such goods or merchandise, or to
regulate the keeping thereof in such manner as may be directed; or
(iii) to prevent or stop the construction of such building, or to alter the disposal of
such substance; or
(iv) to remove, repair or support such building, tent or structure, or to remove or
support such trees; or
(v) to fence such tank, well or excavation; or
(vi) to destroy, confine or dispose of such dangerous animal in the manner
provided in the said order; or, if he objects so to do, to appear before himself or
some other Executive Magistrate subordinate to him at a time and place to be
fixed by the order, and show cause, in the manner hereinafter provided, why the
order should not be made absolute
(2) No order duly made by a Magistrate under this section shall be called in question in any civil Court
Explanation—A "**public place**" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes
134. Service or notification of order -
(1) The order shall, if practicable, be served on the person against whom it is made, in the manner herein provided for service of a summons
(2) If such order cannot be so served, it shall be notified by proclamation, published in such manner as the State Government may, by rules, direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person
135. Person to whom order is addressed to obey or show cause

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The person against whom such order is made shall—
(a) perform, within the time and in the manner specified in the order, the act directed
thereby; or
(b) appear in accordance with such order and show cause against the same

URGENT CASES

144. Power to issue order in urgent cases of nuisance or apprehended danger
(1) In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life,
health or safety, or a disturbance of the public tranquillity, or a riot, or an affray
(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed ex parte
(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area
(**4) No order under this section shall remain in force for more than two months** from the making thereof: Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification
(5) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section, by himself or any Magistrate subordinate to him or by his predecessor-in-office
(6) The State Government may, either on its own motion or on the

application of any person aggrieved, rescind or alter any order made by it under the proviso to subsection

(7) Where an application under sub-section (5), or sub-section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader and showing cause against the order, and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reasons for so doing.

145. Procedure where dispute concerning land or water is likely to cause breach of peace

(1) Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of
Dispute (2) For the purposes of this section, the expression "land or water" includes
buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property
(3) A copy of the order shall be served in the manner provided by the Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute
(4) The Magistrate shall then, without reference to the merits or the claims of any of the parties, to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any as he thanks necessary, and, if possible, decide whether and which of the parties was, at the date of the order made by him under sub-section (1), in possession of the subject of dispute:
Provided that if it appears to the Magistrate that any party has been forcibly and
wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under sub-section (1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub-section (1)
(5) Nothing in this section shall preclude any party so required to

attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.
(6) (a) If the Magistrate decides that one of the parties was, or should under the proviso to subsection
(4) be treated as being, in such possession of the said subject, he shall issue an order
declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed
(b) The order made under this sub-section shall be served and published in the manner laid down in sub-section (3)
(7) When any party to any such proceeding dies, the Magistrate may cause the legal
representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purposes of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto
(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale proceeds thereof, as he thinks fit
(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing
(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107

Investigation

162. Statements to police not to be signed: Use of statements in evidence
(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in

respect of any offence under investigation at the time when such statement was made:
Provided that when any witness is called for the prosecution in such inquiry or trial
whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872
(1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination
(2) Nothing in this section shall be deemed to apply to any statement falling within the
provisions of clause (1) of section 32 of the Indian Evidence Act,

164. Recording of confessions and statements
(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:
Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force
(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily
(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody
(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:—

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made It was taken in my presence and

hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him
(Signed) AB
Magistrate"

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate,best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded
(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried

167. Procedure when investigation cannot be completed in twenty-four hours
(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the
investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate
(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:
Provided that—
(a) the Magistrate may authorise the detention of the accused person, otherwise than in
the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the
detention of the accused person in custody under this paragraph for a total period
exceeding—
(i) **ninety days**, where the investigation relates to an offence punishable with
death, imprisonment for life or imprisonment for a term of not less

than ten years;
(ii) **sixty days**, where the investigation relates to any other offence, and, on the
expiry of the said period of ninety days, or sixty days, as the case may be, the
accused person shall be released on bail if he is prepared to and does furnish bail,
and every person released on bail under this sub-section shall be deemed to be to
released under the provisions of Chapter XXXIII for the purposes of that Chapter;
(b) no Magistrate shall authorise detention in any custody under this section unless the
accused is produced before him;
(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police
Explanation I—For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail
Explanation II—If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention
(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and on the expiry of the period of detention so authorised, the accused person shall be
released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2):
Provided that before the expiry of the period aforesaid, the Executive Magistrate shall

transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be (3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing
(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate
(5) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary (6) Where any order stopping further investigation into an offence has been made under subsection
(5), the Sessions Judge may, if he is satisfied, on an application made to him or
otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.

Suicide

174. Police to inquire and report on suicide, etc

(1) When the officer in charge of a police station or some other police officer specially
empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any); such marks appear to have been inflicted
(2) The report shall be signed by such police officer and other persons, or by so many of them as concur therein, and shall be

forthwith forwarded to the District Magistrate or the Sub-divisional Magistrate
(3) When—
(i) the case involves suicide by a woman within seven years of her marriage; or
(ii) the case relates to the death of a woman within seven years of her marriage in any
circumstances raising a reasonable suspicion that some other person committed an
offence in relation to such woman; or
(iii) the case relates to the death of a woman within seven years of her marriage and any relative of the woman has made a request in this behalf; or
(iv) there is any doubt regarding the cause of death; or
(v) the police officer for any other reason considers it expedient so to do, he shall, subject to such rules as the State Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualifiedmedical man appointed in this behalf by the State Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless
(4) The following Magistrates are empowered to hold inquests, namely, any District Magistrate
or Sub-divisional Magistrate and any other Executive Magistrate specially empowered in this behalf by the State Government or the District Magistrate

175. Power to summon persons

(1) A police officer proceeding under section 174 may, by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case and every person so summoned shall be bound to attend and to answer truly all questions other than questions the answers to which have a tendency to expose him to a criminal charge or to a forfeiture
(2) If the facts do not disclose a cognizable offence to which section 170 applies, such persons shall not be required by the police officer to attend a Magistrate's

176. Inquiry by Magistrate into cause of death – [Custody death](1) When any person dies while in the custody of the police or when the case is of the nature referred to in clause (i) or clause (ii) of sub-section (3) of section 174, the nearest Magistrate empowered to hold inquests shall, and in any other case mentioned in sub-section (1) of section 174, any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if he does so, he shall have all the powers in conducting it which he

would have in holding an inquiry into an offence
(2) The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any manner hereinafter prescribed according to the circumstances of the case
(3) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined
(4) Where an inquiry is to be held under this section, the Magistrate shall, wherever practicable, inform the relatives of the deceased whose names and addresses are known, and shall allow them to remain present at the inquiry
Explanation—In this section, the expression "relative" means parents, children brothers, sisters and spouse

197. Prosecution of Judges and public servants –

(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction—
(a) in the case of a person who is employed or, as the case may be, was at the time of
commission of the alleged offence employed, in connection with the affairs of the Union,
of the Central Government;
(b) in the case of a person who is employed or, as the case may be, was at the time of
commission of the alleged offence employed, in connection with the affairs of a State, of
the State Government:
Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted
(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union whole acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government
(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will

apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted
prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held

Complaints

200. Examination of complainant -
A Magistrate taking cognizance of an offence on complaint shall examine upon oath the
complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:
Provided that, when the complaint is made in writing, the Magistrate need not examine
the complainant and the witnesses—
(a) if a public servant acting or purporting to act in the discharge of his official duties or a
Court has made the complaint; or
(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under
section 192:
Provided further that if the Magistrate makes over the case to another Magistrate under
section 192 after examining the complainant and the witnesses, the latter
Magistrate need not re-examine them

203. Dismissal of complaint -
If, after considering the statements on oath (if any) of the complainant and of the wit nesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing

THE CHARGE

211. Contents of charge –
(1) Every charge under this Code shall state the offence with which the accused is charged
(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only
(3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter
with which he is charged

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge
(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case
(6) The charge shall be written in the language of the Court
(7) If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact date and place of the previous, conviction shall be stated in the charge; and if such statement has been omitted, the Court may add it at any time before sentence is passed

Illustrations

(a) A is charged with the murder of B This is equivalent to a statement that A's act fell within the definition of murder given in sections 299 and 300 of the Indian Penal Code (45 of 1860); that it did not fall within any of the general exceptions of the said Code; and that it did not fall within any of the five exceptions to section 300, or that, if it did fall within Exception 1, one or other of the three provisos to that exception applied to it
(b) A is charged under section 326 of the Indian Penal Code (45 of 1860) with voluntarily causing grievous hurt to B by means of an instrument for shooting This is equivalent to a statement that the case was not provided for by section 335 of the said Code, and that the general exceptions did not apply to it
(c) A is accused of murder, cheating, theft, extortion, adultery or criminal intimidation, or using a false property-mark The charge may state that A committed murder, or cheating, or theft, or extortion, or adultery, or criminal intimidation, or that he used a false property-mark, without reference to the definition, of those crimes contained in the Indian Penal Code; but the sections under which the offence is punishable must, in each instance, be referred to in the charge

212. Particulars as to time, place and person -

(1) The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged (2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money or other moveable property, it shall be sufficient to specify the gross sum or, as the case may be, described the movable property in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been

committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 219:
Provided that the time included between the first and last of such dates shall not exceed
one year

213. When manner of committing offence must be stated -
When the nature of the case is such that the particulars mentioned in sections 211 and 212 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner is which the alleged offence was committed as will be sufficient for that purpose

Illustrations

(a) A is accused of the theft of a certain article at a certain time and place The charge need not set out the manner in which the theft was effected
(b) A is accused of cheating B at a given time and place The charge must be set out the manner in which A cheated B
(c) A is accused of giving false evidence at a given time and place The charge must set out that portion of the evidence given by A which is alleged to be false
(d) A is accused of obstructing B, a public servant, in the discharge of his public functions at a given time and place The charge must set out the manner in which A obstructed B in the discharge of his functions
(e) A is accused of the murder of B at a given time and place The charge need not state the manner in which A murdered B

SUMMARY TRIALS

260. Power to try summarily -
(1) Notwithstanding anything contained in this Code—
(a) any Chief Judicial Magistrate;
(b) any Metropolitan Magistrate;
(c) any Magistrate of the first class specially empowered in this behalf by the High Court, may, if he thinks fit, try in a summary way all or any of the following offences:—
(i) offences not punishable with death, imprisonment for life or imprisonment for
a term exceeding two years;
(ii) theft, under section 379, section 380 or section 381 of the Indian Penal Code
(45 of 1860), where the value of the property stolen does not exceed two hundred
rupees;
(iii) receiving or retaining stolen property, under section 411 of the Indian Penal

Code (45 of 1860), where the value of the property does not exceed two hundred
rupees;
(iv) assisting in the concealment or disposal of stolen property, under section 414
of the Indian Penal Code (45 of 1860) where the value of such property does not
exceed two hundred rupees;
(v) offences under sections 454 and 456 of the Indian Penal Code (45 of 1860);
(vi) insult with intent to provoke a breach of the peace, under section 504 and
criminal intimidation, under section 506 of the Indian Penal Code (45 of 1860);
(vii) abetment of any of the foregoing offences;
(viii) an attempt to commit any of the foregoing offences, when such attempt is an
offence;
(ix) any offence constituted by an act in respect of which a complaint may be
made under section 20 of the Cattle-Trespass Act, 1871(1 of 1871).
(2) When, in the course of a summary trial it appears to the Magistrate that the nature of the case is such that it is undesirable to try it summarily, the Magistrate shall recall any witnesses who may have been examined and proceed to re-hear, the case in the manner provided by this Code.

261. Summary trial by Magistrate of the second class -

The High Court may confer on any Magistrate invested with the powers of a Magistrate of the second class power to try summarily any offence which is punishable only with fine or with imprisonment for a term not exceeding six months with or without fine, and any abetment of or attempt to commit any such offence.

262. Procedure for summary trials -

(1) In trial under this Chapter, the procedure specified in this Code for the trial of summons-case shall be followed except as hereinafter mentioned.
(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

263. Record in summary trials -

In every case tried summarily, the Magistrate shall enter, in such form as the State Government
may direct, the following particulars, namely:—
(a) the serial number of the case;
(b) the date of the commission of the offence;

(c) the date of the report of complaint;
(d) the name of the complainant (if any);
(e) the name, parentage and residence of the accused;
(f) the offence complained of and the offence (if any) proved, and in cases coming under clause
(ii), clause (iii) or clause (iv) of sub-section (1) of section 260, the value of the property in respect of which the offence has been committed;
(g) the plea of the accused and his examination (if any);
(h) the finding;
(i) the sentence or other final order;
(j) the date on which proceedings terminated.

264. Judgment in cases tried summarily -

In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding.

265. Language of record and judgment -

(1) Every such record and judgment shall be written in the language of the Court.

Double Jeopardy

300. Person once convicted or acquitted not to be tried for same offence.

(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under subsection (1) of section 221, or for which he might have been convicted under sub-section (2) thereof.
(2) A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government for any distinct offence for which a separate charge might have been made against him at the former trial under sub-section (1) of section 220.
(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened or were not known to the Court to have happened, at the time when he was convicted.
(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the

Court by which he was first tried was not competent to try the offence with which he is subsequently charged.
(5) A person discharged under section 258 shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first-mentioned Court is subordinate.
(6) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897 (10 of 1897) or of section 188 of this Code.
Explanation—The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section
Illustrations
(a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or upon the same facts, with theft simply, or with criminal breach of trust.
(b) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.
(c) A is charged before the Court of Session and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B.
(d) A is charged by a Magistrate of the first class with, and convicted by him of voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within sub-section (3) of this section.
(e) A is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of B. A may subsequently be charged with, and tried for, robbery on the same facts.

301. Appearance by public prosecutors.
(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.
(2) If any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public
Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

306. Tender of pardon to accomplice. APPROVER

(1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the
trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any, stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.
(2) This section applies to—
(a) any offence triable exclusively by the Court of Session or by the Court of a Special
Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952).
(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.
(3) Every Magistrate who tenders a pardon under sub-section (1) shall record—
(a) his reasons for so doing;
(b) whether the tender was or was not accepted by the person to whom it was made, and shall, on application made by the accused, furnish him with a copy of such record free of cost.
(4) Every person accepting a tender of pardon made under sub-section (1)—
(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;
(b) shall, unless he is already on bail, be detained in custody until the termination of the
trial.(5) Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case.—
(a) commit it for trial—
(i) to the Court of Session if the offence is triable exclusively by that Court or if
the Magistrate taking cognizance is the Chief Judicial Magistrate;
(ii) to a Court of Special Judge appointed under the Criminal Law Amendment
Act 1952 (46 of 1952), if the offence is triable exclusively by that Court;
(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try
the case himself.

Comments

(i) Once an accused is granted pardon under section 306 he ceases to be an accused and becomes
a witness for the prosecution; State (Delhi Admn.) v. Jagjit Singh, 1989 Cr LJ 980: AIR 1989 SC 989.
(ii) Section 306 (4) clearly reveals that the person accepting a tender of pardon should be examined as a witness first in the Court of Magistrate and subsequently in the trial Court; Murlidharan v. State of Tamil Nadu, (1997) 1 Crimes 515 (Mad).

307. Power to direct tender of pardon.

At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person.

308. Trial of person not complying with conditions of pardon.

(1) Where, in regard to a person who has accepted a tender of pardon made undersection 306 or section 307, the Public Prosecutor certifies that in his opinion such person has, either by wilfully
concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter, and also for the offence of giving false evidence:
Provided that such person shall not be tried jointly with any of the other accused:
Provided further that such person shall not be tried for the offence of giving false
evidence except with the sanction of the High Court, and nothing contained in section 195 or section 340 shall apply to that offence.
(2) Any statement made by such person accepting the tender of pardon and recorded by a Magistrate under section 164 or by a Court under sub-section (4) of section 306 may be given in evidence against him at such trial.
(3) At such trial, the accused shall be entitled to plead that he has complied with the condition upon which such tender was made, in which case it shall be for the prosecution to prove that the condition has not been complied with.
(4) At such trial the Court shall—
(a) if it is a Court of Session, before the charge is read out and explained to the accused;
(b) if it is the Court of a Magistrate before the evidence of the witnesses for the
prosecution is taken, ask the accused whether he pleads that he has complied with the
conditions on which the tender of pardon was made.

(5) If the accused does so plead, the Court shall record the plea and proceed with the trial and it shall, before passing judgment in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it finds that he has so complied, it shall notwithstanding anything contained in this Code, pass judgment of acquittal.

320. Compounding of offences.

(1) The offences punishable under the sections of the Indian Penal Code (45 of 1860) specified in the first two columns of the Table next following may be compounded by the persons mentioned in the third column of that Table.

(2) The offences punishable under the sections of the Indian Penal Code (45 of 1860) specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in
the third column of that table:—

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

(4)(a) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf, may, with the permission of the Court compound such offence.

(b) When the person who would otherwise be competent to compound an offence under this section is dead, the legal representative, as defined in the Code of Civil Procedure, 1908 (5 of 1908) of such person may, with the consent of the Court compound such offence. (5) When the accused has been committed for trial or when he has been convicted and an appeal is pending no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

(6) A High Court or Court of Session acting in the exercise of its powers of revision under section 401 may allow any person to compound any offence which such person is competent to compound under this section.

((7) No offence shall be compounded if the accused is, by reason of a previous conviction, liable either to enhanced punishment or to a punishment of a different kind for such offence.

(8) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.

(9) No offence shall be compounded except as provided by this

section

321. Withdrawal from prosecution.

The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried;

and upon such withdrawal,—

(a) If it is made before a charge has been framed, the accused shall be discharged in

respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is

required he shall be acquitted in respect of such offence or offences:

Provided that where such offence—

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi

Special Police Establishment Act, 1946 (25 of 1946), or

(iii) involved the misappropriation or destruction of, or damage to, any property

belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the prosecutor in charge of the case has not been appointed by the Central Government he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the

prosecution and the Court shall, before according consent, direct the Prosecutor to

produce before it the permission granted by the Central Government to withdraw

from the prosecution.

368. Power of High Court to confirm sentence or annul conviction.

In any case submitted under section 366, the High Court—

(a) may confirm the sentence, or pass any other sentence warranted by law, or

(b) may annul the conviction, and convict the accused of any offence of which the Court of Session might have convicted him, or order a new trial on the same or an amended charge, or

(c) may acquit the accused person:

Provided that no order of confirmation shall be made under this

section until the period
allowed for preferring an appeal has expired, or, if an appeal is presented within such period,until such appeal is disposed of.

369. Confirmation or new sentence to be signed by two Judges.
In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall when such Court consists of two or more Judges, be made, passed and signed by at least two of them.

389. Suspension of sentence pending the appeal; release of appellant on bail.
(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.
(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by convicted person to a Court
subordinate thereto.
(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,—
(i) where such person, being on bail, is sentenced to imprisonment for a term not
exceeding three years, or
(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1), and the
sentence of imprisonment shall, so long as he is so released on bail, be deemed to be
suspended.
(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

438. Direction for grant of bail to person apprehending arrest.
(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.
(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it

may thinks fit, including—
(i) a condition that the person shall make himself available for interrogation by a police
officer as and when required;
(ii) a condition that the person shall not, directly or indirectly, make any inducement,
threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;
(iii) a condition that the person shall not leave India without the previous permission of
the Court;
(iv) such other condition as may be imposed under sub-section (3) of section 437, as if
the bail were granted under that section.
(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).

460. Irregularities which do not vitiate proceedings.
If any Magistrate not empowered by law to do any of the following things, namely:—
(a) to issue a search-warrant under section 94;
(b) to order, under section 155, the police to investigate an offence;
(c) to hold an inquest under section 176;
(d) to issue process under section 187, for the apprehension of a person within his local
jurisdiction who has committed an offence outside the limits of such jurisdiction;
(e) to take cognizance of an offence under clause (a) or clause (b) of sub-section (1) of section 190;
(f) to make over a case under sub-section (2) of section 192;
(g) to tender a pardon under section 306;
(h) to recall a case and try it himself under section 410; or
(i) to sell property under section 458 or section 459, erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

461. Irregularities which vitiate proceedings.
If any Magistrate, not being empowered by law in this behalf, does any of the following things,namely:—
(a) attaches and sells property under section 83;
(b) issues a search-warrant for a document, parcel or other thing in

the custody of a postal or telegraph authority;
(c) demands security to keep the peace;
(d) demands security for good behaviour;
(e) discharges a person lawfully bound to be of good behaviour;
(f) cancels a bond to keep the peace;
(g) makes an order for maintenance;
(h) makes an order under section 133 as to a local nuisance;
(i) prohibits, under section 143, the repetition or continuance of a public nuisance;
(j) makes an order under Part C or Part D of Chapter X;
(k) takes cognizance of an offence under clause (c) of sub-section (1) of section 190;
(l) tries an offender;
(m) tries an offender summarily;
(n) passes a sentence, under section 325, on proceedings recorded by another Magistrate;
(o) decides an appeal;
(p) calls, under section 397, for proceedings; or
(q) revises an order passed under section 446, his proceedings shall be void.

LIMITATION

468. Bar to taking cognizance after lapse of the period of limitation.

(1) Except as otherwise provided elsewhere in this Code, no Court, shall take cognizance of an
offence of the category specified in sub-section (2), after the expiry of the period of limitation.
(2) The period of limitation shall be—
(a) **six months,** if the offence is punishable with fine only;
(b) **one year**, if the offence is punishable with imprisonment for a term not exceeding one year;
(c) **three years,** if the offence is punishable with imprisonment for a term exceeding one
year but not exceeding three years.
(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.

THE END

ADMINISTRATIVE LAW I

CASES AND MATERIALS.
LAW DEGREE. A.R.A GROUP.

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SUMMARY

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CHAPTER I. THE PUBLIC ADMINISTRATION

I.- CONCEPT.

The ‘‘division of powers’’ is a political doctrine originated in the writings of Montesquieu. It urges a governmental system structured in three separate branches: the Executive, the Legislative, and the Judiciary. The public administration is part of the executive branch, including the government (Board of Ministers), which has a dual position, both administrative and political.

Although the underlying philosophy of the theory implies that such powers must be independent, in practice they are not whatsoever. Mutual interactions between the three branches are frequent. For example, a relevant part of the Legislative´s action depends on the previous draft legislation from the Executive branch. The Judiciary, though holding complete independent status when it comes to judicial review, lacks complete autonomy with regards to organisational aspects: the appointment proceedings in its Governing Body are strongly influenced by the political parties. Last but not least, decision-making and regulatory making processes in the Executive branch are monitored by the courts. In addition, it has a direct link to the legality principle, and therefore, a relevant subordination to the Legislative.

Dealing with the concept of Public Administration is not an easy task. During Administrative law history, many authors have tried to reach a common point to identify the administrative phenomena; no one has been able to find a definitive result. Three theories have arisen with limited success. Let us test and discuss them.

The **objective doctrine** tries to find either a specific function or formal criteria to explain what Administration is and how it should be. Some authors consider that the ‘‘public service’’ concept is the one that fits best, as every public body must carry out public service activities. However, the theory fails as long as the public service concept significantly changes in time and place. In addition, Administrative bodies carry out many actions that cannot be directly linked to public services (i.e. penalties, tax benefits, etc.).

Other authors prefer to identify Administration with those bodies whose action is always vested with privileges. In particular, with the so called ‘‘*autotutela*’’ privilege. However, the fact is that Administrative bodies do not always act under such privileges. Sometimes they get involved in relations holding the same position as citizens do. Finally, some scholars find the characterising role in the public interest concept (*función típica* o giro or *tráfico administrativo*), but the idea fails for the same reasons as the public service theory does.

The **subjective doctrine** focuses on the legal person that the Law appoints as an Administration body. Therefore, entities holding public legal personality, according to law, will be regarded Administration, and their activity shall be reported under Administrative law and under the supervision of Administrative Courts.

However, the theory has certain inadequacies. Constitutional bodies play functions which are typically administrative in nature, and regardless not being Administrative

entities, actions related to strict liability, labour relations, as well as contracting out, are governed by Administrative law. In addition, some private entities carry out activities which are typically administrative, such as concession holders. Their actions can be challenged to the monitoring authority, becoming administrative in nature. On the other hand, some public bodies play functions typically private or use civil or labour law (i.e. hiring people under labour law schemes). Besides, the Government itself, which is part of the Administration, has a dual position, both political and administrative.

Such difficulties have led some authors to create **eclectic theories**. However, such attempts face the same challenges in order to reach a doubtless point.

II.- ORIGIN AND HISTORICAL EVOLUTION.

Contemporary continental public administration has its roots in the French Revolution. A modern and more complex administration replaced ancient kingdom structures.

The ‘‘division of powers’’ doctrine was created to safeguard the independence of the executive branch from the remaining powers of the old political system. As a result, the public administration was regarded out of judicial review. No appeal was allowed to challenge its decisions. In exchange, a new governmental yet independent organisation, called ‘*Conseil d´Etat*’, was appointed to monitor every public administration decision and action. This non-judiciary reviewing model is called withheld jurisdiction.

In Spain, a similar model of ‘‘withheld jurisdiction’’ was adopted in the nineteenth century. Public administration supervision always had a limited extent. In 1834 the Supreme Court was created, but without authority to supervise administrative behaviour. Administrative jurisdiction was first entrusted to several ancient non-judiciary bodies, such as the *Consejo de Castilla,* the *Consejo Supremo de Hacienda*, the *Consejo Supremo de Indias*, and the *Consejo Real de las Ordenes*. In 1845, the *Consejo de Estado (Consejo Real)* held all those powers and the ‘Administrative section’ was created.

This situation significantly changed with the Santamaria de Paredes Act (1888), which shifted the ‘‘withheld jurisdiction’’ model into a ‘‘delegated jurisdiction’’ model. Under this scheme, courts held jurisdiction just for certain areas of governmental action. Administrative conflicts were entrusted to lower Provincial Courts completely made up of judges; appeals, however, remained under supervision of the *Consejo de Estado*, whose members were not judges, but officials appointed by the Government.

Finally, the Maura act (April, 5, 1904) withdrew all the supervision powers from the *Consejo de Estado,* giving the Supreme Court full jurisdiction over administrative issues. The third section was laid down so to address administrative law related issues. Notwithstanding, judicial control was always limited to certain matters and higher authorities were out of its scope. In 1956 the first *Ley de la Jurisdicción Contencioso Administrativa (LJCA)* was passed and almost every administrative issue and authority was declared under judicial control. Nevertheless, given the political system, the dictatorship of General Franco, many issues remained out of the judicial scope.

The 1978 the Spanish Constitution preempts judicial review from any limit or derogation; therefore, it is the first time in our history where any administrative conflict can be challenged before the Administrative Courts.

III.- PERSONIFICATION OF THE PUBLIC ADMINISTRATION IN THE CURRENT LEGAL SYSTEM. KEY FEATURES.

Let us point out the key features of the public administration:

a.- The public administration must act in accordance with the legality principle (‘*principio de legalidad*)’ (+ -).

b.- The public administration has political grounds. It behaves according to political directions, not only strictly implementing the law.

c.- Every public body enjoys a privilege position. For instance, their reports are presumed to be true, their actions are benefited from the privilege of ‘*autotutela’*).

d.- The public administration does not have any private interests.

e.- The decision making process is carried out according to organisational schemes (Hierarchy, responsibilities, administrative proceedings, etc).

Administrative structures are legal entities according to law. Within every administrative structure there is a bunch of administrative bodies. The administrative structure holds legal personality (not the administrative bodies), which means that it holds rights and duties; it has the ability to have rights and obligations -*capacidad jurídica*-, and the ability to legally act -*capacidad de obrar*-).

Most administrative structures have ‘‘public’’ legal personality, but there are others which personality is deemed ‘‘private’’. This feature is relevant as it represents the use of different types of law in every legal relation (administrative law or private law), and consequently the intervention of different categories of courts in the case of conflicts.

To determine the extent of each public body capacity to legally act, the law must specify the exact powers that are assigned. Once they are assigned, administrative powers and responsibilities cannot be waived: power is attached to the administrative body and every single one must enforce it on a case by case basis.[1]

[1] ‘*Indisponible*’ is used in law to describe those parts of law that the parties may not change. For instance, family law is ‘*indisponible*’, since parties are not usually free to adapt the family regulations to their needs; whereas contract law is said to be available in as much as parties may usually agree on terms different to those put forward by the law.

On the other hand, every administrative structure enjoys ‘‘single’’ legal personality. There are multiple administrative structures (Central Administration, Regional Administration, Local Administration, Corporative and Institutional Administration). As a result, there is not just one single personified administration. All of them enjoy their own legal personality.

Each structure is made up of a group of public bodies without legal personality. They are just branches of government. Their actions reflect on the whole organisation, as administrative structures are fully accountable. On the other hand, citizens have the right to a single response, which does not always happens, as different administrative bodies within the same structure can lay down their own statements on a case by case basis. Assuming such situation could take place, the resulting decision shall be reported null and void ‘*contenido imposible*’.

Other consequences resulting from the single legal personality of public administration is that a single public record system *(registr*o) is required in every administrative structure. Citizens are allowed to register documents in other administrative structures as long as a bilateral agreement for exchange is established among them *(convenio).*

Administrations enjoy organisational, financial and functional autonomy. However, such a principle does not apply to administrative agencies. ‘*Administraciones instrumentales’* (public or semi-private entities founded to implement specific activities and public services).[2]

These key features clearly show the limits concerning agencies´ autonomy:

- They only enjoy powers that are expressly assigned by the parent administrative structure (*Administración matriz).*

- Agency managers and board of directors are appointed by the parent administrative body.

- The agency cannot appeal any decision from the parent administrative body.

- Financial accountability, ‘*responsabilidad patrimonial*,’ will be charged to the parent body. Although the instrumental body has its own legal personality, the parent body is liable because there is no complete financial separation among them. Moreover, the agency is always under a certain level of guidance, supervision and monitoring from the parent body, however,there is a trust relation between them. (*relación fiduciaria, tutelar, culpa in vigilando* and *levantamiento del velo*).

Administrative structures and public bodies are structured following two criteria: hierarchy and competence (*jerarquía y competencia*). Both principles will be addressed in upcoming units.

[2] We shall use the term: ‘‘agency’’ or ‘‘instrumental body’’ to identify the group of ‘*Administraciones instrumentales*’.

QUESTION PAPER.

I.- Why can the public administration not be completely identified with the public service concept?

II.- List at least three institutions with constitutional relevance that are not part of any administrative structure. They do not belong to the executive branch.

III.- Give an example of a private institution or company whose activity can be in part public in nature; therefore under administrative law.

IV.- Give an example of an administrative body. Check its website and explain its key responsibilities.

V.- What is the key difference between an ‘‘administrative structure’’ and an ‘‘administrative body’’.

VI- Assuming that there are several public administrative structures, territorial and functional in nature, how should you explain the sentence: ‘‘the public administration has a single legal personality’’?

CASE STUDIES

I.- Let us assume that there is a conflict between the Ministry of Environment (Ministerio de Medio Ambiente) and the Segura river basinriver basin authority (Confederación hidrográfica del Segura). The river basin authority is an instrumental body directly linked to the Ministry, although it enjoys full functional autonomy. The conflict arises when the Ministry addresses an executive order the watershed authority must meet, providing their authorities regard it as against the law.

-Is the river basin authority allowed to appeal the order?

-Which entity enjoys legal personality, the river basin authority, the Ministry, or both of them?

II.-Let us suppose that the river basin authority builds a water work; the drainage system breaks and causes flooding in several farming fields. Who should the citizens address the claim to for a fair compensation and redress?

III.- Imagine you are a civil servant working for the Spanish parliament. Parliament starts a disciplinary proceeding against you, given that you almost never go to work. After all the proceeding the Congress hands down a decision consisting on firing you. Which branch of the Judiciary should you appeal to? (Labour Courts, Civil Courts, Criminal Courts, Administrative Courts).

IV.- The Spanish Government submits a draft bill to the Parliament. Is it acting as Administration or as Political body? Could a citizen appeal against this action?

V.- The Spanish Government appoints a Secretary of State. Is he/she acting as Administration or as a Political body? Could a citizen challenge the appointment?

VI.- Government powers and responsibilities are listed in the Spanish Constitution, sections 77, 97 et seq. Identify which of them are political or administrative in nature.

VII.- See the following Board of Ministers´ (*Consejo de Ministros*) decision: '*ACUERDO por el que se autoriza el pago del precio en el ejercicio presupuestario de 2013 por importe total de 7V.82I.165,87 euros y un gasto por importe total de IV.9XI.650,28 euros correspondiente al incremento de la compensación financiera, del contrato bajo la modalidad de abono total del precio de las obras: 'Autovía del Mediterráneo (A-7). Tramo: Motril (El Puntalón)-Carchuna, Granada'***.** Do you think it is of administrative or political nature?

VIII- Visit the following website: http://www.la-moncloa.es/ConsejodeMinistros/index.htm Press the link: ''*referencias*'' and find an example of a political decision and another of administrative decision.

CHAPTER II. ADMINISTRATIVE LAW.

I.- NATURE.

Administrative law can be defined as a group of laws, rules and regulations characterised for being applied to every legal relation where at least one public body is involved.

Administrative law is part of the so called 'public law'. It is the 'common' law of the public administration and it is broadly a statutory law. The administrative legal system collects concepts and institutions from other legal systems such as civil law, criminal law, or even labour law. In addition, it is self-sufficient; there is no need to bring rules from other areas of law to fill in the gaps.

The following are the distinguishing elements of administrative law, with regards to other legal systems and codes:

a.- **Privileges and powers** in favour of one of the parts of the legal relation, the public administration.

Administrative law acknowledges the privilege of self-enforcing *autotutela*. Under administrative law the burden of challenging administrative decisions shifts to the citizen.

Administrative law conflicts are addressed by a specialised branch of the Judiciary: the *Jurisdicción contencioso- administrativa*. Plaintiffs must appeal first before the upper administrative body, and only later, once exhausted the administrative channel, are allowed to bring the case before the Administrative Courts.

Public officers and workers are subject to a particular and privileged labour legal framework. Cases related to public employees do not fall under the *Estatuto de los Trabajadores.* On the contrary, public employees enjoy what is called 'statutory position' and, among other things, cannot be removed or fired unless they are sentenced in disciplinary proceedings.

Every public asset, no matter if it is real estate, property, stocks, etc., enjoys a privileged position. As long as they belong to the public domain category, they cannot be sold, cannot suffer positive prescription,[3] and cannot be involved in any enforcing proceeding (seizure, foreclosure, etc.). Even when assets are just common goods, several privileges also apply.

b.- **Burdens and limits** affect the public administration.

Administrative bodies have both, a positive and negative link to law. They are obliged not only not to do what the law forbids, which is a common place, but to enforce the law. The Administration cannot waiver the implementation of its responsibilities and powers. Administration lacks free will, unlike citizens.

[3] The process of acquiring title to property by reason of uninterrupted possession of specified duration. Also called *positive prescription*.

Administrative law brings about lots of formal and procedural burdens, as well as strict financial conditions. Expenses are subject to the public budget.

II.- KEY FEATURES.

a.- Administrative law can be regarded a **'proactive**' law.

Its rules endorse public intervention on society and economy. Three types of public interest activities characterise Administrative action: limiting, promotion and public services provision. Public bodies have specific mandates and granted broad powers. The main sources of Administrative law are regulations, plans and programs, agreements and contracts, and administrative decisions.

b.- **Efficacy and efficiency.**

Many Administrative law institutions are strictly linked to these principles. Efficacy means that every public body has to act accordingly to the assigned goals. Efficiency means that targets must be met maximising benefits and minimising costs.

The public administration´s targets are not comparable to those of the private companies. It is perfectly possible that administrative policies give rise to financial losses or result in lack of economic benefits. What is relevant is that the public service is completely fulfilled to the lower financial cost possible.

The principle backs up several of the most relevant institutions of the Spanish Administrative law, such as the self-enforcing principle *(autotutela).* Administrative statements are presumed to be true, valid and lawful. As a result, all of them are directly enforceable without previous judicial intervention, which is a formidable privilege. In close connection with this principle, we have that in Administrative law cases every administrative report is regarded as a piece of evidence. Therefore, the other party needs to submit at least one piece of evidence to support his/her position. If not, The case will be lost.

The aim of the self-enforcing privilege was historically to help safeguarding the independence of the executive branch from the judiciary. The idea was to avoid any burden to the executive´s task of changing the society after the French revolution. Today, the aim of efficacy that is implicit in this institution is still present.

It is very essential to clearly understand the difference between lawfulness *(validez)* and efficacy. Every administrative decision, regardless it being correct or not, is perfectly enforceable. The decision, however, may be overturned and declared null and void after an appeal, eventually leading to compensations.

c.- **Public interest.**

The public interest is the purpose of every administrative action. And consequently, it is the aim of the Administrative law. Defining the public interest is not easy and may vary in time and place. In our legal system it is broadly defined in the Spanish Constitution and specified in laws and regulations. It is implied in the constitutional recognition of fundamental and socio-economic rights and principles.

In certain circumstances, an administrative decision conflicting the public interest may be reported as a misuse of power, *desviación de poder*. This fault takes place when the Administration exercises its powers aiming to achieve results that are different to those the legal system pursues.

Every administrative decision must have a reason to show that it is really founded in the public interest. If not, the citizen might challenge the decision.

d.- **Open government, public accountability and public participation.**

The public administration manages the public interest and, what´s more, the public budget. Therefore, public officers deal with the money of all the citizens and have to use all the resources effectively. Citizens have the right to know how officers manage their money, and the law should provide accurate proceedings to make it real.

Traditionally, administrative law has included certain procedural mechanisms to allow citizens to gain access to public documents and files. Derogations, however, have been broadly applied, and public access frequently hindered. E-administration and open government laws might change the situation towards being more transparent. E-Administration provides a new framework for relations between citizens and government. Every administrative structure must have its own website and electronic office platform.

Before e-administration most public information was accessible at the request of the party. Just the official bulletins and municipal boards used to offer administrative information ex-officio. New technologies have opened new ways to spread information at the government´s own initiative, and most official websites provideuseful information. The electronic office platform can be used to access information at the petitioner´s request as well. The challenge is, however, to have access not only to positive information (open data), but also to sensible information (open government).

QUESTION PAPER

I.- Explain the meaning of the following sentence: dministrative law is self-sufficient.

II.- Mention any Administrative law feature that can be regarded as a ‘burden’ for the public administration. Give reasons.

III.- Explain what is an administrative decision/statement. What about a regulation?

IV.- Why do you think it is relevant to allow citizens to participate in administrative proceedings? Even as members of certain administrative collegiate bodies.

V.- What does misuse of power (*desviación de poder*) mean? Could you give an example? Look for a court decision to give an accurate example.

VI.- What does reasoning, *motivación*, mean when it comes to an administrative decision/statement?

VII.- A liberal state should have a wide-ranging and comprehensive administrative law (true or false). Give reasons.

CASES

I.- A Police officer watches a traffic violation. Does he have to report it, or is he allowed not to do so as long as he finds it appropriate?

II.- The city (municipal government) wants to hire a company to asphalt a road. Is the city allowed to freely choose any company in the market?

III.- A police officer on duty starts reporting cars that are parked in a non-parking area. He is ordered to move away so to attend another case. Ten cars in the same situation are left without reporting. Do you think the police officer is doing right, or maybe he is committing misuse of power by not reporting everyone?

IV.- One citizen reports to the municipal authorities that in many San Juan beach houses illegal work is taking place. Landlords are opening windows, attics or dormer windows without any building permit. In your opinion, is it binding for the Town Hall to start disciplinary proceedings and even urban restoration proceedings *(restauración de la legalidad urbanística)* to face such offences? Bear in mind that the huge number of violations could makes it unfeasible.

V.- Given that a civil servant is continuously not meeting his obligations at work, the human resources department reports the situation. The head officer decides to open a disciplinary proceeding for the civil servant. However, there are certain facts regarding the allegedly offence that the disciplinary administrative regulation does not regulate. Can the examining officer (instructor) use labour law (*Estatuto de los Trabajadores*) to draw a preliminary decision?

CHAPTER III. ADMINISTRATIVE AUTHORITY AND THE SUBORDINATION TO THE LEGAL PRINCIPLE.

I.- CONCEPT OF AUTHORITY, *POTESTAD*.

Someone has authority when enjoy the power to affect others´ rights in a way they are forced to bear with. Authority and right are different concepts. Authority cannot be waived, transmitted, or modified. On the contrary, individual rights only have such characteristics in specific and exceptional cases. Authority is broad and generic, while individual rights are usually focused on particular aspects.

RIGHT (*derecho*)	OBLIGATION (*obligación*)
AUTHORITY (*potestad*)	SUBORDINATION (*sujeción*)

Administrative authority is characterised by the following aspects:

a.-The exercise of administrative authority **cannot be waived**.

The law assigns the public administration a group of powers and functions. Once assigned, every public body is responsible for implementing them and fulfilling the pursued goals. In case the public body fails to comply with its duties, the citizen can bring the case to Courts according to sections 29 and 30 LJCA (*recurso por inactividad*).

b.- Every power is designed to achieve targets directly linked to the **public interest.** This statement does not mean that the law gives always the administration detailed powers; broad and general powers (*clausulas generales de apoderamiento*) are acceptable as well, but the public interest end must be clearly involved.

c.- Authority is only handed over by law, and the public administration can only enforce it **according to the law**. Whenever an administrative body lays down an enforceable order lacking legislative support, the resulting decision must be declared legally void.

II.- METHODS FOR GRANTING POWERS TO ADMINISTRATIVE BODIES.

a.- **Self-awarding powers.**

As discussed above, only the law can empower the public administration. However, as an exception, the public administration may award itself certain powers dealing with the office´s internal matters. There is a specific category of regulation in Spain named ‘independent regulation’, which is precisely intended to regulate organisational matters with no direct effect on citizens. Such type of regulations are approved without previously enabling the legislation.

b.- **Express attribution of powers.**

This is the ordinary way to assign powers to the public administration. The law clearly states what powers are conferred, as well as its conditions and limits. As already mentioned, the degree of specificity might vary according to the law.

c.- **Implicit attribution of powers.**

Abstract and unspecific powers are not valid; however, implicit powers are acceptable. Public bodies can enforce non-attributed powers as long as they can be inferred from others which have been expressly assigned by law. This alternative helps to fill legislative and regulatory gaps. Analogy, however, is not allowed under Spanish administrative law.

d.- **General empowering clauses.**

These type of clauses is not allowed in Spanish administrative law, even in the organisational field. They can lead to arbitrary decisions and jeopardise the efficacy of the legal principle.

However, there are some extraordinary cases where the legal system enables public administration to issue orders or even regulations without previous legislative coverage.

The following are the main cases: a) actions intending to safeguard the public order and safety (*estados de alarma, excepción* and *sitio*). b) Sections 21 and 25.1 *LRBRL*, enabling majors to pass extraordinary regulations and orders in the event of serious threats and emergency. c) Decisions creating new public corporations to operate business related activities (*iniciativa pública en la actividad económica*).

III.- TYPES OF POWERS.

Conceptually, powers can be broadly different; powers can affect every citizen (*relaciones de sujeción general*), or affect certain individuals with particular links to the administration such as labour relationships, contract relationships, or even users of public utilities (*relaciones de sujeción especial*). Those in the second situation are attached to singular rights and obligations. However, the main distinction takes place regarding the so called: ‘regulated powers’ and ‘discretionary powers’.

Regulated powers are those that are completely defined by law. Issuing an administrative regulated order is an operation just consisting in checking whether the facts are in accordance with the law and, in that case, consequently implement the legal response. No questions of convenience, political expediency, or choosing between equally legal options, will be at stake in regulated powers.

The legal operator shall do the following test so to implement regulated powers in a particular case:

- Confirm and verify the facts, with just certain degree of analysis.
- Automatically implement the legal result.
- No room for assessment, evaluation, or appreciation.

On the contrary, certain room for choosing is precisely the cornerstone of discretionary powers. The administration can decide whether or not, and in which circumstances, to grant the citizen´s application, impose penalties, limit rights, etc. Discretionary powers imply exercising authority according to the agency´s own judgment. Under this scheme the decision-maker is not committed to enforce the law in a particular manner; nevertheless, he/she shall enforce it according to legal conditions.

One of the reasons why public bodies are assigned such type of powers is because they have experience, expertise, and specialisation. In many areas of government it is impossible to strictly define policies and decisions. Leeway is allowed to adapt rules and policies to change circumstances and demands, and to implement appropriate enforcement policies to attain statutory obligations. Leeway, obviously, must be consistent with statutory provisions.

Hence, administrative bodies have wide discretion in choosing between equally legal solutions to attain the legislature´s goals and the public interest. Notwithstanding such margin for action, discretionary powers have relevant regulatory conditions. Defining which administrative body holds the responsibility on a particular matter, the proceeding to be followed, and even certain substantive requirements in which the decision is based, are regulatory conditions out of any discretionary analysis.

Discretionary powers must be used reasonably, impartially, avoiding unnecessary injuries. If not, the agencies´ decisions could be challenged claiming for abuse of power (*arbitrariedad*).

We can therefore identify the following features in discretionary powers:

- The decision-making process is not completely objective; on the contrary, there is always a subjective judgment involved in the decision. (*margen de apreciación*). Nevertheless, every choice must be reasoned according to law.

- Questions of convenience or expediency, according to public policies, may be possible in the decision-making process as long as it is allowed by law. (*motivos de oportunidad*).

- Leeway must not lead to an arbitrary decision (*arbitrariedad*). Arbitrariness is clearly the limit when it comes to discretionary powers. The public administration is strongly limited by several tests in order to guarantee citizen´s rights before unfair or unreasonable decisions. Protecting the public interest is also involved in it.

- The administrative statement, especially those discretionary in nature, must provide enough reasoning (*motivación*). This is imperative and essential to ensure the decision-making process is fair and lawful. Administrative behaviour cannot be inconsistent and unaccountable. In this regard, a non-transparent

government is a way open for arbitrary decisions based on bad office politics. A citizen´s right to defense should be impossible without providing enough information on the grounds of the decision.

In Spain, discretionary powers have been under judicial review since the 1956 *LJCA*, although a comprehensive and full monitoring was not really available before the 1979 Spanish Constitution, and in particular, up until the *LJCA* was significantly amended in 1998.

Discretionary decisions in Spanish administrative law are clearly laid down in section 54 *LRJPAC*.

Let us discuss the current monitoring tests available for discretionary powers:

1.- Monitoring the **regulatory elements (formal and material conditions).**

- Authority: the administrative body must have authority on the case, both from a subjective (it is the correct public body), objective or substantial (the issue is correct), and territorial (the territory is under the public body jurisdiction) perspective.

- Timing: it is necessary to check whether a deadline has been met by all the parties involved in the proceeding. Not meeting the deadline should lead to lapsing the right to action (*prescripción*), or even expiring the proceeding (*caducidad*).

- An administrative decision can be overturned if the proceeding was not correct in terms of essential formalities (*vías de hecho o defectos fomales invalidantes*).

- The relevant public body should not exceed the legal assignment.

- The public body should decide the case according to the public interest as defined by the law. A misunderstanding of the public interest might lead to unfair decisions and even misuse of power.

- The material or substantive regulatory elements (*aspectos de fondo*) must be monitored. For example, penalties are defined by law stating maximum and minimum fines; certain stages of the procedure for awarding public contracts are strictly regulated by law, such as the classification of external contractors; even when appointing high office positions, several pre-conditions might be required by law, such as legal age, academic training, homeland citizenship, etc. Obviously, all thoseelements are not discretionary, even though they are part of a comprehensive discretionary decision.

2.- Monitoring the **discretionary conditions** of the decision.

Every administrative statement must be reasoned (*motivación*). Reasoning is the key condition so to allow citizens to accurately defend their interests and rights. Knowing

the grounds of the decision is the only way to build the pleadings with perfect knowledge. Otherwise, it would be very difficult to articulate the defence. It is worth remembering that in most cases in Administrative law the citizen is the one challenging the decision, acting therefore as a plaintiff.

Judges have implemented several tests to monitor the discretionary elements of the decision; all of them will be part of the judgment:

- Assessing the correct understanding and interpretation of facts in the decision-making process.
- Assessing the correct understanding of law (legal foundations).
- Analysis of the general principles of law, and in particular the public interest concerned.
- Reasonableness and rationality of the decision.

QUESTION PAPER.

I.- What is a regulated decision (*acto reglado)?*

II.- What is a discretionary decision (*acto discrecional)*?

III.- What is an arbitrary decision (*arbitrariedad*)?

IV.- What is *vía de hecho*?

V.- What is *desviación de poder*?

VI- List and discuss the current tests that are available to monitor discretionary powers.

VII.- Do you think bureaucratic red tape, backlogs, arbitrary decision-making and other inefficient practices hamper private activity?

CASES.

I.- Identify the discretionary and regulated conditions in the following administrative statements.

a.- An administrative body adjudicates the competition to fill a vacant position in the central administration. The position is granted to XXX according to the following reasons: XXX is graduated in law, as it is required in the bidding terms. He shows evidence of ten years of professional practice, and according to the bidding terms, five years is the minimum term required. The process includes an oral exam. XXX passes the exam getting better marks than the competitors. Although he dealt with fewer concepts than others, his speech stood out more clear and diligent. In addition, the candidate fulfilled an additional legal requirement consisting in not having applied for an identical position in the last two years.

b.- The Town Hall Board modifies the annual municipal budget including an extraordinary credit to finance urgent works. The Board was summoned in due time and manner.

Days before, another Committee (*Comisión informativa de presupuestos*), responsible according to law to report on budget review proceedings (*informe preceptivo*),[4] had given a positive report before making the public call for summoning the Board.

During the Board session, the opposition managed to amend the proposal setting a 2 month deadline to hire the works, so to speed up the procedure. The Board approved the budget appropriation (*crédito presupuestario*) in 250.000 Euros. This financial scheme was published as a bid base (*base de la licitación*).

The Board decides works will be done by a contractor, leaving aside its own internal maintenance service. The complex nature of the works requires externalising the contract. It is worth mentioning that according to the public contracts act, only companies classified under the B1category can participate such bidding, given the amount and complexity of the contract.

c.- Decision of *Consellería de Bienestar Social* appointing a citizen as *gran dependiente*, grade 3, level 3 (maximum level for handicapped people). As this person is a Spanish citizen, with residence in the Region of Valencia, he/she has the right to be granted subsidies according to Spanish law *(Ley de la Dependencia)*. The citizen´s functional dependency condition was evaluated according to the national scale, which includes several tests such as: is the handicapped capable of eating alone? Does he/she need help to sit down and get up? Is he/she self-sufficient enough to clean up after him/herself? Does he/she have help from others? In addition, the social context report

[4] It is relatively frequent that an administrative body is required to issue a report as part of the administrative procedure whereby another different body will make a decision. This requirement may be voluntary or compulsory (in general terms, the latter possibility is the most common). In those cases, administrative laws refer to such report as *informe preceptivo*, which would be roughly translated as compulsory report.

(municipal social services), as well as the health condition report (healthcare centre) bothhelped to justify the decision.

According to this background, the *Consellería de Bienestar Social* approved the '*programa de atención individualizada*', granting the disabled a monthly allowance of 600 Euros, and providing the petition, granting free admission to a 24 hour assisting living facility or retirement home.

II.- Point out the reasons you find to challenge the administrative decisions described in point c. Consider, for example, arguing about the grading scale, the granted assistance coverage, or the amount of the awarded allowance. What monitoring tests should you use?

III.- Suppose that a citizen´s application to be granted the above mentioned benefits is rejected on the grounds of failure to submit certain mandatory documents (i.e. financial personal data). Do you think the authority is basing the decision on discretionary or regulatory criteria?

IV.- Let us assume that a small municipality has limited means to properly clean up one of the beaches under its responsibility; the Town Hall requires the Regional Government's assistance to meet its obligation. Such assistance is not mandatory according to current legislation Do you find asking the regional government to be lawful notwithstanding it is not stated by law? Identify the type of power the Town Hall is implementing when asking the regional government for assistance.

V.- The power to impose penalties in the case of illegal discharges to water courses (public domain) is assigned to the Júcar river basin authorities (*Confederación hidrográfica del Júcar*) according to the Spanish Constitution. However, protecting the environment is assigned to the regional authorities. In a particular case, the Valencia Regional Government fines a company for making illegal polluting discharges. What should the company do to defend its position?

CHAPTER IV.- SPECIAL NATURE AND TYPOLOGY OF ADMINISTRATIVE ACTION. THE SELF-ENFORCING THE *AUTOTUTELA* PRINCIPLE.

I.- THE *AUTOTUTELA* PRINCIPLE, SPECIAL NATURE.

Autotutela basically means that the public administrations can avoid judicial review in an ordinary action, directly enforcing its decisions; citizens are obviously allowed to challenge regulations and administrative statements, but only after they have become effective.

As a result, Administrative judicial review has been traditionally reported as *jurisdicción revisora*. Courts always act after the decision has been implemented, unless provisional measures are granted. And the latter is not as common as it should be.

To fully understand this feature, it is essential to tell the difference between lawfulness and efficacy of administrative decisions and regulations. Both are regarded effective and fully enforceable from the very beginning; actually, from the time they are notified or published. Both decisions and regulations are presumed to be lawful, and citizens have the burden to challenge them. Once the citizen proves the decision or regulation is against the law, the Court will overturn it and its efficacy will cease.

The following list tells the key privileges that can be worked out in accordance with the '*autotutela*' principle:

- Enforceability (*Ejecutividad*). Administrative decisions and regulations are inherently enforceable. This privilege is set forth in sections 56, 57 and 94 of *LRJPAC*.

- Enforcing action (*acción de oficio*). The administrative body does not need to get previous judicial support to enforce its own decisions. This power is only preempted when Courts grant preliminary relief by maintaining the decision´s efficacy.

- Injunction relief procedures are forbidden (*prohibición de interdictos*). Injunctions in Spain are brief proceedings which have the intention to grant possession or withhold disputed property. *Ley 1/2000 de 7 de enero de enjuiciamiento civil* sets forth several possessory proceedings characterised for quickly granting preliminary relief. Afterwards, both parties may seek a ruling of the matter in a separate ordinary procedure. However, administrative decisions related to real estate and public domain are immune to possessor´s injunctions,[5] with certain exceptions that will be hereinafter studied.

- Appealing administrative decisions, both through the administrative channel or judicial review, does not automatically grant staying execution or deferral of enforcement.

[5] Conflicts where someone is claiming that another party is infringing on their possession of a piece of land, asset, etc.

As already told, appeals do not stay the statement´s efficacy. The decision will not be adjourned or reprieved, unless the upper administrative body or the Court issue provisional remedies. This requires a broad analysis of the public and private interest involved, as well as other aspects such as assessing eventual irreparable and permanent damages, or possible inefficacy of the judicial ruling; *fumus boni iuris* is another test to take into account.

II.- TYPES OF '*AUTOTUTELA*'

1.- **Declaratory '*autotutela*'.**

This feature defines the nature of the administrative decision itself (*ejecutividad del acto*). Every single administrative decision is benefited with a presumption of accuracy and lawfulness. Summing up, the administrative decision is an enforceable order without previous enabling judicial intervention.

The Spanish term '*Título ejecutivo'* refers to a document that, by law, allows the holder to directly enforce it. In private law, it allows to get a pre-judgement attachment on the defendant's goods at the very beginning of the judicial review process,[6] before the trial actually begins. If after trial, the plaintiff's lawsuit is proven to have no merits, the attachment shall be lifted; assuming the Judge rules the case for the plaintiff the opinion shall order the goods to be sold and the resulting amount to be paid to the plaintiff.

In administrative law the meaning of '*título ejecutivo*' is even broader, as the document, in our case the administrative decision, is directly enforceable not only over the citizen´s property, but with regards to every other result included in the decision. The decision, thus, declares and even creates rights and obligations for citizens, and all of them have to meet its goals.

2.- **Executive *autotutela*.**

The so called executive '*autotutela' (autotutela ejecutiva o acción de oficio)* refers to different proceedings instructed by law that public bodies can undertake to enforce the administrative statements.

Once the decision is correctly notified, the citizen must comply with it; if he/she fails, the public body has to carry out one of the following enforced proceedings:

a.- **Seizure proceeding** (*via de apremio*).

When according to the decision the citizen is liable to pay an amount of money, whatever the reason may be, the public administration will start a procedure called *via de apremio*. As a result, as long as the citizen does not pay, his properties and rights will

[6] Attachment: Preliminary legal seizure of property to force compliance with a decision which may be obtained in a pending suit.

be seized. Therefore, the procedure will end up with an attachment order (*providencia de apremio*).

In such proceeding, the citizen is not allowed to argue the decision that is being enforced. According to Section 167.3 *Ley 58/2003 de 17 de diciembre, General Tributaria*, challenging an attachment order is only possible according to the following merits:

- Complete pay-off or claim for expiry time. In the first case, the offender pays and cancels the debt; regarding expiry, the administrative body cannot enforce the payment because it failed to start the enforcing process within the deadline. It has nothing to do with the lapsing of the offence by statute of limitations; expiry refers in this case to the lapse of time set to enforce the payment.

- Application for deferment, installment payment plan, and set-off of debits or credits. All these options are only available during the period for voluntary payment; once expired, no one –for example a tax payer- can be granted such benefits.

- Other suspension causes of the enforcing procedure (formal reasons).

- Lack of notification of the net amount of money to be paid-off.

- Overturn of the decision imposing the debt that is under the enforcing process.

- Formal defects in the attachment order dealing with error or omission identifying the debt or the debtor.

All the above mentioned appealing grounds are fixed by law. The plaintiff can only use such causes to appeal the enforcing order. If the appeal is based on other grounds the Administrative body or the Court will dismiss the case.

b.- **Infliction of physical force** (*compulsión sobre las personas*).

This way to enforce administrative decisions deals with personal obligations no one else can carry out. It normally refers to situations related to safeguarding the public safety.

c.- **Subsidiary enforcement** (*ejecución subsidiaria*).

Whenever an administrative decision imposes a citizen a duty than can be rendered by someone else, the administrative body should warn that, if he/she fails to comply with it, public employees or a hired contractor will replace him/her. Obviously, in such case the administrative body will charge the citizen the amount of money spent to enforce the decision. In the event the citizen failed to pay-off the bill, the public body should enforce the payment through the seizure proceeding.

The warning stage is an essential part of the proceeding, since subsidiary enforcement cannot be carried out without previous notice. In order to start the proceeding it is necessary to previously have a fully enforceable decision (a non-appealable decision or a challenged decision not suspended by the Court).

This subsidiary enforcement process is usually a separate piece of the; this is relevant to point out, since it has implications concerning deadlines and expiry time.

d.- **Periodic penalty payment** (*multas coercitivas*).

In certain cases, before getting the subsidiary enforcement process started, alternative measures intending to persuade the citizen to voluntarily meet the decision might be helpful. Administrative law allows to impose the offender consecutive fines for that purpose.

The *LRJPAC* lays down a general limit. Fines cannot exceed 20% of the total cost the citizen should be charged by completely meeting the decision.

3.- **Reduplicative *autotutela* or *autotutela* in second power.**

Under this concept we are facing additional and arguable administrative privileges. Some of them are currently outdated and obsolete. Others still remain.

There are three main cases:

- Finishing the administrative procedure, including appeals, as a pre-condition to bring the case (the decision) to Courts: exhausting the administrative channel (*agotamiento de la vía administrativa).* This privilege is currently in force. The citizen has the burden to appeal the administrative decision to the upper authority (unless the decision was already delivered by the highest authority) before challenging the decision to Courts. Such burden keeps the citizen out of judicial review during several months and may cause damages or nuisances.

- The direct punishing power (*potestad sancionadora directa).* In Common law it is certainly unusual to give the public administration the power to directly impose on citizens fines or penalties. As a general rule, the public body needs to bring the case to Courts. On the contrary, in our system, the public administration can directly proceed against the offender imposing and enforcing penalties according to law. Then, the offender might challenge the decision, which in certain cases will stay the enforcement according to law,[7] or according to the Court decision.

  This power is strongly restrictive for citizen´s rights. Actually, it could be argued that one party of the legal relation is limiting someone else´s rights, which is certainly impossible in regular relations among citizens. Opposing this argument, it could be said that the public administration is not gaining any personal benefit, as it is just enforcing the law and protecting the public interest.

[7] For example, section 212.3 *Ley General Tributaria*. (2003) declares that once the offender appeals the decision imposing a fine, enforcement will be immediately stayed. No fee is required and no financial penalty or interest will become due for late payment.

- '*Solve et repete*' rule (not in force nowadays ex section. 24 CE). This classic rule in Spanish administrative law, today obsolete, charged the citizen with the burden to pay before being allowed to seek judicial review. Before issuing the appeal, the citizen had to pay, or to give security for, the fine or whatever other financial liability stated in the administrative decision. If not, the appeal would be dismissed the right away.

  This privilege was regarded by Courts to be conflicting section 24 CE, which gives citizens the right to an effective judicial protection (*tutela judicial efectiva).* Putting the payment far above the right to appeal obviously hampers access to judicial review. In addition, section 24 CE is a fundamental right.

III.- LIMITS TO *AUTOTUTELA*.

As already discussed, injunctions against the public administration are forbidden as a result of the *autotutela* principle. As a result, citizens cannot intend to get an injunction so to provisionally keep his/her possession or ownership in an expropriation case. Being that true, the privilege does not apply to the following cases, according to section 101 *LRJPAC*: whenever the public body is acting either out of power *(incompetencia*), or without any proceeding *(vía de hecho)*.

On the contrary, the public administration can directly recover its properties using *autotela* powers (*interdictum propium*). Such proceeding ends up in a recovery order based on the legal assumption that the offender has unlawfully occupied a publicly owned estate. It will also lead to an eviction order in case the property is occupied by people.

However, the privilege is not always available when it comes to recovering public assets other than public domain (*bienes patrimoniales*). Such public properties are characterised for not being attached to any public service or use. In these cases, *interdictum propium* is only available when undue occupation has not lasted for more than one year. Otherwise, the public body will have to bring the case to civil Courts.

Regarding public domain, *interdictum propium* demands the Administration to justify its ownership (*titularidad demanial*). When it is unclear or disputed, the public body should bring the case to civil Courts. Nevertheless, proving ownership is not required referring to coastal areas, public water, livestock or cattle trails *(vías pecuarias),* and other 'natural' areas declared publicly owned by law. The only condition is that they must have been previously demarcated (*deslindados*).

On the other hand, the public administration cannot benefit from the privilege of *autotutela* when contradicting its own previous decisions (*doctrina de los propios actos)*. Administrative bodies cannot change their decisions without first reviewing them though the accurate proceedings *(revision de oficio),* with the enabling participation of the *Consejo de Estado* or the Courts depending on the case.

The best way to object enforceable administrative decisions is seeking preliminary relief (*tutela cautelar*). The citizen may ask the upper administrative body (appeal for review),

or the Administrative Court (appeal for judicial review), to withhold the enforcing procedure (sections 104 and 111 *LRJPAC*, and 129 et ss *LJCA*).

Administrative bodies and Courts are however reluctant to grant preliminary relief, even though Spanish Courts have progressed into a more open position in this area. The former *LJCA* (1956) only allowed withholding an enforceable administrative order when it was clearly proved that its execution would lead to damages unable or extremely difficult to get redress.

After the CE, things started to change. Several judgments of the Constitutional Court stated that although the *autotutela* principle was acceptable in terms of efficacy, preliminary relief was closely linked to section 24 CE, which states the fundamental right to a full and effective judicial review. Therefore, preliminary relief could no longer be regarded as something seldomly used, or an extraordinary remedy (STC 22/1984 and STC 14/1992, 148/1993, 76/1996, among others).

The new *LJCA* (1998) takes on this jurisprudence and declares that preliminary relief is a judicial discretionary power that Courts may use as often as it is necessary, according to the features of each case. To help the Courts to decide on a case by case basis, the law lists a group of tests which have been broadly developed by the jurisprudence.

- According to section 130.1 *LJCA*, preliminary relief should only be granted when enforcing the decision would result in a situation where the appeal would not have any effect *(pérdida de la finalidad legítima del recurso, periculum in mora).* In other words, the possible positive judgment would not entirely or partially fulfill the plaintiff´s claim.

- Detailed evaluation of the public and private interest involved. The Court has to weight the effects of implementing the decision in both areas. Section 130.1 *LJCA* states: '*previa valoración circunstanciada de todos los intereses en conflicto*'. Stressing the relevance of this test, section 130.2 warns against wrong staying decisions that could eventually lead to serious damages either in public or private interests. In such cases, preliminary relief would not be granted: '*perturbación grave de los intereses generales o de tercero*'.

- According to section 728 *LEC,* the Court should take into account the so called: *fumus boni iuris*. This criterion is not enough itself to grant preliminary relief; in other cases, trial would not be necessary. Most cases refer to administrative statements whose features clearly show that they are absolutely null and void.

  Fumus boni iuris is, however, a stronger test when it comes to remedies against administrative inaction. According to section 136.1 *LJCA* this is the most relevant aspect to bear in mind. The precautionary measure will be granted unless it is clearly shown that section 29 and 30 *LJCA´*s conditions do not meet in the case.

- Another relevant test is the so called *perjuicio irreparable*. Courts have always considered that whenever the decision might lead to big loses impossible to repair, precautionary measures should be granted.

Preliminary relief is not only available under Court supervision; administrative bodies can issue staying orders under citizen´s request in appealing proceedings within the administrative channel. Section 111 *LRJPAC* lays down the conditions, which are not significantly different from the above mentioned. It is worth mentioning, however, that the *fumus boni iuris* criteria is expressly mentioned in the section, but with a particular link to one of the causes referred to in section 62.1 *LRJPAC* (null and void causes).

Regarding tax law, adjudication of preliminary relief is even wider open. Preliminary relief is automatically granted in this area, both in the administrative adjudication process and in the judicial process. No caution is required.

IV.- CITIZEN PROTECTION BEFORE *AUTOTUTELA*.

1- Formalities.

Administrative proceedings are overly formal. This is certainly a burden for citizens, which must attend a sequence of acts to get the demanded decision. Nevertheless, the procedure is also an important tool to safeguard their rights. It allows a hearing, access to relevant information, submitting evidences and other documents, appealing the final decision, etc. All these actions are essential to protect citizen´s rights.

The proceeding is not hetero-compositive; one of the parties involved in the conflict, the public body, delivers the final decision. Meanwhile, the sequence of formalities sufficiently ensures the rights to defence, openness and transparency.

As citizens do, the public body has to meet all the stages of the proceeding. However, failure to observe formal requirements does not necessarily lead to a judgment declaring the decision null and void. Even when the plaintiff gets a favorable judgment, in most cases the public body will be able to review, amend and redress that it's wrong.

Administrative proceedings are complex and diverse; no common sequence of acts exist. However, there is a piece of proceeding that has to be always present: the hearing (*audiencia*). Those who happen to be the concerned parties in the proceeding (applicants or third parties granted legal standing) have the right to be heard and issue their pleadings or allegations during the whole proceeding, but they are expressly allowed to at least in one separate phase, the hearing.

Bureaucratic burdens may lead to weaker outcomes and results in administrative policies, and undermines the effectiveness of enforcing decisions. It also affects citizen´s rights, especially in terms of timing. To overcome such undesirable side effects, the following solutions are useful, although they may sometimes lead to additional problems.

- The so called: fleeing (*huida*) from administrative law in a bunch of techniques intended to reach more efficiency. The ultimate goal is to skip from administrative law assuming that its rules and procedures are not suitable in many areas of public action. Especially in those closely related to market or the economy.

Two main solutions have been implemented: from a subjective dimension, by making use of certain categories of legal entities under civil law (*personificación privada*). From an objective dimension, allowing public bodies, agencies, and other public entities to use civil or labor law in certain conditions. Such instrumental use of private law is not compatible with the *autotutela* privilege. Thus, as long as it is used, the public body cannot directly enforce its decisions.

- Another relevant strategy is to facilitate electronic proceedings. E-administration creates new opportunities to reduce bureaucratic burdens. It allows public bodies to share information among them and even to develop proceedings completely online. Besides, it allows citizens to interact with public bodies on the internet, submitting their applications, complaints, documents, appeals, etc 24-7. Public bodies should create an effective platform for Electronic Processing for that purpose.

- In every proceeding, simplifying and reducing timing, administrative and legal requirements, administrative paperwork, or even remove certain steps and phases of the procedure, may lead to better results. Speeding up administrative procedures shall benefit both the public interest and the citizen´s rights, and will reduce costs.

2.- Decisions declaring rights cannot be changed.

As already mentioned, once a decision is taken benefiting someone the public body cannot unilaterally impose other terms or conditions. Changing the decision requires attending certain procedures where another entity must take part (*Consejo de Estado* or Courts).

3.- Every administrative decision must be reasoned.

The decision shall state the exact grounds on which it is based. The statement must be communicated, reasons given, all the relevant facts reflected, legal founding, and the conclusion. Reasoning is essential in administrative decisions, since it is the only way citizens are allowed to know the exact grounds of the decision, and consequently appeal with full knowledge and guarantees. Moreover, it allows upper administrative bodies and Courts to fully monitor and oversee the lower bodies´ decisions.

Regulated administrative statements (*actos reglados)* have to be reasoned, but discretionary decisions require reinforced reasoning. In the first case it is likely enough to set the facts and the applied regulation, but when it comes to discretionary decisions it is not enough, since the public body is allowed to choose between different options; all of them fully legal. That makes it necessary to explain why the chosen option reflects better the public interest. Otherwise, the public body might be acting unlawfully and arbitrarily.

QUESTION PAPER.

I.- When we state that the Administrative jurisdiction is *revisora,* what are we trying to express? Is there any exception?

II.- Administrative orders are directly enforceable (*títulos ejecutivos*)'. How do you understand this? Leaving aside administrative law, do you know any other equivalent enforceable orders or documents in our legal system?

III.-Explain the four *autotutela* enforcing techniques or modalities.

IV.- Complete the following table:

TECHNIQUE	LEGAL RELATION
SEIZURE PROCEEDING *VIA DE APREMIO*	FINANCIAL OBLIGATIONS
PHISICAL FORCE *COMPULSIÓN A LAS PERSONAS*	
SUBSIDIARY ENFORCEMENT *EJECUCIÓN SUBSIDIARIA*	
PERIODIC FINES *MULTAS COERCITIVAS*	

V.- What rule means that before issuing an appeal the citizen must pay the amount stated in the notified administrative decision? Is this privilege currently valid? Express your opinion (pros and cons).

VI.- What does it mean that the public administration has always to enforce its own decisions providing they benefit citizens?

VII.- List and explain the type of administrative decisions that require always reasoning.

VIII.- Find and explain the difference between fully valid and effective.

CASES.

I.-The municipal authority rejects without any reason an application for a building permit, which is a regulated decision. Is the decision valid? Is it effective? How could the concerned party stop it being enforced?

II.- A citizen was granted financial aid *(subvención)* by the Town Hall for a business opening. It has been two months since the amount became due and payable, whilst the Town Hall has not paid off the debt. What kind of obligation is the Town Hall not meeting in this case? What can the citizen do to get the payment?

III.- The Town Hall orders to demolisha building while assuming that its condition is on the point of ruin. The *declaración de ruina* of a building in Spain is a legal condition. It does not necessary imply the building is on the verge of collapsing. It simply happens when the building is decaying and the cost of rehabilitation exceeds 50% of the total cost of re-building with the same features. Moreover, a demolishing order will only take place when, together with the decay condition, there are additional facts such as risks for citizens or adjacent buildings. Assuming in this case the risks have become clear and noticeable, the order states that demolishing should take place within two months from the notice date. The owner does not meet the order within the granted period. What should the Town Hall do in this case to enforce the order?

IV.- The Town Hall issues a demolition order after declaring a building in ruin condition. However, a heritage protection NGO immediately appeals the decision on the grounds of cultural assets at risk. The NGO brings the case to Court but, assuming that the order is directly enforceable, what should the NGO demand the Court to avoid it?

V.- Consider an administrative inquiry processing an application to become declared disable. One of the documents is a social record that must be brought in by a publicly owned company: AVASP. S.A. The report states the citizen is not eligible to being declared dependent. All of the public company employees are not civil servants. According to these facts, do you think the report features *presunción de legalidad*?

VI.- An administrative eviction order is deemed final and therefore not appealable. The concerned citizen is occupying a publicly owned apartment without holding any enabling condition (*título*). The public body starts a proceeding seeking for the occupants' removal. What enforcing tools should the public body use in case the citizens do not comply with the notice of termination?

VII- The Town Hall squatted in several private lands to build a road. Although acting under legal authority, it did not use the expropriation proceeding. Actually administrative officers acted without previously enabling the decision resulting from an administrative proceeding (*vía de hecho*). The citizen seeks for injunction relief before civil Courts, intending to recover possession. Is this possible, taking into account that the administrative body is a public institution under administrative law, in theory, to be benefited with the *autotutela* privilege? In other words, should the Court accept the defendant´s demur challenging appropriate jurisdiction (on the grounds that civil Courts have no jurisdiction over administrative decisions)? Remember the interactions between the *autotutela* privilege and injunction relief.

X- The Regional Government assumes that achieving better results while developing industrial land would be easier as long as a publicly owned company was created for that purpose. How do you call these type of operations?

XI.- The public administration got a piece of land by participating in the benefits of implementing an urban development plan. According to Spanish zoning law, developers must share part of the capital gains with the Administration. In other words, the administration allows the developer to turn greenfield into urban land creating surplus values; in return, the administration participates in the benefits for free from the result of developed land for public use, as well as plots for building purposes (not for public use). Assuming this background, imagine that a citizen unlawfully occupies one of these pieces of land. The Town Hall puts up with this situation for three years. A new political party wins the next elections and takes office in the municipal government. The new administration decides to recover possession in order to auction the property so to get the benefits. How should the Town Hall recover possession in this case?

XII.- The Administration rejects a citizen´s application for a grant stating that the student is not eligible as he has enough financial means. The student appeals the decision on the grounds of a wrong understanding of the actual family income. He shows documents leading to that conclusion. The upper administrative body lays down a statement confirming the lower authority´s decision, without giving new reasons to confront such pleadings. What should the concerned citizen do in this case?

CHAPTER V. SOURCES OF ADMINISTRATIVE LAW. STRUCTURE AND CHARACTERISTICS.

I.- SOURCES OF ADMINISTRATIVE LAW.

The sources of administrative law are not substantially different to those operating in other areas of law. Thus, the aim of this unit is to focus on sources which are especially relevant in administrative law, as well as in those where the public administration is directly involved or plays a key role in the lawmaking process.

Following a classical approach, sources of administrative law could be classified in:

1.- Primary sources.

The Constitution, Acts and Statutes are the main primary sources (*Constitución y Leyes*). The Spanish legal system is hierarchical, so norms of a lower rank cannot override rules of a higher one. The Spanish Constitution was approved in 1978 and holds the higher status in the legal system. It inspires the rest of the legal system, and its rules must be met by every authority of the state, including the Crown.

International treaties. As stated in section 96 CE, international treaties become internal laws once they have been signed, ratified and published in the Official State Gazette (*Boletín Oficial del Estado*). If the treaty yields constitutional responsibilities and powers to an international organisation or institution, the authorisation must be delivered by means of an Organic Law (section 93 CE).

If the treaty concerns either of the following matters which shall require Parliament's authorisation (section 94 CE):

a.- Certain matters of political or military nature.
b.- The integrity of the State.
c.- Fundamental rights and duties laid down at Title I CE.
d.- Creates financial obligations for the public treasury
e.- Involves modifications or repeals some law.
f.- Requires legislative measures for its execution and enforcement

Any other treaty may be signed by the Government, which shall be reported by Parliament (section 9IV.2 CE). As stated in section 95 CE, any international treaty that might eventually contradict the Constitution shall require prior constitutional revision. Either Government or the Chambers *(Congreso y Senado)* are allowed to ask the Constitutional Court to decide whether the contradiction exists.

Statutes and Acts should be an equivalent concept to the Spanish term *(leyes*). However, the Spanish legal system is made of several instruments: *Ley orgánica, Ley, Decreto Ley, Decreto legislativo.* All of them enjoy the same position in terms of hierarchy but differs both in procedural and material conditions.

- Organic Law *(Ley Orgánica*). Organic Laws have two key differences with regards to ordinary laws (section 81 CE) :

-Organic Laws only regulate certain relevant issues (section 8I.1 CE). Among them: the exercise of fundamental rights and public liberties; the Statutes of Autonomy; the general electoral system; the Ombudsman (*Defensor del Pueblo,* section 54 CE); the Council of State (*Consejo de Estado,* section 107 SC); the Constitutional Court (*Tribunal Constitucional*, section 165 CE) and the popular legislative initiative (section 87.3 CE).

-Organic laws require for approval, modification or repeal absolute majority of the Congress in a final vote of the entire bill (section 8I.2 CE).

- Statutes *(Ley).* Statute is every piece of legislation whose subject matter is not reserved as to organic laws by the Constitution. Approving process always starts in Congress. After Congress' approval, the bill is discussed in the Senate, which has the power to approve, amend or veto. Whatever the result was, Congress keeps the final decision (section 90 CE). Statutes require simple majority of both chambers.

  Within this category the *Decretos ley* and *Decretos legislativos* should be included. Both instruments shall be studied with certain detail later on, as they are approved by the executive branch with a secondary participation of the Parliament.

- Regulations (*reglamentos*) are the most characteristic administrative rule. That is because it is the only typology where the public administration controls the whole regulatory-making process. Regulations are ranked below laws.

  The term regulation refers to any general rule dictated by the executive power. However, even though according to Section 97 CE the Government monopolises the regulatory power, other constitutional institutions are also benefited with such power in order to regulate their own internal functioning and procedures. For instance: the Congress and the Senate (section 72.1 CE), the General Counsel of the Judiciary (section 139 LOPJ) or the Constitutional Court (section 2.2 LOTC).

  Regulations are created to complete, specify and help to implement acts and statutes; obviously, they cannot either oppose legal rules or regulate issues expressly reserved as to laws. In disciplinary issues, regulations cannot create new offences or violations. As an exception, organisational regulations are not linked to an existing statute, but they only have internal effects (section 23.3 of *Ley 50/1997, de 27 de noviembre, del Gobierno).*

  Regarding the central government of Spain, there are the following types of regulations:

    - Decrees *(Decreto*) from the Council of Ministers
    - Orders (*Orden*) from the Ministers and Delegated Commissions.
    - Instructions (*Instrucción)* and notices (*Circulares)* from lower political authorities and high officials of the public administration

The regional governments are also allowed to issue regulations, as well as the local governments. Regional regulations are similar to those of the central government. Regulations at the local level are mainly by-laws.

Administrative statements cannot be regarded rules. They are simply decisions that implement and enforce rules on a case by case basis. Unlike decisions, regulations have the following features:

- Generality. The regulation tends to affect all citizens or at least groups of non-individualised citizens.

- Abstraction. While decisions focus on specific cases, the regulation tries to cover every possible situation related to its regulatory scope. It intends to plan ahead for future conflicts.

- As a general rule, regulations have to be officially published, while decisions are just individually notified (except for massive or plural decisions).

- Hierarchy. There is no hierarchy among decisions, while there is between regulations. Some of them enjoy a higher position than others.

- Regulations are created to remain in the future, and as a general rule they remain in force up until a subsequent law or regulation repeals or contradicts them.

In 1986, Spain became a member of the European Union and yielded certain state powers to such organisation. European treaties, as international rules, are directly enforceable as part of the national legal system once signed, ratified and published in the Official State Gazette. The Spanish Supreme Court and the European Court of Justice have both sentenced that any conflict between domestic and European Union legislation must be solved according to the principle of supremacy of Community law.

As primary E.U. legislation (*derecho originario*), there are the Union Treaties and the General Principles of Law. In this group the E.U.´s international agreements with third countries should be also included. As secondary legislation (*derecho derivado*) there are several legislative acts (regulations, directives and decisions), together with non-legislative acts (delegated acts, implementing acts, recommendations and opinions, inter-institutional agreements, declarations, resolutions and action programmes). Lastly, there are conventions between member states in the form of coreper decisions and international agreements.

the position of the primary and secondary European law with relation to the different domestic legal sources is certainly arguable. Once a state becomes a member of the European Union the EU law becomes part of its domestic legal system. Its relation with the rest of domestic legal sources will be therefore based on the competence principle, (not the hierarchy principle). As an exception, the Constitution remains in a higher position, since it is the enabling legislation that makes it possible for a state to become a member of the E.U, and therefore adopt the E.U. legal framework.

2.- Complementary sources.

Customary law is not a common source of administrative law but it is present in certain areas such as municipal law, water law, and cattle road regulations (*concejo abierto, aprovechamientos colectivos de aguas, paso de ganado etc*). Moreover, it is always *secundum legem* in administrative law.

This source of law should not be mixed up with the precedent. Precedents are practices and criteria that have to be kept in following decisions. However, precedent is not binding for the administrative body; the body might diverge from the precedent as long as it is sufficiently justified. Then, the key aspect is to provide an accurate reasoning to back up the new decision.

The general principles of law are as relevant in administrative law as they are in other areas of the legal system. Most of them emerge from the Spanish Constitution, either expressly mentioned or implicitly regarded. Courts (case law) and academic studies (*doctrina*) have contributed as well to define each principle of law.

3.- Clarifying sources.

Reporting case law as a source of administrative law is correct even though judicial opinions are not as relevant as in Common law countries. Case law in Spain, as well as in most European continental countries, plays a relevant yet accessory role. While in common law countries case law is a primary source of law, with even a prevalent position in many areas with relation to statutory law, in civil law countries it only provides non-binding criteria for the lower Courts. Courts can diverge from case law on a case by case basis, although their decisions might be challenged before the upper Courts. Upper Courts, however, could accept the new understanding.

To sum up, case law may help the legal operators but it cannot be reported as a source of binding rules.

The same remark goes to the academic studies, which obviously are not a binding source of law. Nevertheless, they are useful and can inspire the legislative, the judiciary, and the administrative bodies.

II.- ORGANISATIONAL PRINCIPLES.

Primary sources of law interact on the basis of two principles. The hierarchy principle means that certain regulatory instruments are prevalent to others. For example, the Constitution prevails in every case, and the acts and statutes prevail over regulations. The idea is that some sources are in a higher position in the legal system.

The competence principle means that every political or administrative structure has its own areas of power. In theory, such spheres should work as separate policy areas, collaborating when interacting or sharing functions (see sections 148-149, et ss. CE).

According to section 149.3 CE, state law can be reported as subsidiary law (*derecho supletorio*) for regional law. Statutes are deemed subsidiary when, though only indirectly applicable, are called to resolve by extension or analogy a point unaddressed by the code. However, after STC 61/1997, March 20, the subsidiary principle must be regarded an exception and is subject to strict conditions. Regions cannot waive its right-duty to regulate any matter under their assigned responsibilities, pretending to use the subsidiary principle to fill in the gap.

III.- IMPLEMENTATION CRITERIA.

1.- **Timing issues:**

According to section 2 of the Spanish Civil Code, Statutes come into force 20 days after their complete publication in the official journal or gazette. However, the Statute can anticipate or move forward the *vacatio legis*. With regards to regulations, section 24.4 *Ley del Gobierno* states that they will come into force once completely published in the official journal. The regulation shall state the corresponding date to come into force.

Regarding the time effects, it is worth noting that neither **statutes** nor **regulations** can be regarded retroactive when imposing penalties, restrictions or limiting rights (section 9.3 CE). On the contrary, they can affect previous situations as long as they are more advantageous. The retroactive limitation, however, is not complete. If it was, improvements in the current legal framework should not be feasible. Increasing conditions, limits and burdens are sometimes necessary to reach social goals and safeguarding existing rights should not be a brick wall.

For example, it is reasonable to impose greater safety conditions to industrial companies, even though such decision might lead to greater expenses. The key issue here is to make it in a way the new measures would not be completely unexpected. Enough time to get used to the new situation should be necessary too. In other words, retroactive effect of restrictive rules is only possible as long as the citizen is given enough means and time to change with the new requirements.

The temporary provisions (*disposiciones transitorias)*, which are included at the end of laws and regulations, are the core issue for that purpose. Not being careful with such matters in the rule-making process might lead to state liability *(responsabilidad patrimonial ordinaria o responsabilidad del Estado legislador*).

On the other hand, it is acceptable that rules re-define vested rights, even imposing new burdens and conditions, when they do not concern the right´s hard core.

Let us focus now on timing conditions with regards to **administrative decisions.** According to section 57 *LRJPAC*, they only become effective and enforceable once notified. Their effects may take place from that moment on or, if stated, move enforcement ahead. Regarding retroactive effects, there is no problem when the new administrative statement is more advantageous. However, limiting and restrictive decisions shall only anticipate their effects as long as all the following conditions should appear:

- The new decision is replacing a previous overturned decision.
- Facts were present in the date the new decision was pretended to become enforceable.
- No other rights or legitimate interests are expected to be damaged.

Laws and regulations cease to be in force when expressly or implicitly repealed. The new rule must be of the same or higher rank. Sometimes, statutes and regulations themselves state a maximum time to be in force, which is quite usual in plans and programmes. Other regulations, or even administrative decisions, may include a defeasance clause (*condición resolutoria*), or a precedent condition (*condición suspensiva).* Extending the deadline is also possible as well as tacit extensions, under certain conditions.

2.- **Territory.**

Statutes and regulations are in force in the territory where the enacting authority holds power. They do not have any effect, as a general rule, out of their borders.

3.- **Rules of understanding and interpretation.**

Administrative law shares the same interpretation rules as the rest of the areas of law do. Principles of law, and in particular the public interest principle, are significantly important in this field.

It is worth noting that regulations are not deemed real understanding of law '*intepretación auténtica*, in the sense that they are always accurate and precise. Regulations come from the executive branch, while Statutes are enacted by the legislative, therefore, such a conclusion would clearly conflict the separation of powers principle.

IV.- NON-PARLIAMENTARY RULES RANKED AS LAWS.

The Decree-Law (*Decreto-ley*; section 86 CE) is a provisional rule that the Government may issue for extraordinary and urgent matters. It is ranked as law.

These rules are only allowed when extraordinary and urgent reasons require a fast response. The *extraordinaria y urgente necesidad* concept established in section 86 CE is vague (*concepto jurídico indeterminado*). To help understand this concept Courts have stated that decree laws cannot regulate structural matters. In particular, they are not suitable for the following matters:

- Matters that are reserved as to organic laws.
- Basic institutions of the State.
- Fundamental rights of the citizens regulated in Title I CE
- The fundamentals of the Autonomous Communities.
- The general electoral law.

Regarding the fundamental rights, however, decree law is not completely banned. Actually, it would be rather difficult to have decree laws in practice unless they can regulate certain aspects concerning fundamental rights. Almost every relevant issue has something to do with a fundamental right. Therefore, the limit for decree laws is to regulate the essential core of fundamental rights. Regulating incidental issues connected to fundamental rights is according to CE.

Decree Laws must be ratified by Congress within a period of 30 days. The Congress must be conveyed to address this issue. The debate will address the whole decree and the ratification must refer to the whole content. If the decree is not ratified its effects will be *ex nunc*. Thus, it will be regarded valid and effective from the enactment date to the voting session date. From that point on, the decree will be repealed. In the event the Congress was not conveyed to ratify the decree will be repealed too.

Every political group in Congress may apply the decree to be processed as law. Assuming such initiative is allowed, the decree will become a statute. This is particularly useful when intending to gather more political support, introducing improvements, as well as turning a temporary law into a structural law.

The Legislative Decree (*delegación legislativa-decreto legislativo*) is always issued by the government as a result of a previous delegation from Congress (section 85 CE). The resulting rule is also ranked as law.

Legislative delegation must be granted by Basic Law (*Ley de Bases*) whenever it mandates Government drafting a detailed statute (the parliament lays down the fundamentals and government puts forward a detailed statute). As long as parliament only mandates to consolidate several statutes and their amendments into a single text, just an ordinary law is required (consolidated statute, section 82.2 SC).

Delegation must be expressly granted to the government and must refer to a particular matter. It should lay down a specific period of time to fulfill the rule-making process (section 82.3 SC)

The Spanish Constitutional Court (*TC*) has the power to monitor the legislative delegation as well as the legislative decree itself. The Supreme Court (*TS*) is only allowed to supervise whether the legislative decree has exceeded or not the delegation terms and conditions. Although it will be discussed later on, it is worth mentioning that issues included in the decree exceeding the delegation scope must be regarded simple regulations, not enjoying legislative rank. As a result, such parts of the legislative decree can be fully monitored by Administrative Courts (section 82.6 CE and section 1 *LJCA*).

V.- EUROPEAN LAW OVERVIEW.

Together with E.U. treaties, which are actually part of the Spanish legal system once they were adopted, the so called secondary E.U. legislation *(derecho derivado)* plays a relevant role in Spanish administrative law.

Regulations are fully enforceable in every member state as soon as they are passed. They feature the same rank as domestic laws. No action is required by the national governments or the legislature to implement EU regulations. Regulations are passed either jointly by the EU Council and European Parliament, or by the Commission alone.

Directives are addressed to national authorities, who must then take action to make them part of domestic law. As long as directives are not directly addressed to citizens, they are not directly granted rights or affected by obligations. EU directives establish goals that every member state must meet. Domestic authorities have to adapt their own legislation to achieve the goals.

The E.U. is made up of 27 countries and it would be certainly impossible to lay down a common legislation in many areas not allowing them to adapt their domestic rules to the E.U. policies. Domestic legal systems differ broadly in the European Countries, and its political, territorial and institutional structures make direct enforcement of directives impossible.

Directives specify a deadline for their implementation into domestic law. When states do not meet the deadline, directives become partly in force according to the so called: direct vertical ascending efficacy principle. As a result, citizens become allowed to claim for rights resulting from the directive as long as such rights are to be enforced before the state. The principle does not cover, however, neither claims addressed to other citizens, nor claims from the state to citizens.

Each Member State is responsible for implementing the directives. Regions or local authorities are not responsible before the E.U. institutions.

Decisions apply in specific cases, involving particular authorities or individuals. There are laws passed by the EU Council (sometimes jointly with the European Parliament) or by the Commission to address specific cases. This particular feature is probably the main conceptual difference between decisions and regulations. They also create rights and duties completely enforceable for authorities and individuals.

Under the Treaties (Section 258 of the Treaty on the Functioning of the European Union -TFEU-; Article 141 of the Euratom Treaty), the Commission is responsible for ensuring that the EU law is correctly enforced. Whenever a member state fails to comply with the EU law, the Commission has to start proceedings (action for non-compliance) to bring the infringement to an end. Although when doing so the state does not comply, the Commission can bring the case to the European Court of Justice.

The responsible authority is always the state, notwithstanding many European policies are actually implemented by regional or local authorities. The state is internationally liable for noncompliance, irrespective of the authority to which the compliance is attributable.

Under the Commission noncompliance pre-litigation procedure the first step is the so called: pre litigation administrative phase: infringement proceedings. This is actually an opportunity for the state to voluntarily meet the EU Law. The proceeding includes a preliminary investigation, a letter of formal notice, hearing for state´s pleadings, and a reasoned opinion. The latter sets out the Commission's judgment. This statement gives

formal notice of the infringement, and is followed by a referral by the Commission to the Court of Justice. After the referral the litigation procedure shall be started.

The Court of Justice of the EU was created in 1952 to ensure the observance of the EU law. It is a relevant source of understanding of EU law and its aim is to judge conflicts between the EU, states and citizens. It is seated in Luxembourg and is made up with three Courts: The Court of Justice, the General Court (1988), the Civil Service Tribunal (2004). The Court of Justice has 27 appointed judges and 8 advocate generals.

The Court has been clearly granted defined jurisdiction in various categories of proceedings:

- **References for preliminary rulings.**

  Courts of each member states are the ordinary jurisdiction when it comes to E.U. law enforcement. During the trial, doubts about EU law interpretation may arise. In this case, the national Court can refer to the Court of Justice seeking for clarification. This is also intended to ensure the effective and uniform application of European Union legislation and to prevent divergent interpretations. The Court of Justice's reply is not merely an opinion, but it takes the form of a judgment or reasoned order. The national court is therefore bound to follow such interpretation. Likewise, the Court's judgment binds the rest of domestic Courts before where the same problem was raised.

  The national court submits questions to the Court of Justice in the form of a judicial statement (i.e. *Auto*). The concerned parties, the member States and the institutions, can submit written observations to the Court of Justice. Once the written procedure is closed, the parties can apply for a hearing (oral argument). One of the Judges issues a report about the hearing and the Advocate General delivers his/her opinion. This marks the end of the oral stage.

  The Judges deliberate on the basis of a draft judgment drawn up by the Judge-Rapporteur. Judgements are taken by majority and pronounced in open court.

  For references, the EU law envisages a simplified procedure.

- **Direct actions:**

  These actions try to determine whether a member state has fulfilled its obligations under the EU law. Before bringing the case to the Court of Justice, the Commission conducts a preliminary stage including a hearing. Afterwards, the Commission may bring an action for infringement before the Court of Justice. Member states are also allowed to bring that action. The judgement has to be complied, in other cases, the state shall become liable of a fixed or periodic financial penalty.

  - Actions for annulment. Regulations, directives or decisions can be challenged by interested parties seeking for nullity.

- Actions for failure to act. These actions refer to cases where the different institutions, bodies, agencies etc. of the EU fail to act, Jurisdiction to hear such actions is shared between the Court of Justice and the General Court according to the same criteria as for actions for annulment.
- Appeals. The General Court´s judgements can be challenged before the Court of Justice.
- Reviews. Decisions of the General Court, made on appeals against decisions of the European Union Civil Service Tribunal, may in exceptional circumstances be reviewed by the Court of Justice.

- **Applications for interim measures**

  Applications for interim measures seek suspension of every order that might produce serious and irreparable damage to a party.

Flowchart of procedure

Procedure before the Court of Justice		
Direct actions and appeals		***References for a preliminary ruling***
Written procedure		
Application Service of the application on the defendant by the Registry Notice of the action in the Official Journal of the EU (C Series) [Interim measures] [Intervention] Defence/Response [Objection to admissibility] [Reply and Rejoinder]	[Application for legal aid] Designation of Judge-Rapporteur and Advocate General	National court's decision to make a reference. Translation into the other official languages of the European Union. Notice of the questions referred for a preliminary ruling in the Official Journal of the EU (C Series). Notification to the parties to the proceedings, the Member States, the institutions of the European Union, the EEA States, and the EFTA Surveillance Authority. Written observations of the parties, the States and the institutions
The Judge-Rapporteur draws up the preliminary report.		

General meeting of the Judges and the Advocates General. Assignment of the case to a formation [Measures of inquiry]
Oral stage
[Hearing; Report for the Hearing] [Opinion of the Advocate General] Deliberation by the Judges. Judgment

Optional steps in the procedure are indicated in brackets.

* Source: http://curia.europa.eu/jcms/jcms/Jo2_7024/

QUESTION PAPER.

I.- Why is the precedent not regarded a source of law?

II.- What does *vacatio legis* mean?

III.- What does *interpretación auténtica* mean?

IV.- Providing that fundamental rights are regulated only by organic laws, the decree law should clearly not regulate them. However, when regulating many areas of law it is difficult not to indirectly affect fundamental rights. To what extent can the decree law regulate such matters?

V.- What is the use of a legislative decree (consolidated statute)?

VI.- Imagine a decree law comes into force. After 24 days in force, the Parliament rejects its ratification. What should happen to all the cases regulated under the decree during those days?

VII.- Is the Supreme Court allowed to monitor a legislative decree?

VIII.- What does it mean when a directive has a direct ascending vertical effect?

CASES.

I.- The Board of Ministers pass a decree implementing a number of energy saving measures. Among such measures, the decree states that cars will not be allowed to speed up 110 Km/hour. Is this a regulation or an administrative decision? Justify your answer.

II.- The Board of Ministers pass a decree appointing Mr. X as Secretary of State. Is this a regulation or an administrative decision?

III.- Search on the internet examples of regulations and administrative decisions. You can check any of the electronic offices currently available at public bodies´ websites.

IV.- The Board of Ministers pass a decree approving the regulation to protect heritage assets. Do you find it correct according to the principles concerning the sources of law?

V.- The Town Hall agreed to grant a citizen a building permit. Do you find it correct?

VI.- A regional decree regulates water discharges on public waters within the Jucar watershed. The regulation only concerns discharges within the boundaries of the Valencia Region. Do you find it correct?

VII.- A Regional decree states that every condominium must install fire extinguishers on every floor. It established a 3 year deadline and provides grants to help finance the building update. Obviously, the rule concerns previous rights as it imposes new burdens to property. Do you think the decree is lawful?

CHAPTER VI.- REGULATIONS AS A SPECIFIC SOURCE OF ADMINISTRATIVE LAW.

I.- CONCEPT AND CHARACTERISTICS.

Regulations are the typical way the public administration states rules. Unlike decisions, they concern every citizen or situation (*generalidad*). They lay down norms abstract enough to create specific guidelines for their implementation (*abstracción*). With regards to their timing conditions, they intend to state rules that will remain in force until another law or regulation states otherwise (*vocación de permanencia*).

As their main features we should stress the following:

- Every regulation must be done according to law. Regulations against law are always null and void. Regulations must complete, clarify, or even state particular procedures and rules so to help implementing laws. There is just one category, the so called: independent regulations (*reglamentos independientes*) that are completely disconnected from a previous law. Such type of regulations focus on internal matters related to the administrative structure of public bodies. Notwithstanding, even such regulations cannot break the law.

- Regulations fall under ordinary judicial review. Administrative Courts enjoy exclusive jurisdiction to address regulations.

- Regulations must be reasoned. During the process leading to their creation, the government must give reasons to justify their necessity and accuracy.

II.- LAWFULLNESS AND EFFICACY FOR REGULATIONS.

1.- Formal conditions.

- Competence.

Not every single administrative body enjoys regulatory power. Thus, it is relevant to determine whether the incumbent body is acting under its responsibility. That depends on what the law states, but as a general rule, only the upper bodies in the hierarchical administrative structure have such position.

Delegating regulatory powers is not allowed in Spanish administrative law. Unlike administrative decisions, regulations can only be made by the public body entrusted by law.

There are different types of regulations, all of them hierarchically ranked according to the enacting authority position. In the State Administration (*Administración General del Estado*), the Board of Ministers enact Royal Decrees (*Reales Decretos*); Ministers approve Minstry Orders (*Ordenes Ministeriales*); Directors (*Directores Generales*) pass notifications (*circulares*) and directives ‘(instrucciones). Other individual or collegiate

bodies may also enjoy regulatory powers, as well as certain constitutional institutions such as the Parliament or the Senate do with internal efficacy. The same can be said regarding other independent administrative bodies such as Universities, the Spanish Central Bank, etc.

Sometimes, such regulations create rights and duties having effects out of the internal organisation, which is relatively frequent regarding citizens or companies under their supervision. Such scheme is similar to those adopted in the different Regional Governments. Local Governments have regulatory powers as well, taking the form of ordinances and plans. The main regulation, however, is the organic regulation (*reglamento orgánico*), which states the internal regulatory framework in the Town Hall.

- Hierarchy.

As stated above, all the regulations are hierarchically ranked, and their particular position depends on the position of the regulatory body within the administrative structure.

Regulations and ranking structure	President	Board of Ministers	Ministers	Director General	
upper	*Real Decreto.*				
		Decreto del Consejo de Ministros			
			Ordenes Ministeriales		
lower				*Circulares, Instrucciones Resoluciones*	

- Proceeding.

Section 24, *Ley 50/1997, de 27 de noviembre, del Gobierno* states a common procedure for every regulation. Regions have their own procedure, which as a general rule is similar to state procedure. *The Ley 7/1985, de 2 de abril, Reguladora de las Bases del Régimen Local* defines the local government regulatory making process.

Let us describe the key stages in the regulatory-making process:

- Starting stage: the proceeding gets started with a decision of the competent executive body (*Centro Directivo*). The executive body shall make the proposal (*proyecto de reglamento*), including a report on the desirability and opportunity of regulating the issue (*informe de oportunidad*). An economic memorandum stating the economic results and goals expected when implementing the regulation is also required (*memoria económica*).

- In addition, depending on the kind of regulation it may be necessary to collect different reports (*informes, dictámenes preceptivos*), as well as studies to support the project. Sometimes public calls and enquiries allowing public participation are made (*consultas*).

These are the most frequent reports in the regulatory-making process:

- Gender report (*informe de impacto de género*). Required since the 2003 Government Law amendments.

- General Technical Secretariat Report (*Informe de la Secretaria General Técnica*). Not required when the new regulation is just amending a previous one.

- State Advisory Council Report (*Informe del Consejo de Estado*). Not required for independent regulations.

- Ministry of Finance and Public Administration eport. Just required when the regulation concerns the distribution of powers among the State and Regions. This department is responsible for Government action in territorial policies, including regions and local authorities.

- Hearing.

  Depending on the kind of regulation and the concerned groups, the hearing will be opened to everyone or will be offered to the citizens that are directly concerned (*interesados*), normally NGOs, associations and representative entities. As long as the regulation may be harmful to a particular group of citizens, it will be due to have a specific hearing with the association or corporation representing their interests. Let us think about a regulation concerning doctors: the College of Physicians will be due to be heard.

  Providing the hearing is open to all citizens, any natural or juristic person, regardless of such person's nationality who wishes to file pleadings, to provide information, or to make a proposal in this phase of the proceeding, will be entitled to do so.

- Approval of the regulation by the relevant regulatory making competent body, and official publication (*BOE, DOGV, BOP*).

2.- Material conditions.

- The regulation must be consistent with the general principles of law and the prohibition of acting arbitrarily (*interdicción de la arbitrariedad*).

  The Spanish Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal enactments, the no retroactivity of punitive measures that are unfavourable to or restrict individual rights, the certainty that the rule of law will prevail, the accountability of the public authorities, as well as the prohibition against arbitrary action on the part of the authorities.

Regulations are discretionary in nature under Spanish legislation. Therefore, all the supervision techniques available to monitor discretionary powers are fully applicable. Reasoning, however, is not expressly required unlike administrative statements, although it usually appears in the explanatory statement accompanying the regulation (*exposición de motivos*). The principle of preclusion of arbitrariness takes us to what is called material justice.

The Supreme Court has declared regulations null and void on the following grounds so far:

- Lack of enough objective reasoning, or lack of rational or reasonable reasoning (*justificación objetiva suficiente o falta de fundamento racional o razonable*).
- Lack of proportionality.
- Poor assessment of facts.
- Bias.
- Inconsistency.
- Misuse of power (*desviación de poder*).
- Infringement of the principles of good faith and legitimate expectations (*confianza legítima*).

In addition, Courts can sentence the Administration to pass required regulations when not complying with the duty to approve them within the deadline (*inactividad*).

- The regulation must meet the legality principle (*ajuste a la materia reglamentaria*). Regulations cannot regulate matters that are expressly reserved as to legislation[8] (*reserva de ley*).[9]

  Legal conditions are those contained formally and substantially in a Law; regulations cannot interfere with such a principle.

- Non-retroactivity of penalty or restrictive regulations (*disposiciones sancionadoras o restrictivas*). Such limit does not mean that regulations cannot impose new burdens, limits or restrict individual rights. If it was that way, no innovation and improvement would be possible. However, new limits must be justified and the regulation must provide guarantees to allow citizens to adapt themselves to the new situation (transitional provisions, compensations, etc.).

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8 This term is often used in European Union documents.

9 *Reserva de ley* is a principal of civil law for which there is not a precise equivalent beyond due process. However, the same idea is usually expressed in English-language legislation except as provided by law.' In US law, there is the doctrine of preemption where the Federal (national) government has jurisdiction over a particular subject, State legislatures may not legislate, because the field has been preempted by the Congress.

An example might be: 'The Secretary of … may establish regulations prohibiting the use of ..., except as provided by law.' The meaning is that parliamentary or congressional legislation may be enforced by administrative regulation, but may not be limited or contravened by administrative regulations.

- *Inderogabilidad singular*. According to this principle, no administrative decision can preempt a regulation to be implemented in a single case.[10] In other words, the decision-making authority is not allowed to waive implementing a regulation when deciding a case, even if the authority considers that its derogation should benefit public interest. [11]

III.- TYPES OF REGULATIONS.

1.- Executive regulations.

These types of regulations are created to implement or even complement laws. Laws frequently refer to them in order to regulate particular situations, or even by means of general clauses. Notwithstanding, referrals are only allowed to provide the law that regulates the key issues and conditions (*prohibición de remisiones en blanco*).

In any case, in order to verify that the regulatory-maker did not go beyond its limits, a case by case analysis shall always be required. There are *escalas de intensidad de la reserva de ley*. For example, the reserve as to legislation is not the same regarding penalties or promoting measures.

On the other hand, '*deslegalización* is allowed in Administrative law. Such a situation takes place when a law states that a subject, which is not reserved as to legislation according to the Constitution, but it was regulated by law, and can be hereinafter regulated by regulation. In other words, the legislative branch is delegating the power to regulate a particular matter to the executive branch. The regulatory rank of the matter will be lowered. However, the resulting regulation will, in fact, be able to repeal previous laws. The legislative can revoke such privilege at any time while enacting a new law.

2.- Independent regulations.

These regulations are approved regardless of any existing law. A previous delegalisation is not needed. Independent regulations are only suitable as long as the subject matter has not been previously regulated by law. In addition, they are not allowed to regulate matters reserved as to legislation. Their natural area is the internal organisational field.

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10 The preemption doctrine derives from the Supremacy Clause of the Constitution which states that the 'Constitution and the laws of the United States...shall be the supreme law of the land...anything in the constitutions or laws of any State to the contrary notwithstanding'. This means, of course, that any federal law--even a regulation of a federal agency--trumps any conflicting state law. Preemption can be either expressed or implied. When Congress chooses to expressly preempt a state law, the only question for courts becomes determining whether the challenged state law is one that the federal law is intended to preempt. Implied preemption presents more difficult issues, at least when the state law in question does not directly conflict with federal law.

11 In legal English, derogation means that a law or regulation is exempted for a single case.

3- Regulations of necessity.

Regulations of necessity are only suitable in exceptional and temporary situations. In fact, they are only available, in accordance with section 21 *LRBRL*, in cases of catastrophe or major disasters. Majors can take exceptional measures in such cases, including regulatory instruments which are even capable to waiver laws.

4.- Others.

In modern administrative law many other specific regulations have arisen in the last years. The nature of some of them is under discussion, given that some of them might be reported just as administrative statements rather than regulations. The following are the main examples:

- Plans.
- Certain agreements (collective labour agreements)
- List of work posts (RPT).
- Technical standards (ISO, UNE...).
- Codes of ethics and charters of services for the citizen.

IV.- REGULATION MONITORING.

1.- General rules.

- Regulations can only be reported null and void (*nulos de pleno derecho*).
- Annulation causes are stated in section 62.2 *LRJPAC*: regulations against the Constitutions, laws or other regulations highly ranked. Regulations concerning matters reserved as to law, as well as retroactive regulations concerning existing individual rights as long as they unlawfully restrict or limit them.
- Validation (*convalidación*) is not possible for regulations.
- There is no deadline for non-direct appeals, but direct appeals must be done according to legal timing conditions.
- Regulations can be overturned as a result of a citizen´s appeal or even at the administration's own initiative (*Ex officio*).
- Annulation has knock-on effects on every resulting decision pronounced under the regulation (*ex nunc*).
- According to the Supreme Court, certain formal failures are not enough to invalidate a regulation (omission of non-substantial stages of the proceeding). In addition, when trying a non-direct appeal, formal shortcomings are not suitable.

2.- Monitoring and appealing procedures.

- Passive system: non-application of regulations.

  According to section 6 LOPJ, Courts must not enforce unlawful regulations when dealing with particular cases. Judges may question the legality of any regulation

and, in such case, decide on not enforcing it. Such a monitoring power is called *Control judicial difuso*. However, according to this method, the concerned regulation shall not be declared null and void, and therefore the ruling will not have an*erga omnes* effect. It will just have intra-procedural effect.

Citizens or even administrative bodies are not allowed to use such power; only the judiciary can do so.

- *Ex officio* review.

  According to section 102.2 *LRJPAC*:

  > *'En cualquier momento, las Administraciones públicas de oficio, y previo dictamen favorable del Consejo de Estado u órgano consultivo equivalente de la Comunidad Autónoma si lo hubiere, podrán declarar la nulidad de las disposiciones administrativas en los supuestos previstos en el artículo 62.2'.*

  Challenging *Ex officio* a regulation always requires a previous positive report from the Council of State (*Consejo de Estado*). As long as the regulation is declared null and void under such procedure, annulation will have *erga omnes* effects.

  Unlike administrative decisions, the so called *acción de nulidad'* is not allowed regarding regulations. Thus, citizens cannot apply the administration to start *Ex officio* procedures.

  It is worth pointing out that annulation is significantly different from repealing when it comes to results. Annulation has retroactive effects, while repeal does not. In addition, annulation leads necessarily to challenging every non-final administrative decision implementing the regulation.

- Appeal to the Administrative Courts.

  - Direct appeal. Every regulation can be directly challenged to Courts. The deadline is 2 months, starting at the date the official publication of the regulation took place. After the trial, the judgment will have general efficacy and will be officially published.

  - Non-direct appeal. After the above mentioned deadline, no direct appeal is allowed. However, it should be uneven to keep a regulation that infringes the legal system valid and effective. Therefore, there is an indirect system to challenge such regulations with potential general effects.

    Once a citizen is notified of an administrative decision damaging his rights, he is allowed to bring the case to the upper administrative body, and then to Court. Providing that the decision is actually implementing a regulation that might be considered null and void, the citizen can rely on that premise to support his/her appeal. In other words, he/she will challenge the decision on the grounds of a possible illegal regulation.

Eventually, the Court might declare the administrative decision null and void according to such reasons, and the judgment would have intra-procedural effects; it will only concern the administrative decision, not the regulation.

However, in order to purge the legal system from invalid regulations, current legislation allows Courts to open one of the following procedures: a) If the judgment is made by the Supreme Court or by the Court responsible to address the regulation, the Court shall quash both the administrative decision and the regulation. b) In other cases, the Judge or the Court shall have to issue a '*cuestión de ilegalidad*' by means of an '*auto*'. This *'auto'* must be officially published.

Whatever the new judgment on the legality of the regulation was, it will not change the previous judgment about the legality of the administrative decision. However, the ruling about the validity or nullity of the regulation will have '*erga omnes*' effect. The regulation will therefore be overturned.

- Appeal to the Constitutional Court.

  Section 161.2 CE states an appeal before the Constitutional Court that allows the Central Government to challenge regulations made by the Regions:

  > *'El Gobierno podrá impugnar ante el Tribunal Constitucional las disposiciones y resoluciones adoptadas por los órganos de las Comunidades Autónomas. La impugnación producirá la suspensión de la disposición o resolución recurrida, pero el Tribunal, en su caso, deberá ratificarla o levantarla en un plazo no superior a cinco meses'.*

  The appeal is regulated in the LOPJ, as a *'conflicto de competencias'*.

  The appeal can be also issued by citizens both before the ordinary jurisdiction or the Constitutional Court. Standing rights, as we can see, are broad in this case.

QUESTION PAPER.

I.- What are the main differences between an administrative decision and a regulation?

II.- Point out what kind of regulation belongs to each of the following administrative bodies:

- -*Presidente del Gobierno.*
- -*Pleno del Ayuntamiento.*
- -*Pleno de la Diputación provincial.*
- -*Consell de la Generalitat.*
- -*Consejo de Ministros.*
- -*Ministro.*
- -*Comisión delegada del Gobierno.*

III.- What does *inderogabilidad singular* mean?

IV.- Can regulations be deemed annullable?.

V.- List and explain the null and void causes that might affect regulations.

VI.- Are administrative appeals (within the administrative channel) available and possible to challenge a regulation?

VII.- Explain what an indirect appeal against a regulation is.

VIII.- Is the public administration allowed to waiver enforcing a regulation in a particular case, providing it might be against the law?

IX- What does *deslegalización* mean?

CASES.

I.- The Town Hall passes a law regulating begging. The regulation empowers local police to drive out homeless begging on the streets. The law does not establish expelling as a penalty or sanction applicable in this situation, but it also states that begging can be regulated by ordinance. Do you find the above mentioned correct according to law? Imagine that a NGO in the aim to protect immigrants and disadvantaged people comes to your office asking for advice. What would you say?

II.- The Town Hall passed the city planning on January 20th, 2010. One developer, which is your client, applies for a building permit. The Mayor rejects the application on the grounds that it is inconsistent with the urban planning. The reason for rejecting the application is arguable, as the plan might be eventually reported against the law. What should you do in this case?

III.- The Court decides not to enforce one regulation assuming it is null and void. Is the Court acting right?

IV.- The Valencia Regional Government passes a regional planning scheme (*Plan de ordenación territorial*) in order to regulate river bed protection and management. Regions are responsible for territorial planning and environmental protection according to the Spanish Constitution. Providing the area is situated within the River Jucar demarcation, and taking into account that the State is responsible for inter-regional basins, do you think such a plan would be lawful? What should the State River basin Authority (*Confederación Hidrográfica del Júcar*) do in this case?

V.- Imagine that a law states that all the *infracciones y sanciones* scheme applicable under its scope will be laid down by a regulation. Explain the likely legal outcomes for such a law and the resulting regulation.

CHAPTER VII. ADMINISTRATIVE STRUCTURE. SELF-ORGANISING POWERS.

I.- THEORY OF THE ADMINISTRATIVE ORGANISATION (*Teoría del órgano*).

The Spanish term *órgano* has certain close concepts in common law systems: administrative body, agency, authority, council, board.

The ability of the public administration to define its internal organisation is broad. (freedom of organisational schemes). However, there are some limits to be met.

- Administrative bodies must be able to comply with the assigned public goals (aptitude).

- Organisational rules and schemes will not negatively affect constitutional rights and duties; in addition, they must be according to law.

The current *órgano* concept comes from ancient Canon Law, and therefore it is based on the canonical concept of '*sede*'. The key feature of the concept is that decisions become independent from the individual, in other words, from the administrative body holder. The body remains, regardless the holder.

Section 5.2 *Ley 6/1997, de 14 de abril, de Organización y Funcionamiento de la Administración General del Estado (LOFAGE)* states the following definition of '*órgano*':

> *'Tendrán la consideración de órganos las unidades administrativas a las que se les atribuyan funciones que tengan efectos jurídicos frente a terceros, o cuya actuación tenga carácter preceptivo'.*

Administrative bodies have a particular position in the hierarchical structure of every public organisation. They have specific powers and duties. They must be correctly funded, in the sense that they must have budget credits available.

II.- COLLEGIATE BODIES.

Collegiate bodies are those made up of two or more individuals. In the event they are completely made up of authorities or civil servants, they are reported to administrative collegiate bodies; however, as long as citizens or private entities are allowed to participate they should be considered joint committees, boards, etc.

Every single collegiate body has an internal regulation or by-law (*estatuto*). It is a regulatory instrument that establishes its composition, structure, mandate, functions, workings, etc.

- Members:

  - President or Director

    The president holds representative powers. He must convene the meetings and lay down the agenda (*orden del día*). According to the body regulations the president might have casting vote (*voto de calidad*). He monitors compliance with laws and regulations. In the event of vacancy at office by death, resignation, disability, or by any other legal or statutory reason, the office cannot remain vacant. Another member will temporarily take office until another director is appointed by the Board. According to law, it is the Vice-President, the older member, or the one holding higher hierarchical status or authority.

  - Secretary.

    Depending on the type of collegiate body, the secretary can be a full member or just a civil servant assigned to give the body support. The following are the key tasks for the Secretary

    -Holds preparatory functions.

    -Draws up the minute of every meeting session. He/she takes care of secretarial tasks at the hearing, records the various declarations, and takes the transcripts of the hearing.

    -Certifies body´s agreements and decisions and has legal authority to attest documents (*fe pública*).

  - Other members.

    Every appointed full member of the collegiate body holds the following rights and duties:

    -Right to be called to the meetings and provided with all the relevant information.

    -Right to know the agenda in advance.

    -Right to participate in the debates.

    -Right to vote.

    -Civil servants who are members of the body cannot abstain or refrain from voting in the meeting.

    -All the members can make suggestions and askquestions.

-Substitution of members and delegation of voting rights is allowed.

-Other duties can be stated in the body´s regulations.

- Operating conditions:

To be validly convened, the president, secretary, and ½ members should be present in the second call.

Only the issues on the agenda can be addressed in the meetings. However, the Board can discuss matters out of the agenda providing all the members present or being represented, unanimously agree to discuss them.

Agreements will be made by simple majority unless otherwise stated by law or regulations.

After each Board session the secretary is responsible for collecting the agreements and draw up the minute. The minute is a summary record of the meeting. It must be ratified in the following session of the Board.

As validity requirement, each decision of the Board must meet the following aspects; otherwise, the resulting agreement will be deemed null and void:

- Quorum.
- Correct call.
- Right to access information and participation rights.
- Correct majority.

Every other fault would lead to annulability (*anulabilidad*) or just to report an irregularity without invalidating effect (*irregularidad no invalidante*)

III.- ORGANISATIONAL TECHNIQUES.

1.- Authority.

Authority is the legal ability to do something: passing regulations or making decisions. It is expressly assigned by the law and regulations. There are three types of powers: objective authority (*competencia material*), territorial authority (*competencia territorial*) and hierarchical authority (*competencia jerárquica*). Every conflict regarding the distribution of powers should be brought before the Administrative Courts for judicial review. However, as long as the conflict arises between the State and Regions, the Constitutional Court might also intervene.

Let us focus on certain dynamics in the distribution of powers that are intended to reach unity in administrative action (*técnicas de reconducción a la unidad*). Let us see different options to enhance administrative performance.

- Devolution of powers (*transferencia*). There are two options: decentralisation (*descentralisación*) and deconcentration (*desconcentración*).

  Devolution of powers towards other public bodies is a common place in Spanish bureaucracy. It can be defined as the transfer of governance responsibilities to other public bodies, in the form of decentralisation or deconcentration.

  Decentralisation is usually referred to as the transfer of powers from the central government to another administrative structure. Decentralisation is regarded as a way to increase effectiveness in administrative action. It implies a broad delegation of authority with appropriate controls. Authority is transferred to a new legal entity or to a different legal entity already created. There are three types of decentralisation: political, administrative and fiscal. Many privatisation processes takes place in the name of decentralisation.

  On the other hand, deconcentration refers to every transfer of powers and responsibilities from central agencies to their own field offices. It can also be defined as the transfer of administrative responsibilities to lower administrative levels within the same administrative structure. Subsequently, it does not imply the creation of a new legal personality whatsoever.

  Both instruments may help to ensure effectiveness in administrative action. However, greater costs, duplicated structures, flee from administrative proceedings, etc, are the downside.

  Several characteristics are usually present in devolution processes:

  - Powers are usually permanently assigned. Thus, reversal might require complex proceedings.

  - It requires enabling law or at least enabling regulation.

- Delegation (Section 13 *LRJPAC*)

  Delegation means transferring power from certain public bodies to others within the same administration. As a general rule, delegation comes from upper bodies to lower bodies, though it is not necessary to have a hierarchical link between them.

  To be carried out, an express decision officially published is needed (*BOE*, *DOGV*, and *BOP*). The delegating body keeps and retains the power, just transferring its execution and enforcement.

  Certain powers cannot be delegated (i.e. regulatory making powers). Normally, delegation is not granted for specific issues, quite the opposite, it remains until

revocation. Each delegation shall point out the limits and, where appropriate, the length of the delegation. The delegating authority is allowed to reverse delegation regardless time and conditions. Decisions adopted by delegation are regarded as done by the delegating authority. This is particularly relevant to decide the authority holding jurisdiction to address eventual administrative appeals.

Sub-delegation is forbidden. Delegation between different administrative structures (with single legal personality) is possible as long as stated by the law. In addition, section 13 *LRJPAC* enables delegation when it comes to territorial administration and other public entities.

- Call back (*avocación*)

This situation happens when the upper body takes over a competence that was originally assigned to a lower body. However, call backs are always referred to a single matter, a particular case, leaving the distribution of powers intact.

In the case the power was previously delegated to another body, call back does not mean the termination or withdrawal (*revocación*) of the original delegation. It will remain operative since call backs only concern single cases.

Every call back should be reasoned and justified in technical, economic, social or territorial grounds. Consequently, call backs are always reasoned decisions. Citizens, however, cannot appeal against the decision, since call backs are just non-qualified procedural decisions (*acto de trámite no cualificado*). The citizen is just allowed to appeal the substantive decision taken by the upper body on the grounds of an improper call back.

- Management delegation (*Encomienda de gestion*).

With management delegation an administrative body is handed over a particular assignment so to carry out material, technical or managerial activities, as well as public services. Such an entrustment is likely to happen among bodies of the same administration, but it is even possible between different administrations.

Let us give some examples of administrative matters that might be entrusted to other administrative bodies under management delegation:

- Conducting proceedings (except for giving the decision ending the proceeding).
- Performing certain steps of the proceeding.
- Enforcing administrative decisions.
- Developing computer applications.
- Drafting technical reports.
- Seeking for legal advice.
- Etc.

This tool should not be mistaken for public contracts for managing public services or with the contract for supplies. In management delegation neither actual the transfer of competencies nor transfer of essential elements takes place (the entrusted body will never state the final decision in the proceeding).

Whenever the management delegation is entrusted to other administrations or entities, a common agreement and official publication is required. When delegation takes place within the same administration, among their own bodies, the agreement is not mandatory, although it might be done. Official publication, however, is always necessary.

- Delegation of signature (*Delegación de firma*).

With this solution neither the power nor the execution is transferred. The delegating authority is deemed the author of the decision in every case. Thus, the document including the decision shall clearly point out the delegating authority.

Given that delegation of signature has neither significant effect on citizens, nor a deep impact on the distribution of powers, official publication is not needed. It is forbidden to use this technique in penalty proceedings and decisions.

- Substitution and Replacement (*Sustitución y suplencia*).

Substitution works among different administrative bodies, whereas replacement concerns the official holding position in the administrative body. In both cases there are no changes in competence distribution.

2.- Hierarchy.

Administrative bodies are often related to each other under hierarchical relations. However, even within the same administration, bodies pertaining to different departments or structures may only be connected through competence relations. Orders from upper bodies are mandatory for the lower ones. Upper bodies hasve the power to overturn lower bodies´ decisions in appeal proceedings.

3,- Direction.

Whenever an administrative body holds direction power before others a supremacy position among them is presumed. There will not be a hierarchical relation in that case. Normally, such relations are regulated by guidelines and general instructions (*Directrices e instrucciones generales*).

4.- Monitoring.

Supervising is often present among administrative bodies subject to hierarchical relations. Monitor tasks are assigned to specific bodies within the administrative

structure (i.e. General Intervention Board for the State Administration (IGAE), Services Inspectorate, etc.)

5.- Coordination.

Within the organisational structure, coordination can be performed by creating specific administrative bodies.

The *LRJPAC* creates one coordination body called Conferencias sectoriales and it opens the door to other specific bodies (section 5). According to section 6, any administrative body, or even the administrations among them, can reach agreements (*Convenios*) to foster coordination of related policies. They can also promote joint projects and programs, according to section 7.

Another relevant way to achieve coordination is submitting reports. It is broadly common that Spanish legislation demands reporting schemes in the different proceedings. Reports should express the opinion of the relevant body in every field concerning its power within the on-going proceeding. Such reports can be voluntary, mandatory (*preceptivo*), or even legally binding (*vinculante*). It will depend on the nature of the powers involved and the potential clash between their respective fields.

On the other hand, coordination can be achieved via consulting. According to *Ley 50/1997, de 27 de noviembre, del Gobierno*, a consulting stage is allowed within the procedure to pass regulations (section 24).

6.- Cooperation.

When two or more administrative bodies cooperate they are acting in equal position. There is no hierarchical or directive relation between them.

Ordinary ways of cooperation are:

- Sharing information.
- Assistance.
- Creation of new administrative bodies to develop or enforce mutual or related competencies.
- Joint plans and programs.

Every administrative body can enter into collaboration agreements, which sometimes may lead to delegations or management delegations. Section 6 *LRJPAC* precisely refers to one type of such agreements.

QUESTION PAPER.

I. What do you think the sentence *libertad de formas organizativas* means?

II. On what grounds should an administrative decision made be claimed null and void by a collegiate body?

III. What is the main difference between *decentralization* and *deconcentration*.

IV. Providing an administrative body is delegating a power to a lower body, and afterwards it decides to call back the power in a particular case, what should it be the correct answer:

a.- It withdraws delegation.
b.- Delegation stays operating.

V. Can the power to rule appeals against administrative statements be delegated? What about the power to pass regulations?

VI. Do you think delegating responsibilities to administrative bodies within the same administration is lawful? What if delegation is in favour of other administrations?

VII. Is a call back open to challenge?

VIII. Assuming that issuing reports is a way to achieve coordination between public bodies, could you give an example? Do you think reporting is the best way to coordinate policies?

CASES.

I. The Town Hall understands that the social housing policy would be better administered by creating a public entity with private legal personality; for example, by means of a stock company with public capital. Do you find it possible? In that case, should that company be allowed to decide who protected houses should be awarded to, rejecting other applications?

II. All the members of a collegiate body are summoned at 2 p.m. (first call) and 3 p.m. (second call). Not having enough quorum at the first call, the session starts at 2:15 p.m. and a few minutes later the decision is unanimously adopted. A few days later, a member who was present during the session appeals the decision on the grounds of the infringement of calling conditions, as well as the infringement of the

member´s right to participate. He focuses on the argument that the session started before scheduled.

III. Complete the following table:

Authority	Central	Deconcentrated	Decentralised
MINISTER	X		
SUBDELEGADO DEL GOBIERNO			
REGIONAL GOVERNMENT TERRITORIAL DEPARTMENT			
JUCAR HYDROGRPAHIC AUTORITY.			
COUNCIL OF THE REGIONAL GOVERNMENT			
MAYOR			
SPORTS MUNICIPAL BOARD (*Patronato municipal de deportes*)			
STATE-OWNED STOCK COMPANY FOR WATER MANAGEMENT (*Sociedad estatal de aguas*) (AQUAMED)			
AENA			

IV. Assume that one power is delegated. You apply for a grant. The upper body calls back the case. The head of the administrative body calling back the power has manifest enmity with you. Should you appeal against the call back decision?

V. Ebro Watershed Authority delegates the Regional Administration of Catalonia the power to collect the dumping tax for discharges made to public rivers, providing discharges are made within the region. Do you find it possible and lawful? Months later, it also delegates the power to conduct proceedings and lay down decisions so to award dumping authorisations in Catalonia. Is it possible? If the regional administration rejects a company application for a dumpling permit, could the company appeal such decision?

VI. In case the Mayor delegates the signature in a Counsellor (lower position in the hierarchy ladder), can the resulting decision be appealed before the Mayor?

CHAPTER VIII. NATIONAL STATE ADMINISTRATION.

I.- GENERAL CONCEPTS.

State Administration is regulated in the Law 6/1997, April 14th, *de Organización y Funcionamiento de la Administración General del Estado (LOFAGE).* In addition, as government is a branch of State Administration, the Law 50/1997, de 27 *de noviembre, del Gobierno,* must be regarded as a relevant part of its legal regime.

The upper bodies in the hierarchy scheme are:

- *Presidente*
- *Consejo de Ministros.*
- *Comisiones delegadas del Gobierno.*

At a lower level we have:

- Directive level:

- *Ministros.*
- *Secretarios de Estado.*
- *Órganos directivos:*
    - *Subsecretarios y Secretarios generales. (Delegados del Gobierno, rango de Subsecretario)*
    - *Secretarios generales técnicos y Directores generales.*
    - *Subdirectores generales (Sub-Delegados del Gobierno*). At this level authorities are not qualified as *Altos Cargos.*
- *Embajadores and Representantes permanentes before international organisations.*

- Organisational units: *Servicios, Secciones, Negociados* (in the correct hierarchical scheme).

- Administrative units: basic organisational units in every organisational structure. It includes single job positions and public workers sharing a common leader (such administrative units are complex, gathering two or more public workers to carry out public functions).

  Heads of administrative units are responsible for the correct operation of their members. They are responsible for the accurate execution their tasks. The administrative units are defined in the RPTs (*relaciones de puestos de trabajo*), which are approved according to their regulations. All of them are part of a single administrative body.

II.- BODIES.

The administrative structure of the State consists of two main areas. Firstly, numerous administrative bodies are located in the capital of Spain, Madrid, with jurisdiction over the whole country. They are called central bodies. Secondly, central administration approaches the citizen creating peripheral branches outside Madrid, at the capitals of the different regions as well as at the capitals of the provinces.

Peripheral administration is sort of administrative deconcentration, and therefore it does not result in creating new entities with legal personality. Neither central nor peripheral administrative bodies enjoy legal personality, it is the administrative structure who does.

1.- CENTRAL BODIES.

- The GOVERNMENT (*Gobierno*)
    - PRESIDENT/PRIME MINISTER (*Presidente*)
    - VICE-PRESIDENT (*Vicepresidente)*
    - BOARD OF MINISTERS (*Consejo de Ministros*).
    - DELEGATED COMMISION (*Comisiones delegadas*).
    - GENERAL COMMISION OF SECRETARIES OF STATE AND SUBSECRETARIES (*Comisión general de Secretarios de Estado y Subsecretarios*).
    - SUPORTING BODIES (*Órganos de apoyo*).
        - GOVERNMENTAL SECRETARIAT (*Secretariado del Gobierno*).
        - CABINET (*Gabinete)*.
- MINISTERIAL ORGANISATION.
    - MINISTER (*Ministro*)
    - SECRETARY OF STATE (*Secretario de estado*)
    - SUBSECRETARY (*Subsecretaría*)
        - SUBSECRETARIES (*Subsecretarios*)
        - -GENERAL TECHNICAL SECRETARY (*Secretario General Técnico*).
    - -HEADS OF COMMON SERVICES (Legal advisory services, Financial services, International cooperation services, Department of information, Department of advertising, etc.).

- -SECRETARY-GENERAL (*Secretario general*).
- -DIRECTOR-GENERAL (*Director General*)
- -SUBDIRECTOR-GENERAL (*Subdirector general*).

2.- PERIPHERICAL BODIES

- DELEGATES OF THE GOVERNMENT/GOVERNMENT´S REPRESENTATIVE (*Delegado del Gobierno*).
- ISLAND DIRECTOR (*Director Insular*).
- SUBDELEGATES OF THE GOVERNMENT (*Subdelegado del Gobierno*).
- SERVICES

  -INTEGRATED SERVICES (*Servicios integrados*).

  -NON-INTEGRATED SERVICES (*Servicios no integrados*).

3.- INTERNATIONAL BODIES.

- DIPLOMATIC MISSIONS (EMBASSIES).
- NON-PERMANENT REPRESENTATIVES.
- DELEGATIONS.
- CONSULATES.
- OTHER INSTITUTIONS (i.e. *Instituto Cervantes*).

4.- CONSULTING AND SUPERVISING BODIES.

- STATE ADVISORY COUNCIL (*Consejo de Estado*).
- COLLEGIATE COORDINATION BODIES.

  -SECTORAL CONFERENCES (*Conferencias Sectoriales*).

  -FISCAL AND FINANCIAL POLICIES COUNSEL (*Consejo de Política Fiscal y Financiera*).

  -INTER-TERRITORIAL HEALTH CARE SERVICE COUNSEL (*Consejo Interterritorial del Servicio General de Salud*).

-NATIONAL COMMISION FOR LOCAL ADMINISTRATION (*Comisión Nacional de Administración Local*).

- INTER-MINISTERIAL COMMISIONS.

5.- SUPERVISING BODIES.

- INTERNAL SUPERVISION:

  -GENERAL TECHNICAL SECRETARIAT AND COMMON SERVICES (*Secretaría General Técnica y Servicios Comunes*). These bodies carry out legal supervision of administrative activities.

  -GENERAL INTERVENTION BOARD OF THE STATE ADMINISTRATION (*Intervención General del Estado*). This essential body monitors the economic and financial behaviour of the administrative bodies, including state revenue and public expenses. There are delegated intervention boards in every Ministry.

  -DIRECTION-GENERAL OF ADMINISTRATIVE ORGANISATION AND PROCEEDINGS.

  -STATE AGENCY FOR THE ASSESSMENT OF PUBLIC POLICY AND SERVICE QUALITY. (*Agencia Estatal de Evaluación de la Calidad de los Servicios*).

  -CENTRAL AND REGIONAL ECONOMIC ADMINISTRATIVE TRIBUNALS (*Tribunales Económico-Administrativos*).

- EXTERNAL SUPERVISION. Several non-administrative bodies monitor public administration bodies. None of them belong to the executive branch. On the contrary, they are part of the legislative or judicial branch:

  - COURT OF ADUDITORS. (*Tribunal de Cuentas*)

  - OMBUDSMAN/PARLIAMENTARY COMMISIONER (*Defensor del Pueblo*).

CHAPTER IX. THE REGIONAL ADMINISTRATION

I.- BASIC LEGISLATION.

Each Region has its own legislation so to regulate its internal organisation. For example, in the Region of Valencia the relevant legislation is:

a) *Ley 5/1983, de 30 de diciembre, del Consell.*

b) *Decreto 198/2009, de 6 de noviembre, del Consell, por* el que se establece la estructura orgánica básica de la Presidencia y de las Consellerias de la Generalitat.

II.- ORGANISATION OF THE GENERALITAT VALENCIANA.

1.- Central bodies.

- Directive level**.**

The Council of the Regional Government (*Consell*) passes organic regulations for each Regional Ministry (*Consellería*). The Regional Ministers implement internal organisation schemes according to such organic regulations. Every Regional Ministry is structured into three key levels: Superior bodies, Directive level and Administrative level.

Superior bodies are the President, Vice-President, Council of the Regional government (Generalitat), Regional Minister and Regional Secretary (*Secretario autonómico*). All of them work under the supervision of the President.

Regional Secretaries direct and coordinate the Management Bodies (*Centros directivos*), which are accountable before the Regional Minister.

The following are their executive functions and competences of the Regional Secretary:

- Implement the powers and responsibilities related to the assigned area or activity.
- Boost, promote and coordinate programs and projects to be implemented by management bodies under his supervision and dependence, monitoring the fulfillment of goals, aims and purposes set out by the President, Vice-President or Regional Ministers.
- Hear and rule on administrative appeals brought against decisions of the Management bodies under their dependence and supervision, providing such decisions do not exhaust the administrative channel.
- Any other functions expressly laid down by law or delegated by the upper bodies.

In the directive level we find the Deputy-secretary (*Subsecretario*), the Director-general and other Head officers (*altos cargos*) holding director-general rank.

Under strict dependence of the President and Regional Minister, the Deputy-Secretary would monitor all the services under his area. He/she is head of the staff and monitors common services and archives. He/she also backs up and assists the rest of administrative bodies in every Regional Ministry.

Director-Generals are the head of each managing area within the Regional Ministry. Their most relevant functions are:

- Manage the internal organisation and direct the services in the areas under their supervision.
- Supervise, check and monitor how every service is working and reaching the goals.
- Hand down the first administrative statement or decision in most administrative proceedings; unless the upper bodies: Regional Minister, Regional Secretary or Deputy-Secretary held the power.

- Administrative level.

The remaining administrative bodies are part of the so called administrative level. All these units work under the authority of the above mentioned bodies. The level is structured in the following units:

- Deputy-Director general (*Subdirecciones generales*)
- Services
- Sections.
- Units.
- Departments (*negociados*).
- Others

In every Regional Ministry there will be a single General Administrative Secretariat (*Secretaría General administrativa*), under Deputy-secretary supervision. They give legal advice to all the bodies in the administrative level.

2.- Peripheral organisation.

According to the current Valencian Regional Government organisational structure, peripheral organisation is mainly made up of the Territorial Departments (*Direcciones territoriales*). They are branches of each Regional Ministry based on Alicante and Castellón.

CHAPTER X. LOCAL GOVERNMENT.

I.- THE PRINCIPLE OF LOCAL AUTONOMY.

The autonomy of local governments is declared in section 140 of the Spanish Constitution. Given the concept is particularly broad and unspecific, the Constitutional Court has clarified its meaning in STC 32/1981. These are the most relevant statements:

Local autonomy has a core area *núcleo indisponible* made up of a group of particular matters of local concern. Only municipalities and provinces can regulate and manage such areas of power. Moreover, local authorities are just liable before their voters; other authorities should refrain from giving commands, orders or guidelines to them. On the other hand, we are not before an indirect administration as the European Union administration is. They are not delegated administrations either.

Neither the central administration the nor regional administration can monitor local policies. No opportunity or political supervision is allowed. The Constitutional Court stated that local authorities should have their own regulatory and decision-making field, and therefore they have to be granted enough responsibilities by law.

There are several ways to protect local autonomy:

- As a general rule, regulations and decisions concerning local autonomy can be challenged before Administrative jurisdiction. As long as they unlawfully breach the principle they should be reported null and void.

- With regards to laws concerning local autonomy, different options appear in legislation:

    - The *LBRL* creates a joint Parliamentary Commission (State-*CCAA*) with legal standing so to bring appeals on unconstitutionality before the Constitutional Court.

    - The *LOTC* states a direct constitutional process called: conflict for the defence of local autonomy *Conflicto en defensa de la autonomía local*. The legal standing is strictly limited here. As a general rule, the appeal must be issued by a minimum number of municipalities. However, in cases of laws stating rules concerning specific municipalities (*leyes medida*), the local government directly involved will benefit from legal standing.

There are several principles inherently linked to the local autonomy principle:

- Local governments are in fact a kind of political and administrative decentralisation technique.

- Local entities must have democratic-functioning and be financially sustainable.

- They do not hold legislative power.

- They have the following non-delegated powers:

    - Organisational power
    - Regulatory-making power.
    - Financial and Tax raising powers.
    - Expropriator authority.
    - Power to Monitor and manage their own assets.
    - Power to impose penalties.
    - Decision-making power and enforcing power.

II.- SOURCES OF LOCAL LAW.

1.- BASIC LAW:

- *Ley de Bases del Régimen Local (LBRL)*
- *Ley de Haciencas Locales (LHL)*

2.- COMPLEMENTARY LAW.

- *Texto Refundido de Régimen Local (TRRL)*
- *Reglamento de bienes de las Corporaciones Locales.*
- *Reglamento de población y demarcación territorial*
- *Reglamento de organización y funcionamiento y régimen jurídico de las corporaciones locales.*
- *Reglamento de servicios de las corporaciones locales.*

3.- IMPLEMENTING LEGISLATION:

- Regional laws and regulations related to local governments.

4.- ORGANIC REGULATION.

5.- BY LAWS AND BANDOS

III.- SPECIAL LEGAL FRAMEWORKS.

1.- Open council (*Concejo abierto*): small municipalities operating in assembly sessions where every resident is allowed to participate.

2.- Large population municipalities (*Ley 57/2003 de 16 de diciembre, de modificación de la LBRL*). The 2003 act created a new Title X in the law. The new rules are intended to regulate municipalities over 250.000 residents, tows over 175.000 residents, and every regional or provincial capital regardless the number of residents. Smaller municipalities fall before this law in certain conditions.

The authority of the mayor is reinforced under this framework as an executive body, as well as the Government Board (*Junta de Gobierno*).

One of the news of the law is the foresight of directive staff, whose members does not necessary belong to the local corporation. They can be hired among external professionals.

The law creates new participative bodies such as the Social Counsel (*Consejo Social*) or the Districts. A new Advice and Claim Commission (*Comisión de sugerencias y reclamaciones*) is also stated in the law. In addition, the City Council (*Pleno del Ayuntamiento*) loses executive functions in favour of Mayors, concentrating on regulatory-making functions.

3.- Madrid and Barcelona.

- Madrid: *Ley de Capitalidad de 2006.*
- Barcelona: *Carta Municipal (Ley de 1998 de la Generalitat).*

IV.- TYPES OF LOCAL ENTITIES

- MUNICIPALITY
- PROVINCE
- ISLAND ADMINISTRATION.
- INSULAR COUNCIL (*Consejo Insular*). Baleares.
- CABILDO INSULAR. Canary islands.
- COMARCAS
- METROPOLITAN AREAS
- COMMONWEALTH OF MUNICIPALITIES (MANCOMUNIDADES)
- CONSORTIUM
- MINOR LOCAL ENTITIES

VI. STRUCTURE OF LOCAL ADMINISTRATION.

1.- Territory.

- City boundary (*término municipal).* This is the area where the Town Hall has jurisdiction.

- According to *LBRL*, municipalities can be merged (*fusionados).* Spin-offs (*excisiones)* are also possible. Conditions for both operations are strictly laid down in the law.

2.- Residents.

Local law states a category of residents called *vecino*. Such residents have both politic and administrative full rights. They can vote, are eligible in the local elections, and enjoy all the public services displayed in the municipality.

A relevant institution in local law is the register of habitants *padrón*. To achieve the category of *vecino* getting registered is a pre-condition. Registration of third country citizens does not lead to automatically get the rights registration grants. It will depend on the legal situation of the immigrant according to homeland security regulations.

Section 18 *LRBRL* states the following resident´s rights:

- Being eligible and elector in local elections according to law.
- Participate in local policy-making according to law and, in every case, when collaboration was expressly required by local authorities.
- Enjoy and use, according to law, all the public local services, including communal rights according to customary law.
- To contribute, in proportion to his economic capacity, to the payment of the public services, as well as personally collaborate with authorities as stated by law.
- Being informed, prior reasoned application. Lodge applications before the municipal administration regarding files, records and municipal documents, according to section 105 CE. This right is granted in order to help reaching transparency and accountability of authorities and staff.
- Apply for popular consultations on local interest issues.
- Demand the creation or provision of public services providing they are under municipal power (*competencias propias obligatorias*)
- Pursue the popular initiative according to section 70 bis LRBRL

3.- Organisation.

3.1. Members of Local Government:

- Counsellors (*Concejales*).

Counsellors, including the members of the opposition, enjoy the so called: '*ius in officium*'. Such a constitutional right means that every counsellor has the right to be informed on any relevant issue, to participate in the different bodies, to be paid according to law, to be registered in Social Security, and to challenge municipal decisions and regulations, etc. Among their duties, we should stress their accountability for the decisions in which they participate, in addition, they must keep the incompatibilities conditions when carrying on their duties, etc.

A relevant issue regarding counsellors has to do with the consequences that defectors *(tránsfugas*) must bear with. Given that the position of counsellors in the different bodies of the Town Hall is personal, and therefore do not belong to the political parties, defectors remain in their seats and cannot be removed. They automatically become part of the coalition of minority parties (*grupo mixto*). They will be part of the plenary, but they can be removed from other bodies providing their on-going commitment should mean over-representation in the body. If other case, they will remain in their seats.

• Mayor (*Alcalde*).

While counsellors are directly elected by the citizens, the mayor will be appointed by the elected counsellors among them. It is the president of the municipality, holding directive and executive powers. The major is the top position in the hierarchical ladder.

3.2. Bodies.

- MAYOR.
    - It is an essential body.
    - It holds executive power.
    - It represents the municipality in both political and administrative terms.
    - It has directive powers.
    - It is allowed to make *bandos* and necessary regulations.
- PLENARY.
    - It is an essential body.
    - It monitors every other municipal body.
    - It holds regulatory making and taxation power. It passes the annual budget.
- DEPUTY MAYOR (*Teniente de Alcalde*).
    - It is an essential body. It is just one of the counsellors appointed to substitute the Mayor in cases of sickness, holidays, and every other absence causes.
- GOVERNING BOARD (*Junta de Gobierno*).

- This is not an essential body. It is only required in municipalities which population is over 5.000, as well as whenever the organic regulation states it is necessary.
- It is made up of the Mayor and 1/3 of the counsellors.
- It holds assistance functions, as well as executing functions delegated by the Mayor.
- Its meetings are not public.

- INFORMATIVE COMMISION.

  - This is not an essential body either. However, it is required in municipalities over 5.000 population, as well as whenever stated by the organic regulation.
  - It gets issues prepared to be discussed in the plenary.
  - It is made up of counsellors of every political group according to proportional criteria.
  - Defectors can be members, but only when they had a seat before becoming defectors. They cannot pretend to become member of every single informative commission, since they would become overrepresented and would break proportionality.
  - Commissions can be permanent or special (for particular purposes).

- ADVICE AND CLAIM COMMISSION.

  - This body is only mandatory in large population municipalities.
  - Its main task is monitoring every other municipal body.
  - It is made up of representatives from all the political groups.

- SPECIAL COMMISION OF AUDITORS (*Comision especial de cuentas*).

  - It is an essential body and therefore must be established in every municipality. It will be made up of representatives from all the political parties.

- SUPPORTING BODIES

  - GENERAL SECRETARIAT (*Secretaria general*).
  - GENERAL INTERVENTION BOARD (*Intervención general*).
  - TREASURY DEPARTMENT (*Tesorería*).

- PARTICIPATION BODIES and DECONCENTRATED MANAGEMENT BODIES.

  - SOCIAL COUNCIL.
  - TERRITORIAL PARTICIPATION COUNCILS
  - DISTRICTS.
  - MANAGEMENT OFFICES (*Gerencias*), BOARDS (*Patronatos*), etc.

- DECENTRALICED BODIES.

    - SELF GOBERNING BOARDS (*Organismos autónomos*)
    - PUBLICLY OWNED STOCK COMPANIES (*Sociedades de capital public*).
    - SEMI-PUBLIC STOCK COMPANIES (*Sociedades de capital mixto*).

4.- Powers and responsibilities (LBRL)

The list of local competencies is stated in sections 25 and 26 *LBRL*. The first section declares which of them are common to every local government whereas the second states the group of powers that are qualified as mandatory according to the number of residents. Section 86.3 *LRBRL* qualifies some of them as reserved as to local administration. This means that municipalities are allowed to prevent certain activities and services from being practiced by citizens or private companies. They will remain under public ownership and can be even declared as a monopoly.

VI.- THE PROVINCE

Provinces are political divisions with a long historical background. Most *CCAA* have two or more provinces, although some regions are made up of just one province. The latest does not have provincial administrative structures, since regional administration take charge of their responsibilities.

Those having provincial administration share a similar organization and structure as municipalities. Although having their own area of responsibilities according to law, they can carry out regional competencies via deconcentration. However, this is rarely used in practice. On the other hand, they can be benefited from delegations or management delegations from the *CCAA* or the State.

Among their main activities, we should stress:

- Assistance to municipalities.
- Annual plan for works and services (*Plan provincial de obras y servicios*).
- Provision of supra-municipal services.
- Cooperation and territorial planning.

QUESTION PAPER

I.- What does it mean that the local administration should not be deemed as indirect administration?

II.- Providing one *ley orgánica* states rules infringing the local autonomy, what should a single municipality do to challenge the law? What challenging options do exist?

III.- Are the municipal governments allowed to create new administrative bodies even if they are not stated in state or regional legislation?

IV.- Decide whether the following sources of law are directly (*carácter pleno*) or just subsidiary enforceable (*carácter supletorio*):

- *Ley de bases.*
- *Texto refundido de régimen local.*
- *Reglamento de bienes.*
- *Reglamento de organización y funcionamiento.*
- *Reglamento orgánico.*
- *Ordenanza municipal.*
- *Legislación autonómica.*
- *Reglamentación autonómica de régimen local.*

V- What is a *comarca*?

VI- What is a metropolitan area?

VII.- What is a consortium?

VIII.- Let us think about a body that is not stated in the Spanish local legislation: 'The resident´s Ombudsman'. Should it be possible to establish it in a particular city using an organic regulation?

IX.- Is the Town Hall allowed to freely create decentralised bodies or publicly owned companies to administer their activities?

XIV.- Is the Town Hall allowed to administer public services through private companies?

CASES.

I.- The Town Hall provisionally passes the Land Use Plan (*Plan General de Ordenación Urbana*). It hands the dossier on to the Regional Government. The corresponding branch of the regional government returns the record raising several legal

objections. In its opinion the plan infringes the legal standard of minimum green areas. Is this intervention correct? As another objection, the regional body states that developing new residential areas in the northern part of the city is suitable, but it finds it more interesting to focus major developments in the south; therefore, it objects the plan. Do you find it correct? Give reasons to justify your answers.

II.- Municipal governments have power to administer water supply according to sections 25 and 26 *LRBRL*. In addition, it is a reserved service under section 86.3 *LRBRL*. Given such background, what should happen if several citizens living isolated in non-urban areas apply for an extension of current water supply facilities so to get access to the service? Do they have the right to get the service? Before getting access from the municipal networks, could they try an alternative supply from a private company that owns groundwater rights close to the supply area?

III.- By *Mancomunidad de L´Alacantí de servicios* statement it is decided to incorporate representatives from the Environmental Protection Regional Agency as full right members of the body. Do you find this decision correct and valid?

IV.- Aiming to influence local elections in a small municipality, registration of 30 new residents is processed just five months before the Election Day. What is your opinion about such behaviour; do you find such decision suitable to be challenged?

V.- As a general rule, can someone be registered as resident in various municipalities at the same time?

VII.- A local counsellor is denied access to relevant municipal information. Such information is relevant to carry out political duties. What should be the concerned right in this case? What challenging procedure could the counsellor try to protect his rights? Are all municipal councillors, regardless if they belong to the government or the opposition, eligible to have plenty access to municipal information?

VIII.- A Councillor defector apply for becoming part of an informative Commission in the Town Hall. According to law, such a right actually benefits to all the political groups. Defectors are automatically deemed non-affiliated councillors (*concejal no adscrito*), in other words, they are not part of any political group. Before current legislation, defectors used to join the so called mixed group. However, recent amendments in local law, after the anti-defecting agreement signed by all the political parties, repealed such statement. Therefore, defectors do not belong to any political group whatsoever. Given such condition, do you find the above mentioned application allowable?

CHAPTER XI. CORPORATIVE AND INSTITUTIONAL ADMINISTRATION.

I.- CORPORATIVE ADMINISTRATION.

Under this category there are administrative structures which has a main feature that is they are made up of just private parties, citizens in most cases. They are not formally regarded as public administrations, although implicitly they are. *LRJPAC* and *LJCA* declare their actions fall into their field whenever they implement and execute public functions.

Such organisations represent rights of certain collectives or interests. They have authority only over their members and are allowed to make administrative decisions. Beyond their public functions, their actions shall fall within private law. Staff members and employees are not civil servants. When entering into contracts, they use the Civil Code, not the administrative legislation, and their assets are private as well.

Regarding their members, it is worth noting that most of them have to become part of the organisation to be allowed to carry out certain professional activities. Therefore, it is not completely free to become a member.

Types:

- PROFESSIONAL ASSOCIATIONS (i.e. Bar Association).
- CHAMBERS OF COMMERCE.
- OTHERS (CHAMBERS OF AGRICULTURE, USERS OR IRRIGATION DISTRICTS (*Comunidades de usuarios de aguas*), and URBAN CONSERVATION ENTITIES).

II.- INSTITUTIONAL ADMINISTRATION.

1.- Concept and characteristics.

Institutional Administration is group of entities and assets that the parent administration (founder) creates, in order to carry out public services and other activities away from the main bureaucratic structure.

Such entities enjoy legal personality even though their organisation and functioning is strongly influenced by the founder. Given their instrumental condition, these entities do not have self-interests. Otherwise, they manage some of the parent´s administration responsibilities. Between the parent body and the institution there are monitoring relations (appointment of the upper managerial bodies, strategic guidelines, ex-ante supervision about plans, programs, budget, etc.). As a result, their autonomy is merely operative.

Entities under supervision cannot appeal parent bodies´ decisions. Some of them act under Administrative law, however, others use private law in their ordinary relations

(labour or civil law). Even in such cases, part of their activity shall be regarded administrative in nature and therefore under administrative law (*actos separables*).

2.- Legal regime.

The following are the key laws governing institutional administration:

- *Ley 6/1997, de 14 de abril, de Organización y Funcionamiento de la Administración General del Estado. (LOFAGE*).
- *Ley 28/2006, de 18 de julio, de Agencias Estatales para la mejora de los servicios públicos.*
- *Ley 47/2003, de 26 de noviembre, General Presupuestaria. (LGP*)
- Specific regional and local government´s law.

3.- Fundamentals.

The main aim to create institutional entities is to achieve greater efficiency. In addition, lowering public deficit, reducing financial supervision and even benefiting from tax cuts and exemptions are frequently additional objectives.

What is more, under the efficiency principle, Administration tries to reduce bureaucratic burdens preempting from limitations arising from Administrative law. This phenomena has been defined as flee from Administrative law '*huida del Derecho administrativo*'.

4.- Types (State Administration):

- *ORGANISMOS PUBLICOS* (*LOFAGE*).

  -*ORGANISMOS AUTONOMOS.*
  -*ENTIDADES PUBLICAS EMPRESARIALES.*

- -INDEPENDENT AGENCIES (*Administraciones independientes y otras entidades estatales de derecho público*).

  This group is regulated under their own specific legislation. In turn, LOFAGE shall only be applied to fill gaps arising from the specific legislation. This organisational model is clearly inspired in American agencies. Their independent status tries to prevent from political influence in strategic sectors. As a general rule, the appointment of the Director is usually done by the Prime Minister. Though they might receive guidelines, orders and instructions from the territorial Administration are strictly forbidden.

  Independent agencies enjoy financial autonomy and can appoint their own staff members. Even though they are not submitted to direct governmental monitoring, they always have parliamentary monitoring. Only in exceptional cases their decisions can be challenged within the administrative channel before the parent

Administration by specific and limited appeals *recurso de alzada impropio*. Certain entities enjoy regulatory-making powers.

Let us make an attempt of classification:

a. Entities regulating and monitoring markets and public services:

-BANCO DE ESPAÑA.
-FONDO DE GARANTÍA DE DEPÓSITOS
-CNMV
-AGENCIAS REGULADORAS DE SERVICIOS PUBLICOS UNIVERSALES (CMT, CNE, CMSP).
-COMISION NACIONAL DE LA COMPETENCIA.

b.- Entities created for the protection of individual or collective rights:

-CONSEJO DE SEGURIDAD NUCLEAR
-AGENCIA DE PROTECCIÓN DE DATOS.

c.- Other entities with varied ends:

-AEAT
-INSTITUTO CERVANTES.
-ICEX.
-UNIVERSIDADES NO TRANSFERIDAS (UNED)
-SEPI
-AUTORIDADES PORTUARIAS
-CNI
-CONSORCIOS DE ZONA FRANCA
-PUERTOS DEL ESTADO
etc.

- PUBLIC ENTITIES WITH SPECIAL NATURE. LOFAGE refers their regulation to specific legislation. That is the case of the social security management entities (*Entidades Gestoras de la Seguridad Social*):

  - INSS (Organise economic benefits and grants access to the health care system, retirement pensions, disability benefits, family and motherhood benefits, etc.)
  - IMSERSO (Governs non-contributive pensions as well as other social programs).
  - ISM (Organises social benefits related to the marine sector).
  - TESORERIA GENERAL DE LA SEGURIDAD SOCIAL (Registers companies, employees, and organises the contributions and other aspects of financing).

Every Regional Administration and the Local Administration itself have their own specific categories of institutional administration.

In addition, there are special entities with greater autonomous status such as the UNIVERSITIES. They are created by regional or state law and have their own internal regulations and organisational structure. Their autonomy is expressly stated in Spanish Constitution.

III.- PRIVATE ENTITIES IN THE STATE PUBLIC SECTOR.

1.- COMPANIES. (*Sociedades*)

They are expressly recognised in *LOFAGE* as public entities in nature. We can classify them in the following categories:

-Assets in private companies (*Patrimonio empresarial público*). Administrations frequently participate in the capital structures of private companies. They are shareholders.

-Public companies (*Sector empresarial publico*). Companies are private in nature whereas all their capital is publicly owned. Another option for the government is to own more than 50% of the capital share while enjoying complete control on the company. Certain companies have industrial or commercial purposes, though others just have public purposes such as building public works. Their losses do not count as public debt or public deficit in the national accounting system.

Administrative law is only applicable in the above mentioned *actos separables*.

2.- FOUNDATIONS.

Foundations are assets which are associated to particular ends. Although public foundations are made up of public assets, private participation in their capital structure is possible. They enjoy private legal personality and they cannot hold public functions.

These entities are governed under *Ley 20/2002 de 26 de diciembre*. The General Law of Foundations and the Civil Code area only indirectly applicable, and might be invoked to resolve a point unaddressed by the law, a gap in the specific law. Administrative law, in general, shall concern only the so called *actos separables*.

QUESTION PAPER

I.- Strictly speaking, Can corporative administrations be regarded Public Administrations?

II.- Why do you think professional associations actually exist? What aboutcommerce chambers? Do you find the mandatory integration of professionals or companies in such structures correct?

III.- Institutional Administration is often referred to as an instrumental administrative structure. Why instrumental?

IV.- What are the key differences between *organismo autónomo* and *entidad pública empresarial*?

V.- What are the key differences between *entidad pública empresarial* and *sociedad de capital público*?

VI.- What does *actos separables* mean?

CASES

I.- Visit the following website:
http://www.igae.pap.minhap.gob.es/sitios/igae/es-ES/ClnInvespe/Paginas/invespe.aspx
What is your opinion about the number of public entities still existing today in Spain?

II.- According to the information on the website, find the nature of every institution listed below:

- *AGENCIA EFE.*
- *ADIF.*
- *RENFE OPERADORA.*
- *AGENCIA ESPAÑOLA DE COOPERACIÓN INTERNACIONAL PARA EL DESARROLLO (AECI)*
- *FUNDACION AENA.*
- *MUFACE*
- *AGENCIA ESPAÑOLA DE PROTECCIÓN DE DATOS*
- *CORPORACION RATIO TELEVISIÓN ESPAÑOLA*
- *CONFEDERACIÓN HIDROGRÁFICA DEL JÚCAR*
- *AUTORIDAD PORTUARIA DE ALICANTE*
- *FUNDACION COLECCIÓN THYSSEN-BORNEMISZA.*
- *AGENCIA ESTATAL DE METEREOLOGIA*

- *TESORERIA GENERAL DE LA SEGURIDAD SOCIAL*
- *HIPÓDROMO DE LA ZARZUELA*
- *AENA*
- *CONSORCIO CASA DEL MEDITERRANEO*
- *CONSORCIO DE COMPENSACIÓN DE SEGUROS*
- *SEPI DESARROLLO EMPRESARIAL*
- *INSTITUTO CERVANTES*
- *MUSEO NACIONAL DEL PRADO DIFUSION*
- *NAVANTIA*
- *RADIO NACIONAL DE ESPAÑA*
- *INSTITUTO PARA LA DIVERSIFICACIÓN Y AHORRO DE ENERGIA.*
- *PARADORES DE TURISMO DE ESPAÑA*
- *FUNDACION VICTIMAS DEL TERRORISMO*
- *CONSEJO DE SEGURIDAD NUCLEAR*
- *AGENCIA ESTATAL DE LA ADMINISTRACION TRIBUTARIA.*
- *UNIVERSIDAD INTERNACIONAL MENENDEZ PELAYO.*
- *FUNDACIÓN GENERAL DE LA UNIVERSIDAD MENENDEZ PELAYO.*
- *COMISION NACIONAL DE LA COMPETENCIA*
- *PUERTOS DEL ESTADO*

CHAPTER XII. THE ADMINISTRATIVE STATEMENT.

I.- CONCEPT AND CHARACTERISTICS.

The Administrative statement or decision has been simply defined as: *acto jurídico unilateral de la Administración sometido al derecho administrativo* (GARCIA DE ENTERRÍA). Another more complex definition from the same author might be useful as well: *Declaración de voluntad, juicio, conocimiento o deseo, realizada por la Administración pública, en ejercicio de una potestad administrativa distinta a la reglamentaria.*

The administrative statement is the central concept of Spanish Administrative law. The existence of an administrative decision is essential to create rights and duties under Administrative law. Judicial review, moreover, requires a previous decision (express, implicit or just an omission) to be challenged. That is why administrative jurisdiction has been traditionally taken as a reviewing jurisdiction.

We should stress the following features of administrative statements:

- It is a statement (*declaración*).

The decision can be express and written, which is the ordinary way to grant or reject authorisations, concessions, allowances, registrations, certifications, impose penalties, among others. Sometimes, however, the statement is just tacit, unstated or implied, which happens when the decision comes up or is concluded from another expressly written decision.

Finally, the decision can be presumed in case the administrative body fails to hand down a decision within the deadline. The presumption should be positive (positive silence) or negative (negative silence) depending on different conditions, although the general rule is that failure to grant a decision should be regarded as a positive and allowing decision. Legal exceptions, however, are broad according to the law. In fact, implied rejections are a common place in many areas of administrative law.

We should stress that the institution of administrative silence works always with regards to proceedings started on citizen´s request. Failure to make a decision in *Ex officio* proceedings leads to different results. When the proceeding is leading to declare or enforce citizen´s rights, the lack of an express decision within the deadline will have positive implied effect. On the other hand, in proceedings restricting rights or imposing penalties the result will be expiration (*caducidad*).

According to the different types of express decisions, administrative statements can be listed as:

- Declarations of political or administrative will: STATEMENTS.
- Expressing opinions, criteria or giving data: REPORTS, ACCOUNTABILITY REPORTS (*rendición de cuentas*).
- Statements of intentions: PROPOSALS

- Expressing knowledge: POLICE REPORTS (*atestados*), CERTIFICATIONS, DECISIONS GIVING CITIZENS ACCESS TO INFORMATION, VALIDATIONS (*diligencias*), ANNOTATIONS (*anotaciones*), REGISTRY ENTRIES (*anotaciones en registros*), MINUTES (assemblies, meetings), SETTLEMENTS (agreements), CERTIFICATES, TRASNCRIPTIONS, RECORD OF EVIDENCES, etc (*actas y similares*), etc.[12]

- The statement is unilateral:

All the administrative decisions are one-sided statements carried out by public bodies. Only public bodies are allowed to make administrative decisions, since every action carried out by citizens or private companies during the proceeding are not administrative decisions but an action of a party in the proceeding (*acto de parte*).

On the other hand, administrative decisions are not contracts as no acceptance or agreement from the other party is needed to become enforceable.

- It is not a regulation.

Administrative statements are not rules; they concern to individuals or selected and identified groups, instead of the whole community. They are not abstract, and do not remain in force as a part of the legal system. Actually, their efficacy comes to an end in a particular moment, once the recipient is notified and benefits from them or meets the requirements. As a conclusion, they do not have the features regulations must have.

- It is the result of strictly regulated or discretional powers.

[12] Several examples:

acta constitutiva		articles of incorporation, bylaws
acta de adhesión		adhesion contract
acta de asamblea		minutes of the assembly, minutes of the meeting
acta de clausura		act of closure
acta de conciliación		conciliatory settlement
acta de declaración		record of evidence of the witness
acta de denuncia		complaint, police report
acta de entrega		delivery receipt, delivery certificate
acta de fundación		foundation charter
acta de grado		academic transcript, school transcript
acta de manifestaciones		voluntary affidavit
acta de recepción	*UK*	acknowledgement of receipt
	US	acknowledgment of receipt
acta notarial	*US*	notarized document
	UK	notarised document
levantar acta		to take minutes, record the minutes

Administrative statements are the result of a decision-making proceeding. Decisions without proceeding should be deemed null and void (*vías de hecho*). Throughout the proceeding, the public body will be implementing regulated powers (strictly defined by law), or discretional powers (with certain margin for interpretation and even for making a choice between equally legal alternatives).

To perform such powers in a particular case the administrative body must be legally vested of power. If not, the resulting decision will be deemed null and void or just annullable, according to the relevance of the lack of jurisdiction.

- Administrative decisions are under Administrative Law.

Not every decision from an Administrative body falls within administrative law. A small part of administrative actions are subject to private law (civil law or labour law). However, only decisions not excluded from administrative law are actual administrative decisions and remain under administrative court's jurisdiction.

Administrative statements have the following features:

- They are the final step in a process where a public body enforces laws and regulations in particular cases.

- They create rights and obligations, according to law.

II.- TYPES OF ADMINISTRATIVE DECISIONS

1.- DEFINITIVE AND PROCEDURAL DECISIONS (*Actos definitivos y de trámite*).

Definitive decisions end the proceeding and create rights and obligations. Procedural decisions are part of the decision making process and help to build the definitive decision.

Definitive decisions are commonly named: *ACUERDO* or *RESOLUCIÓN*.

The administrative proceeding is made up of a bunch of stages from the application or the decision to initiate proceedings to the final decision. Every step in the proceeding is intended to prepare the definitive decision.

Most procedural statements have the aim of expediting procedural administrative action. However, some of them have material content (i.e. decision not accepting to open the probationary period, not accepting certain means of prove or evidences, reports and opinions (*dictámenes*).

One of the main reasons why we separate these types of statements from those considered definitive is because procedural decisions are not suitable for appeal unless they are regarded *qualified procedural decisions*. Pleadings against procedural acts are

perfectly possible but no appeal would be accepted against them. The concerned party (*interesado*) must wait until the final decision comes up to lodge the appeal.

Qualified procedural decisions, which are separately appealable as already mentioned, are those having at least one the following features:

- They directly or indirectly decide about the merits of the case, the substance of the case.
- They make it impossible to continue with the proceeding.
- They cause serious lack in legal protection (defenselessness) (*indefensión*).
- They create irreparable damage.

2.- DECISIONS EXHAUSTING (OR NOT EXHAUSTING) THE ADMINISTRATIVE CHANNEL (*actos que agotan la vía administrativa*).

- Decisions not exhausting the administrative channel.

These are definitive decisions issued by bodies having at least one upper hierarchical body. The concerned party needs to lodge an administrative appeal before the upper body to exhaust the administrative channel (*recurso de alzada*). In other case, the decision will become final and therefore unappealable. The upper body´s decision will exhaust administrative remedies, and full access to Courts will be opened.

- Decisions exhausting the administrative channel.

Certain definitive decisions exhaust the administrative channel since they are taken by the upper body in first instance or after an appeal.

However, other possible situations leads to exhausting administrative remedies as well. Section 109 *LRJPAC* clearly states the list of administrative decisions with such effect:

> *Artículo 109 Fin de la vía administrativa.*
> *a) Las resoluciones de los recursos de alzada.*
> *b) Las resoluciones de los procedimientos de impugnación a que se refiere el artículo 10VII.II.*[13]
> *c) Las resoluciones de los órganos administrativos que carezcan de superior jerárquico, salvo que una Ley establezca lo contrario.*
> *d) Las demás resoluciones de órganos administrativos cuando una disposición legal o reglamentaria así lo establezca.*
> *e) Los acuerdos, pactos, convenios o contratos que tengan la consideración de finalizadores del procedimiento*

[13] According to section 107.2 *LRJPAC: Las leyes podrán sustituir el recurso de alzada, en supuestos o ámbitos sectoriales determinados, y cuando la especificidad de la materia así lo justifique, por otros procedimientos de impugnación, reclamación, conciliación, mediación y arbitraje, ante órganos colegiados o comisiones específicas no sometidas a instrucciones jerárquicas, con respeto a los principios, garantías y plazos que la presente Ley reconoce a los ciudadanos y a los interesados en todo procedimiento administrativo. En las mismas condiciones, el recurso de reposición podrá ser sustituido por los procedimientos a que se refiere el párrafo anterior, respetando su carácter potestativo para el interesado. La aplicación de estos procedimientos en el ámbito de la Administración Local no podrá suponer el desconocimiento de las facultades resolutorias reconocidas a los órganos representativos electos establecidos por la Ley.*

No administrative appeal is available in these cases except for the so called '*recurso de reposición*. Obviously, the concerned party is allowed to challenge the decision to Courts. However, if he/she decides to lodge the *recurso de reposición*, the same administrative body will make a new decision confirming or overturning the latter. After that, no more administrative appeals will be available and the concerned party should file the appeal to Courts.

Assuming the concerned party neither file the *recurso de reposición* nor file the appeal to Courts within the deadline, the definitive decision will become final and unappealable.

3.- FINAL DECISIONS (*Actos firmes y consentidos*)

These administrative decisions *causan estado*. We have a final decision when the concerned party does not file an appeal (administrative or judicial) within the stated deadline. As a result, the decision will no longer can be appealed neither before administrative authorities nor before the Courts.

When having plural recipients´ decisions (*actos con destinatario plural*), the administrative statement will only become final for those who do not lodge the appeal.

4.- STATEMENTS CONFIRMING OR REPRODUCING PREVIOUS DECISIONS (*actos confirmatorios o reproductorios de anteriores*).

Certain administrative decisions do not produce any innovation. They simply confirm or reproduce previous statements. As a result, such decisions cannot be challenged. Sometimes, concerned parties repeat previous applications which were already decided, with the aim of reviving the submission period for an appeal. In other cases, the citizen challenges an enforcing decision which is only implementing a previous final decision, with the aim of challenging directly the latter.

5.- ADVANTAGEOUS AND DISADVANTAGEOUS DECISIONS (*Actos favorables, desfavorables o de gravamen*).

- Advantageous decisions.

Favourable or positive decisions are those recognising citizens´ rights. Public bodies cannot disregard their own positive decisions, even if they are against the law. In such cases the body must get reviewing proceedings started challenging its own decision in order to declare it null and void; meanwhile, it cannot disregard the decision´s existence and efficacy.

The following list states the most relevant positive administrative statements:

- ADMISSION (*Admisión*).

- CONCESSION (*Concesión*)
- LICENSE/AUTHORIZATION (*Autorización*)
- APROVAL/ENDORSEMENT (*Aprobación*).
- EXEMPTIONS (*Dispensas*).
- CERTIFICATES (*Certificados*)

- Adverse decisions (*actos desfavorables o de gravamen*).

Adverse decisions are often penalties, but many of them are just ordinary statements modifying, reviewing or terminating previous rights.

Let´s point out several examples:

- PENALTIES (*Sanciones*)
- EXPROPRIATION (*Expropiacion*).
- MANDATORY ORDERS (*Ordenes preceptivas*).
- PROHIBITIONS (*Prohibiciones*).

All adverse decisions must be founded and backed up in the law. Regulations are not suitable to limit existing rights without legal coverage (*reserva de ley estricta*).

Adverse decisions must be strictly reasoned (*motivación estricta*) and can be freely revoked by the acting administrative body according to law. Unlike positive decisions, which can only be reversed after conducting reviewing proceedings, adverse decisions can be just reversed by an administrative decision.

6.- SINGLE DECISIONS AND DECISIONS WITH PLURAL RECIPIENTS (*Actos singulares y actos con destinatario plural*)

Most administrative decisions are addressed to a single person or to an identified group of citizens with legal personality. As a result, they are usually notified rather than published. However, sometimes the decision is addressed to a group of people not personified or even not completely identified. For example, massive statements concerning collectives such as contractor bidders in tender proceedings. Anther good example deals with applicants for job vacancies in the public administration to be filled through competitive examinations. Communications and decisions are usually officially published in these cases.

G.- ADMINISTRATIVE STATEMENTS AND PRIVATE STATEMENTS MADE BY ADMINISTRATIVE BODIES.

The public body’s activity is not completely subject to Administrative law. Certain decisions fall within private law such as an attempt to reduce bureaucratic burdens and increase efficiency. That is the case of labour law or civil law, which are frequently used to regulate legal relations between public bodies and other parties. While decisions under administrative law have to be challenged to administrative Courts, private decisions have to be brought before labour or civil Courts.

H.- POLITICAL/GOVERNANCE DECISIONS.

The *LJCA* excludes political decisions from administrative Courts´ jurisdiction. National defence, international relations, homeland security, command and army administration, are typical examples of areas where governance decisions will be present.

Although governance decisions fall outside administrative law, certain elements of the decision can be monitored under administrative law schemes; we are referring to the so called: *actos separables*. These are regulated elements such as the power or the proceeding. Other aspects such as the so called: *conceptos jurídicamente asequibles* fall under public supervision as well. These are other regulated issues or even discretional elements (facts, legal founding, general principles of law, reasonability and rationability; however, the heart of the decision will remain off the scope of Administrative Courts.

III.- ELEMENTS OF THE ADMINISTRATIVE STATEMENT.

1.- SUBJECTIVES.

Administrative decisions must be done by an administrative body holding authority (material, territorial and hierarchical) for the case.

With regards to the administrative officer heading the body, he must have been appointed by the correspondent authority and taken office (*toma de posesión*). He must be in 'active service' and should not have any direct relation to the matter or the concerned parties. If he does, he should abstain from addressing the matter (*abstención*) or can be objected and challenged by any interested party (*recusación*). On the other hand, collegiate bodies must meet their regulations related to members´ participation.

The individual receiving the administrative statement is the concerned party, holding a right or a legitimate interest. He can be a citizen, a company, or even another administrative body.

2.- OBJECTIVES

- FACTUAL CIRCUMSTANCES (Presupuesto de hecho).

Factual circumstances are regulated elements that the public administration cannot disregard, in the sense that they work as a precondition in the decision-making process. However, assessing facts can include discretionary reasoning.

- THE SUBJECT MATTER (Objeto del acto):

The decision must be legal, fair and just; in other words, not unlawful. The subject matter of the decision will include the regulated elements as well as the discretionary conditions and all the collateral agreements (clausulas accesorias). Among the latter, we should point out condition clauses, deadline, clauses stating ways to comply with the decision, etc. All the collateral clauses should obviously stem from the law.

The core clauses and conditions of the administrative statement must be:

- CERTAIN.
- POSSIBLE.
- COMPLETE.
- CONSISTENT.

- PURPOSE AND CAUSE (Fin y causa).

Administrative goals are always public ends. Administrative bodies do not have self-interests. Public interest is therefore one of the cornerstones of administrative action and administrative law. Acting out of the public interest´s bounds should be deemed '*misuse of power*' (desviación de poder), and the resulting decision will be regarded annullable according to section 63 *LRJPAC*:

Section 63.1. *LRJPAC*. Annulability:

> *'Son anulables los actos de la Administración que incurran en cualquier infracción del ordenamiento jurídico, incluso la desviación de poder'.*

Causation in administrative law is the 'social end' (función social) that is involved in every law or regulation. Its entire purpose, its foundation, its rationale must be the public interest. (i.e. safewarding public safety, improving road traffic safety, economic policy and development, etc).

Ex post lack of causation might lead to decaying the efficacy of the decision. A good example is the 'reversion clause' in expropriation proceedings. As long as the programmed public works are not done within the legal deadline, title and control of such property shall immediately revert and vest in the original owner. The owner should pay back the compensation he received as payment for the mandatory acquisition.

3.- FORMAL ELEMENTS.

- The proceeding.

The administrative proceeding is a series of procedural decisions and parties' acts leading to a definitive statement. Some of the stages are more relevant than others. Those of the lower relevance would lead to minor procedural irregularities. In upper stages of relevance, formal defects or violations could result in annulability. Only some of them, the most relevant ones, will result in a null and void definitive decision.

One of the most relevant formal violations is omitting the hearing (audiencia). Such stage in the proceeding is essential since it allows the citizen to have all the relevant

information about the case (records are open and can be checked). In addition, it allows the citizen to lodge the final pleadings. Omitting the hearing is a cause of nullity according to section 62 *LRJPAC*.

This section states the list of causes of nullity, including those related to formal offences:

Art. 62.1. Los actos de las Administraciones públicas son nulos de pleno derecho en los casos siguientes:

a. …
b. *Los dictados por órgano manifiestamente incompetente por razón de la materia o del territorio.*
c. …
d. …
e. *Los dictados prescindiendo total y absolutamente del procedimiento legalmente establecido o de las normas que contienen las reglas esenciales para la formación de la voluntad de los órganos colegiados.*
f. ....
g. …

Letter (b) refers to decisions taken by administrative bodies without material or territorial competence. Lack of hierarchical power is only a cause of annulability and can be easily repaired by the upper body. Letter (e) is broader, since it includes two alternatives. First, it refers to what is called 'vías de hecho'. Such violation takes place whenever the public body takes a decision without any proceeding, or omitting essential procedural stages. The latter should include stages such as the hearing. Second, it refers to the most serious formal violations in collegiate bodies: those infringing quorum, supply of information, calling rules, and participation rights.

Although formal violations are a good ground for appeals, most of them are relatively effective. Only violations leading to defenselessness, or regarded essential, will be effective in terms of annulation. However, most of them can be corrected during the administrative or judicial appeal procedure. Even when rectification is not possible, causes of annulability only lead to take the proceeding back (retrotracción) to the point when failures took place. Once corrected, the decision could be reproduced again.

As a conclusion, just the most relevant formal defects, especially those leading to nullity, or those impossible to correct (prescription, expiry, etc), are really worth to claim.

- The decision formal structure.

Administrative decisions are generally written, although some of them can be oral. Such expressions, such as verbal orders, acoustic or visual signs, etc, can be formalised as a written statement later.

These are the key parts of a typical administrative decision:

- HEADING (Encabezamiento). It will include the competent body.
- INTRODUCTION (Preámbulo). It will state the rules concerning the authority of the acting body.

- SUBSTANTIVE CONTENT (Contenido sustantivo). This will include the reasoning, the legal founding, assessments and reports, other evidences, etc).
- ENACTING/OPERATIVE PART (Parte dispositiva). This is the decision, the statement declaring rights, obligations, or imposing penalties.
- PLACE, DATE AND SIGNATURE (Lugar, fecha, firma).
- DATA ON NOTIFICATION OR PUBLICATION. One of the statements of every decision is ordering its publication or notification, as well as the way it should be done.
- INFORMATION ABOUT AVAILABLE REMEDIES, DEADLINE AND REFERRAL TO THE COMPETENT BODY.

Certain informal actions should not be regarded administrative decisions (Communications, oral information, etc).

Every single administrative decision must be notified or officially published. However, the so called SERIAL DECISIONS can be included in a single statement, with single notification or publication.

The new technologies are increasingly present in public administration proceedings. As a result, in the last few years a new type of administrative decisions has appeared, the so called: TELEMATIC DECISIONS. These are automated administrative decisions (actuaciones administrativas automatizadas), in other words, administrative decisions automatically created by a computerised system, according to preexisting available data. It must not be confused with ordinary administrative decisions which are electronically delivered and notified.

IV.-THE ADMINISTRATIVE SILENCE - TACIT CONSENT OR DISENT – ABSENCE OR LACK OF REPLY: ALLEGED DECISIONS.

Administrative judicial review was originally designed as a reviewing jurisdiction (jurisdicción revisora). Only administrative statements were suitable to appeal. As a result, there was a real need to create an instrument so to grant citizens the right to appeal when the responsible public body refrained to make a written decision in the case. These are the roots for the so called ‘silencio administrativo’, which we attempt to translate ‘*administrative silence*’. The resulting fictional decisions can be understood as well as ‘*alleged acts*’.

1.- OBLIGATION TO EXPRESSLY ANSWER.

The administration must provide a written response whenever a citizen addresses it so to make applications, suggestions, proposals, complaints or requests for information.

Reiterative lack of reply certainly violates the principles of good administration. Lack of reply allows the concerned party to get access to the judiciary, but it does not exempt the administration from the obligation to answer.

Section 42.1 *LRJPAC*: ‘Obligación de resolver’.

‘ La Administración está obligada a dictar resolución expresa en todos los procedimientos y a notificarla cualquiera que sea su forma de iniciación’.

General deadline to issue a definitive administrative statement is 3 months. By regulation, deadline can be extended up to 6 months. By law, more than 6 months is possible, but it must be justified by overriding reasons of general interest.

The time limit for notifying the decision is not a period of prescription but of expiration or lapsing of the legal action (caducidad). This means that any interruption in the proceeding, as a general rule, will not result neither in an extension of the deadline nor in a suspension in the proceeding. Another relevant result is that once the expiry date is reached, the public body will have to start a new proceeding as long as the limitation period was not elapsed. In other words, there was no interruption of the limitation period during the administrative proceeding; the statute of limitations was just suspended assuming that the definitive resolution would come up within the deadline.

There are, however, several potential suspension scenarios according to law. Suspension must be granted by the competent authority, reasoned and notified. Here is the list of cases where suspension is suitable:

- Requesting corrections. According to law, in case of wrong or incomplete applications the public body must grant the citizen ten working days after notice for correcting the application. If the citizen fails the application shall be filed. While this period is pending, the expiry time will be stayed.
- Cases where a prior declaration or report from a E.U. authority is required.
- Cases where a perceptive and mandatory report from other public body must be included in the proceeding. The expiry date can be held up to 3 months in these cases.
- Cases where decisive technical reports or adversary reports are essential. The expiry time will become stayed as long as it is necessary to perform the studies.
- Opening negotiations to settle proceedings between contending parties (terminación convencional).

Deferral of proceedings is allowed providing enough reasoning. The time extension will not last more than the original deadline for the main proceeding.

Obligation to expressly answer lasts forever, even in case of prescription of the action, expiry time, withdrawal, renunciation, waiver, declining, or ex post lack of cause. In such cases, the statement shall declare it.

2.- ADMINISTRATIVE SILENCE.

- General features.

The aim of this concept is to create a legal fiction of an administrative statement. Dealing with alleged acts with positive effect, the fiction will create an administrative decision with plenty of effect. Regarding alleged acts with negative effect, the fiction

will not generate an administrative statement itself, but a simple presumption with the only effect of opening the judicial-review process.

Although positive alleged acts are fully effective and enforceable, no one has the right to do what the law forbids or does not allow. Unlawful results should not be granted by means of administrative positive silence. No one should become enriched without just cause. However, as Administration cannot disregard its responsibilities from its own decisions, even when they are implicit, and in particular cannot ignore its positive decisions, starting an *ex officio* reviewing process and assuming state liability will be the result.

In conclusion, late administrative decisions, notified out of time, are not tied to the particular effect of the alleged act, regardless positive or negative, but the consequences will be significantly different. Let us work out the different situations.

- Lack of reply in proceedings started under one parties' request.

Section 43 *LRJPAC* lays down the general principle that no reply equals a positive response (silencio estimatorio). It certainly strengthens citizen's rights. Failure to take a decision will be regarded as a positive decision.

However, in certain cases omission must be interpreted as a refusal. The application or appeal is rejected in these cases (silencio desestimatorio), thus leaving open actions before Courts. Let us see the cases stated in Section 43:

- When according to Spanish legislation or E.U. law administrative omission to reply is stated as a refusal.

- Proceedings where the concerned party is exercising the constitutional right of petition.

- Whenever the party would result in obtaining rights related to public domain or public service.

- Lack of adjudication in appealing processes, except in cases of 'double silence'. This happens both, when in the main proceeding and in the appeal proceeding the administrative body fails to make a decision.

As above mentioned, positive alleged acts are actual administrative decisions, fully effective; confirming or reproducing late decisions are perfectly possible. If the late decision has to be restrictive, the positive alleged decision must be *ex officio* reviewed. One of the nullity causes according to *LRJPAC* precisely takes place whenever: *'Express or tacit decisions, which are contrary to the legal system, create powers or rights without a proper legal basis and lacking the essential conditions required by law'.*

In case the alleged decision granted rights without legal basis, but not lacking essential conditions, the alleged decision would be just annullable; in that case reviewing is not

always possible, since *Ex officio* review is no longer available after 4 years, which is the deadline to review annullable statements.

To enforce positive alleged decisions it is enough to carry out what the citizen applied for. However, in many cases it is not possible and the citizen has to apply the public body for mandatory enforcement (i.e. applications related to public subsidies). In the event of a new rejection or lack of reply, he enjoys legal standing to challenge the decision before Courts.

In contrast, as alleged decisions with negative effect are just fictions, the competent authority can lay down a late decision just revoking the former. In addition, the alleged decision cannot become a 'consent decision' ever. Although both *LRJPAC* and LJCA lay down certain deadlines (3-6 months) to appeal negative alleged decisions, such due dates are not effective. The Supreme Court stated that as alleged decisions are a mere fiction they can never become final decisions. Therefore, both legal deadlines are just indicative and by no means mandatory.

- Lack of reply in proceedings started at administration´s own initiative (ex-officio).

Own initiative proceedings have a deadline according to the law or the regulation governing the case. According to the legal certainty principl administrative proceedings should not last indefinitely. Suspension cases are the same as the ones above mentioned.

Section 44 *LRJPAC* states the following rules:

- In proceedings leading to granting rights or having positive effect, reaching the deadline without getting an express decision must be regarded as a rejection. (silencio desestimatorio).

- When the proceeding is intended to have a restrictive result, including penalty proceedings, going beyond the legal period will make administrative action to become expired. (Caducidad). The body must issue a decision stating expiration.

V.- THE EFFICACY OF ADMINISTRATIVE DECISIONS.

Every administrative decision enjoys a rebuttable presumption of validity (iuris tantum). To enjoy such presumption the decision must just have minimal external lawful conditions.

Efficacy can be subject to several conditions:

- CONDITION PRECEDENT (Condicion suspensiva). One future fact must take place so the decision to become effective

- RESOLUTORY or DISSOLVING CONDITION (Condición resolutoria). Once the future fact takes place it operates the revocation of

the obligation, placing matters in the same state as though the obligation had not existed. It does not stay the execution of the obligation. It only obliges the party to restore what he has received in case the event provided for in the condition takes place.

- EX-POST APPROVAL OR EX-POST AUTHORISATION (Necesidad de aprobación o autorizacion posterior). Actually, this is sort of condition precedent.

The efficacy starting point is the notification or publication of the administrative statement. Let us discuss about both cases.

As a general rule notification must be done within 10 days from the date the decision was passed. This deadline is part of the general one the administrative body has for issuing a definitive decision in the proceeding. This has to be taken into account in terms of alleged decisions.

Notifications shall include the whole subject matter of the decision. It must be done in the place the citizen has communicated as his residence for notification purposes; as long as citizens do not communicate their residence, notification should be done wherever the Administration was aware of their last-known residence.

Regarding the ways to carry out and receive notifications, it can be done by any means as long as it leaves written record and acknowledgement of receipt. Let us check the different options:

- Personal notification: voluntary appearance at administrative offices.

- Notification at the citizen´s residence. It can be done by post office services (correos), telegram, private delivery services, notarised document, visit of the police or administrative officers, etc.

Unexpected events might make notification difficult in some cases. Let us discuss the possible situations and the legal result.

- The recipient is not found at the address he appointed for notification purposes.

    - Anyone in the home can take charge of the document, prior showing an ID.

    - If no one is willing to take charge of the document, the officer should take note and try again later within the following 3 days. Doing this the same day, after several hours, is accepted as valid notification by Courts.

    - As long as the notification attempt is unsuccessful, the officer will leave notice in the mailing box. In addition, he shall write a note in the notifications list at the post office. The citizen has up to 15 days to collect the document from the post office. After this time limit, the post

office shall send the document back to the administrative body so to continue proceedings.

- The residence is unknown, the citizen rejects receiving the notification, or the notification is not collected from the post office within the deadline.

  In these cases the notification will be regarded legitimately done. The following stage in the proceeding is the notification by edicts (notificación edictal), which is a kind of official publication.

Special rules govern electronic or telematic notification. Every citizen has the right to be notified by electronic proceedings. However, to make such right become effective, the prior adaptation of the administrative structures and proceedings is required. Thus, although the right is clearly recognised by the law, its actual implementation often depends on implementing regulations, the adaptation of formalities, and in most cases, financial support to fund the purchase of programs and equipment.

The electronic notification therefore is only valid as long as the citizen chooses such an option, as well as whenever he voluntarily accepts this way of notification when offered by the authority. This voluntary approach, however, does not apply to everyone. Companies and other legal entities can be forced to accept electronic notification in certain proceedings providing it is stated by the law or regulations.

Electronic documents and records must be part of an electronic folder (carpeta electronica) with plenty access both by the administrative body and the concerned party. All the stages in the electronic procedure will be registered in the electronic folder. Sometimes, the party must register his communications, documents, pleadings, etc, using electronic signature, though it is not always required.

With regards to electronic notifications, every concerned party must give an email address for suitable notifications; acknowledgement of receipt is easy to prove once the citizen opens the file, but the problem might arise when the citizen does not check the email address or voluntarily rejects to open the communication. To avoid misconducting such as inattentiveness or voluntarily lack of checking not to be notified, the law states that the notice will be deemed legally done after 10 calendar days in every case the recipient does not open the computer application or the electronic file.

Publication is an alternative way of notification. It has the same effect in the following cases:

- Statements with plural recipients.
- Statements affecting several applicants.
- Statements in competitive or tender proceedings.
- Whenever the law or regulation states publication as the method of communication.
- Whenever public interest suggests publication as the best communication way.

Sometimes, publication complements notification not replacing it.

VI.- SUSPENSION OF EFFICACY AND EXTINTION OF ADMINISTRATIVE ACTS.

1.- SUSPENSION.

This is a provisional measure which is rendered on administrative or judicial appeals. The aim of suspension of decision´s efficacy is to bring the proceeding to a fair and effective conclusion. In addition, it is intended for limiting or avoiding damages of difficult or impossible redress.

The measure is regulated in sections 111 *LRJPAC* (administrative proceeding) and 120-130 LJCA (judicial proceedings). Both sections point out the following criteria to help decision-making:

- Damages of impossible or difficult redress.
- Balancing every single interest in conflict as a whole.
- *Fumus boni iuris.*
- Safeguarding the complete efficacy of the resulting decision or judgment in the administrative or judicial appeal.

As a general rule, suspension must be granted whenever nullity causes are potentially present. However, in practice administrative bodies and Courts restrictively apply such a criteria, since it involves an anticipated analysis of the substance of the matter. The Supreme Court has continuously stated that suspension should only be granted in such cases when nullity is 'obvious and evident' (*casos ostensibles y evidentes*).

The interested party can apply for suspension in any stage of the proceeding, which will be assessed by separate inquiry. Along this separate proceeding the administrative body can require the applicant to provide security deposit so to respond to eventual damages to public interest or third parties.

Administrative silence is positive in this matter and the deadline to expressly respond about granting suspension is 30 days.

In case of the special judicial procedure for the protection of fundamental rights stated in *LJCA*, the general rules discussed before are completely reversed. Suspension becomes the general rule unless the public body shows serious damages to public interest.

In *ex officio* review proceedings suspension are also available according to section 104 *LRJPAC*, but just in case of potential damages of impossible or difficult redress in public interests.

2.- EXTINCTION.

Administrative decisions will have no longer effect in the following cases:

- The decision has been fully enforced. It has exhausted its legal effects and will no longer be effective.
- The decision has expired. Some administrative decisions have limited time effects.
- Decisions under resolutory condition.
- Decisions impossible to fulfill due to unexpected causes happened after the decision was made.
- Decisions declared annullable or null and void in appealing proceedings before the upper administrative body or Courts.
- Decisions revoked due to *ex officio* reviewing processes.

VII.- VALIDITY AND NULLITY OF ADMINSTRATIVE DECISIONS. THE THEORY OF INVALIDITY.

In Spanish administrative law, the violation of the most relevant legal principles in both regulatory-making and decision-making processes leads to nullity. Regarding administrative statements, less relevant offences might however lead just to annullability.

Let us discuss about both results.

1.- ANNULLABILITY (*anulabilidad*)

This the ordinary situation for unlawful decisions; there is no list of causes of annulability in the law. However, according to section 63 *LRJPAC*, the following should include the possible cases of annulability:

'Any infringements, offences or violations of law, including abuse of power' (*Cualquier infracción del ordenamiento jurídico incluida la desviación de poder*).

There is a wide list of offences that might be regarded as annullable causes:

- Hierarchical lack of power.
- Abstention or recusal.[14]
- Vice of consent.
- Infringement of law and regulations.
- Violation of discretionary limits.
- Lack of reasoning.
- Imposition of improper conditions.
- Violation of calling and public tendering conditions for bidders.
- Error in assessment of facts
- Etc.

Formal offences lead to annullability as long as the resulting administrative decision is unable to achieve its aim and purpose, as well as whenever its implementation should

[14] Recusal is used when a board or administrative body member has a conflict of interest and must abstain from voting on any issues relating to that private interest. If not, it might be recused by interested parties from all deliberations on the matter.

create defencelessness for the concerned party (*principio de instrumentalidad de las formas*).

The Supreme Court has stated several tests so to help deciding when formal defects should end up in annulability. These are the main cases:

- Lack of due process (*limitación de garantías en el procedimiento*).
- The resulting decision should have been otherwise in the case that the offence had not taken place.
- Lack of hearing having as a result that the concerned party was unable to lodge pleadings during the proceeding. The lack was not repaired during the process.
- Refusal of an application to have access to the administrative records (*vista del expediente)*, providing the citizen could not gain access to relevant documents.
- Rejection of relevant evidences the citizen aimed to give during the proceeding.

If we take a closer view, most of the listed violations can be easily rectified during the administrative or judicial procedure. Thus, the disabling efficacy of formal offences and defects just comes down to determining whether the offence has really been a relevant condition in the decision-making process, as well as clarifying whether the offence could have been repaired during the administrative proceeding or the judicial process or not.

In the case that the decision would have been another, three different cases may arise:

- The decision itself is correct and lawful regardless the formal violation (i.e. the citizen does have the right). The resulting decision must be regarded completely valid.
- The decision itself is not correct and lawful (*Vicio de fondo + Vicio de forma*). The resulting decision will be Annullable.
- The legality of the substantial decision cannot be precisely stated. Then, the resulting decision will be deemed annullable. In fact, this is the only case where formal offences themselves generate an invalid decision.

Administrative decisions notified past the deadline, even when it is essential in nature, can be perfectly valid and effective. Time-barred decisions do not always become invalid. Actually, as already mentioned, administrative bodies must always give an answer, regardless of the time-frame of the decision. Late decisions will be lawful unless they create defencelessness or damage the concerned party or third parties´ interests.

On the other hand, deadlines in administrative proceedings are not mandatory in many cases. In contrast, time limits are always mandatory in the judicial process both for the administration and the citizen. Missing the deadline will result in losing procedural rights.

Many annullable decisions can be ‘validated’ or ‘confirmed’ (*Convalidado)*, as soon as the public administration corrects the formal violation. The validating decision shall become enforceable from the very day it is notified and can even have retrospective effect. The new decision validating the former cannot change its substance and content. It will just complete it. Otherwise, the public body would be forced to start an *ex officio*

reviewing process. Cases of error, fraud or a representative's overstepping its commitment, among others, are likely to be validated.

Certain annullable decisions can be 'converted' into others so to become plenty valid (*Conversión*). Such operation takes place when certain procedural decisions are plenty valid and can themselves produce a different definitive administrative statement lawful and valid. Conversion leads to a new decision keeping the parts of the former which does not infringe legal or jurisdictional limits, while erasing those which are fatally flawed and do not adhere the rule of law.

Annullable decisions do not necessarily result in automatic annullability of the on-going related decisions (*transmission o comunicación de invalidez*).

Moreover, illegal procedural decisions do not necessarily make the rest of procedural decisions become illegal (*principio de conservación de actos*).

2.- NULL AND VOID DECISIONS.

The most relevant offences shall have the effect of declaring the decision 'null and void' (*nulidad del pleno derecho*). These are the most serious formal and substantial faults. Nullity makes the presumption of validity decline. Appeals based on the grounds of nullity causes will be granted suspension of the administrative decision. Enforcing null and void decisions is not possible unless they become final, and even in such situation, the public body could start *ex officio* reviewing proceedings.

Nullity causes are clearly stated in section 62 *LRJPAC*:

> *1. Los actos de las Administraciones públicas son nulos de pleno derecho en los casos siguientes:*
>
> *a) Los que lesionen los derechos y libertades susceptibles de amparo constitucional.*
> *b) Los dictados por órgano manifiestamente incompetente por razón de la materia o del territorio.*
> *c) Los que tengan un contenido imposible.*
> *d) Los que sean constitutivos de infracción penal o se dicten como consecuencia de ésta.*
> *e) Los dictados prescindiendo total y absolutamente del procedimiento legalmente establecido o de las normas que contienen las reglas esenciales para la formación de la voluntad de los órganos colegiados.*
> *f) Los actos expresos o presuntos contrarios al ordenamiento jurídico por los que se adquieren facultades o derechos cuando se carezca de los requisitos esenciales para su adquisición.*
> *g) Cualquier otro que se establezca expresamente en una disposición de rango legal.*
>
> *2. También serán nulas de pleno derecho las disposiciones administrativas que vulneren la Constitución, las leyes u otras disposiciones administrativas de rango superior, las que regulen materias reservadas a la Ley, y las que establezcan la retroactividad de disposiciones sancionadoras no favorables o restrictivas de derechos individuales.*

Cases (1.b) and (1.e) were already discussed above when addressing formal offences. The case listed as (2) was addressed when discussing about regulations. The remaining causes deal with substantial aspects which are certainly worth analysing here.

Letter (a) deals with decisions damaging fundamental rights. According to the Spanish constitution, rights stated between sections 14 and 30, including the right to conscientious objection are suitable to be challenged before the Constitutional Court through a privileged and abbreviated procedure called *recurso de amparo*. In addition, the party can bring the case to ordinary Courts being benefited from an abbreviated procedure for fundamental rights as stated in *LJCA.*

The case listed in letter (c) concerns certain administrative decisions which are impossible to enforce due to factual or legal conditions. For example, declaring someone who is not Spanish or citizen of an E.U. country eligible for working positions in the public sector linked to homeland security should be impossible to enforce because it directly conflicts the law.

Letter (d) refers to decisions resulting from major offences such as those with criminal relevance (prevarication, bribery, etc.). Such decisions are deemed null and void. Nullity can only be declared once there is a final judgment in Criminal Courts. Meanwhile, the decision will be effective unless the Court states a provisional measure declaring stay of efficacy. Such measure should be probably granted given that one of the legal causes of suspension takes precisely place whenever the decision is eventually null and void.

Letter (f) is clearly thought for positive alleged decisions, although it might operate with written and notified decisions as well. As already discussed, notwithstanding the alleged decision is regarded as having positive effect, no one is eligible to benefit from something that is against the law. To back up such principle, *LRJPAC* raises the level of the offence to the null and void category.

Finally, letter (g) opens the list of null and void cases to every other one stated by law.

Declaring a decision null and void leads to the following results:

- Null and void decisions cannot be validated or confirmed.
- Null and void decisions can be converted into valid decisions.
- As well as annullable decisions, null and void decisions do not necessarily result in the automatic invalidity of on-going related decisions.

3.- FORMAL OFFENCES WITHOUT INVALIDATING EFFECT: MINOR PROCEDURAL IRREGULARITIES (*Irregularidades no invalidantes*).

Minor offences which neither undermine the essential elements of the decision, nor create defencelessness, should be regarded as a simple irregularity. The final decision meets the basic requirements and would have been the same assuming the offence had not taken place.

QUESTION PAPER

I.- Explain the concept*actos separables*.

II.- What are the key structural features of any administrative decision?

III.- What is the difference between a definitive and a procedural decision?

IV.- Is the citizen allowed to appeal a decision which exhausts administrative remedies? Give reasons and explain.

V.- What happens when the concerned party does not file an appeal against a decision which does not exhaust the administrative channel? What if the decision does actually exhaust administrative remedies?

VI.- When does a decision become final and what are the consequences in such cases?

VII.- Give two examples of favourable decisions and two others of negative decisions. Briefly explain what they consist of.

VIII- Governing decisions of the Board of Ministers can be challenged before the Administrative Courts. Give reasons to support such statement.

IX.- What does abstention and recusal mean?

X.- What is a hearing'and what is its legal relevance?

XI.- What is the point of saying that administrative silence is a legal fiction?

XII.- Explainwhat are the effects of positive alleged decisions.

XIII.- Explain what are the effects of negative alleged decisions.

XIV.- Are late decisions unnecessary as long as we already have an alleged decision? Are late decisions legally bound and tied by the effect of the alleged decision?

XV.- In *Ex officio* proceedings lack of giving an answer might lead to two different results. Which are they?

XVI- How should an administrative notification be legally carried out?

XVII.- When is a publication required?

XVIII.- What cases lead to staying the administrative decision´ efficacy?

XIX.- What are the annulability causes? Are they stated by law?

XX.- List the causes of nullity and briefly explain their key features?

XI.- Prepare the following administrative decisions:

-Decision to initiate disciplinary proceedings (*acuerdo de incoación de expediente sancionador).*
-Draft resolution in disciplinary proceedings (*propuesta de resolución en expediente sancionador*).
-Definitive decision granting financial aid for housing (*acto definitivo de concesión de subvenciones para adquisición de vivienda*).
-Procedural measure opening the period for the production of evidence in a disciplinary proceeding. (*diligencia para que se declare abierto el periodo de prueba en expediente sancionador*).
-Certificate of attendance to the '…' seminar (*certificado de asistencia a un seminario).*

CASES.

I.- Decide whether the following statements refers to administrative decisions or not. Point out their actual nature (administrative, political or private) in each case:

a.- Building permit granted by the Major.

b.- Appointment of Minister by the Spanish Prime Minister.

c.- Hydrological report included in the proceeding for approval of zoning regulations for residential land-use in urban areas (*plan parcial de reforma interior*).

d.- Decision awarding AQUAMED S.A., which is a private company publicly owned, a supply contract for the Regional Government.

e.- Decision granting a discharge permit to a private company by the President of the Jucar River Basin Authority.

f.- Order of the President of one Irrigation District (*Comunidad de regantes*) imposing water distribution conditions to the farmers who are members of the District.

g.- Notice and publication of a public call for hiring a civil servant (tenure position) in the Town Hall of Alicante. The decision is held by the corresponding Department.

h.- Decision of the contracting body excluding 25 candidates assuming they are not eligible due to lack of enough professional skills.

i.- Penalty imposing a fine by the Traffic Deputy Director of the correspondent Ministry.

o.- A group of landowners are summoned to appear for onsite layout (*replanteo*) within the time stated in the Expropriations Act. After the meeting the authority issued a variation order (*acta de replanteo*)

p.- General Director of the Ministry of Agriculture and Environment´s decision rejecting granting financial aid to several applicants.

q.- Alleged decision not granting financial aid. General Director of Agriculture should have made the decision. The alleged decision became effective 9 months ago.

II.- Discuss what expected results the following cases shall have:

a.- Juan´s cousin, who is the General Director of the Regional Ministry of Environment of Valencia grants Juan financial aid to help turn a farming facility located inside the Font Roja pre-park area into an organic farming facility, which is significantly more environmentally friendly. Funding is to be implemented under the following programme: 'Assistance to improve environment in agricultural areas in natural parks and neighbouring ('pre-park') areas'.

b.- One citizen is notified a definitive decision. Notification lacks several relevant formal elements such as the indication of available remedies. The citizen files an appeal (*recurso de alzada*) on the grounds of defencelessness since he was not correctly notified, and requesting the upper administrative body to declare the decision null and void. What do you think should happen in this case?

c.- A citizen receives a telematic notification of an administrative decision. He checks it in his electronic folder and decides not to open it. Do you think the notification was correctly done and therefore fully effective?

d.- One citizen applies for a building permit. Application is registered on December the 30th. The time limit for notifying the decision is two months. The lack of answer in this case has positive effect in this case according to law. On March the 1st, the citizen receives notification rejecting the permit. Do you find it correct? Explain your point.

e.- An administrative body starts a disciplinary proceeding. The time limit for notifying the resulting decision is 6 months from the day the decision to initiate the proceeding was taken. The public body makes a decision imposing a penalty 9 months later. What is the legal situation in this case?

f.- An officer tries to notify a person an administrative decision in his residence at 9:00 am. At 12.00, the officer stops by the apartment again and the person is not still there. Personal notification, therefore, cannot be done. The officer leaves a note in the mailing box. Do you find the whole proceeding correct?

g.- The concerned party, which has not been personally notified, does not appear in the mailing office and does not collect the certified mail. What do you think should happen in this case?

h.- Providing one citizen receives a demolition order involving a building he owns, he decides to appeal the decision requesting the enforcement to be stayed until the Court rules the case. In fact, the citizen appeals on the grounds on an eventual illegality of the zoning regulations of the city. The citizen is actually lodging an indirect appeal against the regulation, although challenging the single decision that directly concerns his

property rights (*recurso indirecto contra reglamentos*). Do you think stay of execution should be granted providing that the building does not have cultural values (heritage laws are not applicable though)?

III.- Choose whether the following cases are null and void or just annullable. Justify your answers.

a.- Decision made by the Subdelegate of the Government in Alicante preventing a group of applicants from promoting a legitimate demonstration.

b.- Town Hall authorities grant a developer a building permit in land excluded from urban development (*suelo no urbanizable*).

c.- Occupation of plot for public purposes without previous notice to the owners.

d.- Positive alleged act recognising a citizen as holding dependent adult status. Later on, it is proved that the recipient was not really in such condition.

e.- Administrative statement not addressing several relevant aspects of the matter (lack of reasoning).

f.- The Mayor grants a friend a building permit. He is convicted of a felony *(prevaricación*).

g.- The municipal governing board (*Junta de Gobierno*) grants a building permit which should have been granted by the Major according to law.

h.- Traffic fine imposed on the grounds of a wrong Police report.

i.- Rejection of an application for a license on the grounds of a negative technical report. The concerned party does not agree with such report.

j.- One citizen receives two conflicting notifications from two different administrative bodies.

k.- One regulation lists and regulates a series of offences eventually breaking the principle of reservation as to law, which is fully applicable in the disciplinary field (art. 25.1 CE).

l.- The competent authority grants a citizen a permit to open a pharmacy. The citizen forged his degree so to become eligible. He was sentenced for falsification and the judgment became final three years later. Notwithstanding, a few days after being granted the permit he actually got the required degree.

CHAPTER XIII. ADMINISTRATIVE PROCEEDINGS.

I.- CONCEPT, NATURE AND IMPLEMENTATION.

The administrative proceeding is a group of formal steps leading to a definitive decision. All the documents except for the definitive decision are procedural stages intended to build a reasoned and fair definitive decision. Procedural and substantive statements make up the administrative record, which can be electronic or physical.

Every single democratic state has a regulation of administrative proceeding. Some of them have created a regulatory structure mostly based on case law, such as the common law countries and others such as France or even the European Union. Others, however, have created a legal framework so to deal with procedural aspects. This model is adopted in the USA (1946 Administrative Procedure Act together with the constitutional doctrine of procedural due process), Germany (1976 Federal law), Italy (1990 law), and obviously Spain (1956 Administrative procedure Act).

Although judicial review and administrative proceeding share common principles and even targets, their nature and ends actually differ. While judicial review tries to reach a fair and impartial judgment, administrative proceeding tries to maximise the so called 'general interest', which is interpreted by one of the contending parties. It does not mean that the administrative proceeding is merely a formality, but there is no getting away from the fact that public administration becomes both, judge and party, in the administrative proceeding.

With regards to the nature of the proceeding, it is worth mentioning that it is a relevant tool to protect citizen´s rights, since it allows them to know all the fundamentals of the case and to actively participate, lodging allegations, and even appealing to upper authorities. Moreover, proceeding helps monitor administrative actions.

On the other hand, it is important to stress that the administrative proceeding is a formal structure made up of various parts (single decisions). All the procedural stages are intended to end up in a definitive decision; thus, they are instrumental to the final decision and are structurally related to each other. Every single procedural stage must be valid. All of them have their own causation and purpose. As a result, all of them might be challenged, although only those considered relevant enough (*cualificados*) can be separately brought to Courts.

Sometimes, procedural decisions are built up in separate procedural inquiries (*piezas separadas*).

The decision-making process requires following the proper proceeding. The *LRJPAC* is the basic law for every administrative structure with regards to the due process regulation. However, the law does not state a complete proceeding structure; on the contrary, it only lays down key principles and settles down certain essential procedural stages.

When it comes to institutional administrative bodies, administrative procedural rules are somewhat applicable to a certain extent, depending therefore on the type of the agency

we are dealing with; it is necessary to bear in mind that certain entities do not fall within Administrative law framework. Corporate bodies are subject to their specific law, but administrative proceeding will be required when acting in public capacity. Both institutional and corporate bodies, when acting under private law, will only be subject to *LRJPAC* proceeding rules with regards to the so called *actos separables*.

Despite being essential and necessary, administrative proceeding certainly creates bureaucratic burdens, sometimes unnecessary, and may impede citizen's quick access to a final decision or judicial review. Excessive red tape is negative for the economy as well. Simplifying proceedings and reducing regulatory burdens is likely to be one of the current key challenges of most governmental policies in Europe.

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market is a good example. 1999 amendments in *LRJPAC* also included a reference to 'simplifying proceedings' and removing unnecessary bureaucracy. However, in practice, little or nothing has been done.

So far, excessive procedural burdens have been a good pretext to what is named as: '*administrative law getaway*' (*huida del derecho administrativo*). The flee from Administrative law is common when it comes to creating and operating public entities under private law schemes, and tactically using private law in regular legal relations such as contracting out, staff regulations, etc.

Procedural regulation has moved forward in the last few years due to the development of the new technologies in public administration´s operations. Law *11/2007 de 22 de junio, de acceso electrónico a la Administración*, states the key rules in this area. Telematic proceedings are likely to be one of the most interesting areas of research in administrative law in the next years. It allows not only to simplify proceedings, but also to encourage public participation, and as a result, helps to achieve new grounds for transparency and accountability.

2007 Electronic Access to Administration Act gives citizens the right to establish relations with administrative bodies through electronic means. This is consistent with section 35 *LRJPAC*, which grants citizens several rights to enable full access to administrative information, files and records. In addition, according to section 6 of 2007 Act, citizens have the right to get online information, seek advice, lodge applications and pleadings, file complaints, suggestions, make payments, transactions, and file appeals against administrative decisions and regulations.

To make such a right fully effective and enforceable, it is necessary to adapt proceedings and to invest in technology platforms. ITS applications should be mature, sufficiently interoperable, and efficient enough to support a growing pattern of electronic relations between administrative bodies and citizens. 2007 Act states that such capacities should be operational in the State Administration before the 31st of December 2009. Regional and local governments, however, are only bound to offer electronic proceedings depending on their budgetary possibilities. Recent amendments in 2007 law, (*Ley 2/2011, de 4 de marzo, de Economía Sostenible*), obliges such administrations to create a program for the implementation of new technologies in their proceedings, scheduling a progressive adaptation (new paragraph 5 of the 3rd final provision of 2007 law).

II.- PRINCIPLES.

Given that there is not a common and uniform administrative proceeding framework, and providing that many *LRJPAC* provisions are merely supplementary of special procedures, the greatest contribution of *LRJPAC* is to create a bunch of common principles that ensure a minimum of uniformity.

1.- Principle of contradiction.

The examining body must grant both parties in the proceeding enough possibilities to participate. Equal treatment and allowing contradiction becomes essential in due process (section 85.3 *LRJPAC*).

According to STC 8th of June 1981, section 24 CE must be interpreted as there is not a valid proceeding, regardless judicial or administrative, where contradiction is not fully guaranteed to all the parties in every single procedural stage. For example, as a general rule Police reports are regarded as mere declaration of facts (*denuncia)* unless ratified by the officer during the proceeding so to allow contradiction (then they become a piece of evidence).

Section 31 *LRJPAC* states that every citizen holding concerned rights (*interesados necesarios*) must be called to the proceeding. Not meeting such obligation would lead to declaring the resulting decision null and void on the grounds of defencelessness. In addition, citizens just holding legitimate interests in the case will become parties in the proceeding providing they voluntarily appear (*interesados no necesarios*). Becoming a concerned party (*interesado*) in one proceeding ensures that those benefited from such position become allowed to fully and actively participate in the proceeding.

Concerned parties have the following rights:

- Actively participate in the proceeding.
- Right to be informed of the current stage of the proceeding.
- Get copies of every decision regardless procedural or definitive.
- Identifying authorities and civil servants.
- Lodge allegations and pleadings.[15] File documents during all the stages of the procedure before the definitive decision.
- Proposing evidences, administrative actions in defence of their rights, and take part and be notified of every relevant procedural step.
- Appeal the definitive decision.

(Sections 35, 78, 79, 81, 84, 85 *LRJPAC*).

[15] Pleadings: a formal document in which a party to a legal proceeding sets forth or responds to allegations, claims, denials or defences. In federal civil procedure, the main pleadings are the plaintiff's complaint and the defendant's answer. Allegations are appropriate in a complaint or similar document.

All the above mentioned rights are actually instrumental to reach fair and actual contradiction, and therefore, to ensure the right to be heard.

2.- Principle of procedural economy (swiftness and efficacy).

This principle is essential to reduce bureaucratic burdens and has multiple effects. Reducing steps in the proceeding, limiting deadlines, sharing information and documents between administrative bodies, among many other operative measures, are regular ways to turn proceedings faster and eventually more efficient. However, implications of the principle go further.

The principle is clearly implicit in the legal and judicial assessment of formal offences. As already discussed, such offences rarely lead to annulation or nullity. Annulation, which only leads to repeat the wrong stages in proceeding, is even more restrictive. Techniques such as conversion and validation and principles stating, that decisions do not necessarily result in declaring on-going related decisions annullable, are also inspired on this principle.

Allowing public bodies to provide a common decision for a number of similar cases is a logical outcome of the principle. The law states that separate but connected on-going proceedings should be taken on by the authority holding the closest and more specific competence.[16]

In the current *LRJPAC,* the principle of efficacy is expressly stated in section 3.I. Paragraph 2 goes even further imposing 'efficiency' as general criteria. Section 57 states that as long as several procedural decisions can be gathered in just one it must be done that way (not consecutive). Finally, section 73 allows gathering administrative records when they are closely linked.

The limit for the procedural economy is not limiting citizen rights and guarantees, as well as not to break the law.

3.- Principle '*in dubio pro actione*'.

The right of individual or collective actions in administrative proceedings must be interpreted in the sense of granting full participation. This is particularly relevant when evaluating legal standing, and therefore, qualifying someone´s position as a concerned party (*interesado*). (STC of July 11th, 1983).

Another result arising from this principle is that most formalities in citizen´s documents are not relevant whatsoever in the proceeding. Even certain deadlines are not strict for citizens. For example, although it is during the hearing when citizens are allowed to file pleadings, nothing prevents citizens from filing allegations during the whole proceeding.

LRJPAC states particular applications of this principle:

[16] See Sections 38-39, 1958 LPA, which are still in force with supplementary effect

- Section 102 states that citizen´s error identifying the type of appeal does not prevent from admitting and processing the appeal.

- Section 92.1 requires Administration to warn the concerned party about the expiry date of the proceeding almost 3 months before it will take place, in the event the proceeding had become stayed from his fault. Without proper warning, the declaration of expiry would not be effective.

- Sections 71 and 76 impose administrative bodies the obligation to grant the citizen a period of 10 days to rectify his/her application or submit additional documents (*subsanación*). Not meeting such demand will result in withdrawing from the current proceeding (*desistimiento*). Deficiencies are not only formal failures; on the contrary, Courts even accept substantial defects as suitable to be corrected. For example, paying fees out of time.

4.- Principle of *Ex officio* expediting administrative procedure (*Ex officio* principle).

The public body has to drive along the proceeding even without request from any concerned party. The onus in pressing on and driving the case ahead relies always on the public body; when citizens do not meet their procedural obligations they get procedural disadvantages, but it is the public body the one that must keep the proceeding moving ahead meeting the deadlines. The principle is clearly stated in section 74.1 LRPAC.

Administrative proceeding is intrinsically 'inquisitorial' and decisions do not depend on what the citizen has brought to the proceeding. On the contrary, decisions should address every relevant issue of public interest.

Section 78.1 *LRJPAC* states what is called investigative measures (*actos de instrucción*), including every administrative action leading to acknowledge and verify every relevant data and information to be dealt with in the case. Every stage must be carried out *Ex officio*, notwithstanding citizen´s request, including the 'evidence hearing' (*periodo de prueba*). (section 80.2 *LRJPAC*).

Section 41 *LRJPAC* holds the competent authorities responsible from properly driving proceedings and removing every set back. Such responsibility is backed up in sections 35.1.j (citizen´s rights in the proceeding) and 42.7 (obligation to answer). In addition after 1999 *LRJPAC* amendments, section 47.2 apparently opens the door to strict liability in these cases (*responsabilidad patrimonial*).

5.- Legal standing (*legitimación*).

Overall or universal standing (*acción pública*) is only available in certain areas of administrative law such as heritage protection, zoning law, coastal law, or access to

environmental information. Most fields of administrative action, however, require certain qualification to participate. Such qualification arises from particular links with the subject matter. According to *LRJPAC*, it is necessary to hold a '*concerned right'* (*derecho subjetivo afectado*) or a '*legitimate interest*' (*interés legítimo*). Those who finally become part of the proceeding are called: 'concerned parties' (*interesados*).

Due to section 24 CE, having a direct, personal and legal interest involved is no longer necessary. The current figure legitimate interest is less demanding than 'direct interest' in terms of granting access to the administrative proceeding and judicial review. Indirect affected interests therefore allow legal standing. Certain collective rights are benefited from legal standing as well according to specific rules such as the so called '*diffuse rights*' (*derechos difusos*).

The same standing conditions are required for judicial review purposes in section 7.3 *LOPJ*, including corporative standing, associative standing and group standing. When it comes to collective action, Sections 18 and 19 *LJCA* grant legal standing in the following cases:

- Corporations
- Associations.
- Trade Unions.
- Groups of concerned citizens.
- Unions without legal personality.
- Independent or autonomous patrimonies.

Section 31 *LRJPAC* replicates such standing scheme for administrative proceedings, specifying the following cases:

- Rights or legitimate interests:

    - Whoever that promotes a proceeding holding concerned rights or legitimate interests, both individual and collective.
    - Whoever that, despite of promoting the proceeding, hold rights eventually affected in the proceeding.
    - Whoever that, despite of promoting the proceeding, hold legitimate interests, both individual or collective, which could be eventually damaged in the proceeding; providing they voluntarily appear in the proceeding before the definitive decision.

- Diffuse interests: associations and representative organisations of economic and social interests, holding collective legitimate interests, will have legal standing according to statutory conditions.

6.- Principle of impartiality.

Section 103 CE demands objectivity and impartiality in administrative behaviour. However, administrative bodies are both judge and party in the decision-making process; in fact, impartiality, which is essential in judicial review, must be regarded in a different way in administrative proceedings.

LRJPAC tries to fill out such principle in a number of sections. For example, disciplinary proceedings must have two different phases: investigation and decision-making (section 134). Abstention and recusal rules are another example (sections 28 and 29). Another attempt to make the principle effective can be found in tender proceedings, whose conditions are stated in the Public Sector Contract Act.

7.- Principle of transparency and accountability.

From 1889 (*ley Azcarate*) administrative records cannot be secret. That law precisely stated a particular stage for the exhibition of documents and hearing to allow citizens access to the records. Notwithstanding, limits to full access were always present in Spanish Administrative law.

Section 105 CE refers to hearings in administrative proceedings, as well as to accessing to administrative records and registries. Particular rules about it are found in statutory provisions.

LRJPAC dedicates Section 37 to that purpose. Such regulation has its roots in the 1966 Free Information Act (U.S), which is the main precedent. To summarise, this section grants concerned citizens full access to every document in the file (papers, images, sounds, digital format, etc.).

However, the same Section states a number of limits: privacy data, nominative documents (accessible only for their owners as well as third parties holding rights or legitimate interests involved), prevailing public interest reasons, prevailing third party´s interests, as well as other cases excluded by law.

Moreover, access is directly forbidden in particular cases:

- Political decisions
- Decisions not subject to Administrative law.
- Homeland security and defence.
- Decisions related to criminal investigations when releasing information might damage third parties or difficult investigations.
- Commercial or industrial secrets.
- Monetary policies.

Access in other cases depends on their particular statutory requirements:

- Classified matters (official secrets).
- Medical documents and records.
- Electoral archives.
- Official statistical studies.
- Register of births, marriages and deaths, Criminal Register (*Registro Central de Penados y Rebeldes*), and other public registers.
- Administrative documents related to elected political representatives (parliaments and municipal boards).

- Historic archives

Applications must be specific, identifying the requested documents; general requests of information or access should not be granted. In addition, applications that might disrupt the ordinary functioning and efficacy of administrative bodies should be rejected (*grave perturbación del funcionamiento del servicio*). Certain limits, in fact, derive from sectorial law or general principles such as the 'abuse or misuse or rights', intellectual and industrial property, official secrets, etc.

Citizens that have been granted access to administrative records are allowed to get copies and certificates. Whenever citizen´s requests or suggestions lead to general answers arising new interpretations of statutes and regulations, as well as current proceedings, they must be published for everybody´s knowledge.

Section 35 states several useful rights to grant transparency and accountability:

- Right to identify authorities and officers.
- Right to get information and advice related to proceedings (legal and technical advice)

Certain sectorial law implements and even broadens access rights. That is the case of environmental access to information, which is thoroughly expanded under Law *27/2006, de 18 de julio, por la que se regulan los derechos de acceso a la información, de participación pública y de acceso a la justicia en materia de medio ambiente.* The law implements in Spain the Directives 2003/4/CE and 2003/35/CE.

h.- Principle of gratuity.

Although *LRJPAC* does not expressly state this principle, it arises from the very nature of the administrative proceeding. No taxes are required to become a party in administrative proceedings, although it was not always this way (i.e. *timbre*). Notwithstanding, administrations are allowed to require citizens to pay taxes for certain documental services such as expediting copies.

With regards to the costs of certain pieces of evidence, section 81.3 *LRJPAC* states that authorities can charge the cost the citizen must pay, and even request advance payments (*anticipos*) subject to definitive settlement (*liquidación definitiva*).

III.- LEGAL STANDING.

Determining legal standing in administrative proceeding depends on the joint interpretation of sections 31 and 35 *LRJPAC*, which respectively state the concept of concerned party and the rights in the proceeding. Let us discuss the key aspects.

1.- Concerned right (*Derechos subjetivos*).

This concept of right in administrative law has the same scope as in private law. Rights are recognised by laws, contracts, or favourable administrative decisions. Citizens

holding right are *interesados necesarios*, and therefore they always have to be called to the proceeding. Infringing such obligation should lead to a null and void statement due to defencelessness. Calling the citizen will not be necessary as long as he/she has already participated in the proceeding as an applicant or has appeared at his/her own initiative.

Providing the citizen has been correctly summoned, and in the event he/she does not appear, the proceeding shall continue in his absence. The same will take place whenever the right holder is not localised or identified. Right holders are always interested parties in the proceeding regardless they are present or not.

2.- Legitimate interest.

The relation with the case is supposed to be smaller than in case of holding a right. Becoming a concerned party in these cases requires a positive action in the proceeding, either appearing as an applicant or after being called. Calling the holder is only required when the relation with the case arises during the investigation and he/she is clearly identified.

In sum, citizens become concerned parties by means of legitimate interest in two cases:

- Those who file an application or appeal.
- Those who appear in proceedings already in progress (*personación*).

Holding legitimate interest requires at least an eventual damage or benefit directly derived from the administrative proceeding. Benefits might be material, legal or even moral. Complete evidence of such benefit is not needed; a mere circumstantial evidence (*indicio*) should be enough (STS July 5th 1972). With regards to damages, competitive interests are included, thus concerning participants in tender or competitive proceedings. Being neighbour, or professional, might be regarded as legitimate interest in certain cases according to sectorial law.

When citizens do not receive the citation, the resulting decision will be annullable on the grounds of a relevant formal offence leading to defencelessness.

Experts, witnesses, or complainants are not parties in the proceeding. Nor those participating in the public information stage with no particular right or legitimate interest involved.

According to section 35 *LRJPAC* concerned parties enjoy the following procedural rights:

- Being informed of the current status of the proceeding and get copies of all the documents. They can get stamped copy of the submitted documents and keep the original documents unless otherwise reasonably instructed.
- Identifying the authorities and officers in charge.
- Using official languages according to law.
- Lodging pleadings and providing supporting documents in any phase of the proceeding before the hearing.

- Not being obliged to file documents that regulations do not require. They should not be made filing documents already in possession of the acting body.
- Getting information as well as legal and technical advice for projects, actions or applications.
- Being granted access to registries and records according to law.
- Being correctly treated by authorities and civil servants.
- Demanding accountability for public officers and the Administration itself.
- Others stated by law.

Concerned parties can lodge allegations and documents by digital means. At any time they can change to the ordinary written means, unless otherwise instructed in the regulations. Only when legislation bans digital means the public body can reject such type of communication. On the other hand, certain statutes expressly require the use of digital means. In such cases, electronic proceeding is mandatory.

According to section 27 *LAE*, e-communications have the same effect as ordinary ones, providing transmission and receipt are properly authenticated (*constancia fehaciente*).

With regards to legal capacity, civil rules are applicable to administrative proceeding. However, minors have legal capacity in some areas such as education. Citizens can participate in the proceeding by means of a representative. The lack of formal representation does not impede filing the document, lodging the application, appealing, or whatever other action; however, the corresponding authorisation must be submitted within 10 working days. The pro-action principle operates in this case.

IV.- ADMINISTRATIVE PROCEEDING STRUCTURE

1.- Place.

Administrative bodies have their own physical or IRS head offices (*sede física o electronica*). Both places have a single entry point for documents, the Registry. Every administrative building which is accessible to the public must have a Registry office according to section 38 *LRJPAC*. Together with the common or general Registry office, certain administrative bodies have their own auxiliary registries. Registries must keep physical and electronic books to make the annotations every time one document enters or exits the body.

The following are the available registries to lodge documents in administrative proceedings:

- Competent body´s headquarters and website.
- In State and Regional Administration, documents can be filed not only in the competent body but in any other bodies´ registers. With regards to municipal administration, they only share documents with other registries prior specific agreement.
- Post offices (documents must be presented in an open envelop for checking and validation).

- Consulate and Embassy´s registries according to law.
- Others according to law.

In case the application is registered in a different office from the one it should have been, the starting date to calculate the deadline to decide the case will be the day the application arrives in the register of the processing body. However, the relevant date in terms of meeting deadlines concerning the citizen will be the day he registered the application.

In State Administration, working operation in Registry offices is clearly laid down in *Real Decreto 772/1999, de 7 de mayo.* Every Regional Administration has its own regulations.

Agreements between Administrations are essential to meet the target: 'one single point of contact' or 'one-stop window' (*ventanilla única*). That is especially relevant with regards to municipal administrations. ITC proceedings make it easier to achieve.

Although *LRJPAC* had certain rules governing telematic registers, section 38.9 was repealed by *LAE*. In addition, detailed regulation was passed by Real Decreto 1671/2009, de 6 de noviembre, por el que se desarrolla parcialmente la Ley 11/2007, de 22 de junio, de acceso electrónico de los ciudadanos a los servicios públicos.

According to it, Administrative bodies in the State Administration, together with state entities (*organismos autónomos*) must create an 'electronic office' (*sede electronica*) in their website. An administrative decision made by the upper authority (Ministers or Directors of public entities) shall state the working rules of the office. The e-address shall be clearly set. The responsible authority for the office shall be appointed and will be clearly identified on the website. Services shall have enough contact data (phone, fax, physical offices, etc.). There should be a space to lodge suggestions and complaints. Sharing electronic offices are also encouraged prior agreement.

Within the e-office there must be a registry point. Every administrative department needs an electronic registry unless a common registry is established. In State Administration a common registry was created by section 31 *LAE*.

Documents should only be rejected in the following cases:

- Documents addressed to bodies or entities not belonging to State Administration unless agreement.
- Electronic documents attaching malicious codes or viruses.
- When standardised documents are required and the citizen does not fill all the gaps in the required fields. Inconsistencies and omissions. Standardised documents are previously laid down by the acting body, which decision can be challenged.
- Documents that should have been registered in specific electronic registries.

In case the document is rejected the citizen must be notified and given the chance to correct the failure. If he/she does not, registration will not take place. Given that e-offices are opened 24-7, documents can be lodged every day at every hour. Interruptions in service must be published and reasoned, and will last the time necessary to fix

problems. Unplanned service disruption must result in an extension of upcoming deadlines.

E-registries must provide a receipt ensured through an electronic signature. E-signatures must be supported by an authenticated digital certificate. It will include copy of the citizen´s document or reference, the date and time of registry and registry number, as well as the identification of attached documents with their digital fingerprint. The receipt will communicate the maximum deadline for notification as well as the effects of possible alleged decision.

Citizens bear with I.D. requirements to become allowed to lodge documents in public registries. In many cases, the document should be ensured through advanced electronic signature, based on a qualified certificate which is created by a secure signature creation device. Electronic signature should offer equivalent assurance with regards to the functionalities attributed to a signature. Spanish I.D. is regarded advanced electronic signature.

According to Law 59/2003, *de 19 de diciembre, de firma electrónica*, it is necessary to distinguish between advanced electronic signature (*firma electrónica avanzada*) and qualified electronic signature (*firma electrónica reconocida*). Directive 1999/93/EC on a Community framework for electronic signatures, also states the difference.

The Directive addresses several forms of electronic signatures:

- The first one is the simplest form of the electronic signature and is given a wide meaning. It serves to identify and authenticate data. It can be as simple as signing an e-mail message with a person's name or using a PIN-code. To have a signature the authentication must relate to *data* and not be used as a method or technology only for *entity* authentication.

- The second form of electronic signature is the advanced electronic signature. This form has to meet the requirements defined in Article 2.2 of the Directive. The Directive is neutral technology, but in practice this definition refers mainly to electronic signatures based on a public key infrastructure (PKI). It uses encryption technology to sign data, which requires a public and a private key.

  Section 3.2 of Spanish law states that this signature allows authorities to identify the signatory and acknowledge any following change in data already signed. The signature is uniquely linked to the holder and it includes all relevant data uploaded when it was created. In addition, this signature remains always under the holder´s exclusive control.

- Lastly there is a third form of electronic signature mentioned in Article 5.1, the 'qualified electronic signature'. This consists of an advanced electronic signature based on a qualified certificate and created by a secure-signature-creation device. It needs to meet the requirements in Annex I, II and III.

  This kind of signature is recognised under section 3.3 of Spanish law. Effects of such a signature are exactly the same as handwritten signature.

The ‘signatory’ is identified in the Directive as ‘*a person who holds the signature creation device and acts either on his own behalf or on behalf of the natural or legal person or entity he represents’*. Though the Directive does not state it, the signatory of a qualified electronic signature (article 5.1 of the Directive) can only be a natural person, as long as this form of signature is equivalent to the handwritten one.

2.- Time.

Although relevant, administrative deadlines are not always essential enough to lead to annulation or even nullity. Formalities are just instrumental in administrative law, not an end themselves, and therefore annulations based on formal offences (including time) are not a commonplace.

However, failure to meet the deadline might have serious results since it might lead to an alleged decision. Prescription and expiry date are also relevant results. Citizens may get procedural disadvantages, in particular when definitive decisions turn into final, consented and thus, unappealable decisions. In addition, those who do not correct applications in time shall withdraw the proceeding.

As a general rule, deadlines in administrative law must be calculated as working days(*días hábiles*) whichexcludes Sundays and other non-working days. Only when expressly stated by law, deadlines should be calculated as calendar days (*días naturales*).

Whenever laws and regulations lay down a day-deadline (i.e. 10 days deadline), the last day should be calculated taking into account if it is a working day or calendar day. In case the due date is Sunday or another non-working day, the closing date shall be the next working day.

When deadlines are laid down in months or years, the key problem is to determine the date the deadline is actually expired when the closing day does not exist or is not a working day (several months does not have 31 days or end on Sunday or holiday). Deadlines should end on the last day of the closing month or year; however, when that day is not a working day, time limit will be extended to the next working day.

In every case, regardless of the deadlines calculated by days, months or years, the starting point of the period will be the next day after notification or publication. In cases of alleged decisions, the starting point will be the next day the alleged decision becomes effective).

Given that in Spain there are not only national holidays, but also regional and even local ones, working and non-working days are not always the same in every territory. The criteria will always be the most favourable for the citizen. Thus, the particular day will be regarded as non-working day to all purposes.

3.- Formalities.

Citizens do not need legal representation in administrative proceedings *(postulación*), since no strict formalities in applications, documents, and appeals, are required. In

addition, the administration provides standardised documents quite often, which use is sometimes mandatory. That makes it even less relevant to have legal representation.

Section 70 *LRJPAC*, however, states several formal conditions for applications. The applicant must be identified (personal data) and will communicate his/her residence (essential to notify decisions). He/she should declare the preferred notification means (electronic or ordinary). It is necessary to indicate the place and date, as well as signing the document. Another relevant element is identifying the administrative body the applicant is addressing the document to. No more formalities are needed, although it is advisable to clearly, quite simply and briefly report facts, the legal founding, and the petition.

In addition, the applicant should take into account the rules stated in section 35 *LAE (Electronic proceedings*), as well as the relevant provisions of law 59/2003 *de 19 de diciembre* (Electronic signature). In electronic proceedings, standardised applications are mandatory and must be supplied by the electronic office. Applications and other attached documents must be always registered with advanced electronic signature. Some standardised documents are partially filled by the computer system, in which case the citizen only needs to complete and sign it.

An electronic document is everyone keeping information in digital format. It should be digitally signed by officers legally vested with authority to attest documents (*fe pública*).

Administration can impose additional conditions for digital signature in administrative proceedings. Such conditions should be objective, proportioned, transparent, and non-discriminatory. They shall not hinder or restrict digital certification services in proceedings where several administrations are taking part.

With regards to the contents of the administrative electronic documents, Spanish law does not require special formalities. Nevertheless, the *Real Decreto 1465/1999, de 17 de septiembre, por el que se establecen criterios de imagen institucional y se regula la producción documental y el material impreso de la Administración General del Estado*, states certain standardising conditions.

In State Administration, e-documents will be done in Spanish. They can be done in other official languages (regional languages) when addressing peripheral administrative bodies. Even in these cases, whenever any concerned party in the proceeding communicates their wish to use Spanish, the whole proceeding will be done in such language. Documents in other language will be just reported in the co-official language to the parties expressly applying for it.

In Regional Administrations, language use is regulated according to their own legislation (section. 36 *LRJPAC*). According to *STC 82/1986 de 26 de junio*, Spanish should be guaranteed whenever any concerned party applies for it. As a result, every document addressed to that party must be translated into Spanish. The same has to be done with documents having effects out of the region (in regions without the same co-official language). Such regulations concerns local authorities as well.

IV.- Stages of the proceeding.

An average proceeding consists of the following sequence of actions:

1.- Initiation.

The starting point of every proceeding is a first action which may be done both by citizens or the administration itself. There are therefore two kinds of proceedings. Those opened at the citizen´s request (*a instancia de parte*), by means of an application, and those opened at the administration´s own request (*de oficio*), by means of a procedural decision initiating the procedure (*acto de iniciación o incoación*).

Ex officio proceedings might start either by the responsible body´s own decision, following orders of upper bodies, accepting reasoned request from other bodies, or by prior citizen complaint (section 69 *LRJPAC*).

It is worth mentioning the difference between petition and application. Petitions do not lead to any administrative proceeding. According to Law (*Ley orgánica de 12 de noviembre de 2001, reguladora del derecho de petición*), every single citizen is allowed to address a petition to public authorities even without any legal standing status. However, no formalised administrative proceeding is started and the citizen is just granted the right to get an answer about the case. Applications, however, automatically create an administrative proceeding and the citizen becomes entitled to get a formal administrative statement.

Another relevant distinction concerns the terms report and application. While the first one is deemed a mere communication of facts that might eventually leads to an *Ex officio* proceeding, applications require legal standing and lead to a formalised proceeding at citizens´ request. As long as citizens report an offence they only have the right to be notified in case the authority decides to open a proceeding, not having any right to be reported subsequent procedural decisions.

Before opening the proceeding, the administrative body can carry out a preliminary stage called preliminary investigation or reserved investigation, which does not necessarily become part of the proceeding. It will become part of it as long as the administrative body decides to open the proceeding according to the results of the preliminary stage.

Cases must be addressed following a temporal sequence according to the application´s date of entry. As long as the decision initiating the proceeding is notified to the concerned parties the limitation period (*prescripción*) becomes interrupted. However, deadline to make a decision in ordinary proceedings (alleged decision) and expiry date in *ex officio* proceedings (*caducidad*) shall get started. The administrative body can order preliminary measures to assure the final decision´s efficacy (section 72 *LRJPAC*).

These are the key conditions for issuing preliminary measures:

- The measure should not create damages difficult or impossible to repair.
- It should not unfairly infringe legal rights.

- It should assess all the public and private interests involved, with particular attention to the principle of proportionality.

As a general rule, preliminary measures will be taken prior hearing the parties, although it is possible to order them *inaudita parte*.; they might be taken in every stage of the proceeding and should be lifted as long as justifying reasons ease up. Preliminary measures, regardless the procedure, are directly appealable and must be strictly reasoned.

When applications are wrong, the public body must give a 10 day period to correct; if the citizen does not comply with such obligation he/she will be considered as having abandoned the application (*desistimiento*) and the procedure will be filed.

2.- Investigation (*instrucción)*.

Principle of *ex officio* expediting an administrative procedure means one stage in the proceeding follows another according to the authority´s own initiative. *LRJPAC* states several sub-phases within the investigation stage. Let us discuss the key phases:

- Allegations.

There is no specific stage for allegations in the proceeding. Concerned parties can file allegations at any time before the hearing.

- Public information disclosure.

Opening the proceeding to public participation is not mandatory unless expressly instructed by law (section 86 *LRJPAC*). When it becomes mandatory, the acting body must make a public call in the Official Gazette, opening a period for allegations (20 days or more). This is actually a kind of hearing open to everyone regardless their condition of concerned parties. Not submitting allegations does not impede concerned parties to appear later in the proceeding.

The definitive decision has to address all the submitted allegations either individually or in groups, otherwise it will be annullable. As long as the public information stage is mandatory it must carried out, otherwise the resulting decision will be annullable. The constitutional principle of participation is at stake.

- Reports.

Reports are a key point in the proceeding given that decisions must be reasoned. Technical or legal reports are essential to and to feed the forthcoming debate and form a judgment. Reports are evidence as well and are regulated in sections 82 and 83 *LRJPAC*. Sometimes the law states that certain reports are required, otherwise the definitive decision becomes annullable. As a general rule, administrative report content is not binding (opinions, assessments, etc.).

In many cases, administrative bodies have to issue reports within other administration proceedings. This is particularly common in complex cases involving different

authorities. Assuming that most of these reports are required by law, omission in reporting could hamper the progress of the proceeding. Consequently, *LRJPAC* states that any delay in reporting does not impede the acting body to continue the proceeding. Late reports, when coming from other administrations, are not necessarily taken into account when settling the case.

When the acting administration does not address the reporting body to draw the report, the resulting decision should be regarded null and void. This is particularly clear when the reporting body is the Council of State (*Consejo de Estado*). Mandatory reports must be followed by the acting body. If not, the decision will also be null and void.

Non mandatory reports are relevant since they will become part of the judgment´s reasoning. According to the Supreme Court, they are presumed to be valid, fair and certain, and must be regarded as evidence. The concerned party can oppose to them by submitting their own evidences. No evidence is better than the other.

Together with mandatory and non-mandatory reports, certain sectorial legislation includes a *tertium genus* that might be called *determining reports* (*informes determinantes*). This intermediate category has a difficult interpretation and must be regarded on a case by case basis. Their omission is not always the cause of nullity. (*STS de 14 de abril, 12 de mayo de 2003 y 18 de febrero de 2004*).

- Evidences.

Regardless of the relevance of evidences in the proceeding, *LRJPAC* pays relatively little attention to their regulation (section 80). In principle, every piece of evidence regulated in civil procedural law is suitable in administrative proceedings. There is an evidence stage in administrative proceeding to be opened whenever there is an argument about the facts. Unnecessary or inappropriate pieces of evidence can be rejected by means of a reasoned decision. Citizens will be charged with the costs unless the public body is bound to carry out the proposed piece of evidence according to law.

Although citizens can apply for the evidence period, the acting authority can open such a period at its own initiative. Simple contradiction in facts obliges the public body to provide at least minimum prosecution evidence (*prueba de cargo*). Pursuant to the Spanish procedural law (Article 217 *LEC*), the burden of proof is either on the party which asserts its claims, or on whoever contradicts them by claiming new facts.

Administrative reports are benefited from a *presumption of certainty and fairness*, but it does not imply that such reports shift the burden of proof to citizens. Such presumption, according to the Supreme Court is limited to undisputable objective facts directly noticed by officers. It will never benefit simple global discernments, appraisals, or legal califications. (*STS de 19 de enero de 1996*).

Section 137.3 *LRJPAC*, as regards to disciplinary procedures, clearly states the presumption of innocence. As a result, facts reported by inspecting officers will be deemed as a piece of evidence, despite every other pieces of evidence to the contrary issued by citizens. The first ones, thus, are not more valuable than the second ones. Both must be equally assessed by the acting authority. In short, what we have here is just a rebuttable presumption, a prosecution or inculpatory piece of evidence (*prueba de*

cargo) that can be perfectly shattered by other pieces of evidence submitted by the defence (*pruebas de descargo*).

Decisions rejecting pieces of evidence submitted by citizens, or even rejecting opening the evidence phase, might lead to declare the definitive statement annullable. To have such effect either the resulting decision must create defencelessness or it can be reported that the decision would have been different otherwise.

The evidence period will last from 10 to 30 days according to section 80.2 *LRJPAC*. The taking of evidence (*práctica de la prueba*) must be done according to civil law (CC and LEC). Obviously, every piece of evidence must be discussed by parties, as the administrative proceeding is an adversary proceeding.

The most relevant pieces of evidence in our legal system are:

- Public or private documents.
- Confession.
- Personal inspection.
- Experts/expert witness (*prueba pericial*).
- Witness evidence.
- Rebuttable-non rebuttable presumptions (*prueba por presunciones*).
- Circumstantial evidence (*prueba por indicios*).

A confession is currently known as examination or cross-examination (*interrogatorio de partes*) according to *LEC*. After 2000 amendments, section 315 LEC admits this kind of evidence in cases involving public administration:

> *Article 315. Questioning in special cases.*
>
> *1. Where the State, an autonomous region, a local authority or any other kind of public body should be a party to the proceedings and the court should accept their testimony, they shall be sent a list containing the questions put forward by the party seeking the taking of evidence and which the court may deem relevant once the taking of such evidence is admitted without waiting for the trial or hearing, so that they may be answered in writing and the responses filed before the court before the date set for such hearing or trial.*
>
> *2. Once the written answers are read at the trial or hearing, any additional questions which the court may deem relevant and useful shall be answered by the court representative of the party that had sent such questions. Should such court representative justify that he is unable to answer the questions, a new set of written questions shall once again be sent as a final procedure.*
>
> *3. The provisions set forth in Article 307 shall apply to the testimonies described in this Article.*

According to section 307, which is titled: *refusal to testify, evasive or inconclusive responses and admission of personal facts*:

> *1.- Should a party summoned to testify refuse to do so, the court shall warn him at the hearing that the facts referred to in the questions may be ascertained as being true unless a legal obligation to keep a secret should exist, as long as the person called to testify has been personally involved in them and their ascertainment as being true may turn out to be fully or partially harmful to him.*

2.- Where the responses given by the party called to testify are evasive or inconclusive, the court shall warn him as set forth in the preceding paragraph on an Ex officio basis or at the request of a party.

With regards to rebuttable and non-rebuttable presumptions, it actually means shifting the burden of proof to citizens, since they become forced to submit evidence to overthrow the proof adduced by the administration.

Circumstantial evidences are admissible although they have to be completely proved. Mere suspicions are not acceptable as evidence. A more intensive reasoning is therefore required in these cases.

The general rule is the freedom to assess and evaluate every piece of evidence (*prueba libre*). Regulated evidence (*pruebas tasadas*) is extraordinary in our legal system (the value of certain pieces of evidence is already stated by law). Only public documents as well as examination or cross-examination can be reported regulated evidences.

Administrative assessment is not mandatory for Courts. Judicial review is not a simple cassation procedure (which is limited to assessing the interpretation of the law), but a complete judicial review. Thus, the Court may assess the pieces of evidence in a different way, and even order new pieces during the adjudicatory proceeding.

- Draft resolution

Before issuing the definitive decision a draft resolution must be done and notified. The investigating body, after processing the case, shall submit a draft proposal to the authority holding the power to settle the case. This stage is not expressly regulated in *LRJPAC*, even though it is mentioned in section 84 which places it immediately before the hearing.

Omitting this stage would lead to an annullable decision as long as the formal offence is not corrected when issuing the definitive decision. In fact, in most cases between the investigating body and the decision-making body there is hierarchical relation, which shall validate the definitive decision.

- Exhibition and hearing.

Allegations, documents, and any other action can be done during the whole proceeding. However, there is one specific stage for that purpose: the hearing. It is an essential phase, since omission leads automatically either to a null and void decision (a number of judgments regard such formal offence as an absolute lack of proceeding), or to an annullable decision (invalidating formal offence).

Once issued the draft resolution, the investigating authority must notify all the concerned parties reporting that the file is opened to full exhibition. Allegations are welcomed during a 10 to 15 days period. When facts or allegations other than those submitted by the concerned parties are not going to be addressed to rule the case, exhibition and hearing is redundant and can be omitted.

Exhibition of all the records must be complete. Restrictions of section 35 *LRJPAC* does not apply, since accessing documents is not here a way to participate in public affairs, but a way to defend personal rights or interests. In addition, without plenty access it would be impossible to guarantee full judicial review (section 24 C.E.)

Between the hearing and the definitive decision no other administrative formality is stated. If further actions are taken during such period a new hearing should be done before settling the case.

- Particular conditions in electronic proceedings.

LAE states certain specific rules for the investigating phase in electronic proceedings. Section 36 states that the concerned party must be granted access to the system, so he could check at least the processing status unless otherwise instructed by law. Such information shall include the list of procedural decisions already done, including date of issuance and summary.

3.- End of the proceeding.

Section 87 *LRJPAC* lists the type of decisions that terminate proceedings:

- Statement (decision, order, etc.) (*Resolución administrativa*):

  This is the ordinary way to terminate proceedings. Administrative bodies have to give an express decision in every case. Such obligation is unavoidable and cannot be waived, even in case of lack, deficiency or obscurity of applicable regulations (section 89.4 *LRJPAC*).

  It must keep the decision, the reasoning (at least by means of transcribing reports), as well as information about available reviewing proceedings, competent body and deadline (sections 54, 58.2 and 79.2 *LRJPAC*). These are, actually, the elements required for administrative notifications.

  The principle of consistency (*congruencia*) is essential with regards to the administrative statement. Definitive and final decisions must answer all the facts, legal founding, allegations, and in general, to every claim reported by the concerned parties; and obviously, addressing public interest conditions. Reasoning must be logic and rational.

  The dispositive Principle, which holds that the parties have the power of disposition on their rights, both procedural and substantive, does not work in administrative proceedings the same way it works in civil procedure.

  Section 218 LEC states the principle of '*Exhaustive effect and coherence of the judgments'*, which means that: '*Judgments must be clear, precise and coherent with the claims and with the other pleas of the parties, as deduced in due time during the proceedings. They shall make the statements required by the latter, convicting or acquitting the defendant and resolving on all issues in dispute that were the object*

of the debate. The court, without deviating from the cause availing of factual grounds or fundamental points of law different from those the parties had the intention to enforce, shall resolve in accordance with the rules applicable to the case, even if they have not been correctly mentioned or alleged by the litigants'.

In administrative proceedings, which deal with public interests, the logic is different since parties´ free will is not present. The administrative body is not tied to the claims brought to the proceeding by the parties (Sections 89 and 112 *LRJPAC*).

Inconsistency by omission (*incongruencia omisiva*) is perfectly acceptable in administrative proceedings. However, *ultra-petita* inconsistency (the decision goes beyond the limits of the action), *infra-petita* inconsistency (the decision does not address all the elements of the action), and *extra-petita* inconsistency (the decision includes elements that no party have brought to the proceeding) have different results from those arising in civil process.

In proceedings initiated at citizen´s request, or in appealing proceedings, the decision should not place the applicant in a worse position.

In appealing proceedings, the decision should totally or partially uphold or dismiss the action, ruling for the plaintiff (citizen) or the defendant (administration).

Formal offences can make the administrative body to order reconsidering or reopening proceedings (in the lower body) before ruling the case (Section 113 *LRJPAC*).

Lacks of consistency might lead to an annullable decision on the grounds of defencelessness, or even to a null and void decision on the grounds of non-existent motivation.

In sum, the principle of consistency means that the definitive decision should answer all allegations filed during the proceeding, as well as give a judgment on every aspect, including those relevant that no party have brought to the proceeding. The only condition is that all the merits of the case had been brought to discussion and contradiction during the proceeding.

- Voluntary dismissal/abandonment of action (*desistimiento*).

The citizen expresses willingness to terminate the proceeding, but keeps the action. Since deadlines are actually expiry periods in administrative law (*plazos de caducidad del procedimiento*), the underlying right is always kept unless it is no longer actionable due to the statute of limitations (*plazos de prescripción del derecho*).

Dismissal can be done at any time during the proceeding. It may be done by appearance in administrative offices (orally), or submitted in writing. Dismissal will not be effective until the authority expressly agrees. Section 91 *LRJPAC* states two cases for rejecting dismissals or waivers. Firstly, cases where public interest is involved, and continuing is advisable to protect it. Secondly, whenever third parties' rights are involved and someone apply for continuing the proceeding. In that

particular case, dismissal or waiver will only be effective for the party and the proceeding shall continue with the others.

- Waiver (*renuncia*).

The citizen expresses willingness to give up a right. All the rules discussed when addressing voluntary dismissal of action are applicable to waivers.

- Unexpected cause that impedes settling down the case (*imposibilidad material de finalización por causas sobrevenidas*).

This type of termination is regulated in section 87.2 *LRJPAC*. The administrative body must make a decision stating the reasons to declare the proceeding finished. We are dealing with cases such as death of the concerned party, physical destruction of the object (i.e. building collapse), etc.

- Expiry (caducidad).

When a deadline comes to an end and the authority has not issued the decision expiry time takes place. However, the administrative body is not released from its obligation to deliver an express administrative statement. In this case, such statement will only declare that expiry time has happened.

Let us discuss every possible situation:

- Stay *ex officio* proceedings for reasons attributable to the citizen. Deadline will be interrupted and the proceeding will become pending. However, the acting administrative body can continue the proceeding. The citizen shall lose procedural rights.

- Stay *ex officio* proceedings due to causes attributable to the acting authority. As already stated, the administrative body is always bound to lay down an express statement in every case. When proceedings are expected to have positive effects on the citizen the lack of answer is regarded as a rejection. In disciplinary proceedings, as well as in every other restrictive proceeding, omitting the decision will result in expiry. The corresponding decision declaring expiration will file the case.

- Stay in proceedings started at citizen´s request due to causes attributable to the citizen. The administrative body must warn the citizen three months in advance about the expiration date to prevent him from an unexpected expiry. Omissions should be only related to essential procedural actions; otherwise, the effect of omitting actions should only be losing procedural rights.

- Agreements to settle proceedings (*fórmulas convencionales de terminación*).

This kind of termination is based on principles such as efficiency, efficacy, and even on the grounds of procedural economy goals. Such agreements, however, are strongly restricted in administrative law, since they can hide a waiver in exercising administrative powers and duties. In addition, agreements cannot

lead to imposing greater burdens than those arising from the Law. Otherwise such clauses would be regarded null and void.

List of current available termination schemes:

- Compromise agreements (*transacción*).

  The Spanish Civil Code regulates compromise agreements in section 1809. It always implies transferring rights among citizens. In administrative law, such agreements are possible but extraordinary, given the principles of legality, public interest, and the principle stating that administrative powers cannot be waived.

  As a result, these agreements are usually limited by both formal and substantial conditions. For example, they are strongly limited with regards to public assets, as well as in relation to Treasury rights and taxes.

- Agreements under section 88 *LRJPAC*.

  This section states a wide range of agreements available to citizens and administrative bodies, assuming they are not contrary to law. There are certain matters where they are not possible.

  Specific legislation must regulate such agreements. Section 88 defers their actual implementation to specific laws. There are particular examples in expropriation law (expropriation agreements), public contracts law (mutual renunciation), and zoning law (urban planning agreements).

  Section 141 *LRJPAC* states a particular case in strict liability proceedings. Under agreement, cash payments can be replaced by reparations in kind where appropriate. In addition, cash payments can be charged by installment when agreed.

- Termination of the proceeding by electronic means.

Section 38 *LRJPAC* allows notifying administrative resolutions by electronic means, although under the condition that procedural regulations enable such means.

Section 39 regulates the so called *automated administrative action*. Under this scheme citizens shall receive not only an electronic administrative notification, but also an administrative decision created by the computerised system itself. This requires the previous definition and approval of technical specifications, programs, technical support, as well as information system auditing including the source code.

4.- Enforcing. (*fase ejecutiva*).

Enforcing focuses in making the administrative decision fully effective. Any other purposes would lead the enforcing order to be regarded annullable on the grounds of lack of proceeding (*vía de hecho*). Before starting the enforcing stage the administrative

body must notice the citizen so he can lately comply with the order. (section 95 *LRJPAC*).

The enforcing authority has to choose the less restrictive enforcing scheme due to the principles of *favor libertatis* and *proportionality*.

There are four enforcing schemes under Administrative law:

- Enforcing order (*Vía de apremio*).

According to section 97 *LRJPAC* this enforcing scheme is suitable for payment obligations. The amount should be clearly stated in the definitive or final decision, although it might be calculated later. In this case the decision shall only lay down criteria to calculate the amount due and payable.

This proceeding is regulated in tax regulations, (*Ley 58/2003, de 17 de diciembre, General Tributaria. Artículos 163 y ss. y Real Decreto 939/2005, de 29 de julio, por el que se aprueba el Reglamento General de Recaudación*).

Let us discuss the key features:

The enforcing proceeding is always started *Ex officio*. The goal is to collect debts expired and unpaid during the voluntary payment period. There is no deadline for ending the proceeding. The starting point is a statement called *Providencia de apremio*, which equals a Court´s judgment in terms of enforcing power. Pending debt, surcharges and a requirement for payment are the key elements of the document.

A deadline for payment is granted in the statement. During such period the citizen can pay the total amount of the debt plus 10% as enforcement surcharge. Late-payment interest is not settled in that case.

If the citizen does not pay within the deadline, the agency can either execute existing guarantees or attach debtor's assets by means of debt collection. The execution of attached assets and rights is carried out by means of public auction, direct award or tender proceedings.

Late-payment interests, as well as the costs incurred by the Tax Agency during the enforcing procedure shall be requested and collected.

The procedure shall be concluded on account of one of the following three causes:

- Payment.
- Agreement whereby the debt is declared fully or partially uncollectable, upon declaring all the parties liable for payment bankrupt.
- Agreement to extinguish the debt for any other cause.

In cases where the debt is declared uncollectable, the enforcement procedure will be renewed in the future upon communication of the solvency of any of the parties liable for payment.

Challenging the enforcing order (*providencia de apremio*) is possible through reversal or economic-administrative claim. According to section 167.*3 LGT*, appeals may only be based on the following grounds:

- Full payment.
- Expiry date involving the enforcement proceeding.
- Application for deferral and payment installment.
- Compensation with other credits.
- Other legal causes suitable for suspension.
- Lack of proper notification of the statement imposing the debt.
- Annulation of the administrative statement declaring the debt.
- Inaccuracies, errors or omissions when identifying debtor or debt.

- Subsidiary enforcement (*ejecución subsidiaria*).

Certain administrative decisions impose citizens the duty to carry out some action (*obligaciones de hacer*). Some obligations, actually, are personal and unable to be performed by someone else (*personalísimas*), but most of them are not (*no personalísimas*). In the latter cases, enforcing is possible by subsidiary enforcement.

Administrative officers or companies hired for such purpose shall carry out the imposed action charging the cost to the liable party. The amount can be provisionally declared due and payable in advance, before execution; in such case, the final cost will be compensated once the works got finished.

- Recurring fines (*multas coercitivas*).

Specially in case obligations are unable to be performed by someone else, in case of negative obligations (refraining from doing something), or even as a way to avoid subsidiary enforcement, Spanish legislation authorises public bodies to lay down recurring penalties so to convince citizens to voluntarily comply with their duties.

LRJPAC states certain quantitative limits. In particular, the total sum of penalties should not exceed 20% of the total cost of the required action. In addition, the Law must expressly authorise imposing such penalties to enforce decisions. Since we are not before disciplinary measures, rules applicable to disciplinary proceedings are not applicable. Consequently, recurring fines are compatible with other fines and penalties that could have been charged for breaking the law.

The obligations suitable to this enforcing scheme are personal obligations to do or not to do something, providing the Administration do not find it convenient to use physical force, regardless they are suitable to carried out by someone else or not.

- Physical force (*compulsión sobre las personas*).

Physical force is an acceptable mean to achieve compliance when it comes to personal not to do obligations. Express legal coverage is always necessary in these cases. The key legal framework is stated by *Ley orgánica 1/1992 de 21 de febrero, de protección de la seguridad ciudadana*. In case of positive obligations that no one else can fulfil

physical force is sometimes an option (i.e. leaving a building in decaying condition or about to collapse).

Authorities have limited scope of action when using physical force, and the use of weapons is extraordinary.

- Warrants authorising entry to private residences (*autorización judicial de entrada en domicilio*).

This Court decision ensures that entrance in private residences is based on a well-founded administrative decision. The Court must monitor that such measure appears *prima facie* to be correct and proportional.

Supervision is not, obviously, deep and comprehensive. It only addresses the key legal requirements of the decision:

(a) The authority is actually competent.

(b) The decision appears *prima facie* to be lawful and is fully enforceable.

(c) Enforcing the decision necessarily requires entry to residence.

(d) Affection to privacy will be limited to what is strictly necessary to grant compliance with the decision.

Such warrants are expressly mentioned in section 96.3 *LRJPAC*. Administrative Courts are competent for issuing such warrants, according to section 8.5 *LJCA*. Entry to residences is a common place in expropriator proceedings, administrative evictions, evictions in cases of buildings declared in risk to collapse, demolition orders, etc.

Warrants are not required to enforce final judgments. They are only necessary to enforce administrative decisions.

Determining what a residence exactly is might be sometimes challenging. Section 91.2 *LOPJ* finds it necessary to get a warrant when entering not only residences, but also to 'other buildings or places which access requires the owner or possessor´s consent'. Such broad and uncertain criteria could actually refer to every single private property. However, it should be stressed that the aim judicial supervision is to grant privacy, not to grant every other owner´s rights. Hotel rooms should therefore be included, but no commercial premises open to the public, for example, not.

- Interception of private communications.

This extraordinary measure can be ordered according to section 579.4 *LECRIM*, as well as under the conditions stated in *Ley orgánica 2/2002 de 6 de mayo, de control judicial previo del CNI*. It obviously requires judicial monitoring.

- Preliminary internment before deportations.

This measure is stated, in immigration laws and must be carried out under judicial supervision.

- Exercising private rights.

Sometimes administrative decisions deal with civil law rights such as property rights, civil contracts, possession status, etc. In such cases, the administration, as every other legal entity, must bring the case to civil Courts.

- *Ultra vires*: decisions taken without proceeding (*actuación por la vía de hecho*).

Every single administrative definitive or final decision should be the result of an administrative proceeding. When Administration does not comply with the legal formalities to the point that it might be considered that no substantial proceeding has been carried out, we are facing *ultra vires*. It should be noted, however, that certain laws or regulations are so clear that no formalities are required to grant enforcement. In addition, enforcing obligations arising from public contracts does not always require formalities. In such cases we are not before *ultra vires*.

Whenever *ultra vires* takes place, the citizen can react throughout civil actions or can choose challenging the administrative decision before the Administrative Courts.
Section 30 LJCA states:

> 'In cases of ultra vires action, the party concerned may file a demand for cessation of said action with the acting administration. If the demand is not lodged or is not heeded within ten days of submission, a claim for judicial review may be presented directly'

CHAPTER XIV.- REMEDIES IN ADMINISTRATIVE PROCEEDING.

I.- *EX OFFICIO* REMEDIES (*REVISIÓN DE OFICIO*).

Favourable administrative statements must be kept and enforced by the administrative bodies. The body cannot simply disregard them by issuing a new statement worsening a citizen´s position (*la Administración no puede ir contra sus propios actos declarativos de derechos*). Such principle is brought to administrative law from the civil law principle called: estoppel. The principle of legal certainty as well as the protection of legitimate expectations are also involved in this rule.

It is worth noting that administrative decisions sometimes have adouble effect. They grant rights and benefits while imposing burdens and restricting rights. Obviously, limitations to *Ex officio* review shall reach only the favourable side of the decision. Revoking the negative side will be easier, since it can be done under section 105 *LRJPAC*, which states that negative decisions may be directly revoked without particular formalities.

So long as positive decisions should prevail, the administrative power to reverse a wrong decision is limited. Let us discuss the different options:

a.- *Ex officio* review based on legal grounds.

Regardless of the concession of rights or benefits, administrative officers must monitor the legality of every administrative decision. Thus, whenever the administrative body becomes aware of an illegal previous decision, whether positive or negative, it must correct the situation.

b.- *Ex officio* review based on opportunity reasons.

Either because of changes in public interest interpretation, or because of a new legal framework, authorities may be bound to back over their own previous decisions. Such behaviour, though possible, could certainly result in finding the Administration liable for every damage actually caused.

c.- *Ex officio* review as a result of disciplinary measures.

Specific legislation in certain areas states *ex officio* review as an additional result in disciplinary proceedings. This is the case, for example, of water law. Serious violations such as discharges containing great pollutant load might lead not only to penalties and fines, but to reviewing water rights to concession holders without compensation.

d.- Agreements resulting in reviewing previous administrative decisions.

Decisions can be subject to condition precedent or cancellation clauses. As long as the future event takes place the right or obligation shall come to an end.

Cases (a) and (b) are the common place for *Ex officio* review cases. Rules governing such proceedings concern to every territorial administrative body as well as to every public entity operating under administrative law.

Ex officio review is available on the following grounds:

a.- *Ex officio* review due to nullity causes (Section 102 *LRJPAC*).

This proceeding concerns both to administrative decisions and regulations. It is always started by the administration, although citizens may apply for initiation. This action, called nullity action, is only available with regards to nullity clauses. The key feature in this proceeding is that the administrative body must bring the case to the State Council, aiming to get a favourable report which is in this case mandatory. In case the acting body is part of the regional or municipal administration, the reporting authority is the Regional Advisory Council. It is worth highlighting that in order to declare the decision null and void under this proceeding the Council must agree.

This remedy is only available as long as the decision is final, as well as with regards to regulations in any case. In the event the case was under judicial review, the body should wait for the judgment or accept the claim (*allanamiento*), reaching the same result.

There is no deadline for nullity action and *Ex officio* review on nullity grounds. Nullity causes are not affected by the statute of limitations (*no prescriben*). The only limit is stated in section 106 *LRJPAC*, referring to the time the administrative body took to react, as well as other circumstances that make reviewing contrary to equity, good faith, someone else´s rights, or the Law. Such broad concepts actually turn the power to start *ex officio* review proceeding as a discretionary power.

As above mentioned, although this remedy is always started at the Administrative body´s initiative, nullity action) is also possible. In such case the proceeding is started *ex officio* regardless the citizen´s request.

The administrative body shall accept or reject the citizen´s action on a preliminary assessment of the case. It will be rejected if the application is not based on nullity grounds or clearly lacks legal basis. Rejection can be challenged to Administrative Courts. If the Court rules for the plaintiff, it will order the administrative body to start the reviewing proceeding. Otherwise, nullity action could be turned into an indirect way to challenge final decisions no longer appealable at citizen´s request.

Once started *ex officio* review, the subsequent proceeding does not differ from regular administrative proceedings (provisional measure staying the effects of the decision, calling to interested parties, submitting reports, evidences, allegations, exhibition and hearing, definitive decision). The only distinguishing feature is the mandatory report of the State Counsel, which statement is binding.

The deadline is 3 months according to section 102.5 *LRJPAC*. Lack of taking an express decision will be regarded as rejection. If the proceeding results in declaring the challenged statement null and void, it will be become terminated with *ex tunc* (retroactive) effects. Administration could be found liable for damages depending on the specifics of the case.

b.- *Ex officio* review due to annullable causes (Section 103 *LRJPAC*)

Administration cannot directly review favourable annullable administrative decisions; Section 103 *LRJPAC* clearly states that the Administration must challenge its own decision to Administrative Courts. Before, the authority shall conduct a proceeding so to reach a *declaration of adverse effects* (*declaración de lesividad*).

Legislation lays down several conditions to be met. The first one is a temporal limit. Declaration of adverse effects cannot be issued after 4 years from the date the administrative decision was signed (not the notification date). Moreover, all the concerned parties must be heard. Decision must be reasoned and should explain the public interest involved. Proceeding should not take more than 6 months, otherwise it shall expire.

Within 2 months after notifying the declaration, the authority is allowed to file the lawsuit (*demanda*) before the Administrative Court (section 4V.4 *LJCA*):

> *'The period for filing for judicial review an action harmful to the public interest shall be two months long, counting from the day following the date of the declaration confirming that the act is harmful to the public interest'*.

c.- *Ex officio* review of non-favourable decisions (section 105 *LRJPAC*).

Section 105 *LRJPAC* grants Administration the power to review their own restrictive decisions as well as rectify their errors. Such action can be done at any time providing it does not mean unlawful waivers or exceptions. Principles of equal treatment, legality, and public interest should be granted too.

With regards to the grounds of the decision, it must be based on nullity or annulability causes. Reversal might be partial, concerning just the restrictive conditions of the statement.

There is no deadline to start this proceeding. The acting body must hear every concerned party and must decide the case within 3 months from the starting point. Failing to lay down a decision will lead to expiry.

The citizen does not have the right to apply for this review, even if legality reasons backs up his claim. Otherwise, deadline for appeals would not make any sense and this proceeding could be used to revive final decisions. Thus, unlike *ex officio* review for nullity causes, where reviewing is mandatory for the Administration, in these cases starting the proceeding is completely discretionary.

Section 105 does not say anything about *ex tunc* or *ex nunc* effects; in fact, Administration shall decide on a case by case basis according to law. The above mentioned section 106 *LRJPAC* is also applicable in these cases.

On the other hand, section 105.2 grants administration the power to rectify at any time material, factual or arithmetic errors. The decision is not illegal and is no way revoked. It will be justly corrected and will remain effective.

II.- APEALS AND OTHER ADMINISTRATIVE REMEDIES: *ALZADA*, *REPOSICIÓN* AND *RECURSO EXTRAORDINARIO DE REVISIÓN*.

From the citizen´s perspective, administrative appeals are a guarantee of their rights. From the Administration perspective, they are a relevant instrument to internally monitor its own decisions. It can be seen as a bureaucratic burden as well, since most appeals have no practical effect and just delay judicial review.

To qualify an action as an 'appeal' two key elements must be present. Firstly, its exclusive object must be an administrative decision aimed to be declared annullable or null and void. Secondly, such a decision must have been done according to Administrative law. Whenever an action does not meet both conditions we might be before a report (*denuncia*), a complaint (*queja*), a claim (*reclamación*), a suggestion (*sugerencia*), a requirement (*requerimiento*, i.e. to stop *ultra vires*, to fight against administrative inaction) or a preliminary claim before issuing civil or labour actions (*reclamaciones previas a la vía civil o laboral*).

LRJPAC allows replacing administrative appeals for alternative proceedings. Section 107.2 refers to conciliation conferences, mediation proceedings, arbitration before independent collegiate bodies, as well as other settlement proceedings.

Only one single appeal is admissible in the administrative stage except for the so called extraordinary reviewing process (*recurso extraordinario de revision*).

The ruling of the case must be clear and consistent with the merits of the appeal, although it might also refer to matters not alleged by the concerned party. When addressing new facts or documents is essential within the appealing proceeding, the acting body must always grant a new hearing. The decision will never make the citizen´s original position worse.

Let us discuss several general principles for appeals:

1.- Parties. Legal standing:

Appeals are only available for the concerned parties in the first proceeding.

2.- Object:

Appeals are only available against definitive decisions or qualified procedural acts. Other procedural stages, as well as final decisions, cannot be challenged. Moreover, there is no administrative appeal against regulations, which should be directly challenged to Courts.

Definitive decisions must not exhaust the administrative channel to allow a hierarchical appeal; otherwise, the citizen can choose whether to lodge an appeal for rehearing before the decision-maker body or directly file an appeal before Courts.

(Sections 107 and 109 *LRJPAC*).

3.- Proceeding:

Appeals are always filed at the citizen´s initiative. The document must include at least the following conditions:

a) Citizen´s I.D
b) Identification of the challenged decision.
c) Pleas in law and grounds for appeal.
d) Identification of the place and preferred means for notification purposes.
e) Identify the authority to which the appeal is addressed.
f) Place, date and signature (section 110 *LRJPAC*).

Errors identifying the remedy are not relevant. The grounds of appeal shall be nullity or annullable reasons, and formal offences should not be alleged by those who took part in them and might be deemed responsible.

Appeals do not have a formal proceeding but due process must be granted. Let us discuss about the key stages:

a.- Provisional measures.

Staying the challenged decision could be granted according to the specifics of the case. Sometimes, suspension is effective *ope legis*; that is the case of the disciplinary proceeding, given that penalty decisions are only enforceable as long as they exhaust the administrative channel (section. 138.3 *LRJPAC*). Once the appeal is decided, the penalty becomes enforceable unless the Courts expressly rule a provisional measure against it.

Deadline for granting suspension is just 30 days and not getting an answer is deemed positive: suspension shall be granted. Such measure might be extended to the judicial phase under citizen´s petition. The Court shall immediately rule for extending or cancelling it. Sometimes the concerned party is bound to submit an appeal bond to be granted the measure. Decision must be notified to every concerned party.

b.- The following phase is the hearing.

Hearings are essential in two cases:

- Whenever new facts or documents arise in the case, providing they were not submitted or registered in the original file and are relevant to the decision. Exhibition and hearing is essential in this case so to allow the concerned party plenty knowledge about the new elements and let him/her file pleadings and documents to argue them.

- Whenever other parties, together with the one that has filed the appeal, have rights or legitimate interests involved in the proceeding. They are not only those who were already concerned parties in the proceeding, but every other that might have become concerned according to the new facts arisen during the appeal process. In both cases, such parties must be called to the proceeding, be granted access to all the documents, and have a hearing.

Failing to guarantee a hearing shall lead the resulting decision to be declared null and void, assuming defencelessness should be clearly evidenced.

The proceeding ends with a ecision (*resolución*), although alternative dispute resolution proceedings are allowed. The decision must be reasoned and consistent. It might rule the case for the plaintiff upholding the appeal, granting totally or partially requests. It might dismiss the appeal totally or partially as well. In addition, it might declare the appeal bar to proceeding (*inadmisión*) when lacking essential requirements not suitable to get corrected (i.e. late appeals, decisions unable to appeal, etc.).

The proceeding might also end up due to waiver (*renuncia*) or abandonment (*desistimiento*). Agreements for alternative dispute resolution are also possible but limited, given that appeals are basically focused on legal grounds. It is likely that a transaction could be implemented with regards legal interpretation issues.

The following are the appeal proceedings currently available under Spanish Administrative Law:

- APPEAL FOR REHEARING (RECURSO DE REPOSICIÓN) (Sections 116 and 117 *LRJPAC*)

An appeal for rehearing may be filed before the acting administrative body to challenge administrative decisions ending up the administrative channel. This is just an option for the citizen unlike hierarchical appeals, which are mandatory to exhaust the administrative channel and bring the case to Court. In fact, this remedy is only admissible as long as hierarchical remedies were not available to address the case, given that the acting authority is the upper body in the organisation.

Deadline to submit the appeal is two months from the date the challenged decision was notified (starting the following day) or could be regarded as a negative alleged statement (the following day as well). Deadline for ruling the case is one month counting from the date the document was registered.

Once the citizen has filed the appeal he/she has to wait for an express decision or, eventually, for an alleged decision. Meanwhile, the case cannot be brought to ours. Alleged decisions are always negative in these appeal proceedings since double silence cannot take place unlike in hierarchical appeals.

With regards to tax proceedings, appeals for rehearing are optional as well. However, after the appeal the citizen is still not allowed to bring the case to Court as it is necessary to previously file an appeal before the Central or Regional Administrative Economic Tribunal.

- HIERARCHICAL ADMINISTRATIVE APPEAL (*RECURSO DE ALZADA*) (Sections 114 y 115 *LRJPAC*).

This is a mandatory remedy since the concerned party has to lodge the appeal before the upper administrative body to eventually open the judicial channel, unless the challenged decision arises from the upper administrative body in the organisation. In other words, it is always binding to file the appeal providing the challenged decision does not exhaust the administrative channel.

Certain appeals involve different administrations or entities. This is the case of appeals to the parent administration related to decisions taken by the monitored entity. Besides, decisions taken by concession holders in municipal public services can be challenged to the municipal authorities. Such appeals are known as: *recursos de alzada impropios*. Section 82 *Ley 50/1998 de 30 de diciembre, de medidas fiscales, administrativas y de orden social* states the key rules to conduct such appeals when concerning public entities´ decisions (*organismos autónomos*)

Certain administrative bodies are not under hierarchical monitoring. That is the case of several collegiate bodies created to conduct tender proceedings (hiring committees, contract award panels, economic tribunals, etc.). When their decisions do not exhaust the administrative channel, appeals should be filed either before the body they are assigned to or, alternatively, before the body that appointed the president or director of the challenged body. (art. 114 *LRJPAC*). Some of them, however, exhaust the administrative channel as the expropriation tribunals (*jurado provincial de expropiación).*

With regards to peripheral state administration, *Real decreto 1330/1997 de 1 de agosto, que regula los órganos que han de resolver los recursos presentados frente a los órganos de las Delegaciones del Gobierno*, states particular rules. The Government Representative has the power to rule appeals filed against lower bodies´ decisions. The decisions are appealable before the Minister.

Deadline to lodge hierarchical appeals is one month from the next day after the administrative decision was notified or published. On the other hand, notice has to give the citizen enough information about the time limit; otherwise the period will not run. In case of alleged acts, deadline for appeal is three months from the next day the alleged decision took place according to Law. However, such deadline is actually not mandatory. The period will not be regarded started until the citizen makes any action from which it might be inferred that he knew the negative effect of the decision. In addition, it is worth remembering that the obligation to answer never expires.

Late appeals shall not be accepted and the challenged decision shall become final and not suitable for appeal. The appeal should be lodged before the upper body; however, if the citizen files it before the challenged body it will be referred to the upper body within 10 days. The challenged body must report about the case and send full copy of every document in the file (section 114.2 *LRJPAC*).

The time limit to lay down the statement is three months. Alleged decisions will be regarded negative unless *double silence* takes place. The latter happens when the citizen is in fact challenging a previous alleged decision.

- APPEAL FOR EXTRAORDINARY REVIEW (*RECURSO EXTRAORDINARIO DE REVISIÓN)* (11VIII.1 *LRJPAC*)

Unlike appeals discussed above, this remedy is deemed extraordinary as it is only available against certain qualified administrative final decisions. It is admissible as long as one of the following causes takes place:

- Error as to the facts resulting from documents that were already in the file. Regardless of this option to file an appeal, in this case it would likely be easier and advisable to directly apply to the authority to rectify the mistake according to section 105.2 *LRJPAC.*
- New documents not included in the administrative file appear, providing they are essential to rule the case, regardless of if they were created after issuing the decision (such documents must prove that the decision is based in a wrong understanding of facts or legal grounds).
- Decisions significantly influenced by documents or testimonies which are found false by Courts in final judgment.
- Decisions stated as a result of felonies and violations involving misconduct in public office such as corruption/malfeasance (to deliberately issue a decision/ruling that is contrary to law (*prevaricació*n), bribery (*cohecho*), miss-appropriation of public funds (*malversación de fondos públicos*), etc. The felony must have been declared by Courts in final judgment.

The last two cases are in fact nullity causes, as the original decision was issued as a result of criminal offences. Therefore, in order to rectify the situation it would be enough to conduct an *Ex officio* reviewing proceeding.

When it comes to deadlines, this remedy shall be correctly filed in the first case as long as 4 years from the date the challenged decision was notified had not went by. In the rest of the cases the deadline is just 3 months starting from either the day the documents were known, or from the day the judgment became final.

The appeal must be lodged before the decision-making body, which shall also be competent to rule the case. If accepted, the body must refer the case to the State or Regional Council for a mandatory report. The deadline to rule the case is three months and the lack to hand down express answer is deemed as not allowing the citizen´s petition. The decision is appealable to Court, which cannot judge the original administrative decision, but only the grounds for rejecting this extraordinary appeal.

- PRELIMINARY CLAIMS BEFORE CIVIL OR LABOUR APPEALS (*RECLAMACIONES PREVIAS A LA VÍA CIVIL O LABORAL*).

These administrative remedies are mandatory if the citizen wishes to file a lawsuit to Courts in civil or labour matters. Administrative decisions can be under civil or labour

law; challenging such decisions to the proper jurisdiction requires trying these preliminary procedures in advance (section 120 *LRJPAC*). Such remedies are not actually administrative appeals, since the challenged decisions are not subject to Administrative law.

In fact, these remedies are sort of a mandatory settlement hearing (*conciliación*). It is worth noting that they are not required when the challenged decision comes from a public company or foundation.

Alleged decisions are regarded negative in both proceedings. The deadline for ruling the claim is 3 months in civil hearings and 1 month in labour hearings. Filling the claim automatically leads to staying the deadline to file the lawsuit before civil or labour Courts.

- SPECIAL APPEALS (RECURSOS ADMINISTRATIVOS ESPECIALES).

Specific legislation such as public contracts law can create singular appeal proceedings. Section 107.2 *LRJPAC* expressly allows to create such remedies with the condition that they should be addressed to independent collegiate bodies. Such remedies would substitute hierarchical appeals. Cases in Spanish legal system are strongly limited.

One example is the Claim Commission stated *at Ley Orgánica 6/2001, de 21 de diciembre de Universidades*, which is an independent collegiate body where conflicts related to recruitment competitions for staff provision in Universities can be lodged. On the other hand, the Spanish Public Contracts Law (*Real decreto legislativo 3/2011, de 14 de noviembre, por el que se aprueba el texto refundido de la Ley de contratos del sector público*) states an appeal to address conflicts in tender proceedings. The procedure, which is abbreviated, becomes mandatory for contracts exceeding certain quantitative and qualitative limits.

The common downside is that these appeals bring the case to the administrative monitoring authority, instead of bringing it before an actual independent external body.

LGT (Tax law) and *Decreto 520/2005 de 13 de mayo*, state an appeal proceeding to challenge tax related decisions to the *Economic-Administrative Tribunals*. Such Tribunals are administrative bodies of the Ministry of Finance. They are completely separated bodies with no direct relation to management, monitoring and tax collection bodies. They enjoy a broader range of independence.

- ALTERNATIVE DISPUTE RESOLUTION (ADR) (*TERMINACIÓN CONVENCIONAL*).

Section 107.2 *LRJPAC* states three *out of Court* settlement proceedings. Let us discuss about them

a) MEDIATION. An appointed person assists the parties to negotiate a settlement (mediator). Mediation has a structure, timetable and dynamics that ordinary negotiation lacks. The process is confidential and might be enforced by law as long

as parties agree in advance. Participation is voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process. He/she does his/her work by lowering tensions, improving communications, interpreting issues, providing technical assistance, and exploring potential solutions.

b) CONCILIATION: It is a process whereby an independent person (conciliator) addresses the parties separately in an attempt to resolve their differences. He/she issues a non-binding decision. Conciliator has no authority among parties but tries to reach an agreement about his decision. The aim of the proceeding to bring about a negotiated settlement.

c) ARBITRATION. Parties refer a dispute to the arbitrator or arbitral tribunal, whose decision (the award) they agree in advance to be bound. Arbitrator imposes a decision that is legally binding for both parties and therefore fully enforceable before Courts.

In Administrative law, out of Courts settlement proceedings are limited. Agreements are only allowed providing the law expressly authorises them and fall within particular formal conditions. The lack of freedom of choice (*autonomía de la voluntad*) in many cases makes settlements especially difficult.

Such limited framework contrast with the broad development of these strategies in other legal systems. That is the case, for example, of the United States where since 1990 a specific law endorses and encourages these proceedings in federal agencies´ cases (Administrative Dispute Resolution Act (ADRA) The law states proceedings such as mini trial, fact-finding, convening, facilitating, or summary jury trial.

In Spain, the *LRJPAC* states two different settlement methods:

- ALTERNATIVE DISPUTE RESOLUTION. SECTION 88 *LRJPAC* (*TERMINACION CONVENCIONAL*).

Section 88 *LRJPAC* allows Administration and citizens reaching agreements to settle proceedings. The resulting administrative decision shall lay down the resulting conditions. Eligible parties for reaching agreements are both public and private entities. The terms and conditions of the agreement shall be legal and referred to tradable matters. Public interest must be always kept and guaranteed. Mediation and conciliation are possible ways to reach such agreements.

- ALTERNATIVE DISPUTE RESOLUTION PROCEEDINGS UNDER SECTION 107.2 *LRJPAC*

Mediation can conciliation proceedings can be used to settle administrative appeals according to this section. Both means, which are self-compositive, are admissible in Administrative law. Arbitration, however, which is a hetero-compositive dispute resolution proceeding, is uncertain given the specifics of Administrative law (Administration cannot waive exercising its powers).

As a result, reference to arbitration in administrative legislation is rare. Some can be found in the *Estatuto básico del empleado público* (art. 45), as well as in *Ley general*

presupuestaria (Section 7.3). Another example is shown in *Ley de Contratos del sector público* (Section 39). With regards to contract law, only public entities with private legal personality are eligible to join arbitration proceedings.

Agreements can be reached even once the administrative channel is exhausted, as well as during the judicial review process (section 77 LJCA). It is a privilege of the Judge, once the complaint (*demanda*) and the answer to the complaint (*contestación a la demanda*) have been submitted, to ask both parties to acknowledge facts and documents, as well as to reach an agreement to settle the case (frequent with regards to conflicts related to money quantification).

When parties reach the agreement, the Court shall issue a resolution (*Auto)* declaring the proceeding terminated as far as the agreement does not infringes the law or damages someone else´s interest or the public interest itself. In the meanwhile, the judicial process will not become stayed unless every party applies for it.

Finally, it is worth mentioning section 7 *Ley 47/2003, de 26 de noviembre, General Presupuestaria* (General Budgetary Law), which states the limits applicable to disposal Treasury rights.

- Treasury rights and assets cannot be disposed, mortgaged, or leased unless expressly stated by law.
- Waivers, cancellations (*condonación*), discounts or moratorium in tax revenues are only possible when expressly authorised by law.
- Judicial or extrajudicial compromises related to Treasury assets, as well as arbitration affecting them, must be authorised by the Board of Ministers by Royal Decree, prior State Council hearing.

CHAPTER XV.- STRICT LIABILITY IN PUBLIC ORGANISATIONS.

I.- CONCEPT AND FEATURES.

Strict liability in public organisations has its roots in civil law. The key distinguishing feature between civil liability and administrative liability is said to rest in the broader scope of liability in the public sector. While liability in civil law is based in damages caused by willful misconduct in the course of people´s activities, as well as damages caused by negligence, administrative liability does not require such conscious or intentional behaviour.

Section 1902 CC states that '*the person who, as a result of an action or omission, causes damage to another by his fault or negligence shall be obliged to repair the damage caused*'. In addition, Section 1903 CC declares that '*the obligation imposed pursuant to the preceding article shall be enforceable not only as a result of one´s own actions or omissions but also of those of such persons for whom one is liable (...) the liability provided in the present article shall cease if the persons mentioned therein should evidence that they acted with all the diligence of an orderly paterfamilias to prevent the damage'*.

At first, administrative liability was charged to civil servants instead of the public body itself. With the continuous growth of state responsibilities and functions, such approach proved to be unsuccessful and insufficient. Progressively, both law and Courts found the Administration responsible for damages occasioned by its officer´s actions or omissions. Civil servant´s responsibilities shall therefore have only internal effects in the organisation as a result of disciplinary proceedings.

1954 Expropriation law (*LEF*) was the turning point in the traditional conception of administrative liability. From here on, responsibility of public organisations are no longer addressed by civil law, assuming specific principles and rules. More recently, the Spanish Constitution stated in section 106.2 that: '*Private individuals shall, under the terms laid down by law, be entitled to compensation for any harm they may suffer in any of their property and rights, except in cases of force majeure, whenever such harm is the result of the operation of public services*'.

Section 139.1 *LRJPAC* reiterates such principle including as strict liability damages unlawfully caused by laws imposing obligations and burdens that the citizen´s is not legally bound to bear with. On the other hand, according to section 121 CE, '*damages caused by judicial error as well as those arising from irregularities in the administration of justice shall give rise to a right to compensation by the State, in accordance with the law*'.

Therefore, it is crystal clear that the administration´s budget shall cope with every compensation that may arise from an administrative action, legislative activity, as well as judicial activity. The latter case is regulated in sections 292 et ss of the Organic Act governing the Judiciary (LOPJ). Section 292 *LOPJ* states that '*damages caused to any assets or rights through judicial error as well as those resulting from abnormal operation of the Administration of Justice, shall grant those who have suffered damage the right to compensation from the State, except in cases of force majeure pursuant to the terms of this Title*'. Before judicial errors the concerned party is allowed to file a

complaint to the Ministry of Justice, which shall investigate the case and eventually draft a preliminary decision prior report of the Council of State. The Board of Ministers shall lay down the final compensation.

Public liability in Spain is direct and strict. Proving willful misconduct or neglect is not required to become eligible for a compensation and repair. Causation, however, must be clearly evidenced. There must be a direct or indirect link between the damage and the administrative action or omission, regardless of such activity being under administrative or private law.

Damages should be effective and valuable; they must be suitable to individualise and therefore link to a particular person or identified group. Future damages will not be compensated under this procedure. However, compensation shall include both, actual losses (*daño emergente*) and lost profits or earning potential (*lucro cesante*). Eligible damages are physical or moral.

Given that liability arises regardless of a normal or abnormal operation of public services, lawful activities will be the common place in the first cases, while most willful misconducts or reckless behaviour shall be linked to the malfunction of public utilities. With regards to the *vis major* exception, it shall only take place as long as facts and circumstances were unable to avoid according to the current state of the art in sciences, technics and knowledge.

On the other hand, simple annulation of administrative decisions or regulations does not lead itself to strict liability.

In sum, these are the key merits to base liability claims:

a.- Damage.

It must be effective, valuable, individual and unlawful.

b.- Assignment of responsibility (*imputación del daño*).

Every public body, including public entities can be reported liable for damages. Damages caused by contractors or concession holders should be charged to them, unless they were following direct orders from the monitoring administrative body.

When liability is traceable to several Administrations acting together, all of them shall be found jointly and severally liable (*responsabilidad solidaria*). Sometimes, damages arise from actions or omissions performed by different administrations without prior agreement or collaborative scheme. In such case, liability should be traced according to their respective responsibilities, the protected public interest, or the grade and intensity of respective action. If such analysis is not possible, they will be regarded jointly and severally liable as well (section 140 *LRJPAC*).

In addition, as Administrations currently have liability insurance, the concerned party shall sue the insurance company together with the Administration. Administrative Courts shall be competent to rule these cases and Administrative law shall be enforced (no civil law) regardless such companies are privately owned.

c.- Objective elements of the claim.

Administrative statements, alleged decisions, ultra vires, omissions, as well as regulations, are eligible to resulting in strict liability. Regulations have to be previously reported null and void, since lawful regulations only generate strict liability in extraordinary circumstances. That is the case, for example, of damages resulting from changes in urban planning according to zoning law.

d.- Causation.

There must be a direct link between the action or omission and the damage. The problem is that in most cases several causes and conditions, not all of them attributable to the acting body, may participate in the result. Courts have created three different tests to establish causation:

• Excusive causation (*causalidad exclusiva*). In this case, damage is strictly linked to administrative action or omission when carrying out or monitoring public services.

• Equivalence in conditions (*equivalencia de condiciones*). There are several causes for the damage, all of them necessary to create the damage. If any of such causes had not taken place, the damage would have not arisen. In these cases, every acting body, regardless public or private, will be liable in terms of jointly and severally liability. Courts actually try to get the administrative body involved to guarantee the compensation.

• Sufficient causation (*causalidad adecuada*). Although several causes are present, only one of them is qualified enough to cause the damage. Such analysis shall determine the attribution.

II.- PROCEEDINGS.

Sections 142 and 143 *LRJPAC* states the proceeding for strict liability of public organisations. *Real Decreto 429/1993 de 26 de marzo,* completes such regulation.

Let us discuss the key conditions.

1.- Timing.

Citizens can lodge an application for strict liability within one year from the date the action, omission, or the fact causing damages took place. The problem is that, in practice, it is not always easy to set and prove the starting point.

With regards to physical and moral damages, deadline shall get started as soon as citizen heals, or permanent complications are determined. Another difficult case arises when calculating deadline in cases of regulations declared null and void. The one year period shall get started the day the final judgment is published in the official gazette.

2.- Stages:

Strict liability proceeding can get started '*Ex officio*' or at citizen´s request. When initiated *Ex officio,* if beneficiaries neither appear in the first allegations phase nor in the hearing phase, the proceeding shall conclude. The ordinary situation, however, takes place when citizens apply for compensation. The application shall clearly express:

- Damages and date of production.
- Public service activity involved.
- Causation between damages and public service.
- Quantification of damages and applied compensation.
- Pleadings, documents, evidences, and any other relevant information. The concerned party shall request Administration to open the evidence phase and admit the taking of evidences.

The Administrative body must investigate the case. Applications for taking of evidences can be accepted totally or partially; when rejected, the acting body shall clearly state the reasons to consider the proposed evidences irrelevant. The authority has to require other bodies whatever reports are deemed necessary. Finally, once the investigation comes to an end, the authority shall offer a hearing before issuing a draft decision.

After the draft decision is done, it must be reported to the Council of State or Regional Council for mandatory report. Such collegiate consultant bodies shall give their opinion about causation, quantification of damages, final amount due and payable, as well as about the means of payment. The report, although it is a mandatory stage in the proceeding, is not binding when it comes to its statements.

Once the above discussed procedure has come to an end, the responsible body must make a definitive and reasoned decision. The responsible body is always one of the upper ones in every administrative structure, such as the Minister, the Board of Ministers, the Regional Minister, the Mayor, etc. It depends on each case. Alternative dispute resolution is available in these cases, but the agreement shall be previously reported by the Council of State or the Regional Council.

Maximum deadline to reach a decision is six months. Lack of answering is deemed to have a negative effect (rejection). Given that decisions are laid down by the upper bodies, they exhaust the administrative channel and leave the case up to judicial review.

There is, however, an abbreviated proceeding regulated in sections 142.2 and 143 *LRJPAC*. It may be used whenever causation and valuation of damages are crystal clear. Phases of this procedure are similar to the ordinary one, but deadline to get a decision is significantly shorter, just 30 days.

CHAPTER XVI. JUDICIAL REVIEW (I).

I. ORIGINS AND FUNDAMENTALS.

In the origins of modern Administrative law, during the years of the French Revolution, monitoring administrative regulations and decisions became sort of what have been called: *withheld jurisdiction*. Supervision was taken over by the Administration itself, not allowing the Judiciary to interfere in administrative action. As we know, the climate of mistrust between the executive power and the judiciary led to adopting the *autotutela* principle, benefiting administrative decisions from direct enforcement.

In France, this type of self-monitoring was assigned to a specialised independent institution called *Consell d´Etat*. At first, this body was regarded a mere advisory body, since the upper executive bodies withheld the responsibility to lay down a judgment, but its reports were almost always accepted. It was not until 1872 that the *Consell d´Etat* was granted the power to fully judge administrative conflicts.

In Spain, before 1956 Administrative Judicial Review Act (*LJCA*), monitoring over administrative behaviour was extrajudicial as well, according to a model known as delegated jurisdiction. Several consultative state and provincial bodies had the power to address non-binding draft decisions to the executive authorities dealing with conflicts.

In 1888, such scheme partially changed with the *Ley de Santa María de Paredes*, which is regarded as the first Act trying to lay down a common legal framework for judicial review. However, that legal scheme was just an attempt to improve supervision, but did not manage to completely restrain administrative action. Both Provincial Courts and the specialised Courtroom at the Supreme Court, created in 1904, had a mix composition of judges and administrative officers.

With regards to the scope of such jurisdiction, it was certainly poor at that moment, since discretionary decisions (including regulated decisions with discretionary elements) were excluded from supervision. For those actions under monitoring (strictly regulated statements), a high level of legal standing was required: an affected individual right, thus excluding legitimate interests, was essential to be granted access to judicial review. In addition, political statements, broadly interpreted, were also excluded as (including public safety decisions and the regulatory-making power).

Enforcing the judgments relied on the Administration, and the Board of Ministers was granted the power to declare any judgment unenforceable. Moreover, public funds and assets were prevented from seizure proceedings. With such a limited framework, we can clearly state that there was no actual supervision of administrative decisions by Courts.

After 1939, situation got worse in a context of dictatorship. Actually, in 1938 every option to challenge executive decisions was stayed and it was not lifted until 1944. A

new law restored the Administrative appeal scheme, but increased and reinforced the exemptions (broadening the political decisions´ exemption, excluding labour relations, etc.). Such an old fashioned and authoritarian scheme was partially replaced by the 1956 LJCA.

1956 *LJCA* assigns all the supervision over administrative action to Courts for the first time in Spanish history. It creates a specialised jurisdiction within the Judicial Power of the State. In addition, Courts are granted broad power to monitor administrative behaviour, including the French concept *excess de pouvoir* (*desviación de poder*).

Obviously, given the existing political framework, political decisions remained out of the judicial review. In contrast, discretionary decisions were included. With regards to enforcing the judgments, not enforcing them remained as a prerogative of Administration, but causes backing up such decision were reduced. Prohibition of seizing public assets remained as well. To speed up proceedings, an abbreviated process was stated.

The next step in the updating process of judicial review in Spain dates back in 1978, with the Spanish Constitution. Our Constitution collects a group of relevant principles in terms of judicial review as the new democratic context imposes. Section 24 *CE* clearly grants every citizen the right to be granted full access to judicial review and to be benefited from an effective defence of his rights before Courts. In addition, section 24 is defined as a fundamental right itself, which reinforces its efficacy.

> *Section 24*
>
> *I. All persons have the right to obtain effective protection from the judges and the Courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense.*
>
> *II. Likewise, all have the right to the ordinary judge predetermined by law; to defense and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defense; not to make self-incriminating statements; not to plead themselves guilty; and to be presumed innocent. The law shall specify the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding allegedly criminal offences.*

Section 106 *CE*, on the other hand, states:

> *Section 106*
>
> *I. The Courts shall check the power to issue regulations and ensure that the rule of law prevails in administrative action, and that the latter is subordinated to the ends which justify it. II. Private individuals shall, under the terms laid down by law, be entitled to compensation for any harm they may suffer in any of their property and rights, except in cases of force majeure, whenever such harm is the result of the operation of public services*

Finally, section 103 *CE* states the complete obligation of public administration to follow the law, which therefore implies its full subordination to Court supervision:

> *Section 103*
>
> *I. The Public Administration shall serve the general interest in a spirit of objectivity and shall act in accordance with the principles of efficiency, hierarchy, decentralization, deconcentration and coordination, and in full subordination to the law.*

With regards to enforcing the opinions, section 117.3 assigns such proceedings as an exclusive power regardless of the kind of process to the Judiciary. Only one limitation is kept if section 132, declaring public assets as free of seizure.

> *Section 117.3*
>
> *The exercise of judicial authority in any kind of action, both in ruling and having judgments executed, is vested exclusively in the Courts and tribunals laid down by the law, in accordance with the rules of jurisdiction and procedure which may be established therein.*
>
> *Section 132.*
>
> *The law shall lay down the rules governing public and communal property, on the basis that it shall be inalienable, exempt from prescription and seizure, and it shall also provide for the case of disaffection from public purpose.*

Such sections, given their direct effect, led to implicitly repealing every sections of 1956 *LJCA* opposing such principles. The new 1998 *LJCA* finally collects all of them.

II.- NATURE AND FEATURES OF JUDICIAL REVIEW.

Judicial review reaches the regulatory conditions of every administrative statement, including its goals (misuse of power). With regards to discretionary elements, monitoring shall include the relevant facts, general principles of law, legal grounds, rationability and reasonability. Judicial review appears to be therefore significantly deep and broad.

However, the principle of separation of powers limits Courts in their monitoring powers, in the sense that they are not allowed to substitute administrative action. When supervising administrative behaviour they can check whether the public body has met legal standards, including discretionary powers, but in most cases cannot change the challenged decision for another. Keeping these limits on a case by case basis is certainly difficult; one of the greatest challenges in Administrative law is precisely to distinguish whether the Judge is going beyond his limits or is keeping them.

Judicial review has traditionally not displayed a comprehensive monitoring in this field. Plaintiffs have been always allowed to claim for annulation with regards both to decisions and regulations, but claims intending the recognition of rights were unavailable. Section 24 CE overcame such limitations allowing Courts to grant citizen protection as well as adjudicating in favour of citizen´s rights (*pronunciamiento de condena*). From that point we have been involved in an on-going process aiming to extend judicial monitoring scope.

The current *LJCA* recruits such approach in the following sections:

> *Section 71.1. When the ruling upholds the claim for judicial review:*
>
> *a) It shall declare the protested provision or act unlawful and quashed in full or in part or shall order the challenged action stopped or modified.*
>
> *b) If the claimant sought acknowledgement and reinstatement of a legal situation specific to an individual, the ruling shall acknowledge the said legal situation and take such measures as necessary for the full reinstatement of the said legal situation.*
>
> *c) If the measure consists in issuance of an act or performance of a legally binding action, the ruling may set a period for compliance with judgment.*
>
> *d) If a demand for damages is upheld, the right to redress shall at all events be declared, indicating likewise who is obligated to pay compensation. The ruling shall also set the amount of the compensation when asked expressly by the claimant to do so and sufficient proof is a matter of case record. Otherwise the bases for determining the amount shall be established and the definitive specification of the amount shall be deferred until the judgment execution period.*

Sections (b), (c) and (d) are clear examples of full jurisdiction, and goes beyond the traditional approach of simply declaring the decision or regulation annullable or null and void.

Both perspectives are laid down as well in section 31:

> ***Section 31.***
>
> ***I.*** *The applicant may seek to have acts and provisions amenable to challenge under the preceding chapter declared unlawful and rendered void or quashed, as applicable.*
>
> ***II.*** *The applicant may also seek acknowledgement of a legal situation specific to an individual and appropriate measures for full reinstatement of that situation, inter alia, payment for damages.*

Section 32 goes even further granting direct access to Courts even in cases of inaction as well as regarding actions without proceeding (*ultra vires*).

> ***Section 3II. I.*** *When an application is made for judicial review of administrative inaction under Section 29, the applicant may seek to have the court sentence the administration to discharge its obligations pursuant to the specific terms in which those obligations are established.*

> ***II.*** *If the object of the petition is a material action constituting ultra vires action, the applicant may seek to have the action declared unlawful and quashed and may seek the other measures provided for in Section 31.2 where appropriate.*

As regards with the latter section, it is worth noting that allowing direct access to judicial review against administrative inaction, as well as in cases of ultra vires, is one of the best examples of how Administrative Jurisdiction is progressively leaving behind its traditional *reviewing condition* (*carácter revisor*). Such feature has traditionally meant that Administrative Courts had only the power to review regulations or express administrative statements. Actually, the concept of administrative silence was precisely created so to avoid keeping such behaviour out of judicial review. Creating a fiction of administrative decision allowed Courts to address such cases.

1956 *LJCA* stated an important breach in the principle allowing claims seeking acknowledgement of specific legal situations to individuals, as well as every appropriate measure for the full reinstatement of citizen rights, including charging payments for damages. However, the presence of an administrative decision, whether it's express or implicit, remained as a condition to proceed.

What 1998 *LJCA* actually represents is the final overcoming of such limitations allowing full judicial review. The object of the process is now clearly defined as any administrative behaviour *actuación*, which includes not only express or alleged decisions and regulations, but every other material action conducted without procedure (*ultra vires*), as well as the simple omission of a required action.

III.- PARTIES AND OBJECT OF ADMINISTRATIVE APPEALS.

1.- SCOPE

- From an objective point of view, Administrative Courts hear every claim against actions coming from administrative bodies acting under administrative law. They shall address conflicts related to regulations including plans and programs, as well as legislative decrees overstepping the limits of delegation (Section 1.1 *LJCA*).

  They shall monitor every kind of administrative action, regardless express or alleged decisions, ultra vires or simple inactivity, providing such activity is subject to Administrative law.

- From a subjective point of view, section 1.2 *LJCA* states that Administrative law shall concern every kind of public bodies, including territorial administration as well as institutional, corporative and independent agencies. What is more, certain issues administrative in nature, when addressed by non-administrative institutions with constitutional relevance, such as asset management, strict liability, or labour relations, shall be heard under this proceeding.

  On the other hand, challenging decisions from the special administration for electoral processes (*Ley Orgánica 5/1985, de 19 de junio, del Régimen Electoral*

General: LOREG) must be done to Administrative Courts. *LOREG* precisely states a special procedure to address such cases, while *LJCA* shall be only applied to fill possible gaps in such regulation.

With regards to Public companies and Foundations, their actions are out of Administrative Courts´ scope except for certain parts of their activity, involving public interest conditions that remain under Administrative law. Such subordination to Administrative law arises either as a result of the *actos separables* theory, or as a result of particular legal frameworks. That is the case of the special administrative appeal before administrative Courts stated in Public Contracts law *(LCSP*).

- From a formal point of view, administrative jurisdiction on a case by case basis must be determined according to the following criteria:

  - Political decisions. Judicial review is limited to fundamental rights, regulated elements, as well as strict liability.

  - Private contracts agreed between Administration and citizens. Only preparatory and awarding decisions are under Administrative Courts´ supervision.

  - Regulations and decisions dictated by Public Law Corporations carrying out public functions. The *LJCA* does not regard such institutions as administrative bodies in terms of judicial review (section 1.2), extending administrative judicial review only to actions of *administrative in nature.*

  - Monitoring certain concession of the holders' decisions in public service areas, as long as they imply enforcing delegated administrative functions, according to the law governing the area.

  - Although the *LJCA* does not say anything on the so called *excluded sectors* (water, telecommunications, energy, etc.), they enjoy their own legislation from 1998, where it is stated the citizen´s right to appeal private companies´ decisions before administrative bodies in certain conditions. Obviously, as soon as the Administrative body rules these conflicts citizens are automatically granted access to Administrative Courts.

  - Strict liability claims, regardless the nature of the action causing damage. This is a significantly relevant rule, as it appoints the whole matter of public liability to the Administrative Courts. The particular nature (public or private) of the legal relation between the Administrative body and the citizen does not make any difference in this field. Administrations shall never be sued before civil Courts, even when it has a civil liability insurance with a private insurance company. 2003 amendments in *LOPJ* prevented civil Courts from addressing these cases even when the claimant sues only the private insurance company.

  - Matters expressly assigned to other jurisdictions (Civil, Labour, Criminal Courts) as long as they are related to Administrative action. That is the case of penalties imposed by administrative bodies due to infringements in social security law, Trade Unions law, among others.

- Conflicts of jurisdiction between Courts and Administrative bodies. Such conflicts are assigned to a special Court (Conflicts Court) made up with members of the Supreme Court and the Counsel of State (*Ley orgánica 2/1987 de 18 de mayo, de conflictos jurisdiccionales*).

- Negative or positive conflicts of competence (*conflictos de atribuciones*) among bodies within the same Administrative structure. In these cases the Administrative structure itself shall decide the case. Courts shall not intervene.

- Questions referred to Court for a preliminary or incidental ruling (*cuestiones prejudiciales o incidentales*). Administrative Courts shall address cases that according to their nature should have been filed before other Courts (civil or labour), as long as they are closely related to an Administrative appeal and are essential to rule the case. For example, sometimes it is necessary to decide about property rights before deciding a conflict related to expropriation.

  The decision about such issues shall be handed down *incidenter tantum*, that is to say, for purposes of deciding the case, regardless of what any other Court might rule in the future. Thus, neither it will become a legally settled matter *res iudicatae*, nor it will have out-of-Court effects.

  Nevertheless, preliminary or incidental ruling does not extend to criminal or constitutional matters (post-Constitutional statutes). In the first case, the Court shall stay the proceeding and refer the question to the criminal Court. In the second case, the Court shall rise a question of Constitutionality to the Constitutional Court; the same operational will take place with the European Court of Justice with regards to E.U. law (Section. IV.II. *LJCA*)

2.- PARTIES.

Parties in Administrative proceedings are the Administration (normally as defendant) and the citizen (normally as plaintiff). However, it is not rare that two or more Administrations litigate each other. The key point is that one Administration must always be part of the procedure.

- The public Administration.

Public administrations shall be understood to be, for the purposes of legal standing in Judicial proceedings:

- The state administration.
- The regional administration.
- The entities belonging to local administrations.
- The entities organised under public law that are dependent on or linked to state, regional or local entities.

In addition, certain entities not belonging to the Administration can become part of Judicial proceedings providing their activity is often close to administrative body´s one. That is the case of the bureaucratic nature of several activities displayed by the Congress of Deputies, the Senate, the Constitutional Court, the General Council of the Judiciary, the Court of Auditors and the Ombudsman, likewise by the corresponding entities in the regions.

- Citizens.

The Code of Civil Procedure (*LEC*) states the conditions to hold capacity to file proceedings (legal standing). However, according to *LJCA* minors defending their legitimate rights and interests might also enjoy this position according to law. Non-personified groups of citizens and unions shall also have capacity to file proceedings according to law.

With regards to legal standing conditions, natural or legal persons holding legitimate rights or interests are granted such position. In addition, it enjoys legal standing every corporation, association, trade union, group and entity defending legitimate collective rights and interests concerned by administrative action.

Quite often, administrative bodies act as plaintiffs and litigate to each other. With regards to Spain being a complex state where powers are strongly divided, conflicts frequently arise among public in different Administrations. On the other hand, in certain relevant cases, the Prosecution Service can be party to the proceedings

Administrative Courts grant legal standing to personified entities organised under public law, to citizens in public interest claims according to law, as well as to entities defending gender bias cases, including Trade Unions and Associations (prior authorisation of the concerned citizen is required in such cases).

Although in most cases Administration plays a role of defendant in administrative conflicts, we should remember that administrative *Ex officio* reviewing processes, on the grounds of annullable reasons, require the Administrative body itself to challenge its own decision before Courts, prior declaring the decision as damaging the public interest.

Sometimes, claims against administrative action concerns someone else not directly involved in the case. It happens in cases where the judicial opinion might involve damages or loses in someone else´s assets or rights. That is the case, for example, of those benefited from the challenged decision. Obviously, all of them shall be recognised legal standing in the process as co-defendants with the challenged administration, and must be called to appear in the process.

- Courts.

Judicial structure in Spain is made up of independent, irremovable judges and magistrates, subordinated only to the law, and exclusively responsible for judicial reviewing, pronouncing judgment, and ensuring enforcement of judgments.

There are four jurisdictional areas:

- Civil
- Criminal
- Administrative
- Social
- Military (special chamber of the Supreme Court)

With regards to Courts, there are:

- Single Judge Courts:
    - Justices of Peace (*Juez de Paz*)
    - District Courts (*Juzgados de Primera Instancia*)
    - Examining Courts (*Juzgados de Instrucción*)
    - Criminal Courts (*Juzgado Penal*)
    - Administrative Courts (*Juzgado de lo Administrative*)
    - Social Courts (*Juzgado Social*)
    - Juvenile Courts (*Juzgado de Menores*)
    - Parole Courts (*Juzgados de Vigilancia Penitenciaria*)
- Panel of Judges Courts
    - Provincial Courts (*Audiencia Provincial*)
    - High Courts (*Tribunales Superiores de Justicia*)
    - National Courts (*Audiencia Nacional*),
    - Supreme Court (*Tribunal Supremo*).

Single Judge Courts usually judge cases that have not been previously addressed to any other Court. They are, therefore, the first step for judicial review in most cases. However, although Panels of Judges normally intervene as appeal Courts, sometimes, according to law, can also be the first step for those seeking judicial review in cases of significant relevance. What is more, in Administrative law conflicts, the nature and position of the challenged administrative authority may be decisive in terms of addressing the conflict first to Panels of Judges.

Judicial review of cannot be postponed (*improrrogable*). In other words, Courts shall only address cases that fall under their sphere of competences. Actually, during the judicial process, one of the first steps is to decide whether the Court holds jurisdiction on the case. Such analysis is done *Ex officio* and the result is notified for hearing.

Not only can jurisdiction not be postponed, the same happens with regards to *competence*. Although in Common law systems jurisdiction and competence are fairly the same, in Spanish law they are not equal terms. While jurisdiction, strictly speaking, refers to the distribution of the different areas of law (administrative, labour, civil or criminal law) among groups of Courts, competence has to do with the particular sphere of cases that every Court within the same jurisdictional area is allowed to judge.

In particular, Administrative Courts are made up of the following bodies:

a) Single-judge administrative Courts (*Juzgados de lo contencioso administrativo*).

According to section 90 *LOPJ*, these Courts are made up of just one Judge. They have provincial status, although they can be based in several towns within the province. In addition, their jurisdiction can be extended to several provinces within the same Region. 2003 amendments in *LOPJ* widened their jurisdiction to new issues, resulting in a new composition of section 8 *LJCA* (14th Additional provision *LOPJ*).

They address all cases related to municipal affairs except for regulations and zoning plans. They also have jurisdiction on a number of administrative decisions of the regional administration, except for those dictated by the upper body: the Regional Council. Strict liability not exceeding 30.050 Euros falls within their jurisdiction as well.

Decisions and regulations laid down by peripheral state and regional bodies are addressed by these Courts, as well as decisions (not regulations) adopted by organisations, bodies, entities or corporations organised under public law whose competence is not nationwide. However, conflicts greater than 60.000 Euros, as well as those related to public property, national public works, condemnation under sovereign right of eminent domain or special properties, are beyond their competence.

Cases related to nationwide competences or beyond such quantitative limits shall therefore be reported to Single-judge central administrative Courts.

Likewise, it falls within their competence to authorise restrictive measures that health authorities report urgent, even if they mean restricting freedom or any other fundamental right. In addition they shall hear and grant authorisations for entering residences and inspecting homes, business venues, land and means of transport when the owner refuses to it.

b) Single-judge central administrative Courts (*Juzgados Centrales de lo Administrativo*).

These judicial bodies did not exist within the original *LOPJ* framework, but were incorporated in the 1998 amendments. As a result, the *LJCA* established them with the aim to deconcentrate functions from the National Court. They are single-judge courts and their competences have significantly grown after 2003 *LOPJ* amendments. They are

based in Madrid, although their jurisdiction extends to the whole country. They shall hear cases related to State Administration decision-making, including public entities.

In addition to the competences referred to in subsection (a), related to qualitative and quantitative conflicts greater than those that single provincial Courts are allowed to hear, several relevant competences must be highlighted. In particular, they shall hear decisions handed down by ministers and secretaries of state in matters of financial liability, as long as the claim does not exceed 30,050 Euros, decisions related to political asylum, and decisions in oversight proceedings handed down by the Spanish committee on discipline in sport.

c) Administrative divisions of the Regional Superior Courts (*Sala de lo Administrative de los Tribunales Superiores de Justicia*).

The territorial scope of Regional Superior Courts is the Region where they are based or part of it. As a matter of fact, regions such as Andalusia and Castilla León have more than one division based in different provinces. Divisions have different sections as well. Every Division, including the Administrative Division, is a collegiate judicial body made up of at least 3 Judges. One of them, at least, must be specialised in administrative procedure.

Their jurisdiction shall depend on the place where the challenged Administrative Body is based. However, in labour, special properties, and penalties, the issue of the venue of jurisdiction shall depend on the plaintiff´s free will deciding between his/her own residence or the place where the body is based. In zoning law conflicts, expropriation, and in every issue related to private property shall depend on the territory the real state is located. In cases involving several interested parties, jurisdiction shall be assigned to the Judicial Body holding office in the place where the challenged administrative body is based.

These Courts can sometimes hear cases as trial Courts (*primera instancia*), and even without any appeal option (*única instancia*). Normally, they shall hear cases as an appeal Court or even as a cassation Court.

Most Court cases are related to regional administrative law conflicts. A great deal of cases are actually appeals against rulings made by single administrative Courts. In addition, they are qualified to hear the most relevant issues arising from local authority's action, such as regulations. They hold a residual power as they shall hear every decision of local and regional entities that are not expressly assigned to single-judge administrative courts.

Decisions related to election boards others than those under Single Courts jurisdiction shall be brought to Regional Courts. Prohibitions related to citizen´s demonstrations are another relevant issue under their jurisdiction.

Another important field concerns decisions made by administrative bodies of the state administration whose competence is nationwide and whose institutional level is lower

than a minister or secretary of state; monitoring powers, however, it only concerns matters of personnel, special properties, as well as condemnation under sovereign right of eminent domain.

They shall hear conflicts of competences between single-judge administrative courts working in the same Region, as well as appeals for doctrine unification (contradictory judgments of different Divisions and Sections of the Regional Courts with regards to regional law). Another area of work are the so called: appeals in the interest of the law (with relation to judgments of Single-Judge Courts related to regional law conflicts).

This Court addresses *recursos de queja* against Single-Judge Courts rulings, as well as *recursos de revision* against final rulings from the same Courts,

d) The Administrative Division of the National Court (*Sala de lo Administrative de la Audiencia Nacional*).

The Administrative Division of the National Court is made up of a variable numbers of sections depending on the number of cases. This Court only addresses conflicts related to the State Administration. The key cases are the following:

As a trial Court (without previous judgement), the National Court hears claims for judicial review in connection with regulations and decisions of Ministers and Secretaries of State, including personnel matters referring to the creation or termination of tenure positions of civil servants.

Likewise, the National Court hears conflicts related to inter-administrative agreements. What is more, it addresses decisions of economic administrative nature dictated by the Ministry of Finance, the Exchequer, and by the Central Economic Administrative Court, except in relation to taxes transferred to the Regions (Regional Courts shall be competent in the latter cases).

According to *LJCA* 4th Additional Provision, it shall address appeals against decisions handed down by independent agencies (*administraciones independientes*) such as the Bank of Spain, CNMV, etc. Judgments are unappealable.

When it comes to appeals against judgments of lower Courts, it shall be competent to hear those handed down by Single-Judge Central Administrative Courts. It shall also hear conflicts of competence between them, as well as *recursos de queja* and *recursos de revision*.

e) The Administrative Division of the Supreme Court (*Sala de lo Administrative del Tribunal Supremo*).

The upper judicial body in the hierarchical ladder in Spanish Judiciary is the Supreme Court. The Court is structured in several chambers according to the nature of the matters assigned. With regards to Administrative law conflicts, the Division responsible on

these matters is the *Sala de lo Contencioso Administrativo* (3rd Division), which according to law can be divided into as many sections as advisable in view of the number of cases.

In particular, 3rd Division is currently divided into 7 sections. Cases are distributed according either to the nature of the matters in conflict or the position of the challenged bodies.

Although in most cases the Court acts as a Court of appeals, in certain cases it shall intervene as a trial Court. As a matter of fact, it shall happen with regards to regulations and decisions dictated by the Council of Minister, Delegated Government Committees, General Counsel of the Judiciary, as well as regulations and decisions in matters of personnel, administration and asset management laid down by the Congress of Deputies, the Senate, the Constitutional Court, the Court of Auditors and the Ombudsman.

When it comes to acting as Court of appeals, it shall hear every kind of appeals against decisions handed down by lower Courts (administrative divisions of superior Courts and the National Court), as well as those dictated by the Court of Auditors.

Likewise it shall hear claims related to electoral legislation arising from the electoral administration.

Appeals in the interest of the law, as well as appeals for doctrine unification and appeals for review shall be entrusted to a particular and special section of the administrative Division.

f.- Special Division of the Supreme Court ext. Section 61 *LOPJ*.

This division is made up of the President of the Supreme Court, all the Presidents of the Divisions, as well as the older and younger Judges of each Division. With regards to Administrative law conflicts, such Division addresses *recursos de revision* filled against Supreme Court rulings handed down as trial Court.

Proceedings of recusal or disqualification against Presidents of Division, or against more than two Judges of the same Division, must be filed before this special Division as well. In addition, claims for state strict liability in cases of judicial error caused by a judgment of the Supreme Court are included.

3.- OBJECT.

- Cases suitable for appeal.

As already mentioned, cases suitable for appeal have significantly grown as a result of the latest legislative reforms in administrative procedural law. The ‘revising’ character

of Administrative judicial review has made way for a new scheme where every illegal administrative behaviour falls within such Jurisdiction.

Regarding express or alleged statements, the key condition is that the citizen must have exhausted the administrative channel. In addition, decisions must be definitive (not final), except for qualified procedural acts.

Both regulated and discretional decisions are appealable, as well as mere political statements with the limitations already discussed in this work. New decisionsreproducing or confirming previous final statements do not give new grounds for appeal. Claims should not be accepted for processing in such cases (*inadmisión*). In addition, enforcing statements, when the enforced decision is already final, cannot be challenged on the grounds of eventual illegalities in the latter decision.

Mere explanatory decisions handed down to clarify previous decisions cannot be challenged either, as long as they do not add new conditions to the original decision.

On the other hand, regulations and overstepping legislative delegations can also be appealed. Appeals can be direct or indirect, and involve the whole regulation or just parts of it. Rulings shall have *erga omnes* effect in direct appeals, and shall normally have retrospective effects. Proceeding is preferential in these cases, and shall be proceeded before appeals against administrative decisions.

Indirect appeals against regulations, built on the grounds of an eventual illegality in the enforced regulation, should not be only based in formal grounds according to section 27.*1 LJCA*. The ruling shall declare the challenged decision null and void, but the regulation shall remain in force. However, for legal certainty reasons, *LJCA* states several rules to quash the regulation.

Thus, when the indirect claim was addressed to the Court holding competence both to monitor the decision and the regulation, it shall declare the regulation null and void. The Supreme Court, actually, shall always make such judgment. In other cases, the Court shall raise a *cuestión de ilegalidad* (*auto*) to the Court holding the power to monitor the regulation´s lawfulness. This will lead to a new procedure where the regulation´s validity or nullity shall be declared with *erga omnes* effect.

A relatively recent appeal, introduced in 1998 *LJCA* amendments, allows citizens to directly appeal against administrative lack of action (*inactividad material*). We are not talking about formal omissions (alleged acts), but about simple inaction when doing or not doing something is required. This situation might take place, according to law, in the following cases:

- Lack to enforce final decisions.
- Lack to enforce regulations as long as no administrative decision is needed to implement them.
- Contracts and agreements stating specific and definite actions in favour of the concerned party (frequently linked to public utilities).

In these cases it is enough to require the Administrative body to meet its obligations; in case it is rejected or the citizen does not get any answer, the case can be directly brought to Courts. Obligations should be immediately enforceable, which means that no further administrative decisions are required to define, precise or specify the obligation. The obligation must also be certain, determined and not generic.

It is worth noting that *ultra vires* is also directly appealable to Administrative Courts. Before 1998 *LJCA* amendments, concerned citizens were only allowed to use civil injunction processes in particular cases stated by law. Prior request to the Administration, before bringing the case to Courts, is not mandatory, although possible.

- Potential claims.

Plaintiffs in the judicial review process can issue the following claims:

- Declaratory claims (*pretensiones declarativas*). It pretends the Judge to declare decisions or regulations annullable or null and void.

- Full Jurisdiction claims (*Pretensiones de plena jurisdicción o de condena*). They pretend Court issues an order imposing administration specific actions in addition to declaring the act invalid. There are three key requests for full jurisdiction:

    - Being granted individual benefits in terms of rights and legitimate interests (*situaciones jurídicas individualizadas*).
    - Ordering the administrative body to restore damages (*restablecer la situación jurídica infringida*) (obligations of action).
    - Claims for damages and compensation (*pretensión indemnizatoria*).

Obviously, requiring the Court to lay down judgments substituting the administrative power in timely or discretionary matters is unable according to section 7I.2 LJCA.

- Consistency.

While the plaintiff and the defendant set the limits of the case in other proceedings, and the ruling itself is bound to the parties´ claims, the principle of consistency is not fully applicable in Administrative law given that Courts must guarantee the public interest. Thus, whenever the Court finds that parties have not correctly defined their demands and opposing arguments, it shall apprise them by *providencia*, setting 10 days to lodge allegations.

In case the Court does not conduct such stage and rule the case exceeding the parties´ claims, we shall have *extra petita* inconsistency. Inconsistency by omission will take place whenever the Court does not sentence on every claim. Besides, when Courts go

beyond the limits of the claim as brought by the parties, we shall have *ultra petita* inconsistency. Such cases guarantees from section 24 *CE* would have not been granted.

- Plurality of claims or appeals:

Let us discuss three specific motions (incidents) intending to speed up proceedings:

- Order consolidating cases (*acumulación de pretensiones*). The plaintiff can combine various claims into a single case. This will lead to a judicial order consolidating claims unless he considers more effective to conduct separate processes.

- Order consolidating appeals (*acumulación de recursos*). Whenever several citizens, or even one citizen, file appeals challenging the same regulation or decision, or linked decisions, the Court may decide to consolidate cases prior hearing all the concerned parties.

  In cases of massive appeals (*recursos en masa*), *LJCA* allows Courts not to consolidate cases. Instead, the Court shall conduct one procedure dealing with just one case on a preferential basis. The rest of appeals shall become suspended. As soon as the Court sentences the case, the ruling shall be automatically extended to the other cases.

- Once the process has got started, whenever the Judge gets to know that any other administrative decision or regulation is linked to the case, it shall order parties to extend the appeal (*ampliación del recurso*) so to address it. This situation will take place before alleged decisions as long as during the trial the Administrative body lays down an express written decision. Plaintiff shall abandon the claim in case the decision benefits him or shall apply for an extension of the appeal otherwise.

CHAPTER XVII. JUDICIAL REVIEW (II).

I.- APPEALING FOR JUDICIAL REVIEW.

The appeal for judicial review is a document issued by the concerned citizen or the affected Administration, where the Court is required to declare the challenged regulation or decision contrary to law and, where applicable, to declare it annullable or null and void. In addition, the plaintiff may include other petitions such as being granted benefits or compensations in strict liability cases.

The document for appeal is a summarised document that must only include the regulation or decision challenged, as well as the inactivity or ultra vires situation; in addition, the interested party must apply the Court to admit the appeal, referring and enclosing certain documents.

- Documents showing representation of the appellant, unless such documents were submitted before at the same Court because of a previous proceeding; in this case the plaintiff shall require the Court to issue a certificate and include it in the Court file.
- Document showing plaintiff´s legal standing when the right or legitimate interest has been awarded the plaintiff due to third parties´ transmission (inheritance, etc.).
- Copy of the challenged decision or regulation, indication of the administrative file or official gazette instead. In cases of Administrative inaction or *ultra vires*, the plaintiff shall mention the responsible administrative body, as well as the administrative file when applicable; he shall add every other data deemed relevant to identify the object of the appeal.
- Document showing compliance with every legal requirements for issuing appeals in case of legal entities; such requirements will depend on the statutes and regulations governing such entities. Such documents will not be required in case they had already been shown as a result of the first requirement (documents showing representation of the appellant).

The deadline for filing the appeal is two months from the following day after notification or publication of the challenged decision or regulation. In cases of alleged decisions, the deadline is six months from the following day after the effects of silence took place.

When the Administration does not enforce its own final decisions, the concerned parties might apply for its enforcing and, in case it is not done within one month period, they shall have two months to file the appeal from the day the month period became expired.

In *ultra vires* cases, the concerned party can require the Administrative body to stop acting. This is not a mandatory step in the proceeding. When the requirement has no effect within a period of ten days, the citizen is allowed to file the appeal within a period of ten days. As the requirement is not a mandatory step, the citizen can directly

challenge *ultra vires* to Court; in these cases, it shall be done within a 20 day period after the administrative action determining *ultra vires* got started.

The deadline to lodge an appeal, when it comes to conflicts between two different administrative bodies, is two months unless otherwise stated by law.

It is worth noting that in Spain there are two essential elements that any complaint must comprise of. Firstly, stating clearly the facts. Secondly, there is a required section called Legal Grounds, in which the Plaintiff sets out the basis in law of your Complaint. And under that heading, it must be invoked the Court's jurisdiction and set forth other procedural matters. That would be a separate sub-section under Legal Grounds. Lawyers would, therefore, identify the two discreet sections appropriately. Nothing of that is included in the appeal document.

A typical document of appeal could be the following:

AL JUZGADO/SALA DE LO ADMINISTRATIVO

Don ..., Procurador de los Tribunales, (o Abogado) en representación de Don ... , cuya representación acredito mediante la escritura de poder que debidamente bastanteada acompaño,

COMPAREZCO Y DIGO:

Que de conformidad con el art. 25 de la Ley de la Jurisdicción Contencioso-Administrativa, y dentro del plazo legal de ……. interpongo recurso Administrative contra el acuerdo/artículo …. del (reglamento), dictado (aprobado) con fecha ..., y que me fue notificado (fue publicado) el día ..., asunto que se tramitó en el expediente n: ...,

De conformidad con el art. 45 de la misma ley, con este escrito acompaño (la documentación aportada puede variar según las circunstancias del caso):

UNO. El documento que acredite la representación del compareciente, salvo si figurase unido a las actuaciones de otro recurso pendiente ante el mismo Juzgado o Tribunal, en cuyo caso podrá solicitarse que se expida certificación para su unión a los autos.

DOS. El documento o documentos que acrediten la legitimación del actor cuando la ostente por habérsela transmitido otro por herencia o por cualquier otro título.

TRES. La copia o traslado de la disposición o del acto expreso que se recurran, o indicación del expediente en que haya recaído el acto o el periódico oficial en que la disposición se haya publicado. Si el objeto del recurso fuera la inactividad de la Administración o una vía de hecho, se mencionara el órgano o dependencia al que se atribuya una u otra, en su caso, el expediente en que tuvieran origen, o cualesquiera otros datos que sirvan para identificar suficientemente el objeto del recurso.

CUATRO. El documento o documentos que acrediten el cumplimiento de los requisitos exigidos para entablar acciones las personas jurídicas con arreglo a las normas o

estatutos que les sean de aplicación, salvo que se hubieran incorporado o insertado en lo pertinente dentro del cuerpo del documento mencionado en la letra a) de este mismo apartado.

Por ello,

AL JUZGADO/LA SALA SUPLICO: Que tenga por presentado este escrito con los documentos que le acompañan, me tenga por comparecido y parte en representación de ..., y tenga por interpuesto recurso Administrativo contra el acto mencionado del ..., interesando la devolución de la escritura de poder previo testimonio en autos, por ser general y precisarla para otros usos.

En ..., a DD de MM de AAAA.

II.- Proceeding for judicial review.

1.- Ordinary proceeding.

- Preliminary proceedings.

In cases of *Ex officio* review, on the grounds of annullable causes, Administrative bodies must declare the decision adverse to the public interest, before filling an appeal for judicial review to quash the decision.

In litigation between public administrations, claims for judicial review may not be filed in administrative proceedings. Nevertheless, when one administration files for judicial review against another, the former may first instruct the latter to repeal the provision, annul or revoke the act, cease or modify the material action or initiate the activity it is obligated to perform. It certainly happen the same with regards to decisions taken by administrative bodies deciding upon special appeals and complaints in matters of contracting.

- Filing the appeal and petitions for files.

Claims for judicial review shall be initiated in a written application according to what was mentioned above. The Court Clerk shall examine *Ex officio* the validity of the party's appearance as soon as the application has been submitted. If it is deemed valid, the clerk shall admit the claim. In case of incomplete applications or when the Clerk deems that the requriements are not met, he/she shall immediately instruct the claimant to remedy the failure. Failing to correct the application shall lead to declaring the proceedings closed.

Claims against action that are harmful to public interest differ substantially from those issued by citizens or administrations in ordinary appealing proceedings. They shall be

initiated in the form of a suit accompanied by the declaration confirming that the act is harmful to public interest and the administrative file. When it comes to challenging regulations, *ultra vires* or administrative inaction, the process shall also be initiated by means of a suit in which the challenged provision, act or conduct shall be specified and the grounds for its unlawfulness shall be stated.

After checking the case for admission, the next step is to give third parties or the citizens in general notice of the claim. In cases of administrative decisions, publication is not always required; actually, it shall take place only at claimant request or when the Judicial Clerk deems it necessary. However, when challenging regulations, publication is necessary as regulations extend their effects to undetermined citizens. This phase is called the announcement of the appeal (*anuncio del recurso*), and the aim is to allow third parties holding legitimate interest in upholding the lawfulness of the challenged provision to appear in the proceeding.

Next, the Court Clerk shall instruct the administration to dispatch the administrative file and to summon all the interested parties. The Court supervision will not be possible without the documents included in the Administrative file. In addition, the plaintiff, once the file is lodged in the Court, shall have the chance to check all the documents and therefore build the arguments properly.

The essential nature of this procedural phase made that the 1998 *LJCA* amendments strongly focused on creating stronger means to make administrative bodies comply with such an obligation. This includes imposing fines to the authorities or civil servants who willingly do not comply with it. If failure to comply extends, the Court might even inform the Prosecution Service for criminal responsibility. The original file or a copy thereof shall be sent in full, with its pages numbered, authenticated where appropriate, accompanied by a table of contents (likewise authenticated) listing the documents therein contained.

On the other hand, summoning every interested parties is the best way to guarantee everyone´s right to defence. Although in most cases it is the Administration who plays the role of defendant in Administrative judicial proceedings, sometimes citizens or private companies may benefit from keeping the decision as it currently is. They could even get damages in case it is declared void. Thus, while in the case of administrative bodies it is considered they have appeared in the proceeding when they dispatch the administrative file, third parties must be expressly summoned. It is the challenged administrative body, under Court supervision, which must convene every right or legitimate interest holder.

After examining the administrative file, the Court shall declare the application inadmissible when it holds no jurisdiction or competence, the applicant holds no legal standing, the application has been filed against an activity not amenable to challenge, or the period for filing applications has expired. In addition, the Court may refuse to admit the application when other, substantially identical claims have been dismissed. In u*ltra vires* cases, the Court may also refuse the case if it is evident that the administrative

body held competence and acted in conformity with the procedure. In cases of presumed inaction, the Court shall not admit the case if it is evident the administration had no specific obligations with the applicant.

Non admission orders are amenable to appeal and must be issued before hearing the parties.

- Submission of the Claim and statement of reply.

Once the administrative file is received at Court and verified, the Court Clerk must deliver it to the plaintiff, giving a twenty-day period to file a suit. If the suit is not submitted in due time the Court in due time the Court shall declare the suit lapsed. When the suit has been filed, the Court Clerk shall serve the suit, including the administrative file, on the defendant parties who have appeared, giving twenty days to reply.

The defendant administration shall be the first defendant to lodge its reply. When other defendants apart from the administration are to reply, they shall all lodge their replies simultaneously, even if not acting under a single director.

In the statement of claim and the defendant's reply, the findings of fact, considerations of law and arguments presented shall be duly separated. The plaintiff is not tied in with regards to the grounds that have been laid before the administration during the administrative proceeding. Before the Court Clerk there is another phase for correcting defects, and once finished, the Court Clerk shall admit the suit. Otherwise the court clerk shall report it to the judge, who shall decide on its admission.

The parties shall enclose with their statement of claim or reply the documents on which their right is directly grounded. After the statement of claim and reply, the parties shall be allowed no additional documents beyond those found in cases of strict liability. Nevertheless, before the parties are called to appear before the court or to submit closing arguments the plaintiff may additionally submit documents whose object is to upset arguments contained in the replies and that highlights disagreement over the facts.

After the stages discussed above, the Court Clerk shall declare the lawsuit ready for trial. However, the case could be set for judgment in case the plaintiff demands the Court to decide the case (*por otro sí*) without evidence period, hearing, or closing arguments, providing the defendant does not oppose this petition. When none of them demanded such stages to be conducted in their claims and replies, the case will be set for judgment as well.

- Preliminary pleas.

Within a very short period, just in the first five days of the period established to file the reply, the defendant may issue allegations trying to prove lack of competence of the Court or reporting the claim to be inadmissible given the following grounds:

a) Where the administrative court has no jurisdiction.

b) Where the claim has been filed by a person who is incapable, not duly represented or without legal standing.

c) Where the object is provisions, acts or actions not amenable to challenge.

d) Where the claim concerns res judicata or the same case is pending in another court.

e) Where the initial statement of claim is submitted in untimely fashion.

Such grounds, save that of lack of competence, may nonetheless be argued in the reply, even if dismissed as a preliminary plea. The court clerk shall serve the prior pleas to the plaintiff providing a five day period to correct any defects. A ruling dismissing preliminary pleas shall not be amenable to appeal and shall order the defendant to reply to the suit within the period remaining. A ruling upholding preliminary pleas shall declare the claim for judicial review inadmissible.

- Evidence period.

In order to be granted a period for evidence within the procedure, the parties should apply for it in their statements of claim and reply, or complementary pleas (in cases of new facts referred by the defendant). Those applying for conducting the evidence period must define the points of fact to which the evidence refers, and the pieces of evidence proposed. The Court shall discretionarily decide which proposed means of proof are relevant enough to be granted.

Evidence shall be handled under the general rules established for civil proceedings. Panels of judges might delegate these proceedings to lower Courts. Even if any of the parties have requested the evidence period, the Court may rule *Ex officio* to open the evidence period. Parties, obviously, will be allowed to participate by issuing allegations.

- Hearing and closing arguments

Parties may petition for a hearing and for the submission of closing arguments. However, if they deem it profitable, they can request the lawsuit to be declared ready for judgment. Said petition must be formulated after the principal petition in the statement of claim or the defendant's reply, or made in writing after the evidence period has got concluded. If the parties have not lodged any petitions whatsoever, the Court may, in exceptional circumstances, rule to hold a hearing or to receive closing arguments.

Hearings allow the parties to state their case succinctly. The hearing shall be recorded and an electronic document should be drawn up and authenticated by applying a recognised electronic signature when possible.

The Court shall call for closing arguments, which must address the facts, the evidence submitted, and the considerations of law on which the demands are based. Questions not brought up in the statement of claim or the defendant's reply cannot be introduced at the hearing or in the closing arguments. When the Court finds new grounds relevant for the judgment, different from the grounds pleaded to be discussed at the hearing or closing arguments, it shall notify the parties for hearing. Later on, the day for voting and sentencing shall be scheduled and the Court shall declare that the lawsuit is ready for judgment.

- Other modes of procedure termination.

The claimant may abandon the claim at any time prior to issuance of judgment, the defendants may accept the claimant's demands except in clear violation of law.

If, after a claim for judicial review is filed, the defendant administration fully recognises the claimant's demands in administrative proceedings, the Administration must inform the Court; The Court shall dismiss the case prior offering a hearing to both parties.

When the trial deals with matters amenable to compromise, the Court *Ex officio* or at party´s request, may submit to the parties for their consideration the opportunity to acknowledge facts or documents, likewise the possibility of reaching an agreement ending the controversy. Proceedings shall not be stayed during the conciliation attempt unless both parties agree. The conciliation attempt may be made at any time prior to the day when the lawsuit is declared ready for judgment.

If the parties reach an agreement, the Court shall hand down an order declaring the procedure finished, provided that the agreement terms are not manifestly unlawful or injurious to the public interest or third-party interests.

2.- Short proceeding.

The 1998 *LJCA* created a new procedure for judicial review of administrative decisions based in the principles of orality and immediacy. While ordinary proceedings are mostly written, this procedure is broadly oral. It is regulated in section 78 *LJCA*. In 2003 cases under such procedure were significantly increased due to the introduction of new motives enabling its use.

Single-judge administrative courts and single-judge central administrative courts may use this short procedure to hear cases arising over public administration personnel, foreign citizens, non-admission of applications for political asylum, doping in sport, and

all matters involving sums of 30,000 Euros or less. Claims for Administrative inaction ex section 29 *LJCA* can be conducted under this procedure as well.

Judicial review shall be initiated by filing a suit, enclosing the document or documents on which the plaintiff grounds his/her right and the documents required by law. Where the Court Clerk finds the court to hold jurisdiction and objective competence, he/she shall admit the claim. Otherwise, he/she shall report to the Court, which shall decide accordingly.

After the suit is admitted, the Court Clerk shall notice the defendant administration, who must summon the parties to a hearing. He shall instruct the defendant administration to dispatch the administrative file at least fifteen days prior to the date for which the hearing is scheduled. That notwithstanding, if the claimant requests (in the claim) a ruling with no need for evidence or hearing, the Court Clerk shall serve notice thereof on the defendants to enable them to reply within twenty days, The defendants may request a hearing, in which case, the Court Clerk shall summon the parties to the hearing. Otherwise, he/she shall close the proceeding with no further formalities and the rule shall be delivered.

After the administrative file is received, the Court Clerk shall send it to the plaintiff and the interested parties, who have appeared, enable them to submit arguments at the hearing. After all or some of the parties have appeared, the judge shall declare the hearing in session. If the parties fail to appear or if only the defendant appears, the Court shall deem the plaintiff to have abandoned the claim and shall award costs to him/her. If only the plaintiff appears, the Court shall order the hearing to proceed in the defendant's absence.

The hearing shall begin with the claimant's statement of the fundamental points of the claimant's requests, or ratification of the statements made in the statement of claim. Forthwith, the defendant may put to the court such arguments, commencing with any questions concerning jurisdiction, objective and territorial competence, and any other fact or circumstance that may hinder the valid prosecution and conclusion of the proceedings.

After the defendant has been heard on these questions, the judge shall issue a decision. If he/she orders the trial to continue, parties can raise procedural questions; if not, or if such questions arise and the judge decides to proceed with the trial, the parties shall be allowed to speak in order to establish clearly the facts. If there is no agreement on the facts, evidence shall be proposed. Once the evidence is deemed relevant and therefore admitted, such evidence shall be submitted forthwith.

When the controversy is purely legal and evidences are not proposed or are deemed not relevant, and the parties do not wish to submit closing arguments, the judge shall hand down a ruling without further delay. When the hearing takes place, questions question shall be proposed orally, without admitting written interrogatories. Documents

containing written questions and cross-questions shall not be admitted for securing oral evidence.

When the number of witnesses is excessive and, in the view of the judicial authority, the witnesses' statements may constitute pointless repetition of testimony concerning matters that have been made sufficiently clear, the judicial authority may limit the number of witnesses at its discretion. In the taking of expert witnesses, the general rules on the selection of experts by random drawing shall not be applicable.

Parties may appeal against the judge's decisions to refuse evidence or to admit evidence denounced as obtained in violation of fundamental rights by filing a petition for reconsideration at once, to be substantiated and decided upon forthwith.

Should the judge deem that there is some relevant evidence that cannot be submitted at the hearing and no *mala fides* on the part of the person burdened with furnishing the evidence is involved, the judge shall stay the hearing. The competent court clerk shall immediately schedule the place, date and time for resuming the hearing without the need to give further notice.

After the submission of any evidence and any closing arguments, parties may be allowed to make any oral statements at the conclusion of the hearing, before the hearing is terminated. The hearing shall be documented. When the recording media cannot be used for any reason, the court clerk shall draw up a record of each session.

III.- The ruling.

The ruling shall lay down one of the following judgments:

a) Non-admission of the claim for judicial review.
b) Upholding or dismissal of the claim for judicial review.

The ruling shall moreover contain the appropriate award of costs.

The ruling shall declare the claim inadmissible in the cases discussed above. It shall uphold the claim for judicial review when the regulation, decision, inaction or *ultra vires* commits any legislative infraction, including misuse of power (exercise of administrative powers for purposes other than those laid down by legislation). It shall declare the challenged regulation or decision unlawful and quashed in full or in part, or shall order the challenged action stopped or modified. If the claimant sought acknowledgement and reinstatement of a legal situation specific to an individual, the ruling shall acknowledge the said legal situation, and take such measures as necessary for the full reinstatement of the said legal situation.

If the measure consists in issuance of an act or performance of a legally binding action, the ruling may lay down a period for compliance with judgment. If a claim for damages is upheld, the right to redress shall be declared, indicating likewise who is obligated to

pay compensation. The ruling shall also decide on the amount of compensation when asked expressly by the claimant and sufficient proof is a matter of case record. Otherwise, the assessing criteria shall be established and the definitive specification of the amount shall be deferred to the enforcing period.

A ruling declaring a claim for judicial review inadmissible or dismissed shall have effects amongst the parties only. Quashing of a provision or act shall have effects for all persons affected. However, final rulings quashing a general provision shall have general effects as of the date of publication of the judgment, except for final decisions dictated before the quashing order takes general effect. Upholding of claims for acknowledgement and reinstatement of a legal situation specific to an individual shall have effects amongst the parties only. Nevertheless, such effects may be expanded to third parties

Rulings may be modified if after pronouncement, decisive documents are recovered; the same shall take place when the ruling was handed down by virtue of certain documents which have been acknowledged as and declared false, as well as in cases where the ruling was handed down by virtue of oral evidence and later the witnesses were found guilty of giving false testimony. Moreover, if the ruling was handed down by virtue of bribery, breach of official duty, violence or some other fraudulent machination, the ruling must be modified.

IV.- Appeals against writs (*providencias*), orders (*autos*) and rulings (*sentencias*).

1.- Appeals against procedural decisions: writs and orders.

Petitions for reconsideration (*recurso de súplica*) may be filed against writs and orders not amenable to appeal to a higher court or to the Supreme Court.

Appeals for reversal (*recurso de reposición*) are possible unless otherwise stated by law, except for orders deciding upon appeals for reversal, or petitions for clarification.

Orders (*autos*) handed down by Single-Judge Courts are open to appeal to the upper hierarchical Court in the following cases;

a) Orders ending separate proceedings for precautionary measures.

b) Orders in proceedings aiming to enforce judgments.

c) Orders declaring non-admission of the claim for judicial review, or making the claim impossible to continue.

d) Orders in electoral challenging proceedings.

e) Orders handed down in application of provisional measures requested in appealing proceedings against judgments.

2.- Appeals against rulings.

- Ordinary appeal to the next higher Court.

The rulings of single-judge administrative courts and single-judge central administrative courts shall be appealable to the next higher court, except for the following cases:

a) Cases involving sums of 30,000 Euros or less.

b) Cases concerning election matters.

The following rulings shall always be amenable:

a) Rulings declaring the appeal inadmissible in the case in subparagraph a) of the paragraph above.

b) Rulings handed down in the procedure for the protection of fundamental personal rights.

c) Rulings deciding on litigation amongst public administrations.

d) Rulings deciding on indirect challenges to general provisions.

Appeals to the next higher court are admissible with both devolutive and suspensive effects, unless otherwise instructed by law. In addition, the Court may at any time, at the request of the interested party, take the pertinent precautionary measures to ensure future enforcing of the ruling. The mere filing of an appeal to the next higher court does not stay enforcing proceedings. Actually, the parties favoured by the ruling may request provisional execution.

Likewise a bond or some security may be demanded to cover liability. In that event provisional execution may not take place until the bond or measure is completed in the case records. Provisional execution shall not be ordered when it may cause irreversible situations or damage impossible to redress. Parties shall have the right of a hearing in any case. Public administration, however, is exempted from furnishing a bond.

The notice of appeal shall be filed with the court that handed down the ruling at issue in a well-reasoned document that must contain the arguments on which the appeal is based. If not filed at the end of fifteen days, the Court Clerk shall declare the ruling final. If the submitted notice meets the requirements established in the paragraph above and refers to a ruling amenable to appeal, the court clerk shall hand down a decision admitting the appeal. The parties may ask for the admission of evidence refused or not duly submitted in the previous trial.

After checking the appeal for admission, the Court shall refer the case records and the administrative file, in the company of the documents filed, to the higher court, summoning the parties to appear before the upper Court. The parties may ask the

judicial authority to schedule a hearing, to receive closing arguments, or to declare the lawsuit ready for judgment forthwith.

The court clerk shall decide if a hearing and closing arguments is to be held. When the hearing has been held, or the closing arguments have been submitted, the Court Clerk shall declare the lawsuit ready for judgment. The Court shall lay down a ruling.

- Ordinary appeal to the Supreme Court.

Rulings handed down by the National Court (not in appeal proceedings) and by the Regional Courts (not in appeal proceedings) shall be appealable to the Supreme Court.

Exceptions are made for:

a) Rulings referring to questions of personnel, save where they affect the creation or termination of the service relationships of career civil servants.

b) Rulings, regardless of the matters at issue, in cases involving sums of 600,000 Euros or less, except for the special procedure for the defence of fundamental rights, in which case appeals shall be in order regardless of the sum involved.

c) Rulings handed down in the procedure for the protection of the fundamental right to freedom of assembly to which Section 122 refers.

d) Rulings on election matters.

The following orders are also amenable to appeal to the Supreme Court, in the same events provided for in the preceding section:

a) Orders declaring the claim for judicial review inadmissible or making it impossible to continue.

b) Orders ending separate proceedings for suspension or other precautionary measures.

c) Orders laid down in execution of the ruling, whenever the orders settle issues not directly or indirectly decided upon by the ruling or the orders contradict the terms of the judgment being executed.

d) Orders handed down provisional execution of rulings.

In order to prepare an appeal to the Supreme Court it is a necessary requirement to have filed a petition for reconsideration beforehand. An appeal to the Supreme Court must be founded on one or more of the following grounds:

a) Abuse, excess or defect in the exercise of jurisdiction.

b) Incompetence or improper procedure.

c) Non-observance of the essential forms of the trial due to violation of the rules regulating judgment or governing procedural acts and guarantees, provided that, in this latter case, the party has been rendered defenceless.

d) Violation of the rules of the legislation or jurisprudence applicable in the settling of the debated issues.

Appeals to the Supreme Court shall be prepared via notice of appeal entered at the lower Court. It must contain a statement of the intention to appeal, with a succinct explanation of how the necessary requirements of form are met. Should the ten-day period expire and no appeal have been prepared, the ruling shall become final. If the preparatory document meets the requirements, and refers to a decision appealable to the Supreme Court, the Court Clerk shall deem the appeal prepared. Otherwise the clerk shall report to the Court, which shall decide accordingly.

If the appeal is held to be prepared, the Clerk shall summon the parties to appear and file the appeal within the stated period before the Supreme Court. He/she shall forward the original case records and the administrative file as well. The filing of an appeal to the Supreme Court shall not forestall provisional execution of the challenged ruling. The parties favoured by the ruling may request provisional execution. A security bond may be demanded to cover liability. The lower Court shall refuse provisional execution when it may cause irreversible situations or damage impossible to redress.

The appellant must appear before the Supreme Court and lodge the notice of appeal stating the well-reasoned grounds on which the appeal rests, and citing the legislation or jurisprudence the appellant considers violated. If not, the Court clerk shall declare the appeal lapsed. After the appeal has been filed, the Court Clerk shall forward the proceedings to the reporting Judge. The decision to admit or not to admit the appeal shall then be examined and submitted to the division for deliberation.

The division shall hand down an order of non-admission in the following cases:

a) The appeal requirements have not been observed or the challenged decision is not amenable to appeal.

b) If the invoked in the notice of appeal are not included amongst those above listed as motives of cassation.

c) When the legislation or jurisprudence supposedly violated is not cited; if the cited legislation or jurisprudence bears no relationship whatsoever to the debated issues; or if it was necessary to have requested correction of the failure and there is no record of any such request having been made.

c) If other substantially identical appeals have been dismissed on the basis of merits.

d) If the appeal is manifestly ungrounded.

e) In cases of an unidentified amount not referring to direct or indirect judicial review of a general provision, if the appeal is grounded on the reason in Section 8VIII.I.d) and the case is regarded as lacking Supreme Court interest whereas it does not affect a large number of situations or is not sufficiently general in content.

Non-admission is eventually held by means of an order, and in most cases it will award of costs to the appellant. The order in not appealable.

Where the appeal is admitted, the Court Clerk shall deliver a copy of the appeal to the defendant and give him/her a period to lodge their opposition in writing. When the period has expired, whether opposition has been submitted or not, the Clerk shall schedule a date and time for the hearing should the division so decide, or otherwise shall declare that the lawsuit is ready for judgment. The Supreme Court shall hand down a ruling after the hearing or the declaration that the lawsuit is ready for judgment.

- Appeals to the supreme court for doctrine unification.

Appeals to the Supreme Court for doctrine unification may be filed against rulings handed down by the administrative divisions of the Supreme Court, the National Court and Regional Courts, when different pronouncements are reached with respect to the same litigants or different litigants in an identical situation, on the merit of largely the same findings of fact, considerations of law and demands.

- Appeals to the supreme court in the interest of the law.

Rulings handed down by administrative judges and rulings pronounced by administrative divisions of Regional Courts and of the National Court may be challenged to the Supreme Court by public authorities when the decision is deemed seriously injurious to the general interest and wrong. Only the correct interpretation and application of legislation issued by the State and having a telling effect on the challenged judgment may be tested through this appeal procedure.

- Appeals against decisions of the court clerk.

Appeals for administrative reversal may be filed against procedural rulings (*diligencias de ordenación*) and non-final decrees (*decretos no definitivos*) issued by the court clerk.

V.- Special procedures.

1.-Procedure for the protection of fundamental rights

Section 53 *CE* states a special procedure for judicial protection of fundamental rights, which are those comprised between section 14 and 30 of the Spanish Constitution, including the conscientious objection. Administrative jurisdiction shall address such

issues. Citizens might also challenge the regulation or decision to the Constitutional Court through the appeal for protection of fundamental rights regulated in *LOTC*.

These claims shall always be processed as preferred claims and the procedure is particularly fast. The application for judicial review shall clearly and precisely state the right or rights whose protection is sought and concisely state the basic arguments on which the application is founded. On the day of application submission or the following day, the Court Clerk shall urgently instruct the appropriate administrative body to dispatch the file accompanied by any reports and data. Upon dispatching the file, the administrative body shall notify all who appear as concerned in the file. Such notice shall enclose a copy of the application and will summon the parties to appear at the Court as co-defendants.

The administration upon dispatching the file and the other defendants upon appearing may submit a well-reasoned petition for non-admission, and petition for a hearing. When the administrative file is received at the Court, the Court Clerk shall so notify the parties giving two days to submit arguments.

After deciding on admission, and providing that it is decided to carry on with the special procedure, the Court Clerk shall lay before the claimant the file, giving the claimant eight days in which to lodge the suit and enclose the documents. When the suit is lodged, the Court Clerk shall serve notice thereof on the Prosecution Service and the defendant parties, giving them a shared, unextendable period of eight days to submit their pleas.

After such step, the judicial authority shall decide on the admission of evidence starting a phase for evidence proposal and submission that shall in no case be longer than twenty days. Finally, the judicial authority shall hand down a ruling within five days of the conclusion of proceedings. Devolutive appeal to the next higher court shall always be possible against rulings of single-judge administrative courts.

2.- Questions of illegality

The Court that declared a decision null and void in an indirect appeal concerning a regulation must lodge a question of illegality to the competent Court within the five days following the day when the case records show the ruling to be final. The question must be restricted exclusively to that section or sections whose declaration of illegality served as the basis for upholding the suit and declaring the decision null and void.

The Court shall summon the parties, enabling them to appear and lodge arguments. The Clerk shall order publication of the order raising the question in the same official periodical where the questioned regulation was published. At the end of the period for appearing and entering arguments, the Clerk shall declare the procedure concluded. The ruling shall be handed down within ten days of the said declaration. The ruling shall partly or entirely uphold or dismiss the question, save where some procedural

requirement is missing and cannot be corrected, in which case the question shall be declared inadmissible.

When the ruling settling the question of illegality has become final, the court clerk shall notify the judge or multi-judge court that raised the question. The ruling shall not affect the particular legal situation stemming from the ruling handed down by the lower Court that raised the question. Final rulings dismissing questions of illegality shall also be published.

3.- Procedure in cases of prior administrative suspension of resolutions

In cases where by law the administrative suspension of acts or resolutions of public entities or corporations must be followed by the judicial review, *LJCA* states certain specific procedural rules.

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The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law

Abstract: The discussion on the emergence of global administrative law is centered around the question: "Is it law?" and problems of accountability. This is a narrow perspective which ignores the autonomy of the administrative "internal law" generated by administrative agencies themselves. This is shown for the evolution of domestic administrative law in the 19th century and its transformations in the 20th century. Domestic administrative law is only to a much lesser extent a product of courts or legislators than hitherto taken for granted. This is why it should not come as a surprise that the instruments and forms of global administrative law are generated by transnational administrative networks of agencies. The evolution of both domestic and transnational administrative law will allow for new heterarchical forms of accountability and legitimation once the focus on a hierarchical concept of delegation is given up. The paper tries to outline a perspective on the transformation of administrative law based on domestic administrative law but at the same time intends to open a perspective on a new look at the emergent global administrative law.

Keywords: accountability, global administrative law, autonomy, administrative "internal law", Domestic administrative law, transnational administrative networks of agencies, new heterarchical forms of accountability, legitimation, delegation, transformation

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The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law

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I. PRELIMINARY REMARKS

The discussion on "international administrative law" has been established – following the logic of its object – as an international topic for quite some time. However, this evolution does not exclude the differentiation of, so to speak, regional and methodologically approaches within the global network of legal research: in the US, one can observe a focus on "global administrative law" at the law faculty of NYU – and this shift of the accent to "global" instead of "international administrative law" is not without consequences. The focus is more on case studies and methodological questions.[1] This approach corresponds with the ideas of an Italian group of researchers, which has been set up at Viterbo,[2] and with other individual contributors to the international discussion. In as far as one can already talk about an established field of research in Germany, one can observe a different focus on a rather traditional systematic differentiation of certain "matters" which are undergoing a process of internationalisation.[3] In the following, an approach will be developed which tries to build a bridge between global and domestic administrative law. It will be shown that there is a close link between the evolution of administrative law in postmodernity and the emergence of global administrative law, and that the basic institutions of administrative law are products of the autonomous rationality of administration. This sheds new light on the questions of both the accountability and the legitimation of transnational global networks.

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[1] See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, (68 LAW AND CONTEMPORARY PROBLEMS, 15 (2005); Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*", 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 187 (2006); Jean-Bernard Auby, LA GLOBALISATION. LE DROIT ET L'ETAT, 2nd ed., 2010.

[2] www.ricercaitaliana.it/prin/unita

[3] See the contributions in: INTERNATIONALES VERWALTUNGSRECHT (Christoph Möllers & Andreas Voßkuhle, eds) 2007).

II. THE AUTOPOIESIS OF LAW AND THE EMERGENCE OF GLOBAL ADMINISTRATIVE LAW

A. NO ADMINISTRATIVE LAW BEYOND DELEGATION OF POWER? THE SELF-GENERATIVE FUNCTION OF ADMINISTRATIVE LAW IN THE EVOLUTIONARY PROCESS

In systems theory, the focus of the observation of the legal system shifts from norms to decision-making, *i.e.*, the legal system is regarded as being composed of decisions, not of persons and not of norms as the object of application to specific cases. At least, this is constitutive of the difference between centre (decisions) and periphery (legislation) of the legal system. This may sound counter-intuitive to traditional approaches to law, and it may not do sufficient justice to the practice of contracting[4] and other transactions, which do not take on the form of a binding decision.[5] However, this discussion will not be taken up here. The autopoietic construction of the legal system as processing from decision to decision is opposed to a more traditional conception of decision-making as deriving (specific) decisions for cases from a (general) norm which is integrated in a whole system of legal rules and – super-imposed at this level of norms – a set of principles which integrate the law in a system. For the purposes of this article, the difference between continental European and Anglo-American law will be left aside, because, as will be shown later, the blind spot of the most diffused approaches to the understanding of the self-transformation of the legal system that the law undergoes under the pressure of the evolution of modern society is the same in both traditions. The focus of the following assumption is more on the inevitable autonomy of not only judicial, but also administrative, decision-making, which allows for a recognition of the creative normative function of the processing of administrative decision-making.[6] The traditional conception tends to reduce the creative norm-generating role beyond the legislative authority to the judiciary whereas the this normative role of the administration is left in the shadow. Modern

[4] See Jody Freeman, C*ollaborative Governance in the Contracting State*, 45 UNIVERSITY OF LOS ANGELES LAW REVIEW, 1 (1998); *ead*., *The Contracting State*, 28 FLORIDA STATE UNIVERSITY LAW REVIEW, 155 (2001), (arguing that the rise of the contract in administrative action is a sign of a general transformation towards a more open type of "governance" and not a symptom of decline of democratic legitimation of administrative agencies); Alfred A. Aman jr., *Globalization, and the Need for a New Administrative Law*, 49 UNIVERSITY OF LOS ANGELES LAW REVIEW,p. 1687 (2002); for a critique, see Mark Seidenfeld, *An Apology for Administrative Law in the "Contracting State"*, 28 FLORIDA STATE UNIVERSITY LAW REVIEW, 215 (2001), (emphasising the flexibility that was already inherent in traditional administrative law); for the far advanced practices of the contracting state in the UK, see Peter Vincent-Jones, THE NEW CONTRACTING STATE: REGULATION, RESPONSIVENESS, RELATIONALITY (Oxford: Oxford University Press, 2006).

[5] See in a theoretical perspective Karl-Heinz Ladeur, *Das subjektive Recht als Medium der Selbstransformation des Rechts and Gerechtigkeit als deren Parasit*, p. 109 & 114 *et seq*., in: ZUR (UN-) MÖGLICHKEIT EINER GESELLSCHAFTSTHEORIE DER GERECHTIGKEIT (Gunther Teubner, ed., 2008).

[6] Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era 1801-1829*,116 YALE LAW REVIEW 1636 (2007).

administrative law cannot, of course, deny a creative element that is termed "discretion", although this leeway for administrative autonomy is hidden within the idea of a legislative delegation of power.[7]

"Delegation" includes the assumption that the domain of options within which the "delegated" power of administrative decision-makers can develop is defined by the legislator. However, global administrative law is confronted with the design of forms, instruments and procedures beyond the established rules of general administrative law and its inherent structuring function.[8] As will be shown in more detail below, the fundamental forms and components of general administrative law have not been developed by the legislator nor by the judiciary (which has made some of its implicit rules explicit), but by an experimental search process of the administration itself.[9] The ensuing "reverse" process of norm-generation – from administrative experimental rule generation to explicit stabilisation through courts and finally through legislation – appears to be incompatible with the traditional understanding of the separation of powers.

This unavoidable self-generative element of the legal system is due to the fact that we have to distinguish- from explicit rule-making - an evolutionary process of self-transformation of (not only administrative) law, which is due to the dynamic of society at large, including its knowledge basis and the social norms and expectations that try to cope with the societal complexity. As will be discussed later, the basic forms of both administrative and private law are not created by the legislator, but are, instead, stabilised *ex post* by the formulation of historical "versions" in the legislative process which correspond to a societal challenge which is managed - in a first step - by administrative or judicial decision-makers (the latter in private law).

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[7] See only the overview in Francesca Bignami, The Administrative State in a Separation of Powers Constitution: Lessons for European Community Rule-Making from the United States, Jean Monnet Center for International and Regional Economic Law and Justice, New York University, 1999; for a critique see Jerry L. Mashaw, *Federal Administration and Administrative Law of the Gilded Age,* 119 YALE LAW JOURNAL 1362, 1377 et seq. (2010).

[8] See Eberhard Schmidt-Aßmann, DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE (2d ed., 2004).

[9] The role of courts in the development of general administrative law is overstated when the latter is reduced to *judge*-made law, see Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law,* 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW23 (2009): from the absence of a legislative delegation of power to administrative deciders does not follow a supplementary norm generating role of courts alone, administration itself has to be regarded as the creator of the instruments and forms of administrative law; the role of the judges consisted rather in the doctrinal stabilisation of the institutions of general administrative law, for the role of doctrine in general administrative law see Eberhard Schmidt-Aßmann, ALLGEMEINES VERWALTUNGSRECHT ALS ORDNUNGSIDEE (2nd ed., 2006) 3 et seq. and Jens Kersten & Sophie-Charlotte Lenski, *Die Entwicklungsfunktion des Allgemeinen Verwaltungsrechts*, 42 DIE VERWALTUNG 503 (2009); Oliver Lepsius, *Themen der Rechtswissenschaftstheorie*, 1, 27, in:, RECHTSWISSENSCHAFTSTHEORIE (Matthias Jestaedt & id. , eds., 2008) . For a critique of simplistic "functionalist" conception of legislation as the (generative) democratic will see Martin Loughlin, PUBLIC LAW AND POLITICAL THEORY 60 (2003); id., WHAT IS PUBLIC LAW?, 151 et seq. (2003).

Neither administrative nor private law can be understood and practiced without the observation of social norms and cognitive assumptions of normality. The legal system is linked permanently to the "collective knowledge" of society[10] and the basic forms of attribution of responsibility: in modernity, we can first observe the emergence of the "society of individuals",[11] which provokes the rise of a new administrative law based upon individual decisions. The next stage of the evolution of administrative law is characterised by the new paradigms derived from the requirements of the "society of organisations" and its consequences (such as planning law, the forms of the welfare state, *etc*.) The forms and procedures of this new stage of administrative law had to be found in an experimental process first, and could afterwards be integrated in new types of laws and legal procedures of decision-making. We are now confronted with a new change of paradigm, the rise of the "network society", which, again, demands new administrative forms and procedures for decision-making in conditions of increasing complexity. With Jerry L. Mashaw, one might describe the evolution of administrative law as underlying a "cyclical oscillation between categorical and contextual norms".[12] Administrative law is deeply characterised by paradigmatic transformations which are initiated by administrative decision-makers in experimental processes and finally stabilised by court practice and the legislator.

The hypothesis which underlies the following reflections is based upon the assumption that the globalisation process does not invade a stable domestic administrative (or private) legal system from outside, but that it is also a consequence of an evolutionary process that disrupts the legal system from within. It goes without saying that this evolutionary model does not assume that the new paradigms replace the older ones completely[13], but that we have to conceive of the legal system of postmodernity as being multi-layered because the new paradigms are based upon a secondary respectively tertiary re-modelling of the preceding one. This hypothesis can explain the unavoidable and legitimate creative role of administrative agencies in the new transnational realm of decision-making, and allows for a more systematic self-reflection of the dynamic process of change in administrative and private law.

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[10] One can even speak about the "fact" in legal contexts as not being a "truth" but the product of a legal procedure, Barbara J. Shapiro, A CULTURE OF FACT. ENGLAND, 1550 – 1720, 11 (2000).

[11] Norbert Elias,THE SOCIETY OF INDIVIDUALS(1939 in German, 1991).

[12] Jerry L. Mashaw, *Accountability and Intellectual Design: Some Thoughts on the Grammar of Governance,* 115, 154 et seq., in: PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS, EXPERIENCES (Michael Dowdle, ed., 2006).

[13] This is why the question posed by Carolyn J. Hill & Laurence E. Lynn, *Is Hierarchical Governance in Decline? Evidence from Empirical Research,* 15 JOURNAL OF PUBLIC ADMINISTRATION. RESEARCH AND THEORY (2005) 173, 189, is legitimate though the authors' quantitative focus on the permanence of hierarchical structures of decision making is only of limited analytical value.

B. A SIDE LOOK AT PRIVATE LAW: IS *LEX MERCATORIA* LAW?

Some legal theorists have put forward the claim that global law, the *Lex Mercatoria* as a self-organised practice of private law, in particular, has to be regarded as "less closed" and less autonomous.[14] However, this would be a misunderstanding: as will be shown later, global law differs considerably from state-based law; this notwithstanding, the law should not be regarded as losing its autonomy under conditions of globalisation. Instead, the network paradigm can contribute to a better understanding of the new types of transnational legal practices: *Lex Mercatoria* lacks the coherence and methodological foundation of traditional private law,[15] but this is not a problem, because the common frame of interests of (mainly) big transnational firms can compensate for the lack of guidance of the arbitration practices. Its openness is further attenuated by the practice of referring to clusters of arbitration decisions and the UNIDROIT-principles.[16] A parallel might be drawn between this new type of entanglement of norms and contracts in private law, and the new creative function of administrative agencies, which consists of the design of new forms of action in transnational networks of public and private actors.

The disruptions and fragmentations emerging from the evolution of the "global law beyond a state"[17] or, rather, from a heterarchical "network of networks" of law with varying combinations of characteristics according to actors, transactions, knowledge bases do not – according to systems theory – call into question the autonomy of law as a self-constructing system which operates with its own tool box and observes itself within its own horizon, which

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[14] Assuming only a "relative autonomy" and reducing the law finally to what the judge say what the law is: Michel van de Kerchove und François Ost, LE DROIT OU LES PARADOXES DU JEU (1992); for an alternative position see G. Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems,* 45 THE AMERICAN JOURNAL OF COMPARATIVE LAW 149 (1997), id. & Peter Korth, *Zwei Arten des Rechtspluralismus: Normkollisionen in der doppelten Fragmentierung der Weltgesellschaft*, 137 in: NORMATIVE PLURALITÄT ORDNEN (Mattias Kötter & Gunnar Folke Schuppert, eds., 2009); from a political science perspective Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 JOURNAL OF EUROPEAN PUBLIC POLICY 627 (2006).

[15] Wolfgang Peter, Jean-Quentin de Kuyper & Benedict de Candolle, ARBITRATION AND RENEGOTIATION OF INTERNATIONAL INVESTMENT AGREEMENTS 152 (1995); Paul Lagarde, *Approche critique de la Lex Mercatoria*, in: ETUDES OFFERTES À BERTHOLD GOLDMANN 125, 133 (1983); Andreas Abegg, *From the Social Contract to a Social Contract Law. Forms an Functions of Administrative Contracts in a Fragmented Society: A Continental View*, Center for the Study of Law and Society Faculty Working Paper, February 2008.

[16] Axel Metzger, EXTRA LEGEM, INTRA IUS. ALLGEMEINE RECHTSGRUNDSÄTZE IM EUROPÄISCHEN PRIVATRECHT 533 (2009); Ursula Stein, LEX MERCATORIA 242 (1995); for the evolution of its self-reflexive momentum see also Gunther Teubner,"Global Bukowina". Legal Pluralism in the World Society, in: GLOBAL LAW WITHOUT A STATE, 12 (1997); Andreas Fischer-Lescano & id., *Regime Collision The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 999 (2004); Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 EUROPEAN LAW JOURNAL 400 (2002); Gralf-Peter Calliess & M. Renner, *From Soft Law to Hard Code: The juridification of Global Governance*, SSRN-WP 2007; Andreas Fischer-Lescano, *Transnationales Verwaltungsrecht*, 63 JURISTENZEITUNG 373 (2008); see also the contributions in: INTERNATIONALES VERWALTUNGSRECHT (Christoph Möllers, Andreas Voßkuhle & Christian Walter, eds., 2007).

[17] See Gunther Teubner, Breaking Frames: Economic Globalization and the Emergence of Lex Mercatoria, 5 EUROPEAN JOURNAL OF SOCIAL THEORY 199 (2002).

cannot *but* draw a distinction between itself and its environment (the other systems in particular) and is not just driven by external forces (like the political or the economic system).[18]

However, it is not without consequence that it is not just from the point of view of systems theory that the question "is global law 'law'?" has to be raised.[19] The doubt that the question may be answered in the negative is one of the uncertainties which irritate the professional observers of the practices that are termed "global law" as opposed to international law.[20] This is probably one of the reasons why N. Luhmann took the view that the "world society"[21] - beyond the legally-structured nation state and the international public law as centred on the nation state as well - is increasingly governed by "cognitive" rules,[22] and not in any traditional normative mode.

C. GLOBAL LAW – IS IT LAW?

In the present discussion on global law, the question "Is it law?" has been raised in particular by G. Teubner,[23] and, recently, by B. Kingsbury.[24] The recognition of a possible "generation of

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[18] Kingsbury, *supra*, note 9; David Dyzenhaus, *The Concept of (Global) Administrative Law*', IILJ Working Paper 2008/7, www.iilj.org; for lex mercatoria Teubner , *supra, note* 17 ; id & Korth, *supra*, note 14.

[19] Kingsbury, *supra*, note 9; see also Alec Stone Sweet & Florian Grisel, *L'arbitrage international: Du contrat dyadique au système normatif*, 52 ARCHIVES DE PHILOSOPHIE DE DROIT 75 (2009) who focus on the judge-like stabilisation of a "dyadic" normative practice by a third party; this view underestimates the autonomous creative potential of a transsubjective practice.

[20] See Eberhard Schmidt-Aßmann, *Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen*, 45 DER STAAT 315 (2006); Franz C. Mayer, DIE INTERNATIONALISIERUNG DES VERWALTUNGSRECHTS (2006); Auby, *supra, note* 1; Stefano Battini, AMMINISTRAZIONI SENZA STATO. PROFILI DI DIRITTO AMMINISTRATIVO INTERNAZIONALE (2003); Sabino Cassese, LO SPAZIO GIURIDICO GLOBALE (2003); id., *The Globalisation of Law*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 976 (2006); Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 695.

[21] For the concept of the "world society" see Niklas Luhmann, *Die Weltgesellschaft*, 51, in: SOZIOLOGISCHE AUFKLÄRUNG, Vol. 2, (id., 1975).

[22] David Kennedy, *The Mystery of Global Governance,* 37, 58, in: RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeffrey L. Dunoff & Joel P. Trachtman, eds., 2009).

[23] Gunther Teubner, *Self-Constitutionalization of Transnational Corporations? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 17 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 2010, to appear; id., Constitutionalising Polycontexturality, 19 SOCIAL AND LEGAL STUDIES 2010, to appear; id., *The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination,* 203, in: CONFLICT OF LAWS AND LAWS OF CONFLICT IN EUROPE AND BEYOND (Rainer Nickel, ed., 2010); see also id., *supra*, note 10, 3; see also Jean-Marie Guéhenno, THE END OF THE NATION STATE (1995), 100.

[24] Kingsbury, *supra*, note 9; for a critique see Ming-Sung Kuo, *Inter-Public Legality or Post-Public-Legitimacy?, A Response to Professor Kingsbury's Conception of Global Administrative Law*, 20 EJIL 997 (2009; see also Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 55 AMERICAN

norms as a spontaneous process" between equal private actors seems to be quite acceptable for traditional approaches to law.[25] However, this is different with reference to public law, which seems to be based upon the will of an institutionalised legislator or a delegation of law-making power.[26] Some authors even go so far as to deny any evolutionary dimension of public law that is said to be "intentionally steered".[27] Traditional public law still draws on the forms that have emerged in the realm of the nation state, and tends to deny the legal character of the new phenomena of global law when it seems to transcend the borders of international law.[28] The uncertainties of the new legal order which no longer fit in the forms of law, which have been moulded by, and with reference to, the state are expressed by the use of the term "soft law".[29] Jerry L. Mashaw has convincingly argued that the doubts of the "lawness" of global administrative law stem from the same origin as the conventional ignorance of the generative power of administration that manifests itself in the emergence of the "internal administrative law" in the 19th century.[30] In the following, it will be shown that the basic transformations domestic administrative law has undergone in the last decades can only be explained if such an evolutionary dimension of public law, which opens a new perspective also on the emergence of global administrative law, is recognised.

In international private law, the question of whether *Lex Mercatoria* is law is controversial, as well..[31] In global administrative law, the question can – apparently - be left open according to

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JOURNAL OF COMPARATIVE LAW 843 (2007), who give an overview of the discussion and demonstrate the primarily semantic character of the controversy; Gralf-Peter Calliess & Peer Zumbansen, ROUGH CONSENSUS AND RUNNING CODE. A THEORY OF TRANSNATIONAL LAW 79, 113 (2010), take the view that elements of domestic law that are transplanted to the transnational sphere of law undergo a "transmutation" – one may think that this is but another version of the semantic controversy.

[25] See Christoph Möllers, *Transnational Constitutionalism Without a Public Law?*, 329, in: TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM (Christian Joerges, Inger-Johanne Sand & Gunther Teubner, eds., 2004).

[26] See with reference to (domestic) standards Veeck v. Southern Building Code Congress International, 293 F3d 791, 799 (5th Cir. 2002); Harm Schepel, *Constituting Private Governance Regimes*, 161, 162: in: Joerges et al., (eds.), *ibid*.

[27] Möllers, *supra*, note 25, 330, 338.

[28] For the sources of international law that are relevant in global administrative law See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW AND CONTEMPORARY PROBLEMS 15, 29 (2005); for the necessity to go beyond these norms in the traditional sense see Christian Tietje, *Recht ohne Rechtsquellen?*, 24 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 27, 40 (2003).

[29] Pierre-Marie Dupuy, *Soft Law and International the Law of the Environment*, 12 MICHIGAN JOURNAL OF INTERNATIONAL LAW 420 (1991); Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VANDERBILT OF TRANSNATIONAL LAW 501 (2009); for the far spread conceptual vagueness see also Anne Peters & Lucy Koechlin, *Towards Non State-Actors as Effective, Legitimate, and Accountable Standard Setters*, 492, 495, in: NON-STATE ACTORS AS STANDARD SETTERS (ead, ead.,Till Förster, and Gretta Fenner Zinkernagel, eds., 2009).

[30] Mashaw, *supra, note* 6, 1470, 1476.

[31] See Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 NDIANA JOURNAL OF GLOBAL LEGAL STUDIES 447 (2007) (that lex mercatoria can neither be reduced to "anational" law nor to a derivative of state law but hat attained a new quality of a law beyond the state that combines diverse elements); see the documentation

many authors, because also domestic administrative practice have acknowledged a number of forms of preparation, of internal rule-making, procedures which have a strong impact on the legal processes without being (unanimously) regarded as being legal acts or legal norms in the stricter sense.[32] G. Teubner – as a private lawyer – is focused on private legal norms, and takes the view that it is "global civil society" to which the new forms of societal legal norms can, and, indeed, have to, be attributed as an authoritative "source" of law beyond the state. This approach pre-supposes a new "societal constitutionalism"[33] that stipulates a law-making potential beyond the traditional forms of the state.[34] The spontaneously generated norms of transnational operations (not only commercial in the narrower sense, but also including the "*Lex Digitalis*" of the global communication order or *Lex Sportiva*[35] as the law of the transnational sports organisations and their rule-making requirements) are not generally recognised as law[36] by state-based tribunals, whereas, in fact, as long as this "law" can make use of its own institutions (the international mediation procedures), it is, at least, a functional equivalent to law in the stricter sense. G. Teubner takes a more principled approach and, as a consequence of the acknowledgment of the norm-giving power of the "global civil society", attributes legal character in the stricter sense to *Lex Mercatoria* – following the terminology of H.L.A. Hart - because it has generated its own "secondary rules", *i.e.*, procedures of reflection, distinction and control, as opposed to non-institutionalised norms of morality, *etc*.[37] This reference risks to be reductionist because it sets aside the paradox of the self-generation of the law as a social practice, as a "language" with its eigenvalue, and to end up in a circular

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of the controversy in Klaus-Peter Berger, FORMALISIERTE ODER "SCHLEICHENDE KODIFIIZIERUNG" DES INTERNATIONALEN WIRTSCHAFTSRECHTS (1996) (containing a differentiated discussion of all major pros and cons with reference to the question "is it law?"; see also (skeptically) Jan Kropkoller, INTERNATIONALES EINHEITSRECHT 123 (1996); more positively: Ursula Stein, LEX MERCATORIA 211 et seq. (1996); Hans-Joachim Mertens, *Das Lex Mercatoria Problem*, in: FESTSCHRIFT ODERSKY 857, 860 (Reinhard Böttcher et al., 1996).

[32] Joel Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEXAS LAW REVIEW 553 (1998) (describing the normative effects of technology on the legal structure of transactions via information technology). .

[33] David Sciulli, THEORY OF SOCIETAL CONSTITUTIONALISM: FOUNDATIONS OF A NON-MARXIST CRITICAL THEORY (1992).

[34] Gunther Teubner, *Verfassungen ohne Staat? Zur Konstitutionalisierung transnationaler Regimes*, in: RECHT OHNE STAAT (to appear, Klaus Günther & Stefan Kadelbach, eds., 2010).

[35] Reidenberg, *supra*, note 32; Birgit Rost, DIE HERAUSBILDUNG TRANSNATIONALEN WIRTSCHAFTSRECHTS AUF DEM GEBIET DER INTERNATIONALEN FINANZ- UND KAPITALMÄRKTE 251 (2007); Christopher M. Bruner, *States, Markets, and Gatekeepers: Public-Private Regulatory Regimes in an Era of Economic Globalization*, 30 MICHIGAN JOURNAL OF INTERNATIONAL LAW 125, 165 (2008);.Franck Latty, LA LEX SPORTIVA. RECHERCHE SUR LE DROIT TRANSNATIONAL (2007).

[36] See for this argument with reference to the Lex Mercatoria Berger, *supra*, note 31, 75; for a theoretical reconstruction of an autonomous law beyond the state ee Gunther Teubner, *Breaking Frames: Globalisation and the Emergence of Lex Mercatoria*, 5 EUROPEAN JOURNAL OF SOCIAL THEORY 199 (2002).

[37] See Teubner & Korth, *supra*, note 14.

argumentation which shifts the criterion for the recognition of "lawness" just to a meta-norm.[38] Such an approach tends to neglect the emergent character of legal institutions which are only stabilized by secondary norms "after the fact". The following analysis tries to shed some light on the historical transformations within domestic administrative law which generate new institutions in emergent processes for a better understanding of the specificity of a global administrative law perhaps not "without the state" but with "entangled hierarchies" which do not (yet?) allow for a clear distinction of "primary" and "secondary norms".

III. THE HISTORICAL EVOLUTION OF GENERAL ADMINISTRATIVE LAW

A. THE ESSENCE OF THE "POSITIVE LAW" OF THE LIBERAL SOCIETY: ITS RULE-LIKE CHARACTER

In a deeper sense, a law that – as one might rephrase the above-mentioned quotation from the recent book of Joyce Appleby – rests on the assumption that "nobody is in charge of the collective order", is "positive".[39] As a consequence, it is "non-instrumental", in the sense that it refers to a "relationship in terms of rules".[40] These rules are decoupled from substantive values, and allow for the co-ordination among agents who pursue their self-chosen goals. This assumption raises a lot of criticism about the collective and social character of the individual – a criticism which misses the point. Clearly, the individual is not - in a meaningful sense - to be pre-supposed as the creator of his or her own self. Individuality is - itself - a social form that underlies permanent change.[41] The non-instrumentality of the "positive" law and its corresponding conception of individual freedom do not invoke the "voluntary disposition of self-interested economic actors".[42] They pre-suppose an acentric society the collective order of which resides in the permanent emergence of innovations that establish a "play of ideas",[43] a pool of variety that contains an excess of possibilities over reality generated from the practices of co-operation, competition, imitation, and experimentation in society. Clearly, this process generates not only spontaneously, but also in a reflexive form of second order observation of the very rules and patterns its own infrastructure, meta-rules and stabilising institutions. However, it is most important to underline that the individual as a merely "self-interested

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[38] Cf. Jean d'Aspremont, *Hart et le positivisme postmoderne en droit international*, 113 REVUE GENERALE DE DROIT INTERNATIONAL 635 (2009); also Niklas Luhmann, LAW AS A SOCIAL SYSTEM 123, 125 et seq. (2004).

[39] Joyce Appleby, THE RELENTLESS REVOLUTION: A HISTORY OF CAPITALISM 248 (2010).

[40] Michael Oakeshott, ON HUMAN CONDUCT 140 (1975); Terry Nardin, THE PHILOSOPHY OF MICHAEL OAKESHOTT 202 (2001); see also, EdwardF. McClennen, *Rationality and Rules,*13, in: Peter A. Danielson (ed), MODELING RATIONALITY, MORALITY AND EVOLUTION 13 (1998).

[41] See, generally, Markus Schroer, DAS INDIVIDUUM DER GESELLSCHAFT (2003); Jean-Claude Kaufmann, L'INVENTION DE SOI: UNE THÉORIE DE L'IDENTITÉ (2004); Kenneth J. Gergen, THE SATURATED SELF: DILEMMAS OF IDENTITY IN CONTEMPORARY LIFE (1992); Joanne Finkelstein, THE ART OF SELF-INVENTION (2007).

[42] Wolfgang Streeck, RE-FORMING CAPITALISM. INSTITUTIONAL CHANGE IN THE GERMAN POLITICAL ECONOMY 156 (2010).

[43] Appleby, *supra*, note 39, 156.

economic actor" is primarily not a myth of liberal society, but one of its critics. This can be demonstrated by referring to the present discussion of the protection of the "commons" of culture against private appropriation in the digital world and its equivalent in the genetic engineering. The relationship between privately-owned knowledge and the "intellectual commons" is a permanent problem of liberal society, but one should not overlook the collective, albeit distributed, character of the core of the "common knowledge" of society,[44] which was characterised by open access and restricted by patent law only to a limited extent. In the economic order of the liberal society, a "culture of improvement" [45] is enshrined, which was always open to knowledge transfer which was, to a large extent, not only accepted as being unavoidable, but also as being productive for the permanent generation of technological innovation and competition. This process does not exclude "public intervention" – on the contrary, apparently, the public knowledge infrastructure in countries such as Germany in the 19th century had a positive impact on the culture of innovation.[46]

B. THE GENERATION OF THE "*ACTE ADMINISTRATIF*" AS THE MAIN FORM OF ADMINISTRATIVE ACTION IN THE "SOCIETY OF THE INDIVIDUALS"

The focus on legitimation and the derivative logic of the "application" of norms to cases misses the internal dynamics of the legal system, which is due to the subjective right as an institution which not only opens the potential for societal self-organisation of the economy, politics, the arts, *etc*., but also opens society towards a distributed rationality of continuous transformation because it changes the temporal orientation from the past (the "given" and its reproduction as the aim of society) to the future and the uncertainty that it generates. The legal norms basically do not "steer" society in modernity, but protect the self-organisational potential inherent in the unrest which it introduces in the "society of the individuals".[47] This self-organisational potential comes to the fore when the legal system is challenged by the dynamic knowledge base which generates "experience" as a distributed type of knowledge which no longer accepts a central privileged point of observation of society which is either "given" by tradition or claimed to be possessed by the political sovereign power in the European absolutist states.[48] In Germany, this "sovereign" knowledge, which combines normative and empirical aspects in as much as it

[44] See for this concept Herbert Gintis, *Rationality and Common Knowledge*, 22 RATIONALITY AND SOCIETY 259 (2010).

[45] Robert Friedel, A CULTURE OF IMPROVEMENT: TECHNOLOGY AND THE WESTERN MILLENNIUM (2007).

[46] See generally Rainer Wolf, DER STAND DER TECHNIK (1986); Milos Več, RECHT UND NORMIERUNG IN DER INDUSTRIELLEN REVOLUTION 272, 367 (2006).

[47] See only Appleby, *supra*, note 39, 248.

[48] See on the emergence of the public knowledge that is needed for the government of the absolutist state Michel Senellart, LES ARTS DE GOUVERNER. DU REGIMEN MEDIEVAL AU CONCEPT DE GOUVERNEMENT, 236 et seq. (1995).

claims that the administrative state holds this privileged position which allows us to know what the requirements of the public order are, is termed "*Polizeywissenschaft*" ("police science").[49]

The new administrative law of the second half of the 19th century[50] undergoes a fundamental change when it accepts that the concept of order mainly refers to a factual normality and its description by societal experience, and is no longer based upon the traditional knowledge of the sovereign state.[51] This is why it would be superficial to take the "*acte administratif*" ("*Verwaltungsakt*"), the sovereign unilateral administrative decision that has binding force *even if* it is not in conformity with the law, at face value.[52] It is meant to to deliver "fixed points" in the "floating mass of administrative activities".[53] Both legislation and legal doctrine were more interested in very broad issues of the general legal order, whereas the operation with the increasing complexity of technical knowledge and industrial innovation were left to the discretion of administrators.[54] The "*acte administratif*" corresponds to the distributed logic of the "private law society" (*Privatrechtsgesellschaft*)[55] which processes innovation, experiment and social experience.[56] The authoritarian character[57] of the "*acte administratif*"

[49] Matthias Bohlender, *Metamorphosen des Gemeinwohls – von der Herrschaft guter polizey zur Regierung durch Freiheit und Eigentum,* 247, in: GEMEINWOHL UND GEMEINSINN –HISTORISCHE SEMANTIKEN POLITISCHER LEITBEGRIFFE (Herfried Münkler & Harald Bluhm, eds,. 2001).

[50] See for the development in Germany Michael Stolleis, GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND, VOL 2: 1800 – 1914, 410 et seq. (1992): the concept had found its contours only at the end of the 19th century; the same goes for France, cf. Philippe Belaval, *Foreword*, in: Cédric Milhat, L'ACTE ADMINISTRATIF: ENTRE PROCESSUS ET PROCEDURES 7 (2007).

[51] In a theoretical perspective see Pierre Macherey, PETITS RIENS. ORNIÈRES ET DERIVES DU QUOTIDIEN 21 (2009); id., DE CANGUILHEM À FOUCAULT. LA FORCE DES NORMES 77 (2009).

[52] The focus of German (and French) administrative law on the Verwaltungsakt ("acte administratif") is said to have focused on state intervention and to have neglected the role of the administration in the development of benefits administration and infrastructure in particular, Kersten & Lenski, *supra*, note 9, at 504; but this is far from convincing because the American evolution follows the same track without being focused on the "administrative act", Mashaw, *supra*, note 7.

[53] Otto Mayer, DEUTSCHES VERWALTUNGSRECHT, Vol. I, 95 (1914).

[54] Več, *supra*, note 46, 281; Erk-Volkmar Heyen, *Deutschland,* in: GESCHICHTE DER VERWALTUNGSRECHTSWISSENSCHAFT IN EUROPA 29, 32 (id., ed., 1982); H. Berthélémy, TRAITÉ DE DROIT ADMINISTRATIF ÉLÉMENTAIRE, 8th ed., 354 et seq. (1916) for the regulation of „installations classées".

[55] It is not a coincidence that one of the founders of modern public law in Germany, Carl Friedrich von Gerber (GRUNDZÜGE EINES SYSTEMS DES DEUTSCHEN STAATSRECHTS, 2nd ed., 1869) was first a private lawyer; his focus on the "will power" ("Willensmacht") of the state and its putative "blindness" to political goal finds its reverse side in the openness toward the observation of the social dynamic of a liberal society; see also Carsten Kremer, DIE WILLENSMACHT DES STAATES. DIE GEMEINDEUTSCHE STAATSRECHTSLEHRE DES CARL FRIEDRICH VON GERBER, 296 (2008) (for the relationship between goals and "willpower").

[56] The work by Reimund Schmidt-De Caluwe, DER VERWALTUNGSAKT IN DER LEHRE OTTO MAYERS 63 et seq. (1999) and Michael Stolleis, GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND, Vol. II, 332 et seq. (1992) overstate the political connotation of the emerging German administrative law in the 19th century and neglect its internal rationality; more differentiated Thomas von Danwitz, VERWALTUNGSRECHTLICHES SYSTEM UND EUROPÄISCHE INTEGRATION 31 et seq. (1996); Roger Müller, VERWALTUNGSRECHT ALS WISSENSCHAFT,FRITZ FLEINER 1867 – 1937, 100 (2006).

(*Verwaltungsakt*) should *not* be taken at face value; it is an extremely modern instrument that that has demonstrated its flexibility even under postmodern conditions of complexity.[58] It is a form of a flexible public intervention that corresponds to the character of the positivist law "without a goal" of its own.

The "*acte administratif*" has both an external function (in the limitation of subjective rights) and an internal function which allows administration to process rational decision-making on a case-by-case mode[59] from which a structure emerges which can be deciphered both by the administrative practitioners themselves *and* by private actors. If this process is not in line with the experience diffused and reproduced by society, and if it comes into conflict with the rights of the private actors, it can be controlled by courts with reference to the rationality of the decision-making process itself. This conflict gives courts the opportunity to re-process the "*actes administratifs*" in a network of judicial decisions with a view to the legitimate expectations which can be formulated and further processed upon the basis of the "rights" of private actors. In this way, the "*acte administratif*" is "re-coded" as an infringement in personal rights while, at the same time, it is processed in the administrative decision-making procedures which contribute to the stabilisation of the impersonal inter-relationships[60] which allow for the self-organisation of society. This evolution corresponds to the rise of "realism", a social ideology that challenges the holistic conceptions of German idealism and opens a perspective on the dynamic of "will power as the point of departure for a new construction of society – as distinct from tradition.[61]

Here, we are confronted with the blind spot of the legal system, which demonstrates difficulties in acknowledging the process-like acentric character of the evolution of its own frames of reference. It is not by coincidence that Philippe Belaval, a member of the French Conseil d'Etat, in his preface to a book on the modern use of the "*acte administratif*" refers to the "plurality of the architects" of the concept[62] - a view that pre-supposes that the elements of architectural

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[57] The focus on willpower fits in the general trend towards a social-darwinian "vitalism" as a far spread everyday philosophy in Germany that is neither liberal in a political sense nor democratic but not antimodern; see Jürgen Große, LEBENSPHILOSOPHIE 89, 101 (2010), where the momentary expression of willpower in response to a situation is highlighted.

[58] Karl-Heinz Ladeur, *Die Zukunft des Verwaltungsakts,* 86 VERWALTUNGSARCHIV 511 (1995)..

[59] Marcel Gauchet*, L'Etat au miroir de la raison d'Etat: La France et la chrétienté*, in: RAISON ET DERAISON D'ETAT 193, 237 (Yves-Charles Zarka, ed.,1 994).

[60] Douglass C. North, John J. Wallis & Barry R. Weingast, VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED SOCIAL HISTORY 261 (2009).

[61] See the wonderful book by Jacques Le Rider, L'ALLEMAGNE AU TEMPS DU RÉALISME. DE L'ESPOIR AU DÉSENCHANTEMENT 1848 – 1890, 33, 46, 52 (2008).

[62] Belaval, *supra*, note 50, 7.

design are pre-determined and given.[63] From a postmodern perspective that takes into consideration the approaches of comparative research in literature which try to describe the text as a paradoxical effect of an anonymous intertextuality, the co-presence of other texts which interfere with the production of meaning beyond the will of the author,[64] one might get an idea of how basic concepts of public law such as the "*acte administratif*" (*Verwaltungsakt*) in continental European law can only be regarded as the result of a process that writes itself within an "environment of possibilities" ("*environnement des possibles*").[65] It is the emergent product of a discontinuous process of variation of cases, the stabilisation of "local equilibria", and of transcending them in crises and of the search for new "local equilibria".[66] Certain possibilities are given up, others are retained and interwoven in a multitude of inclusive options and exclusive constraints.[67] This inter-disciplinary approach sheds some light on the distribution of competencies between administration, administrative courts and the legislator. The focus on legitimation is misleading, because it tends to reduce the processing of the administrative act to its "would-be" origin in the *Ancien Régime* and to oppose it to the democratic will as the only acceptable source of legitimation. Without a "discursive memory" that links - in retrospect - the distributed intertextuality of the implicit[68] construction of a basic legal institution to a prospective generative dimension within a domain of options that is only - to a limited extent - the object of explicit design, a productive role of the legislation is inconceivable.[69]

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[63] See from a perspective of the humanities Michel Charles, INTRODUCTION À L'ÉTUDE DES TEXTES 221 (1995).

[64] Gérard Genette, PALIMPSESTES. LA LITERATURE AU SECOND DEGRÉ 8 (1982).

[65] Charles, *supra*, note 63, 102.

[66] Charles, *supra*, note 63, 102.

[67] This reference to the acentric intertextuality of the selftransformation of law may in fact be more adequate to legal theory than the focus on "evolution" which can only be used in a more or less metaphorical way because there is no functional equivalent to genes in the legal system; see for the observation of oscillatory processes at the "borders" of the legal system Fabian Steinhauer, GERECHTIGKEIT ALS ZUFALL. ZUR RHETORISCHEN EVOLUTION DES RECHTS 94 (2007); Marc Amstutz, EVOLUTORISCHES WIRTSCHAFTSRECHT 271 et seq. (2001); Gunther Teubner, AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 221et seq., 226 (1988) (the focus on "pattern prediction" still remains vague and is ignorant of selftransformation processes that the system cannot control), Niklas Luhmannn, DIE GESELLSCHAFT DER GESELLSCHAFT, Vol. 1, 549 (1997) takes the view that the "evolution of ideas" is context dependent and does not underlie the control by argumentation – what this means for the evolution of system remains unclear; critically Robert W. Gordon, *Critical Legal Histories*, 36 STANFORD LAW REVIEW 57, 81 (1984); also Lawrence Rosen, LAW AS CULTURE 56 et seq. (2006).

[68] Michael Polanyi, PERSONAL KNOWLEDGE. TOWARDS A POST-CRITICAL PHILOSOPHY (1998).

[69] This does not mean that no radical reform is possible because the model that could only be briefly sketched cannot exclude that search processes end in a lock-in that blocks any productive experimentation; see the paper by Daron Acemoglu, Davide Cantoni, Simon Johnson & James A. Robinson, *The Consequences of Radical Reform: The French Revolution*, Discussion Paper 2010, http://econ-www.mit.edu/files/5644 (arguing plausibly that the Napoleonic reforms introduced in several German territories at the beginning of the 19th century had lasting positive effects on the economic development.

This is why the requirement of a democratic legitimation for both private *and* public law can only be acknowledged to a very limited extent.[70] The administrative law of the "society of individuals" is closely linked to the logic of private law and its reference to the self-organisation of differentiated societal systems (the economy in particular). It introduces a similar logic into public law because its cognitive frame of reference is now the society and its practical knowledge basis and not "police *science*" as in the past.[71] Police power, which is the core of administrative decision-making, refers to a societal dynamic conception of the "normality"[72] – not to factual tradition and not to a privileged knowledge possessed by the state.[73] However, the close link between the normative and cognitive elements of the definition and the protection of "public order" is preserved,[74] even though it has to be observed and reflected in a much more sophisticated mode than in the past.[75] This is all the more the case because knowledge takes on a dynamic character itself[76] - in the same vein as the law. The state makes itself "understandable" by laying open the knowledge base which it wants to establish for

[70] See Ralph Michaels, Umdenken für die UNIDROIT Prinzipien: Vom Rechtswahlstatut zum Allgemeinen Teil des transnationalen Vertragsrechts, 73 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 866 (2009).

[71] Bohlender, *supra*, note 49; the mostly smaller German states in the late 17th and early 18th century had tried to epitomise an administrative rationality as the legitimation basis of public power, Yves-Charles Zarka, PHILOSOPHIE ET POLITIQUE À L'ÂGE CLASSIQUE 158 (1998); Michel Senellart, LES ARTS DE GOUVERNER. DU REGIME MEDIEVAL AU CONCEPT DE GOUVERNEMENT 282 (1995); id., *"Juris peritus, id est politicus"? Bodin et les théoritiens allemands de la prudence civile politique au XVIIe siècle*, 201, 216 et seq., in: JEAN BODIN. NATURE, HISTOIRE, DROIT ET POLITIQUE (Yves-Charles Zarka, ed.,1996) this allowed for the development of a compromise between an approached which remained focused on the state and an approach which described the state as a function of society. Because of the rise of a fragmented "special knowledge" as a basis for public decision making it seems doubtful that the concept of "police science" can be revitalized under conditions of postmodernity, See however the contributions in: THE NEW POLICE SCIENCE. THE POLICE POWER IN DOMESTIC AND INTERNATIONAL GOVERNANCE (Markus D. Dubber & Mariana Valverde, eds., 2006).

[72] See the famous "Kreuzberg"-judgment of the Prussian Higher Administrative Court (Oberverwaltungsgericht) of June 14th, 1882, Reports (OVGE)) Vol. 9, 353; See Volkmar Götz, ALLGEMEINES POLIZEI- UND ORDNUNGSRECHT, 13th ed., 18 (2001); for the historical development in France, in particular the flexibility of the emerging police law see Paolo Napoli, NAISSANCE DE LA POLICE MODERNE: POUVOIRS , NORMES, SOCIÉTÉ 15 (2003).

[73] Bohlender, *supra*, note 49; for the US see T. R. Powell, *Administrative Exercise of the Police Power*, 24 HARVARD LAW REVIEW 268 (1911); for France Senellart, *supra*, note 48.

[74] Paolo Napoli, Misura di polizia. Un approccio storicoconcettuale in età moderna, 44 QUADERNI STORIC I 523 (2009).

[75] For the broad conception of "police" in the ancien regime See Pasquale Pasquino, THEORIES OF THE STATE IN EARLY-MODERN EUROPE 42, 61, in: Dubber & Valverde (eds.), *supra*, note 71.

[76] One element of the new coordination between state and society in the 19th century is the rise of statistics and its use by both public and private actors: Theodore M. Porter, *Lawless Society: Social Science and the Reinterpretation of Statistics in Germany, 1850–1880*, 351, in: THE PROBABILISTIC REVOLUTION , VOL. 1 (Lorenz Krüger, Lorraine J. Daston & Michael Heidelberger, eds.,1987).

administration[77] and the world has to be made calculable.[78] "Experience" is based upon self-transformation of society as is the legal system.[79] This new perspective changes the status or the rule in general: it is generated "bottom up" from individual behaviour, and not from a totalising point of view,[80] which would be incompatible with the experimental order established by private law. This new dynamism comes to the fore both in police law, which observes the new economic and technical dynamism referring to the distinction of "danger"/normality (in conformity with experience), and models its "control project" on the patterns of the societal self-understanding of technology (control of steam engines, gas containers, safety of buildings, *etc*.).[81] The "normal" is not dangerous.[82] The same is true for private law where, for example, the requirements of the conclusion of a contract or the definition of "negligent" (unlawful) behaviour refer to experience emerging in society.

The state even intervenes in the activities to distribute experience in society when its knowledge remains restricted to local or regional communities. It presses for the establishment of private self-organised organisations which are meant to evaluate and promote experience which can be regarded as reliable (Technischer Überwachungsverein, TÜV, Verein Deutscher Ingenieure , VDI, *etc*.). [83] This shows that the legal system cannot be onlycognitively open on a case-to-case basis and adhere to stable legal rules at the general level: there is a continuous exchange between a normalised societal experience which is increasingly formulated in technical rules for the construction of machinery, or the construction of buildings. And both private law and public law have to refer to this "normal" knowledge" when it comes to the question of whether damage (caused by the explosion of a gas container, for example) was to be attributed to "negligence" (*ex post*) or whether it had to be regarded as "dangerous" by police (*ex ante*). This does not mean that the economic system or technology impose certain rules on the legal system and call its self-construction into question – not at all. Legal rules cannot be processed without a reference to societal rules and the self-generated "internal law" of administration[84] – this constitutive link between recurring patterns of behaviour in society

[77] Marcel Gauchet, *L'Etat au miroir de la raison d'Etat: La France et la chrétienté*,193, 237 in: RAISON ET DERAISON D'ETAT (Yves-Charles Zarka, ed.,1994).

[78] Alain *Desrosières*, THE POLITICS OF LARGE NUMBERS. A HISTORY OF STATISTICAL REASONING (1998); François Ewald, L'ETAT PROVIDENCE (1986); Theodore J. Porter, THE RISE OF STATISTICAL THINKING (1986).

[79] Alexandre Lefebvre, THE IMAGE OF LAW. DELEUZE, BERGSON, SPINOZA 15 (2008).

[80] Claude Gauthier, L'INVENTION DE LA SOCIÉTÉ CIVILE 233 (1993).

[81] The police power as a "governmental practice" of the state preserves its forms but it exchanges the cognitive schemes it draws on; see Paolo Napoli, *"Police". La conceptualisation d'un modele juridico-politique sous l'Ancien Régime*, 20 DROITS 183 (1994) and 21 DROITS 151 (1995).

[82] Karl-Heinz Ladeur, *Coping With Uncertainty: Ecological Risks and the Proceduralisation of Environmental Law*, 299, in: ENVIRONMENTAL LAW AND ECOLOGICAL RESPONSIBILITY: THE CONCEPT AND PRACTICE OF ECOLOGICAL SELF-ORGANIZATION (Gunther Teubner, Lindsay Farmer & Declan Murphy, eds., 1994).

[83] Wolf, *supra*, note 46.

[84] Mashaw, *supra, note* 7, 1413, 1461; the concept goes back to Bruce Wyman, THE PRINCIPLES OF ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS (1903).

and the normative patterns which have to be constructed, observed and tested in the legal system is essential to the legal rationality.[85] This does not mean that normal knowledge is just blindly introduced into the legal system. On the contrary, the legal system can, and has to, observe whether these practical rules are sufficient, reliable, have to be modified upon the basis of new experience, *etc*. Normality and normativity are closely linked, and this link is continuously observed, revised and re-modelled.

Administrative law is driven by two contradictory forces: on the one hand, the administrative agents behave as a "community of experimentalists",[86] which operates with a kind of implicit horizontal linking from case-to-case, whereas courts, on the other hand, have a tendency towards a type of explicit conceptual re-coding, which tries to limit the processes of self-organisation that are necessarily inherent in the administrative practice. There is a permanent interplay between these two types of internal and external stabilisation of the administrative legal process. However, it would be superficial to regard the judicial practice as the creator of the institutions of administrative law.[87] Its stabilisation is the outcome of a co-operative process which is only moulded in statute law much later. This process can be regarded as a distributed evolutionary process[88] which draws upon the different functions of administration and judiciary.[89] The autonomy of the "relational rationality" of administrative decision-making should not be derived from "expertise"[90] in a stricter analytical sense, but is due to the evolutionary character of the dynamic self-transformation of society: this evolutionary process which subsumes administrative law to a permanent unrest from which new patterns and instruments of decision-making are generated can be described as drawing on an "abductive" approach (following the terminology of Charles S. Peirce)[91] which is a reasoning that creates a new meaning from the observation of "cases" and conflicting rationales, and leads to a broadening perspective on the societal pool of variety beyond the possibility of inferring a new stable rule that can be "applied".[92] It is more a kind of a "move" within a game with incomplete

[85] Lefebvre, *supra*, note 79, 59.

[86] See generally Peter Ochs, Peirce, PRAGMATISM AND THE LOGIC OF SCRIPTURE 107 (1998).

[87] Mashaw, *supra* note 7, 1378.

[88] See Müller, *supra*, note 56, 86 in particular; generally Wolfgang Meyer-Hesemann, METHODENWANDEL IM VERWALTUNGSRECHT (1981).

[89] See for a critique of the Chevron-approach Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the the Function of Agencies and Why it Matters*, 59 ADMINISTRATIVE LAW REVIEW 673, 677 (2007).

[90] See for this argument Long Island Care at Home Ltd. v. Coke, S. Ct. 127 2339, 2346-47 (2007).

[91] Christiane Chauviré, *Peirce et la signification. Introduction à la logique du vague* 201 (1995).

[92] See in defense of the rationality of administrative decision making Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Statutory Interpretation*, 57 ADMINISTRATIVE LAW REVIEW 501 (2005).

rules which emerge from the game itself. This is a logic of incompleteness that is not accessible from a control-project which epitomises conformity to rules.

But to describe administrative law and its institutions in the 19th century as judge-made law misses the point: it is mainly an autonomous product of administration itself both in Europe and the US:

> "The structures and processes of administrative adjudication were designed and built almost entirely by the administrative agencies themselves."[93]

This is true also for the US: Jerry L. Mashaw has epitomised the generation of "trans-substantive" internal rules of decision-making by administrative decision-makers in the 19th century.[94] For the US, it is quite characteristic that the existence of much of this earlier administrative law was even denied at all,[95] mainly because it did not fit in the model of accountability and legitimacy of law. The US administrative law is not based upon a focal construction like the French and German "*acte administratif*" ("*Verwaltungsakt*"); however, it is also centred on the search for the adequate forms of intervention into individual rights and the processes of self-organisation that their use unleashes.[96]

C. INTERMEDIARY REMARKS ON THE EMBEDDEDNESS OF THE LEGAL SYSTEM IN THE "EPISTEMIC KNOWLEDGE BASE" OF SOCIETY

Historians of social and economic institutions, such as Joel Mokyr, have underlined - with good reasons - the hypothesis that one should not over-estimate the role of formal institutions in the evolution of modern western societies.[97] Cultural beliefs and self-enforcing practices of trust-building and reputation were at least as important as formal institutions.[98] The complex legal system is rooted in a broader "epistemic knowledge base". We will see later that the one-sided perspective on the legal system in the stricter sense leads to futile questions on what the legal nature of "global administrative law" really is.[99] This approach either leads to the fixation of a traditional static concept of law or the problematical assumption that a global civil society can

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[93] Mashaw, *supra*, note 7.

[94] Mashaw, *supra*, note 7, 1377, 1466.

[95] Mashaw, *supra*, note 7, 1378.

[96] Frank J. Goodnow, COMPARATIVE ADMINISTRATIVE LAW 6 et seq., 371 et seq. (1905).

[97] Joel Mokyr, INSTITUTIONAL ORIGINS OF THE INDUSTRIAL REVOLUTION, 4, 22 (2008).

[98] Avner Greif, INSTITUTIONS AND THE PATH TO MODERNITY: LESSONS FROM MEDIEVAL TRADE (2006); Douglass C. North, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE (2010).

[99] See only Kingsbury, *supra*, note 9; for the relationships between global administrative law and traditional international law Sabino Cassese, B. Carotti, L. Casini, M. Macchia, E. Macdonald & M. Savino, GLOBAL ADMINISTRATIVE LAW. CASES, MATERIALS, ISSUES, 2nd ed., p. XXV www.iilj.org,

be regarded as generating and "constitutionalising" its own legal system beyond the state.[100] The focus should, instead, be on the permanent unrest inherent in the experimental acentric order of (post-) modern society which introduces an evolutionary "drift"[101] into the cultural memory of society, which is also a challenge for the legal system, because there is a close inter-relationship between the cognitive and the normative rationality of society.

The knowledge order of society was (and is) constituted in a way which not only differentiates between general knowledge ("in the books" and in practical experience) and privately appropriated information (legally-protected by patents or practical processes of keeping know-how secret in firms) but also left open a broad range of operations of freely-sharing information (which seems to be regarded by many protagonists of the internet world as something completely new – which is definitely not the case). Robert C. Allen calls this phenomenon "collective invention"[102] which includes, for example, the spread of the steam engine as a basic innovation of the 19th century. Especially in the UK and later also in Germany and other countries, social conventions and "self-enforcing modes of behaviour"[103] were much more important for the stabilisation of the legal system than the formal adjudication by independent judges in ividual cases of conflict. It is quite characteristic that the goals of policing in Germany included the preservation of "public order" (as opposed to "public security"[104] in the narrower sense) *i.e.*, the observation of the "appropriate" behaviour in public and the respect for social conventions (below the level of formal law) such as disciplined and controlled self-presentation in public including basic norms of politeness, clothing, cleaning, sexuality,[105] *etc*.

These remarks should have made it clear that, in the "society of individuals"[106] of the 19th century, both public and private law were based upon complex layers of social knowledge, conventions and professional practices, all of which were enshrined in the public order at large or in social and technical experience. Without reference to this cognitive infrastructure, neither private nor administrative decision-making can be understood.

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[100] for a critique see also Möllers, *supra*, note 25, 329; Christian Tietje, *Transnationales Wirtschaftsrecht aus öffentlich-rechtlicher Perspektive*, 101 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 404, 418 (2002); Rost, *supra*, note 35, 87.

[101] Francisco J. Varela, Evan Thompson & Eleanor Rosch, THE EMBODIED MIND: SCIENCE AND HUMAN EXPERIENCE 200 (1993)

[102] Robert C. Allen, *Collective Invention*, 4 JOURNAL OF ECONOMIC BEHAVIOR 1 (1983); Mokyr, *supra, note* 97, at 22.

[103] Mokyr, *ibid.*, 12.

[104] For Germany see Volkmar Götz, ALLGEMEINES POLIZEI- UND ORDNUNGSRECHT, 13th ed., 43 (2001).

[105] See for the policing of prostitution Jacques Berlière, LA POLICE DES MOEURS SOUS LA IIIE RÉPUBLIQUE (1992).

[106] Nobert Elias, *supra*, note 11.

The "administrative act" was, as seen in the perspective opened here, not a relict of the absolutist state, but a modern instrument of rationalising administrative practices and of co-ordination between the society of the individuals and the preservation of "public order".[107]It turns it into the new experimental order that can no longer draw on a fixed set of rules and traditions. Its new form is a product of the evolutionary "drift" of the development of administrative law, which can only *ex post* be stabilised by "judge made law" or later by the legislator.

D. THE SECONDARY RE-MODELLING OF THE TRADITIONAL ADMINISTRATIVE LAW OF THE SOCIETY OF THE INDIVIDUALS

The exchange process between the law and the structured practical networks which generate and distribute societal experience is in constant flux.[108] A distinction has to be made between the continuous flow of information which emerges from the permanent variation within societal knowledge basis, and the momentary suspension of normality by the rise of new factual paradigms which induce a kind of "break of symmetry" in the inter-relationship between technical normal knowledge and the feedback loops which have to be designed within the legal network of networks. This was, for example, the case when the knowledge process became more dynamic and, as a consequence, the concept of normality had to be re-framed: increasingly, this dynamic is reflected in the legal system when the question is raised as to whether bigger firms have a duty to take an active part in the creation of knowledge and are no longer allowed just to adapt to the current "state of the art"[109] or when (in administrative law) the orientation on experience and "danger" (in the end: damage) is at stake.

The hitherto central unilateral administrative decision is in decline – not only in global administrative law. Things get more complicated to judge if one bears in mind that this is also true for domestic law. At the global level in particular, not only informal measures and procedures take the lead over the "*acte administratif*" as expression of the internal sovereignty of the state, but also the norms which are referred to in global law are mainly not legal norms which are part of international public law, but factual standards or, if one may put it this way, self-organised "norms in being", procedural rules in particular.

The same goes for the concept of "person" as a cornerstone of the liberal positive legal order: this concept draws on the stability of roles and the attribution of future-oriented expectations to legal actors abstracted from the stability of tradition.[110] Once the person is supplemented by

[107] Gauchet, *supra*, note 77.

[108] For an overview of the function of the "Verwaltungsakt" in present day German administrative law see Christian Bumke, *Verwaltungsakte,* 1031, in: GRUNDLAGEN DES VERWALTUNGSRECHTS, VOL. 2 (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Andreas Voßkuhle , eds., 2008).

[109] For the different bridging concepts that are used for the transfer of knowledge into the legal system see Ladeur, *supra*, note 83.

[110] Irène Théry, LA DISTINCTION DE SEXE: UNE NOUVELLE APPROCHE DE L'EGALITE 384 et seq. (2010).

the organisation and – recently – by networks of relationship, one may assume that the fundamental relevance of the person has changed, as well. The role of the person is mediated by its position in organisations and networks.[111] Expectations can be multi-faceted under both conditions of complexity[112] and the dynamic of self-transcendence of liberal society. This dynamic allows for a new type of reflexivity of the legal order, which can operate with an open linkage between norms in the stricter sense and a whole range of different types of "social norms",[113] which, in the past, remained more or less hidden in the administrative practices.[114] Both components of the normative order are permeable for a reflexive acentric modelling of "expectations of expectations" both by and between organisations that have more strategic potential, in as much as they can construct longer chains of actions.

The new reflexivity gives sufficient space for a "management of rules" which re-models the distinction between legal and factual norms: the spontaneous character is replaced more and more by explicit "standards" that demonstrate a new fragmentation and heterogeneity within the social knowledge base: experience based knowledge has to distinguished from the "best available knowledge",[115] in particular. Knowledge is further dynamised. This development includes the necessity to find procedural meta-norms for the observation of the new versions of the "loops" between both types of rules because there are, of course, problems which raise the question of how a norm has to be characterised: this is the case when the rights of persons who did not participate in the creation of the norm are infringed. However, this is not often to be assumed, because, in the society of organisations,[116] persons are, in many constellations, legally represented by organisations or are subsumed under new general patterns of expectations beyond the classical "no harm" principle (for example, protection by public insurance, transformation of liability, including strict liability, the creation of group rights, such as the rights of workers and consumers). Often, no external effect of norms can be observed because it is only the general framework of decision-making that is touched by an organisational process. Many social norms are more a kind of functional equivalent to the process of self-construction of experience as a collective, distributed knowledge base.

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[111] The reverse side is to be seen in the fact that the natural person as opposed to the "legal person" in the stricter sense has also been transformed: Increasingly norms are integrated into the legal system that refer to the individual "personality" as the object of care and assistance.

[112] Théry, *ibid*., 140.

[113] It is not a coincidence that at the beginning of the 20th century neither doctrine nor legislation had taken much account of the relationship between legal and social norms, Več, *supra*, note 46, 281.

[114] Calliess & Zumbansen, *supra, note* 24, 250 et seq.

[115] For the meaning of this and other bridging concepts in environmental law see Ladeur, *supra*, note 83..

[116] For the concept see James S. Coleman, *Social Structure and a Theory of Action*, in: Peter M. Blau (ed.), APPROACHES TO THE STUDY OF SOCIAL STRUCTURES (Peter M. Blau, ed., 1975) 76; Charles S. Perrow, COMPLEX ORGANIZATIONS. A CRITICAL ESSAY, 3rd ed. (1986).

The more complex type of administrative decision-making that comes to the fore in the domains of planning, high technology (nuclear power, genetic engineering) and risk, in particular, demonstrate that the construction of a balancing decision in these fields is not equivalent to the classical type of a judgment based upon a "statutory interpretation".[117] This was the basis for the German legal conception of a structured process of planning that distinguishes the stable and the creative elements of decision-making. More often than not, the difference between public and private decision-making is not so fundamental: in both cases, the underlying legal norms are (mainly) not applied (when one can speak about a realm of discretion) but are referred to as limits to a self-organised practice of administration or a public-private "joint venture".

The interplay between administrative decision-making and the law is historically changing: the external legislative norm or the judicial decision-making processes can exercise their stabilising role once a certain "internal" administrative practice has settled in a rule-like manner, while, in times of transformation, administrative horizontal-heterarchical approaches of processing from case-to-case in a creative way tend to experiment with new forms of administrative operation that do not follow rule-like patterns. This is creative function which one may call the "modernising mission", which David A. Strauss[118] attributes - with good reason - to the judiciary, but which includes - in a differentiated way - the administration, as well.

One has to accept that, from the outset, the public dimension of technical (and, later on, the more complex technological) risks and the private process of production are entangled. Technologies in postmodern society are more dependent on complex design and are "hybrid", in as much as they often pre-suppose the development of a whole domain of options including far reaching potential side-effects on third parties or on human values (nuclear power, genetically modified organisms, nano-technology, *etc*.). However, technological questions have always had a societal dimension.[119]

In environmental law,[120] the pivotal role of the practical experience based upon the observation of damage is called into question,[121] and the control project for high technology trajectories has to be adapted to risk management and the precautionary principle, upon which

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[117] See for Germany Rainer Wahl, Herausforderungen und Antworten: Das Öffentliche Recht der letzten fünf Jahrzehnte 43, 51 (2006).

[118] *The Modernizing Mission of Judiciary Review*, 76 CHICAGO LAW REVIEW 859, 894 (2009).

[119] Frank Fischer, DEMOCRACY AND EXPERTISE. REORIENTING POLICY INQUIRY 143 *et seq*. (2009)

[120] Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 NEW YORK UNIVERSITY LAW REVIEW 1495 (1999); id & Maria H. Ivanova, *Revitalizing Global Environmental Governance: A Function-Driven Approach*, 181, in: GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS AND OPPORTUNITIES (id., eds., 2002); Oran R. Young, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY (1994); Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental law?*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 596 (1999).

[121] Karl-Heinz Ladeur, The Introduction of the Precautionary Principe into Ec Law – A Pyrrhic Victory for Environmental and Public Health law?, 40 COMMON MARKET LAW REVIEW 1455 (2003).

it is based. For our perspective, it is important to bear in mind that these deep transformations within the technological networks and the legal network of practices which try to learn from them find their repercussion in the legal system, albeit only partially.

One of its major transformations is to be seen – from the "cognitivist" point of view taken here, *i.e.*, the observation of the emergence and transformation of rules and institutions as elements of a societal memory – in the rise of the groups and organisations as the actors and as the generators of new types of knowledge in particular: the increasing importance of probabilities, groups with statistical regularities, the evolution of technologies of production and management ("expert knowledge" [122] as opposed to distributed "experience" based upon action and upon the observation of its consequences) have had a strong impact even on administrative law. However, it would be an illusion to reduce the new discretionary power gained by reference to expertise to a mere delegation of power by parliament.[123]

E. GENERAL ADMINISTRATIVE LAW AS THE PRODUCT OF ADMINISTRATIVE EXPERIMENTATION ... AND ITS JUDICIALISATION

Upon the basis of the theoretical reflections given above, one should, first of all, bear in mind that administrative law could not and cannot be conceived of as being mainly a product of the legislator. The same is valid for private law. Both legal domains are characterised by the challenge of enabling processes to cope with the fundamental uncertainty and the dynamic of the self-transformation of society and to generate forms of binding them in order to allow for co-operation, co-ordination, and learning. Both the development of the administrative law of the "society of the individuals" and the successive administrative law of the "society of organisations" could only be the emergent product of primarily administrative experimentation and of the retention of successful forms of action[124] including the increasing importance of procedure[125] as a resource for the creation[126] and combination of knowledge for decision-

[122] Burkard Wollenschläger, WISSENSGENERIERUNG IM VERFAHREN (2009).

[123] This is the view taken by Kenneth Bamberger, Regulation as Delegation: Private Firms, Decision Making and Accountability in the Administrative State, 56 DUKE LAW JOURNAL 377 (2006).

[124] See generally for the autonomy of administration Edward L. Rubin, *It's Time to Make the Administrative Procedure Act Administrative,* 89 CORNELL LAW REVIEW 95 (2002) (claiming that administrative law is too narrowly following the patterns of judicial decision making); in a German perspective Wolfgang Hoffmann-Riem, *Die Eigenständigkeit der Verwaltung,* in: GRUNDLAGEN DES VERWALTUNGSRECHTS, Vol. 1, § 10 No. 13 (Eberhard Schmidt- Aßmann & Andreas Voßkuhle, eds., 2006); for the legitimation of administrative agencies, Hans-Heinrich Trute, *Die Legitimation der Verwaltung*, *ibid.*, § 7, 307.

[125] The role of procedure in administrative law should not be regarded as an illegitimate "ersatz" for appropriate democratic hierarchical empowerment, it is a necessary component of a procedural rationality of decision making which has to meet the challenge of uncertainty, see also Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law,* 115 YALE LAW JOURNAL 1490 (2006).

making processes.[127] Both in the private industry and in public administration, the use of experience as the common societal knowledge basis was no longer sufficient.[128] It is not by accident that, in a country such as Germany, since the early 1960s, a continuous process of broadening the scope of judicial control over the whole domain of the administration, which, in the past, had been reserved for non-legal administrative rationality (schools, status of public staff).[129] In the same vein, discretion has been increasingly judicialised.[130] As in the US, in Germany, too, there has been a permanent broadening of the acceptable arguments in legal controversies: more and more public decision-making is not only subject to strict control upon the basis of specific legal arguments, but also reference to the "principle of proportionality"[131] or a broad understanding of constitutional liberties (which include "principles of protection" beyond the traditional conception of negative liberties) are commonplace today. This evolution is hailed by many as a phenomenon of "legalisation" of factual power.[132] Upon closer inspection, this view appears to be superficial because it neglects the decline of the impact of the self-organised knowledge base and the set of social conventions which defined a collective understanding of a "common sake" of the public ,[133] while bargaining processes regarding the right of the individual upon an *ad hoc* basis have increasingly come to replace this collective element of the conventional infrastructure of the law as described above. This is, so to speak, the dark side of the change of paradigms in society: the emergent "society of organisations" tends to keep its rationality more or less invisible. Once self reflexive bargaining processes come into place which undermine the universalistic character of the liberal legal order, and the

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[126] Lefebvre, *supra*, note 79, 254, for the creative role of legal decisions.

[127] For the U. S. administrative law in the 19th century this autonomous role of administration and the creation of its own "internal law" is epitomised in Mashaw, *supra*, note 7; 1413, 1461.

[128] See for the evolution of the knowledge basis of public decision making Karl-Heinz Ladeur, *The Postmodern Condition of Law and Societal Management of Rules. Facts and Norms Revisited*, 27 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 87 (2006).

[129] Again this does not differ much from the court restraint visa-vis administrative discretion in 19th century, Mashaw, *supra*, note 127.

[130] See Elizabeth V. Foote, Statutory Interpretation or Public Administration: How Chevron Misconceives the Fuction of Agencies and Why it Matters, 59 ADMINISTRATIVE LAW REVIEW 673 (2007).

[131] Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW (2008), 72; Jacco Bomhoff, *Genealogies of Balancing as Discourse,* 4 LAW & ETHICS OF HUMAN RIGHTS 108 (2010), available at http://www.bepress.com/lehr/vol4/iss1/art6; the principle has found a philosophical preparation in the German "materiale Wertethik" (Nicolai Hartmann and Max Scheler) which has attributed to the facticity of values a normative foundation in the subjective act of valuing, See Nicolai Hartmann, *Das Wertproblem in der Philosophie der Gegenwart*, in: KLEINERE SCHRIFTEN, 327 (1958), where the "type of situation" and its framing by the time of its emergence is regarded as essential for the attribution of values; Robert Spaemann, SCHRITTE ÜBER UNS HINAUS. GESAMMELTE REDEN UND AUFSÄTZE, VOL. I 90 (2010); for a critique see also Karl-Heinz Ladeur, *Das Bundesverfassungsgericht als 'Bürgergericht'?*, 31 RECHTSTHEORIE 267, 76 (2000).

[132] For its development see Eric Engle, *The History of the General Principle of Proportionality: An Overview*, July 2009, available at ssrn.

[133] Myriam Revault d'Allonnes, LE POUVOIR DES COMMENCEMENTS. ESSAI SUR L'AUTORITÉ 59 et seq. (2006).

borderline of the "no harm" principle[134] loses its cognitive and normative function (for example, the attribution of personal responsibility) *any* interest might re-enter the procedure of rule-making and put the bindingness of law at risk.[135]

This decline is a repercussion of the emergence of a new paradigm of the legal infrastructure, *i.e.*, the rise of the "society of organisations".[136] Again. the focus here is not on the comprehensive re-construction of this new societal formation and the transformation of the legal system which it provokes. Instead, the focus will be on the change of the societal knowledge basis which is characterised by a split between, on the one hand, the continuity of the self-reproduction of general experience distributed over the whole of society, and, on the other, the advanced knowledge which is generated by the big organisations both in the economic and the broader sense (including political parties, unions *etc*.).[137] This new type of technological knowledge in particular has a far-reaching impact on the laws concerning the protection of health and the environment, because they introduce a prospective strategy ("the precautionary principle",[138] "risk", instead of experience based "danger", the balancing of interests in planning law, *etc*.[139]). The differentiation of the new legal paradigm cannot be described in detail here.[140] What is relevant for the intention of the present article is the hypothesis that *both* administrative action *and* judicial control change considerably – an assumption which does not rule out the continuity of the ongoing administrative practices of the past within a basic layer of decision-making on which a new layer of operations is super-imposed It is structured by more complex and more sophisticated conventions and rules, which underlie a higher level of organised reflected observation,[141] explicit formulation and revision:

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[134] Nadia Urbinati, MILL ON DEMOCRACY: FROM THE ATHENIAN POLIS TO REPRESENTATIVE GOVERNMENT 211 (2002).

[135] See also Ran Hirschl, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 212 (2009), where the increasing juridification of political questions is correlated with the waning of confidence in technocratic governance: the judicial institutions replace the lessening integration of society by social norms.

[136] See only Ladeur, *supra*, note 128.

[137] Ladeur, *supra*, note 128.

[138] See only for the precautionary principle Nicolas de Sadeleer, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES 174 (2005).

[139] See Matthew Diller, The Revolution in Welfare Administration: Rules, Discretion and Entrepreneurial Government, 75 NEW YORK UNIVERSITY LAW REVIEW 1121 (2000).

[140] Karl-Heinz Ladeur, *The Introduction of the Precautionary Principle into EC Law - A Pyrrhic Victory for Environmental and Public Health Law?*, 40 COMMON MARKET LAW REVIEW 1455 (2003), and the critical commentary by Sebastian Wolf, *Risk Regulation, Higher Rationality and the Death of Judicial Self-Restraint*, 41 COMMON MARKET LAW REVIEW 1125 (2004).

[141] See Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 241, 260 (2008) for the problems related to the

more and more implicit conventions which were co-ordinated and administered by large professional associations (VDI *etc*.)[142] are replaced by explicit "standards"[143], and by private-public organised decisions (in multiple forms).[144] For the New Deal, it can be shown, as well, that the emergence of a new type of expertise-based administration, deference to a type of knowledge that originated from the organised processes of cognitive specialisation beyond the general level of distributed experience, led to a reduction of judicial control which was later on compensated[145] – once the new structure had settled and was organised by a new paradigm – by new approaches to a closer control of procedure,[146] instead of the substance of decision-making. This shows that the participation of private parties in the regulatory process is inevitable[147] and legitimate, as was the case in the private generation of experience in the "society of the individuals".

One can summarise this evolution with the words of Noonan, Sabel and Simon[148] as a transfer from "rule orientation" to the "formulation of plans". This is, of course, a simplification, but it epitomises, with good arguments, the rise of a strategic component in both public and private decision-making: it is no longer the ideal of the continuity of the self-transformation of experience and the stability of public order which are both observed and preserved in a case-by-case mode via individual decisions ("*acte administratif*"). Instead, decisions increasingly have to be made in prospective "chains" of a plurality of actions both at the same time level (co-ordination of plans) and with a view to an increasingly uncertain future. This leads to more fragmentation within administration, an evolution which finds its expression in the rise of independent agencies in the US, in particular, or in a loosening of the inter-relationship between the processed singular decisions: the "administrative act" loses its role of co-ordination among single decisions, while, at the same time, the fragmentation and the pluralisation of the types of decision-making rises. The focus on the processing of single acts and administrative discretion, on the one hand, and the observation and stabilisation of internal rules and doctrinal focal points as frames of reference in the processing of decisions on

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fragmentation of international environmental law: one way to deal with them consists in the reintegration of open principles of international law into the more elaborated structure of domestic environmental regulations.

[142] For the evolution see Wolf, *supra*, note 46; Več, *supra*, note 46.

[143] See the overview in Sabino Cassese, *Global Standards for National Administrative Procedure*, 68 LAW AND CONTEMPORARY PROBLEMS 109 (2005).

[144] See the contributions in INTEGRATING SCIENTIFIC EXPERTISE INTO REGULATORY DECISION-MAKING (Christian Joerges, Karl-Heinz Ladeur & Ellen Vos, eds., 1997).

[145] Reuel Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICHIGAN LAW REVIEW 399 (2007).

[146] See in a political science perspective Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Political Control*, 3 JOURNAL OF LAW, BUSINESS AND ORGANIZATION 243, 257 (1987).

[147] See Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUMBIA LAW REVIEW 229 (2005).

[148] Legal Accountability in the Service based Welfare State, Columbia Public Law Discussion Paper 08-162

the other, vanishes and is replaced by the emergence of more loosely-coupled clusters[149] and patterns of strategic comprehensive decision-making.[150]

The complexity of planning procedures, social insurance and social assistance, and the supervision of technologies which developed beyond the horizon of practical communities and led to the establishment of more professional communities of specific knowledge ("expertise")[151] could primarily only be tackled by 0 administration itself and not by steering laws.[152]

F. SOCIETY OF NETWORKS AND THE NETWORKS OF LAW

The rise of the "society of networks",[153] a kind of a tertiary remodelling of the "society of the individuals" is the next step within the evolution of administration: it is characterised in the cognitivist approach developed here by the reaction to a further rise in complexity of the knowledge base of society. This evolution is due to the fact that the structuring capabilities of the second order model of modern society is changed by the rise of a new mode of production and organisation (supported by the importance of information as the principal resource of production). The change to flat hierarchies[154] and heterarchical self-organisation which process information in a new mode generates a third layer of the organisation of postmodern society. Technological knowledge, in particular, is no longer concentrated in stable expert communities, but is distributed in overlapping project-oriented "epistemic communities" which combine general and specific knowledge production in hybrid forms of communication; the primary examples are biotechnology, and computer technology both as a basis of production of new

[149] See for a conception of the cases of the U.S. Supreme Court as "nodes" within a network of interrelationships Timothy R. Johnson et al., *Network Analysis and the Law: Measuring the Legal Importance of Supreme court Precedents*, 15 POLICY ANALYSIS 324 (2007); in a similar vein David G. Post & Michael B. Eisen, *How Long is the Coast Line of the Law?. Thoughts on the Fractal Nature of Legal Systems*, 29 JOURNAL OF LEGAL STUDIES 584 (2000).

[150] See for a reference to the network (and related conceptions) Thomas A. Smith, The Web of Law, San Diego Legal Studies research Paper 06-11.

[151] See Philip E. Tetlock, EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW? 216 (2005).

[152] This does of course not exclude a more dominant role of the judiciary which tends to second guess the rationality of administrative decision-making, Martin S. Shapiro, *Juridicalization of Politics in the US*, 15 INTERNATIONAL POLITICAL SCIENCE REVIEW 101, 107 (1994) (for the "litigation-oriented style of rulemaking").

[153] See for a general theory Manuel Castells, THE RISE OF THE NETWORK SOCIETY: THE INFORMATION AGE. ECONOMY, SOCIETY AND CULTURE, Vol. 1, 2nd ed. (2000).

[154] Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 247 (2006); Paul Schiff Berman*, From International Law to Globalization and Law*, 43 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 485 (2005).

information programmes and as an organisational resource in other fields of production.[155] More and more hybrid modes of organisation which blend forms of the market and organisational closure ("network contracts")[156] spread in society, and have a repercussion on the procedures of administrative decision-making which transcend traditional borders and stable separations. This transformation is driven by a disruptive change of information technology and the ensuing modes of communication[157] that easily transcend the hitherto established borderlines between organisations, organisational departments and allow, for example, for hybrid forms of co-operation between people who remain, in one respect, strong competitors.[158]

The rise of the concept of "governance"[159] as a reflection of the transformation of the established "control projects"[160] is referred to in both the private and the public sector. For administration, this is equivalent to an even more intense involvement in knowledge generation processes,[161] on the one hand, and the decrease of the privileged role of the "*acte administratif*" ("*Verwaltungsakt*") as the "signifier[162] for the processing of the inter-relationships which allow for the weaving of knowledge-generating and knowledge-stabilising networks of decisions[163] which bind uncertainty and allow for the linkage with private

[155] Michel Gensollen, *Economie non rivale et communautés d'information*, RÉSEAUX 141 No. 124 (2004),; id., *Biens informationnels et communautés médiatisées*, 113 REVUE D'ECONOMIE POLITIQUE, Special number, 8 (2003); see also Ladeur, *supra*, note 146.

[156] Gunther Teubner, NETZWERK ALS VERTRAGSVERBUND. VIRTUELLE UNTERNEHMEN, FRANCHISING, JUST-IN-TIME IN SOZIALWISSENSCHAFTLICHER UND JURISTISCHER HINSICHT (2004).

[157] Dirk Baecker, *Systems, Network, and Culture*, 15 SOZIALE SYSTEME 271, 272 (2009).

[158] For the trend toward network like organizations see Paul J. DiMaggio, *Introduction: Making Sense of the Contemporaray Firm and Prefiguring its Future*, 3, 5, 19, in: The TWENTY-FIRST CENTURY FIRM: CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPEKTIVE (id., ed., 2001).

[159] For the use of the concept of "governance" for a theory of administrative law in particular see Orly Lobel, *The Renew Deal*, 89 MINNESSOTA LAW REVIEW 263 (2004); for political science see Renate Mayntz, *Governance Theory als fortentwickelte Steuerungstheorie*, 11, in: GOVERNANCE-FORSCHUNG, (Gunnar Folke Schuppert, ed., 2005); Hans-Heinrich Trute, Wolfgang Denkhaus, Doris Kühlers, *Governance in der Verwaltungsrechtswissenschaft* 37 DIE VERWALTUNG 451, 456 (2004); for the change from regulation and public "steering" of market processes to the design of complex processes of public-private coordination; see also the contributions in: GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009) and Karl-Heinz Ladeur, *Keyword: International Governance, Theory of*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, to appear 2011.

[160] Harrison C. White, IDENTITY AND CONTROL. HOW SOCIAL FORMATIONS EMERGE, 2nd. ed., 220 et seq. (2008); id., *Networks and Meaning: Styles and Switches*, 13 SOZIALE SYSTEME 543 (2007); Dirk Baecker, WIRTSCHAFTSSOZIOLOGIE 128 (2006).

[161] This is why the explanation of the rise of the concept of "governance" as a repercussion of the subsumption of the state under the logic of the firm seems to be to simplistic, see Myriam Revault d'Allonnes, POURQUOI NOS N'AIMONS PAS LA DÉMOCRATIE 125 (2010).

[162] Yair Neuman, *On Love, Hate and Knowledge*, 90 INTERNATIONAL JOURNAL OF PSYCHOANALYSIS 697 (2009).

[163] See in a theoretical perspective on the paradigmatic structuring of intrapersonal networks of self-regulation, Neuman, *ibid.*, 702.

transactions. The relationship with private actors takes on an increasingly project-based orientation because it is the private sector which controls the knowledge processes in project-related networks as well. "Project", in this sense, is not equivalent to a goal-oriented process – on the contrary, it refers more to a complex "mapping" of different co-operative ventures which are supposed to generate a domain of action first from which specific actions and strategies might emerge in an evolutionary way.[164] Administrative networks of co-operation[165] have to be set up both within the public sphere for the knowledge accumulation and outside it, *i.e.*, via inter-relationships with networks of private actors.[166] This is true for the support of technology (telecoms, high-tech) and also for the management of whatever risks which emerge from production processes which are set up beyond the realm of the traditional experience-based knowledge production. It should be epitomised that the basic "change agents" which produce a new deep process of self-transformation within the legal system and its infrastructure of social norms[167] and practices have a cognitive nature: *i.e.*, the knowledge used in production processes and their management underlie a disruptive change, and shatter the paradigm of co-ordination among the different layers of the rule system of society. The rapid transfer of knowledge enabled by information technology undermines the conceptual, organisational, legal and practical separations upon which the legal system is based, such as the institutional separation of the market (exchange processes) and organisation (which keep production and management processes partially insulated from markets). The use of sophisticated information technology allows for the establishment of hybrid co-ordination processes which show characteristics of both hitherto separated forms of order: for example, complex contracts on the co-ordination of firms and their suppliers make a close integration of production processes possible without a formal integration. This is one of the phenomena of a new network-like forms of generating order between stable organisational hierarchy and heterarchical "loose" co-ordination via the market and contracts. A further element is to be seen in the closer connection between technology and science in the development of high-tech products and procedures: the established stable mode of co-ordination between general science and specific product development undergoes a transformation which leads to a much

[164] For a theoretical perspective see Patrick Schumacher, *Les mécanismes de l'innovation radicale*, 85 COMMUNICATIONS No. 85, 171, 180 (2009).

[165] See for the transnational level Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1 (2002).

[166] For the characteristic element of transnational cooperation among "like" administrative agencies see ead. & David Zaring, *Networking Goes International: An Update*, 2 ANNUAL REVIEW OF LAW & SOCIAL SCIENCE 211, 215, 223 (2006).

[167] See also Eric A. Posner, LAW AND SOCIAL NORMS 4 (2000) who points out that law operates alwa against a " background stream of nonlegal regulation" – however, game theory may be to thin to do justice to the productivity of social normativity.

closer reciprocal interrelationship between science and technology in both directions:[168] *i.e.*, on the one hand, joint-ventures on research of private firms react to the rapid transfer of scientific knowledge to product development (biotechnology). At the other extreme of the range of possibilities, one can observe even technological processes (Nano-technology) where there is no separation between these hitherto separated modes of knowledge and technological interventions into nature or the structure of materials creates new realities which lie beyond the abstract scientific observation of an outside reality. This need not be deepened here.[169] At the middle range of technological evolution, the transformation of the network industries, in particular, have to be mentioned: the monopolistic hierarchical development of telecommunications services that followed a stable trajectory of technological improvement of "big networks"[170] has been changed to a complex heterarchical opaque search process under extreme uncertainty.[171] This development has had considerable repercussions in the transformation of the legal structure of regulation: the state no longer claims to occupy a privileged observing position, instead, its position has been shifted to the periphery of a heterarchical network whose development can only be anticipated in a scenario-like mode.[172]

G. THE CHANGING "SOCIAL EPISTEMOLOGY" OF THE LAW AND THE FRAGMENTATION OF SOCIETY

The strategic "design" of such loosely-coupled networks is only imaginable as a co-operative venture in which the private actors have a stake themselves, because it pre-supposes the joint constructive contributions of more actors and information brokers,[173] and includes the necessity to set up a self-reflexive component of a knowledge management: knowledge is not a neutral resource that can be conceived without paying attention to "social epistemology" as should have been made plausible by the examples of the knowledge basis of the "society of the individuals" and the "society of organisations".[174] This reflection should have shown that the form of networks that is - with good reasons - invoked when it comes to the description of

[168] This is the case for nanotechnology Jean-Pierre Dupuy & Alexei Grinbaum, *Living with Uncertainty: Toward the Ongoing Normative Assessment of Nanotechnology*, in: NANOTECHNOLOGY CHALLENGES: IMPLICATIONS FOR PHILOSOPHY, ETHICS AND SOCIETY 287 (Joachim Schummer & Davis Baird, eds., 2006).

[169] See for the emergence of a conception of objectivity in natural science Lorraine Daston & Peter Galiston, OBJECTIVITY (2007).

[170] Thomas P. Hughes, NETWORKS OF POWER: THE ELECTRIFICATION OF WESTERN SOCITIES 1880 – 1930 (1993).

[171] See in a theoretical perspective Herbert A. Simon, *The Architecture of Complexity*, PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY Vol.1006, 467 (1962).

[172] Robert Baldwin & Martin Cave, UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE, 31 (1999); see also Gunther Teubner, *After Legal Instrumentalism? Strategic Models of Post-Regulatory Law*, 299, in: DILEMMAS OF LAW IN THE WELFARE STATE (id., ed. 1986).

[173] Michael Stohl & Cynthia Stohl, Human Rights, Nation States, and NGOs: Structural Holes and the Emergence of Global Regimes, 442, 72 COMMUNICATION MONOGRAPHS No. 4 (2005).

[174] Eileen M. Milner, MANAGING INFORMATION AND KNOWLEDGE IN THE PUBLIC SECTOR, 65, 164 et seq. (2000).

administrative processes beyond the frames of territoriality[175] is primarily a phenomenon which emerges from within the societal transformation of the nation states themselves. Global administrative law is not the product of the challenge of the state-based legal structure from outside, it is, instead, to be described as the outcome of a general shift from the paradigmatic forms of the "society of organisations" to the "society of networks", which has a disruptive effect on the legal structure which found a new stability in the 1970s and 1980s of the 20th century after a long period of experimentation. The emergence of the fragmented network form is due to a new evolutionary transformation of the knowledge- and rule-base of society in the broad sense sketched in this article.[176]

The rise of the concept of the network[177] is a consequence of the fact that it is no longer a stable separation between the general experience as a distributed knowledge base, on the one hand, and the "best available" knowledge[178] produced by big firms, on the other hand, which characterise the focal structure of the cognitive "pool of variety" but a much more heterarchically fragmented loosely-coupled cognitive network which is at stake in postmodernity.[179] This new structure allows at the same time for more intense co-ordination among private actors themselves and between public and private actors in a way that blurs the hitherto-established separations that had already – if only to a limited extent – been severed by the institutions of the "society of the organisations".[180] The flexibility draws on the fact that the phenomenon of the "joint venture" established by firms which still compete with each other on the market demonstrates the potential of co-operation in new project based "epistemic communities".[181] This is valid both for the private and the public domain. In the realm of the

[175] For the fundamental transformation and flexibilisation of „space" see Saskia Sassen, TERRITORY, AUTHORITY, RIGHTS. FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2008); for the reconstruction of "space" as an outcome of complex formal and informal networks (as opposed to clear separation of "levels") see Kevin R. Cox, *Spaces of Dependence, Spaces of Engagement and the Politics of Scale*, 17 POLITICAL GEOGRAPHY 1 (1998).

[176] This transformation finds its repercussion in the rise of multiperspectivism in philosophy, in particular in Jacques Derrida, see Rodolphe Gasché, INVENTIONS OF DIFFFERENCE: ON JACQUES DERRIDA, 10, 61 et seq. (1994).

[177] See also Albert-László Barabási,LINKED. HOW EVERYTHING IS CONNECTED TO EVERYTHING ELSE AND WHAT IT MEANS FOR BUSINESS, SCIENCE AND EVERYDAY LIFE (2003); Veronika Tacke, *Differenzierung und/oder Vernetzung? Über Spannungen, Annäherungspotentiale und systemtheoretische Fortsetzungsmöglichkeiten der Netzwerkdiskussion*, 15 SOZIALE SYSTEME 243, 254 (2009).

[178] For the use of knowledge in economy still fundamental Friedrich August von Hayek, T*he Use of Knowledge in Society*, 35 AMERICAN ECONOMIC REVIEW 519 (1945).

[179] For a „cognitivistic" approach to the regulation of global financial markets in particular See the contributions in: TOWARDS A COGNITIVE METHOD IN GLOBAL FINANCE. THE GOVERNANCE OF KNOWLEDGE-BASED FINANCIAL SYSTEM (Torsten Strulik & Helmut Willke, eds., 2006); Torsten Strulik & Matthias Kussin, *Finanzmarktregulierung und Wissenspolitik. Basel II – Die aufsichtsrechtliche Konstitution kollektiver Intelligenz*, 26 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 101 (2005).

[180] Renate Mayntz, Modernization and the Logic of Interorganizational Design, 1 KNOWLEDGE & POLICY 3 (1993).

[181] Gensollen, *supra*, note 155.

latter, the state is able to co-ordinate its strategies with groups of firms in research processes which are no longer "steered"[182] by stable technological trajectories and expectations.

Something similar goes, for example, for the co-ordination among transnational firms upon the basis of the new *Lex Mercatoria* which is self-organised by private operators; however, one should bear in mind that, in general, rather big enterprises are parties like a "club",[183] to its processing while conflicts among smaller firms are still judged by state courts with reference to a generalised set of norms which have their origin in the realm of public transactions.[184]

One has to admit that the cohesion of the new transnational law is (and can be) - to a much lesser extent - stabilised by public institutions; institutions (legal norms in particular): it is more driven by a network of dispersed strategic operations of big law firms (for transnational clients). This is not so much a non-democratic illegitimate form of law-making but, due to the advent of a new structural "drift" in the legal system, a phenomenon that is not new if we look back to the emergence of preceding legal paradigms.[185]

Looking back on the internal self-transformation of the state-based legal system, one can - with good reason - ask whether the ensuing fragmentation of the cognitive basis of the postmodern society and its impact on the fragmented legal system does not challenge the role of the public at large and its participation in legal rule-making.[186] However, one has to be aware of the fact that, even in the liberal "society of the individuals", the central frame of reference for the generation of a collective order has been the spontaneously processed realm of experience and its societal rules, upon which the formal legal system was super-imposed as the second layer of the normative system of society. The legislator had only played a minor rule in this system as has been shown above. Even in the "society of organisations" during its heydays in the 1970s, the democratic "steering" potential of the state[187] could not primarily make use of legislation, but, in the so-called "golden age", the nation state had to draw on the pre-structuring of society by the corporatist co-operation of the pluralistic social groups and the big firms and the

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[182] See for the paradigm of "steering" private action through administrative law see Kersten & Lenski, *supra*, at 9, 530 et seq.; Wolfgang Hoffmann-Riem, *Eigenständigkeit der Verwaltung*, in: GRUNDLAGEN DES VERWALTUNGSRECHTS, Vol. 1, § 10 No. 13 (Eberhard Schmidt-Aßmann & Andreas Voßkuhle, eds., 2006).

[183] Esty, *supra*, note125, 1490; see also Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 JOURNAL OF EUROPEAN PUBLIC POLICY 627 (2006).

[184] Monica Kilian, *CISG and the Problem with Common Law Jurisdiction*, 10 JOURNAL OF TRANSNATIONAL LAW & POLICY 217, 226 (2001); Ingeborg Schwenzer & Pascal Hachem, *The CISG – Success and Pitfalls*, 57 AMERICAN JOURNAL OF COMPARATIVE LAW 457 (2009).

[185] See Sigrid Quack, Legal Professionals and Transnational Law-Making: A Case of Distributed Agency 14 ORGANIZATION 643, 644 (2007).

[186] For the legitimation function of participatory processes in decision making procedures see Esty, *supra,* note 125, 1489.

[187] For this paradigm see David Y. Livshiz, Updating American Administrative Law: WTO, International Standards?, Domestic Implementation and Public Participation, 24 WISCONSON INTERNATIONAL LAW JOURNAL LAW 961 (2007).

"representative organisations" of both.[188] This complex group-based infrastructure of the late modern nation state has left its traces in the legal system, which was composed of both an increasing number of laws and the regulation of more and more spheres of societal domains in the welfare state. However, a closer look at the norms themselves make it clear that their conception pre-supposed a moderating role of administration and in the legal system in the proper sense a new methodology that opened itself toward the "normalising" impact of the differentiated social spheres by reference to broad concepts which built a bridge between the pre-structured reality and the law. A prominent example for this new methodology is the rise "balancing", and the "proportionality principle":[189] both are fact ridden, in the same way as the understanding of the major concepts of liberal law had drawn on general experience and social norms[190] as the frame of reference for the legal practice. The state-based conception of the democratic statute[191] as the core of the legal system has always been normativistic wishful-

[188] See Colin Crouch, CAPITALIST DIVERSITY AND CHANGE: RECOMBINANT GOVERNANCE AND INSTITUTIONAL CHANGE 32, 92, 101 (2005).

[189] See the overview in Tor-Inge Harbo, *The Function of the Proportionality Principle in European Law,* 16 EUROPEAN LAW JOURNAL 158 (2010); the "proportionality principle" can in my view not be interpreted as a judicial strategy to gain dominance over policy making or even the reform of constitution, as Alec Stone Sweet & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 68 (2008), argue; this would be a much too broad assumption because this approach is often also chosen where courts could well follow more classical doctrinal strategies of argumentation (e. g. the judgments of the German Federal Constitutional Court on the constitutional limits of the freedom of expression or other constitutional liberties); even a rather politically active court such as this court is far from "dominating" policy making, it strengthens sometimes interests that are neglected by the consensus oriented political process but does not call its basis into question; reference to the proportionality principle is rather an expression of the increasing internal tensions within the postmodern legal order (Karl-Heinz Ladeur, KRITIK DER ABWÄGUNG IN DER GRUNDRECHTSDOGMATIK (2004) and its overcomplexity due to the openness to any interest and its lack of "meta-rules of collision"; see Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1999 (2004); Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARVARD INTERNATIONAL LAW JOURNAL 471 (2005); and from a more pragmatic point of view Michelle Everson & Christian Joerges, *Reconceptualising Europeanisation as a Public Law of Collisions: Comitology, Agencies and an Interactive Public Adjudication*, 512, in: Administrative Governance (Herwig C. Hofmann & Alexander H. Türck ,eds., 2006). This means does not have a stable orientation as was the case in the liberal society of the individuals; Lucien Jaume, LA LIBERTE ET LA LOI 259, 304 (2000). The growing importance of constitutional control of the law and decision making processes in more and more countries is one of the many symptoms of the fragmentation of the legal system and its "entangled" hierarchies but not a consequence of a shift of law making power to courts. Hirschl , *supra, note* 135, 214, points out with good reasons that high courts only rarely call into question the established political power.

[190] The focus on "social agents" as the main source of legal norms (and not the state as such) goes back to Philip Selznick, Philippe Nonet & Howard M. Vollmer, LAW, SOCIETY AND INDUSTRIAL JUSTICE, 1969, 244.

[191] In the US "democratic" legitimacy of administrative action historically was based more on the authority of the president than democratic statutes, see Jerry L. Mashaw, *Administration and 'The Democracy': Administrative Law from Jackson to Lincoln 1829-1861*, 117 YALE LAW JOURNAL1568 (2008).

thinking.[192] In this respect, no fundamental change has occurred in the postmodern society of the networks. This common limitation of legislation by its dependence on the "framing" effects of societal norms notwithstanding, the challenge to the legal system and its difficulties in finding a consistent response is undeniable. The question has to be re-formulated, though, in the sense of a search for a new role of the legal system in the stricter sense and a re-formulation for the inter-relationships with the fragmented heterarchical type of loosely-coupled norms generated from segmented functionally-specified networks,[193] instead of rather stable group-based and organisation-based links between the law and the societal knowledge base. Both the law of the society of the individuals and the pluralistic law of the society of (representative) organisations[194] were characterised by broad comprehensive cognitive "pools of variety" which corresponded to the territorial logic of the nation state, whereas the fragmented functionally-ordered segmented cognitive network of postmodernity lacks this focal orientation, which implies a potential transparency, of mutual interference and co-ordination by common meta-rules and methods of argumentation and comparison.

The common reference to the proportionality principle both in domestic and European law is problematical: because of its vagueness, it tends to block the adequate conceptualisation of new challenges related to the heterogeneity of postmodern law and its concomitant "norm collisions".[195] It is only acceptable as a kind of "placeholder" for a new type of an emergent norm that is generated in an experimental mode *ex post* from the observation of new conflicts which cannot be solved with reference to traditional norms that are set *ex ante* and are "applied" to cases. This new type of norm which is generated "bottom up" is due to the high level of complexity of postmodern law.

The network like structure of the postmodern cognitive infrastructure is much less transparent and not easy to integrate into a comprehensive framework. This has an impact also on the self-understanding of citizenship which is not obviously compatible with the loose network of knowledge distributed not over society at large, but over differentiated webs which are not easily accessible to individuals,[196] which take on a fragmented and self-designed character themselves.[197]

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[192] The authority of public institutions is derived from a complex "overarching governance structure" and not legislation alone, see Esty, *supra*, note125.

[193] Niklas Luhmann, *Die Paradoxien des Entscheidens*, 17, 43, in: PARADOXIEN DER ENTSCHEIDUNG: WAHL/SELEKTION IN KUNST, LITERATUR UND MEDIEN (Friedrich Balke, & Urs Stäheli, eds., 2003).

[194] Crouch, *supra*, note 184, p. 32.

[195] Joerges & Everson, *supra*, note 189; from the point of view of administrative law see Karl-Heinz Ladeur, *The Significance of General Administrative Law for European Administrative Law*, 167, in: Rainer Nickel (ed.), CONFLICT OF LAWS AND LAWS OF CONFLICT IN EUROPE AND BEYOND (Rainer Nickel, ed, 2010).

[196] Peter Fuchs, MODERNE KOMMUNIKATION 67 (1993).

[197] Ladeur, *supra, note* 128.

IV. THE RELATIONSHIP BETWEEN ADMINISTRATIVE AGENCIES AND COURTS

A. THE CO-OPERATIVE CONSTRUCTION OF A NORM

The focus on legitimacy and the simplistic supposition of a deductive rationality of the legal process detracts the attention from the problems of "internal autopoiesis" of law, *i.e.*, the requirements of maintaining the closure of the system at the micro-scale, which Luhmann seems to neglect as well.[198] The legal system can be regarded as being composed of chains of decisions being produced by the tribunals – this is what Luhmann calls the "centre" of the legal system, whereas the processing of contracts and other private transactions is to be located at the periphery.[199] In my view, this rather static internal differentiation does not give sufficient tribute to the internal "unrest" which is continuously moving the system and which prevents its acentric processing from coming to a halt.[200] The same is true for the conception of the legal system as composed of norms and their "application" to a case. Systems theory's focus on decisions and transactions comes closer to a more productive view of the internal aspect of the self-construction of the legal system. The legal system not only has to reproduce its border lines in order to close its rationality off from the direct interference of other systems (religion, politics) but it also has to reproduce its unity both by the flow of "legal components" (decisions, contracts, *etc*.) and by the reflection and control of the internal rationality of the inter-relationships between operations: the process of decision-making or contracting cannot always start from zero, its internal experimentation has to weave connections between operations and to observe which patterns prove to be successful and which have to be "second guessed" in new trial and error processes. The functional requirement to stabilise expectations under conditions of uncertainty[201] pre-supposes not only autonomy *vis-à-vis* the other social systems, but also the internal management of rules. Rules have a paradoxical character in as much as they cannot just preserve the "given" (in this case, one does not need rules in the modern sense), they have to allow for orientation in a society which is continuously involved in processes of self-transformation[202] that includes the subject himself or herself, who "fulfils the mysterious function of association lived experience of the individual with a communicable and

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[198] This seems true in spite of the fact that Luhmann takes into consideration that law is dependent on cases and is in search of a kind of "'local' rationality" alone, Niklas Luhmann, supra, note 40, 352..

[199] Luhmann, *ibid.*, 293 et seq., 304.

[200] See in a theoretical perspective on the discontinuity within the search processes of self-organization Henri Atlan, *L'émergence du nouveau et du sens,* 115, 122, in: L'AUTO-ORGANISATION. DE LA PYSIQUE AU POLITIQUE (PAUL DUMOUCHEL & JEAN-PIERRE DUPUY, 1983): "random perturbations" may be self-reinforced and provoke the emergence of a new paradigm of "order from noise".

[201] Luhmann, *ibid.*, 263 et seq.

[202] This is why a the "paradoxical co-existence of legal and non-legal" has to be presupposed, Peer Zumbansen, *Transnational Legal Pluralism*, 1 TRANSNATIONAL LEGAL THEORY 141, 159 (2010).

social form of expression".[203] The rule has to be continuously re-worked and re-modelled[204] by both new judgments and new operations as well as the generation of new patterns of public and private decision-making[205] in order to be able to allow for co-ordination among individuals or other legal persons who have to struggle with the dynamics of self-transformation of society. This is why precedents (decisions) or patterns of contracting and a certain stability of expression guaranteed by referring to patterns of behaviour have to be reproduced by the legal system. The paradox of the decision is expressed quite convincingly by Russell Hardin, who takes the view that, in common law – not only there – the individual court decision is meant to produce a new rule for third persons, while the present litigants are simultaneously treated as though the rule had been in place when they acted".[206] This includes the "docility" of the legal actors who have to adapt themselves to both factual and legal standards of behaviour.[207] Against the background of these general assumptions, the concept of "network" may be helpful for the conceptualisation of the internal rationality of the legal system: this concept pre-supposes a complex infrastructure of the legal system and its internal inter-relationships which are managed and re-arranged by different forms of feedback loops.[208] The feedback loops re-inforce the connections between a cluster of operations which aggregate a "hub" and reproduce the closure of patterns of behaviour or a second order reflexive concept based upon the observation and justification of a pattern. At the same time, the network of patterned operations reproduces differentiation *i. e.*, the separation between a pattern and a set of "exceptions" which are loosely-coupled with the pattern as a default mechanism which exerts a certain attraction on the acceptability of a certain construction, interpretation or argumentation in a legal process:[209] for example, the freedom of a contract can, of course, always be called into question because "freedom" is a vague concept, but, in a traditional legal understanding, the possibility of bringing in this argument is kept separate from the pattern of normal contracting and restricted to invocation of mental illness, error, breach of *boni mores*, *etc*. This is not necessarily the case: the "hub which reproduces the pattern of a normal contract can be re-opened and the "structural hole", as network analysis might put the relationship between the stabilised "hub" and the weaker node of exceptional operations

[203] Neuman, *supra*, note 162, 705.

[204] See Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW AND SOCIETY JOURNAL 719 (1973), who rightly underlines that the law is not an "entity capable of controlling that (social – KHL) context".

[205] Kathleen Noonan, Charles F. Sabel & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOCIAL INQUIRY 523, 524 (2006).

[206] Russell Hardin, INDETERMINACY AND SOCIETY 33, 47 (2003).

[207] For a theoretical perspective on the transsubjective character of procedures of standardisation as normalisation in the Foucauldian vein see Stéphane Legrand, LES NORMES CHEZ FOUCAULT, 2, 154 (2007); Macherey, *supra*, note 51, 81 et seq.; Albert Ogien, *Du sens commun comme une sorte de faculté de juger*, 445, in: NORMATIVITES DU SENS COMMUN (Claude Gauthier & Sandra Laugier, eds., 2009.

[208] The transnational networks find their repercussion in the internal fragmentation of the nation state: Kenichi Ohmae, THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES (1995).

[209] Lefebvre, *supra*, note 79, 59.

which are kept separate in a smaller "hub", can be overcome by introducing new types of "weak" individuals for whom the pattern is modified (consumers, dependent workers and employees, *etc*). A new mode of overcoming this structural hole in private law is the reference to the constitution, *i.e*., an analogy is drawn between a private law operation and the infringement of a constitutional right by the state.[210] This re-opens the internal closure which was established in the past and demands new forms of closure which limit this inter-relationship in order to allow for stability within. The example shows that a completely patternless openness of the legal system to arguments would block the internal autopoiesis even if the outer autopoiesis was not at stake, because it could just be an orientation crisis of the legal system and not a case of interference of a different social system.

The past and present status of administrative law is not a creation of judges. Law in the administrative system is to be understood primarily as a self-generated set of rules by administrative deciders, which is controlled or shaped by the legislator or judges only after the fact.[211] Judicial review can only be "sporadic and peripheral".[212] A different picture would lead to "institutional blindness"[213] and ignorance of the creative and experimental function of administrators themselves and of the "wider conception of administrative justice" that includes the impact of the *eigenrationality* of administrative practices.[214] It would also overtax the unity of administrative law.[215]

It is not by chance that, in Germany, the general rules of administrative procedure have only been codified in 1976.[216] The above-mentioned complex processes enacted by the administration of the "society of organisations" have also been tackled at first by the administrative agencies themselves and have only been the object of vague laws which draw on the experience of administrators later on. Administrative law emerges from the indetermination of a process which draws on the decision as that which creates new experimental "bindingness" from situation to situation - in a society which is no longer based

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[210] See the comparative contributions in: EUROPEAN AND US CONSTITUTIONALISM (Georg Nolte, ed., 2005).

[211] Thomas Poole, *The Reformation of English Administrative Law*, 68 CAMBRIDGE LAW JOURNAL 142, 155 (2009) 156; Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 UNIVERSITY OF TORONTO LAW REVIEW 497, 520 (2005); id. supra, note 7, at 1378.

[212] Poole, *ibid.* 157.

[213] See generally Adrian Vermeule, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

[214] Poole, *ibid.*, 164, 167.

[215] Poole, *ibid.*, 165.

[216] This is very similar to the evolution of American administrative law: the APA has mainly codified administrative practices, see Mashaw, *supra*, note 7;; for the political constellation that made possible the APA as a reaction to the New Deal see McCubbins, Noll & Weingast, *supra* , note 146..

upon the illusion of being able to reproduce a tradition - and not as deduced from a stable norm.[217]

This development, which was very similar in other countries such as France, UK, USA, is summarised by B. Kingsbury[218] in the assumption that judges have, over time, been able to construct a system of administrative law without comprehensive specification in statutes or constitutional norms. The second part of this observation concerning the reduced involvement of the legislators is certainly correct. With the first part concerning judges, one might have difficulties, at least, as far as the "construction" of a system of administrative law is concerned. The main instrument of administrative law in France and Germany, the "administrative act", has long been regarded as a remnant of the absolutist state. However, as was remarked earlier, this is a one-sided observation: this institution has been completely remodelled and been adapted to the conditions of the liberal state and society: it allows for objectivation, self-continuation, learning and transparency.[219] However, it remains a construction of administration; it has been recognised, structured and formalised by the judiciary. To call this "judge-made law"[220] is somewhat superficial, because it is more a product of a coupling between the networks of administration and the processing of a network of the judges which introduced stability (for the rights of individuals in particular) and specific rules for validity *etc*., into the administration law, although a major part of the rules relate to practices which have been generated by the administration itself. This true, in particular, for the broad range of administrative operations which are mainly self-referential, in the sense that the direct contact to the rights of the citizens is reduced or regarded as non-existent. In Germany, this is the world of the "special power relationships" ("*besonderes Gewaltverhältnis*") dominating public schools, military service, the status of civil servants and "public assistance", which implied a specific dynamic status allowing for administrative "creation", as opposed to public services provided by the state (such as the telephone, water, electricity, *etc*.) or local agencies, which could be the object of a special public law regime but did not impose a status of continuous regulation.

The claim to preserve a continuity of public order by administrative decision-making (administrative acts in particular) involved a leeway of discretion because rights were regarded from the outset as being inherently limited by the rights of others and the comprehensive "general interest".[221] Notwithstanding this, this general interest was no longer that of the state,

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[217] For a theoretical perspective on "indetermination" as the rule to which "perfect knowledge" is only the exception see Albert Ogien, LES RÈGLES DE LA PRATIQUE SOCIOLOGIQUE 109 (2007); Christiane Chauviré, PEIRCE ET LA SIGNIFICATION. INTRODUCTION À UNE LOGIQUE DU VAGUE (2007), both draw on Charles S. Peirce.

[218] Kingsbury, *supra*, note 9.

[219] For a critique see Mashaw, *supra*, note 9, 1378.

[220] See in a theoretical perspective Kerchove & Ost, *supra*, note 14.

[221] See Bohlender, *supra*, note 49, for the evolution of the concept of "Gemeinwohl" ("common interest") in Germany.

but of the "order" of society at large, which included - as mentioned before - continuous change.[222]

This phenomenon does not differ much from the relationship between private law in a stricter sense and the practical networks of experience which process the cognitive infrastructure of the law.

This is what is at stake when N. Luhmann[223] regards "decisions" as the operation which is characteristic for the autopoietic process of reproduction of the legal system. One should go one step further and expand more on the idea of network as the infrastructure of the legal system. Luhmann himself also refers to the idea of network, but does not give much detail on what he means when referring to the phenomena of "networks" in the legal system.[224] The shift from the hierarchical perspective on the legal norm as the steering element of the process of setting up the internal autopoietic structure of the legal system, to a heterarchical conception of the development based upon a processing of decisions not just from case-to-case but as a kind of management of inter-relationships and connection possibilities within a network of decisions,[225] contracts and, above all, judgments might be more adequate as the reference to norms or "principles" as the "open source" of the legal system. Legal principles should not be regarded as being based upon the "nature of things" (G. Del Vecchio) or an abstract set of meta-rules for the generation and completion of norms, or their adaptation to specific cases. Instead, they are to be conceptualised as reflexive general experiences drawn from a vast amount of cases [226] and linked to practices of legal decision-making. They have a distributed character themselves, in as much as they are processed within the networks as recurring patterns of the management of the inter-relationships and constraints which have been accumulated in the legal system.[227] The autonomy of the legal system is not equivalent to being insulated from moral values, politics, economic interests, *etc*. Its autopoiesis consists, instead, in sustaining an impersonal "network of networks" of inter-relationships which generate patterns of operations, institutional constraints and beliefs (including the possibility of forming expectations and longer chains of actions) so as to make learning as a means of coping with uncertainty both possible and attractive. The autonomy of the legal system is a response

[222] Powell, *supra*, note 73.

[223] Luhmann, *supra*, note 198, 46, 78, 98, and passim.

[224] Luhamnn, *supra*, note 193, 17, 43.; id., DIE GESELLSCHAFT DER GESELLSCHAFT, 65, 851 (1997), refers to the "networked" ("netzwerkförmig") interrelationships between communications and the generation of new opportunities for communication within systems; see also Tacke, *supra*, note 177.

[225] Luhmann, *ibid.*, 17, 43.

[226] Luhmann, *supra*, note 198, 438.

[227] North et al., *supra*, note 60, 261.

to the "essential incompleteness" ("*inachèvement essentiel*"[228]) of both individuals and society, which makes institutions the "engines of history" which retain a productive "pool of variety" of operations that shape change by imposing constraints,[229] and allow for an impersonal monitoring upon the basis of a systemic memory. This distributed memory which is processed by the complex "network of networks" of cases and the internal rules on the reflection of inter-relationships between cases and decisions allows for the "invention" of that which is not given *a priori*[230] and generates new structured "regular" action potentials which, at the same time, open a perspective for co-operation, co-ordination, and repetition. Order cannot be generated from a privileged rational totalising view on society from "outside"; in a civil society, it is the emergent property of individual and organised productive operations with and within chaos,[231] which is retained and structured by an institutionalised memory beyond the individual.

B. THE NEW ROLE OF JUDICIAL CONTROL IN POSTMODERN SOCIETIES

As has been shown in this article, the breaks of symmetry in the technological system which challenge the network structure within the legal system are not managed by the legislator first, and are then broken down to a new practice of decision-making in the legal system. On the contrary, the constant flux of operations in the networks within the legal system and the exchange processes with the knowledge-producing networks outside are themselves the "agents of change".[232] Apparently, the recent evolutionary transformations of administrative law are not well-reflected in legal theory, which tries to meet the challenge of complexity by new holistic approaches which abandon conceptual and doctrinal analysis of the change process.

German administrative law has been superseded in the last decades by a tendency to establish a monistic approach focused on rights[233] and the proportionality principle.[234] Interestingly, the same has been said recently about English administrative law, after the introduction of the European human rights into the English legal system.[235] This is a reductionist perspective that

[228] Gauthier, *supra*, note 80, 242.

[229] North et al. , supra, note 60, 261; Greif, *supra*, note 98, 380.

[230] Gauthier, *supra*, note 80, 242.

[231] Gauthier, *supra*, note 80, 233.

[232] See also the approach developed by Mashaw, *supra*, note 7, 1413, who also concentrates on practices of administrative agencies and not primarily its justification.

[233] The same can be said for constitutional law; this seems to be a general tendency in western law, see Mark V. Tushnet, *The Rights Revolution in the Twentieth Century,* 377, in: THE CAMBRIDGE HISTORY OF LAW IN AMERICA, Vol. 3, 337 et seq. (Michael Grossberg & Christopher Tomlins, eds., 2008), (arguing that the concept of rights is shifting towards a broader understanding of the protection of "autonomy").

[234] See the references *supra*, note 189.

[235] Poole, *supra,* note 211, 155; see also Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 NEW YORK UNIVERSITY LAW REVIEW 437 (2003), who identifies different paradigms in American administrative law.

ignores the complexity of the administrative tasks that cannot be accessed by a focus on the individual rights which are at stake in a decision-making process.

In global administrative law which is, in many respects, much more dependent on legitimation by state law in the stricter sense that the protagonists of a new look at a transnational legal sphere beyond the state tend to refer to general principles of law[236] as – if not a source of legitimation – a limiting constraint, on the one hand, which serves as a legitimation basis, on the other hand. The role of these general principles remains rather unclear[237] in modern legal theory, whereas, in more traditional approaches, the possibility of the deduction of such principles from the "nature of things"[238] is focused in a way which is no longer plausible today. This construction is another version of the ignorance of the necessary responsive cumulative mode of law-making inherent in administrative processes of decision-making.[239]

The recent evolution of new complex types of procedure and decision-making has had a strong impact on the coordination of administrative and judicial decision-making (and on the legislator, as well). Reference to the more structured and reflexive types of knowledge needs more procedural rules which re-construct the informational infrastructure of complex decision-making processes,[240] instead of the more substantive, rule-based type of decision of the society of the individuals of the past. It should be born in mind that "rule-based", in the sense intended here includes all the layers or the normative and cognitive rules and conventions which are processed by reference to the individual right in the "private law society" and the single "administrative acts" of public administration which follow a similar logic, despite the seemingly sharp difference between public and private law. A similar evolution can be observed in private law, as well. This is, above all, true for tort law and liability for negligence, in particular.

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[236] Tarcisio Gazzini, *General Principles of Law in the Field of Foreign Investment*, 10 JOURNAL OF WORLD INVESTMENT AND TRADE 1 (2009); Axel Metzger, EXTRA LEGEM, INTRA IUS: ALLGEMEINE RECHTSGRUNDSÄTZE IM EUROPÄISCHEN PRIVATRECHT 483, 519 (2009).

[237] A perspective which is more focused on the creative and generative elements of an autonomous legal system and its emergent character would lead to a procedural approach which regards general principles of law as a secondary layer of reflection of the inherent "unrest" of a system which is implied in a continuous process of self-transformation, see in this respect Metzger, *ibid*., 545 et seq.

[238] Giorgio del Vecchio, GENERAL PRINCIPLES OF LAW, 10 (1956); for a critique see Luhmann, *supra*, note 198, , 418.

[239] Mashaw, *supra*, note 7, 1476,

[240] Thomas Vesting, *Die Bedeutung von Information und Kommunikation für die verwaltungsrechtliche Systembildung,* in: GRUNDLAGEN DES VERWALTUNGSRECHTS, vol. 2, *supra*, note 108, § 20 No. 1.

With reference to court practice, the co-ordination between administration and judicial control becomes much more complex,[241] as well. Whereas judicial control of administrative acts in the "society of individuals" could be focused on the doctrinal construction, variation and preservation of rules and mediating doctrinal inter-relationships between cases and decisions, judicial control of the administrative decision-making in the "society of networks" is much more complicated: one could re-conceive it more as a "web" or a network of judgments which revolve around a cluster of cases,[242] and process information and orientation to administration in a more diffuse way.[243] This evolution can lead to a more politicised control,[244] both in a positive sense as an attempt by courts to set the substantive standards under conditions of uncertainty, or in the negative sense of leaving more room to administrative discretion, or it has to be re-considered and re-framed in a new way. As in the past,[245] however, the steering function of the law and of the statutes, in particular, should not be over-estimated:[246] the deliberation of this question should not be focused in a one-sided way on the legislator – assuming a delegation of discretion enshrined in a statute where no such thing is to be found. Instead, a parallel should be drawn to the relationship between the law and its cognitive infrastructure in the "society of individuals": administration can no longer be oriented by the distributed sets of experience; instead, it draws on a multiplicity of self-organised societal knowledge types including self-generated "best practices",[247] which stand for the innovative dimension of experimental future-oriented administrative action under conditions of uncertainty.[248]

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[241] Carol Harlow & Richard Rawlings, LAW AND ADMINISTRATION. LAW IN CONTEXT, 3rd ed., 711 (2009); Armin von Bogdandy, GUBERNATIVE RECHTSETZUNG 368 (1999).

[242] Michael. J. Bommarito,II, Daniel M. Katz & Jon Zelner, *Law as Seamless Web*, in: PROCEEDINGS OF 12TH INTERNATIONAL CONFERENCE ON ARTICIAL INTELLIGENCE AND LAW, available at http://ssrn.com/abstract=1419525

[243] Thomas J. Miles & Cass R. Sunstein, *Depoliticizing Administrative Law*, University of Chicago Public Law Working Paper 223 (June 2008), ; for a critique Peter L. Strauss, *Overseers or Deciders: The Courts in Administrative Law*, 75 UNIVERSITY OF CHICAGO LAW REVIEW 815 (2008).

[244] Miles & Sunstein, *ibid.*.

[245] For the changing conception of the relationship between (active) administrative regulation and the judicial control in history see Foster H. Sherwood, *Judicial Control of Administrative Discretion 1932 – 1952*, 6 THE WESTERN POLITICAL QUARTERLY 730 (1953).

[246] The ambiguity of the role of courts in complex cases of controlling administrative behaviour is a big issue in recent literature, see Strauss, *supra*, note 243, 815; Kenneth A. Bamberger & id, *Chevron's Two Steps*, 95 VIRGINIA LAW REVIEW 611, 621 (2009): should courts act as guides for future administrative decision making procedures or rather respect the creative function of administration? See for the creative role of administrative agencies Dorit Rubinstein Reiss, *Administrative Agencies as Creators of Administrative Law Norms: Evidence from the UK, France and Sweden*, in: COMPARATIVE ADMINISTRATIVE LAW, 2010 (Susan Rose-Ackerman & Peter Lindseth, eds., to appear).

[247] See generally David Zaring, *Best Practices*, 81 NEW YORK UNIVERSITY LAW REVIEW 294 (2006);

[248] The OECD plays also an important role in the search for transnational benchmarks Markku Lehtonen, OECD Benchmarking in Enhancing Policy Convergence. Harmonisation, Imposition and Diffusion Through the Environmental Performance Reviews, Ms. (2005).

The focus of control should as a consequence shift to a more network like mode, *i.e.*, the rules for administrative decision-making in complex domains, planning law, environmental[249] or high-technology law, or other types of strategic goal-oriented ways which comprise chains and networks of operations. The frame of reference for judicial control cannot be stable conceptions of the norm, individual rights, experience or doctrinal concepts, but, instead, the administrative decision-making process has to be formulated in a more comprehensive open way with a view to the limitations set by the challenge of action under conditions of uncertainty. As a consequence, the "control-project"[250] should also be formulated in a more open way, which is focused more on the outside observation (with a view to administration) of the plurality of network like inter-relationships between the different steps of the decision-making process on the one hand, and the potential concatenation of several decisions on the same time-scale and with a view to potential future administrative operations. This means that, instead of the orientation on the "substantive rationality"[251] of rules whose structures and goals can, more or less clearly, be pre-supposed, the "procedural rationality" of both the distributed network of administrative[252] and the judicial decisions should be considered with regard to the learning of new practices.[253] With Dorf & Sabel, one could talk about distributed practices of "experimentalism",[254] which as I would like to add, replace or supplement

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[249] Ladeur, *supra*, note 82..

[250] See White, *supra*, note 160, 220.

[251] Herbert A. Simon, *From Substantive to Procedural Rationality*,129, in: METHOD AN APPRAISAL IN ECONOMICS, (Spiro J. Latsis, ed., 1976).

[252] Kingsbury, Krisch & Stewart, *supra*, note 1, 20; see also Benedict Kingsbury, *Omnilateralism and Partial International Communities: Contributions of the Emerging Global Administrative Law*, 104 JOURNAL OF INTERNATIONALLAW AND DIPLOMACY 98 (2005); Eleanor D. Kinney, *The Emerging Field of International Administrative Law: It's Content and Potential*, 54 ADMINISTRATIVE LAW REVIEW 415 (2002); Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, in: 9 GERMAN LAW JOURNAL 1909 (2008). http://www.germanlawjournal.com/pdf/Vol09No11/PDF_Vol_09_No_11_1909-1938_Articles_von%20Bogdandy.pdf; for the terminology see Susan Marks, *Naming Global Administrative Law*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 995 (2006).

[253] John S. Brown/Paul Duguid, *Organizational Learning and Communities of Practice: Towards a Unified View of Working, Learning and Innovation*, 2 ORGANIZATION SCIENCE 40 (1991); Frédéric Creplet, Olivier Dupouet, Francis Kern, Babak Mehmanpazir & Francis Munier, *Consultants and Experts in Management Consulting Firms*, 30 RESEARCH POLICY 1517 (2001), id., *Technology Policy in the Kowledge-Based Economy*, 75, 100, in: INNOVATION POLICY IN A KNOWLEDGE-BASED ECONOMY (Patrick Llerena & Mireille Matt, eds., 2005); Patrick Cohendet, *Knowing Communities in Organizations,* in: ADVANCING KNOWLEDGE AND THE KNOWLEDGE ECONOMY 91, 93 (Brian Kahin & Dominique Foray, eds., 2006).

[254] See Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUMBIA LAW REVIEW 267, 314 (1998). See generally Charles F. Sabel and Jonathan Zeitlin, Learning from Difference: The New Architecture of Experimentalist Governance in the European Union, European Governance, Paper No C-07-02 (May 10, 2007), available online at <http://www.connex-network.org/eurogov/pdf/ egp-connex-C-07-02.pdf > ; Abbott & Snidal, *supra*, note, 2009, 43.; for the democratic potential of open cooperation see Errol Meidinger, *Competitive Supra-governmental Regulation: How Could it be Democratic?*, 8 CHICAGO JOURNAL OF INTERNATIONAL LAW 513

distributed experience as a core element of the infrastructure of the law. The relationship between administration and judicial control could be phrased as " tangled web",[255] instead of as a stable rule-orientation, as might seem adequate for the "society of the individuals". As Joanne Scott and Susan P. Sturm[256] have luckily formulated, one might regard the role of the judiciary in this tangled web of decisions somewhat as a "catalyst" which functions as "enabling", blocking or setting conditions of new actions under conditions of uncertainty, and uses the interference in the administrative process rather as a monitoring function thereby strengthening the internal rationality and transparency[257] of the informational process and the learning capabilities in the future.[258] At the same time, the judicial system should consider whether its own learning capabilities can be improved and stabilised by considering the productive concatenation of a new judgment with the requirements formulated in former decisions, and with a potential new judgment the future. In the analysis of judicial decision-making, reference has already been made to the distributed rationality of a network of judgments which have to be read in a horizontal heterarchical mode of processing from case to case.[259] This approach should not be read as a support for individualised situative decision-making, not at all. There has to be a flexible concatenation which allows for the creation of reflexive web of "similar" judgments that tries to learn from the practical response of actors to its previous "entries" in the network of judgments. This institutional arrangement is a kind of "judicial polycentricity"[260] that corresponds to the polycentric processing of markets and its

(2008); ; on the responsibility of transnational governance networks see James Bohman, DEMOCRACY ACROSS BORDERS. FROM DÊMOS TO DÊMOI, 2010, 44 seq.; Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy,* 121, in: PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION (Karl-Heinz Ladeur, ed., 2004); Karl-Heinz Ladeur, *Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?*, *ibid.*, 87.

[255] Harlow & Rawlings, *supra*, note 241, 711; Bommarito et. al., *supra, note* 242, epitomize the role of the "interconnectedness" of court decisions.

[256] *Courts as Catalysts: Rethinking the Judicial Role in New Governance*, 13 COLUMBIA JOURNAL OF EUROPEAN LAW 565 (2007).

[257] Esty, *supra, note* 125.

[258] See on the meaning of learning of general administrative law in jurisprudence, Carol Harlow, *Changing the Mindset: The Place of Theory in English Administrative Law*, 14 OXFORD JOURNAL OF LEGAL STUDIES 419 (1994); on learning through the development of „ordering ideas", in the exchange between general and particular administrative law, Eberhard Schmidt-Aßmann & Stéphanie Dagron, *Deutsches und französisches Verwaltungsrecht im Vergleich ihrer Ordnungsideen*, 45 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES UND VÖLKERRECHT 395 (2007).

[259] See in a theoretical perspective on the concept of network as a paradigm of conceptual construction Seth J. Chandler, *The Network structure of Supreme Court Jurisprudence*, University of Houston Law Center No. 2005-W-01..

[260] See Paul Dragos Aligica & Peter J. Boettke, CHALLENGING INSTITUTIONAL ANALYSIS AND DEVELOPMENT. THE BLOOMINGTON SCHOOL, 26 et seq., 63 (2009); see also Robert Cover, 30, in: PROCEDURE (id., Owen Fiss, & Judith Resnick, eds., 1988).

administrative observation and limitation[261] (in the past with the help of the "*actes administratifs*" in particular).

The network based approach[262] developed here would assume that there is also a process of coupling between the practical networks of administrative decision-making and the private processes of contracting or arguing about the limits of rights (damage, negligence, *etc*.[263]) on the one hand, and the networks of court judgments which have to cope with the internal requirements of preserving consistency and the external requirement of keeping the practical networks of administration and private actors (in private law) productive and dynamic – this includes the respect for private autonomy in private law and discretion in public law, on the other. Robert Cover has regarded "jurisdictional redundancy" as a flexible strategy of avoiding errors.[264] This idea is not to be confined to the plurality of courts in federal systems alone, but it should include the polycentric web of judgments that try to generate and manage the "density of experience".[265] Methodological "dissensus"[266] can also be regarded as a productive element in a more experimental search for new rules and patterns of co-ordination in both private an public law as long as a web-like structure of mutual reference, reflection, and revision is preserved with a view to the proactive generation of a common frame of judgment that loosely integrates a practice which is taken seriously.

C. A COMPARATIVE LOOK AT THE NETWORK LIKE STRUCTURE OF TRANSNATIONAL COURT PRACTICE IN THE FIELD OF (PRIVATE) MEDIA LAW IN PARTICULAR

A closer look at *Lex Mercatoria* or the other private legal regimes shows that they have formed a new legal order for a network of (regular) participants, transnational economic and legal transactions in particular,[267] which does not cover the whole of the arena of transnational

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[261] At the same time there seems to be a structural limit to the intervention of courts into polycentric public-private networks, Noonan, Sabel & Simon, *supra*, note 205, 559.

[262] For an Overview of the new relationship between systems theory and the new concepts of "network" see Tacke, *supra, note* 177, 243.

[263] Kenneth S. Abraham, *Custom, Noncustomary Practice, and Negligence*, 109 COLUMBIA LAW REVIEW 1784 at 1796 (2009).

[264] Cover, *supra*, note 260, 30.

[265] Cover, *ibid.*, 30.

[266] See Ethan J. Leib & Michael Serota, *Feature Essay: The Costs of Consensus in Statutory Construction*, YALE LAW JOURNAL online, www.yalelawjournal.org, July 30th 2010; this article is a critique of Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE LAW JOURNAL 1750 (2010).

[267] Teubner, *supra*, note 17.

exchange.[268] The bearers of this network of law are (in private law) big firms, which continuously engage in an exchange of roles (they act both as sellers/providers and as buyers). This engagement is the basis for the emergence of common interests which are shared by transnational corporate actors in particular. At the other end of the range of action formats in transnational affairs, we must not forget the smaller- and medium-sized firms (SMEs) which only rarely engage in transnational transactions or the role of consumers. In this field, transnational contracts are still judged in cases of conflict by state courts. And it seems to be far from simple to develop a homogeneous stable court practice even upon the basis of a uniform legal text such as the Convention on International Sale of Goods (CISG)[269] and in spite of a duty imposed on courts to consider the common interest in a homogeneous legal practice.[270] The networking[271] in this latter case is done by courts and not by the participants in transactional legal affairs, as in the field of *Lex Mercatoria*. This seems to be a common denominator which might be productive in conceptualising global law – public and private: The emergence of a global type of law "beyond the state" pre-supposes a network based common interest of participants,[272] which is not identical with the public interest of an overarching community. This does not, from the outset, speak against the recognition of a new type of global law – far from it. It should, perhaps, warn us not to regard this phenomenon as just a transitory momentum which, in the long run, ends up in the "constitutionalised" world society.[273] It would be

[268] For the rise of self-regulation of private actors see Virginia Haufler, *Globalization and Industry Self-regulation*, 226, in: GOVERNANCE IN A GLOBAL ECONOMY (Miles Kahler & David A. Lake, eds., 2003); Peter Gourevitch, *Corporate Governance: Global Markets, National Politics*, *ibid.*, 305.

[269] Schwenzer & Hachem, *supra, note* 184, 468: who point out that the duty to refer to foreign judgments is no equivalent to the integrative function of a common supreme court.

[270] Kilian, *supra, note* 184; Schwenzer & Hachem, *ibid.*

[271] The "network" concept is often used in a loose way; it should specified with respect to „some combination of informality, equality, and commitment" Paul DiMaggio, *Conclusion: The Futures of Business Organization and Paradoxes of Change*, in: id. (ed.), supra, note 158, 212 — I would add its functionality for a mode of generation of knowledge and management of uncertainty; see for the concept of the "disaggregated State" Anne Marie Slaughter, A NEW WORLD ORDER (2004); see also the contributions in: Ino Augsberg, Tobias Gostomzyk & Lars Viellechner, DENKEN IN NETZWERKEN (2009).

[272] See The examples in Michael S. Barr and Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 15 (2006) 15; Michael Livermore, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 NEW YORK UNIVERSITY LAW REVIEW 776 (2006); Gus Van Harten and Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 121 (2006).

[273] Deborah Cass, The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Communityin the International Trading System (2005); Neil Walker, *Constitutionalism in a New Key: The EU and the WTO*, 31, in: The EU and the WTO: Legal and Constitutional Issues (Gráinne de Burca & Joanne Scott, eds., 2001); Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN JOURNAL OF INTERNATIONAL LAW 579 (2006); David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 LAW & CONTEMPORARY PROBLEMS, 127, 139 (2005); Euan MacDonald, The ‚Emergence' of Global Administrative Law, 2007, www.iijl.org/GAL/documents/MacDonald.pdf; with reference to human rights in particular Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 621, 631 (2002); Bardo Fassbender, *The United Nations Charter As*

preferable to distinguish more reflexive mechanisms in the practice of self-organised rules, which would – following the conception of the inter-relationship between law and different forms of social convention –include also rules of a practice which implicitly also formulate considerations about the balancing of competing interests of parties which are not involved in the network itself.

This is the case, for example, in the media, which continuously experiment with new formats of a construction of reality as they have to observe not only "reality", but also the self-transformation of the "identity" of the recipients themselves.[274] According to a more collective societal (and not only individualistic) understanding of civil rights, the freedom of the press, in particular, also comprises the autonomy of the press as a societal institution with the consequence that it implies the freedom to formulate and modulate conceptions of the public interest and modes of its "formatting".[275] At the same time, this implies a distributed tentative mode of considering competing interests such as the privacy of media stars and politicians.[276] The role of courts should protect these rights, of course, but, at the same time, this implies a respect for the whole network of media communication and the logic of its functioning: the protection of conflicting rights should be fine-tuned to the rules and conventions of the media and not ignore its autonomy also with regard to the re-formulation of its understanding of, for example, what the public realm is (European Court of Human Rights, ECHR).[277] This means that the constraints set by competing rights have to be formulated by courts, instead from a heterarchical point of observation which would be focused on "re-entering" a constraint into

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Constitution of the International Community, 36 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 529 (1998); id., *‚We the Peoples of the United Nations': Constituent Power and Constitutional Form in International Law*, 269, in: THE PARADOX OF CONSTITUTIONALISM. CONSTITUENT POWER AND CONSTITUTIONAL FORM (Martin Loughlin & Neil Walker, eds, 2007) and, for a broader approach not limited to the UN framework, see two articles by Erika de Wet, *The International Constitutional Order*, 55 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 51 (2006); epitomizing rather the difference between administrative and constitutionalist approaches to gobal law: Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 247, 253 (2006); Esty, *supra*, note 125, 1490; for a differentiated view cf. also Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 663 (2005) .

[274] See also Daniel J. Solove, UNDERSTANDING PRIVACY (2008): the contradictory relationship between privacy and publicity is also a consequence of the shaky ground on which the evolution of the media takes place.

[275] Karl-Heinz Ladeur, DAS MEDIENRECHT UND DIE ÖKONOMIE DER AUFMERKSAMKEIT (2007).

[276] See for the relationship between protection of substantive rights of individuals ("dignity") and a more formal process of public controversy James Q. Whitman, *'Human Dignity' in Europe and the United States, the Social Foundations*, 108, in: Nolte (ed.), *supra*, note 210, 108.

[277] See with reference to the European judgments on the status of religion in public (schools) Ino Augsberg & Kai Engelbrecht, *Staatlicher Gebrauch religiöser Symbole im Licht der Europäischen Menschenrechtskonvention*, 65 JURISTENZEITUNG 450 (2010), who demonstrate the difficulties European courts have in managing the cultural pluralism in Europe.

the network for a re-modelling which bears in mind the procedural rationality which epitomises the rules and requirements of processing information under conditions of uncertainty[278] and not to be blinded by traditional substantive rule orientation.[279] This means that courts, instead, fulfil the role of oversight which should try to irritate the self-organisational potential of the media network in order to broaden the productive range of possibilities of reaction of the media system and not focus on a case-to-case-based substantial rationality of stable rules.[280] The same is true for other private net-based communication such as the *ebay*[281] valuation system, or ICANN,[282] a system with its own private formal organisation which also has to find a balance between conflicting rights and interests. These examples could be counted as versions of self-organisation which need a certain public oversight because of the involvement of outsiders who cannot participate in the process of generating self-organised rules.[283] This is not so unusual if one considers even the traditional experience-based rules, which courts refer to when deciding on "negligence"[284] or the preservation of the public order. The only major difference is to be seen in the fact that experience is more or less a spontaneously generated set of practical rules which has developed only a thin institutional layer in some fields (associations of engineers, *etc*.), whereas, in the case of a differentiated self-reflexive potential

[278] This is true in particular for transnational law See Cinto Della Cananea, *Beyond the Stae: the Europeanization and Globalization of Procedural Administrative Law*, 9 EUROPEAN PUBLIC LAW 563 (2003).

[279] This problematique includes also the evaluation of scientific uncertainty, see Stephanie Tai, Uncertainty About Uncertainty: The Impact of Judicial Decisions on Assessing Scientific Uncertainty, University of Wisconsin, SSRN; Karl-Heinz Ladeur, *The Role of Contracts and Networks in Public Governance: The Importance of the 'Social Epistemology' of Decision Making*, 14 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 329 (2007).

[280] James Q. Whitman, *supra*, note 276.

[281] Karl-Heinz Ladeur, EBAY-Bewertungssystem und staatlicher Rechtsschutz von Persönlichkeitsrechten, 10 KOMMUNIKATION & RECHT 85 (2007).

[282] Milton L. Mueller, John Mathiason & Hans Klein, The *Internet and Global Governance:Principles and Norms for a New Regime,* 13 GLOBAL GOVERNANCE 237 (2007) ; see for the tension between domestic legal principles and the self organized global ICANN regulatory regime Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route around the APA and the Constitution*, 50 DUKE LAW JOURNAL 17, 57 et seq. (2000); Jonathan Zittrain, *Between the Public and Private. Comments before Congress*, 14 BERKELEY TECHNOLOGY LAW JOURNAL 1077 (1999); Jochen von Bernstorff, *The Structural Limitations of Network Governance: ICANN as a Case in Point*, 257, in: Christian Joerges, Inger-Johanne Sand & Gunter Teubner (eds.), *supra*, note 105; Karl-Heinz Ladeur & Lars Viellechner, *Die transnationale Expansion staatlicher Grundrechte: Zur Konstitutionalisierung globaler Privaterchtsregimes*, 46 ARCHIV DES VÖLKERRECHTS 42 (2008).

[283] Lawrence R. Helfer, Whither the UDRP: Autonomous, Americanized, or Cosmopolitan?, 12 CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 493 (2004); id. & Graeme B. Dinwoodie, Designing Non-National Systems: the Case of Uniform Domain Name Dispute Resolution Policy, 43 WILLIAM AND MARY LAW REVIEW 141 (2001); Michael Froomkin, ICANN's «Uniform Dispute Resolution Policy» - Causes and (Partial) Cures, 67 BROOKLYN LAW REVIEW 605 (2002).

[284] Lefebvre, *supra*, note 79, 19; Gert Brüggemeier, HAFTUNGSRECHT. STRUKTUR, PRINZIPIEN, SCHUTZBEREICH 56 (2006); for the dependence of the concept of "negligence" on changing social norms See also Simon Deakin, Angus Johnston & Basil Markesinis, MARKESINIS AND DEAKIN'S TORT LAW, 8th ed., 113 (2008); Steven A. Hetcher, Creating Safe Social Norms in a Dangerous World, Vanderbilt Law School, Joe C. Davis Working Paper No. 99-5.(arguing that game theory misses the collective element of social norms in the process of concretizing negligence).

of observation and revision of rules of practice to be followed by big firms (even below the level of formalisation in explicit standards[285]), the court has to consider the strategic effects of its decision-making practice in the search processes of the incumbent firms (duties to warn). These remarks should have demonstrated that private self-organisation and public oversight are *not* mutually exclusive. Law-making has always been process-driven, the institutionalised stable component used to be nested with the societal knowledge basis and with strategic action taken by legal practitioners.[286]

D. AFTER THE EXPERIMENTAL CREATION OF NEW COOPERATIVE FORMS OF ADMINISTRATION…WHAT? THE CODIFICATION?

The recent evolution of more complex administrative processes has raised interest in the internal procedures of generating information, knowledge, and evaluation of alternatives, *etc*.,[287] within the administration, which are no longer obvious, as was the case in the past. Administrative procedures of information as a side-effect of the increasing complexity of decision-making informal procedures[288] of knowledge generation and forms of public- private co-operation[289] (including contracting[290]) have been developed – again from within the administration.[291] Approaches to establish a legal structure for this version of "co-operative

[285] See the contributions in: MULTILEVEL GOVERNANCE OF GLOBAL ENVIRONMENTAL CHANGE (Gerd Winter, ed., 2006); Martin Herberg, GLOBALISIERUNG UND PRIVATE SELBSTREGULIERUNG: UMWELTSCHUTZ IN MULTINATIONALEN UNTERNEHMEN (2007); also the contributions in: RESPONSIBLE BUSINESS. SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS (Olaf Dilling, Martin Herberg & Gerd Winter, eds., 2008), in particular Errol Meidinger, *Multi-Interest Self Governance through Global Product Certification Chains*, *ibid.*, 259.

[286] Quack, *supra*, note 185, 643, 644.

[287] Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUMBIA LAW REVIEW 1749 (2007) (emphasizing the role of courts to create acceptable rules for administrative agencies); for a critique that emphasizes the role of courts in the protection of rights as opposed to public policies see McNollgast & Daniel B. Rodriguez, *Administrative Law Agonists*, 108 COLUMBIA LAW REVIEW, SIDEBAR 2008; see generally Stuart Shapiro & David Guston, *Procedural Control of the Bureaucracy, Peer Review, and Epistemic Drift*, 17 JOURNAL OF PUBLIC ADMINISTRATION, RESEARCH & THEORY 535 (2007); (underlining the dependency of conceptions of administrative control on the transformation of "embodied" knowledge).

[288] See for the difficulties to fit informal action into traditional legal administrative formats Kersten & Lenski, *supra*, note 9, 521.

[289] See Errol Meidinger, The Administrative Law of Global Private-Public Regulation: the Case of Forestry, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 47 (2006).

[290] See only Andreas Abegg, *Die Vertragsfreiheit der Verwaltung – Verwaltungsverträge im Schatten des Rechts*, 128 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 387 (2009).

[291] This development concept is related to the rise of the "governance", Lobel, *supra*, note 159.

administration"[292] have failed hitherto. This is symptomatic for the relationship between the legislator and the administration: the major instruments of administrative action as such are beyond the reach of general regulation. This is due to the fact that the relationships between "public" and "private"[293] always contain an element of a "self-fulfilling prophecy": what is accepted as "regarding all" is an emergent property of entangled processes of the observation of practices and of paradigmatic settlements that are dependent on experiment. They can only be controlled on a case-to-case basis by the judges. The legislative form of rule-making is only compatible with administrative action if the networks of decision-making have developed contours – especially upon the basis of conflicting legal interests, subjective rights in particular. Notwithstanding this, this constellation is accessible only to a limited re-structuring by the legislator, which leaves enough potential for the shaping of different cases and the experimentation with different patterns of the management of inter-relationships.

The reflection on the evolution of modern law and its transformation during the 20th century have demonstrated the importance of the cognitive infrastructure of legal practice which has changed considerably, not only with regard to the character of the knowledge base itself upon which legal decision-making depends continuously. The law is not just super-imposed upon a cognitive base which allows it to be specified case-by-case, but the inter-relationship of both the cognitive and the normative layer of the law is not a passive one. The exchange is pre-structured by secondary normalising meta-rules which stabilise the regularity of the process of reproduction of the "pool of variety" for different types of practices, and, at the same time, the law itself develops its own set of internal rules of interpretation, of estimating probabilities, proof rules in cases of *non liquet*, rules of presumption, of co-ordinating societal conventions and the legal rules in particular.[294] In addition to this, there is an intermediate layer in which the role of the producers of the knowledge base is institutionalised (from public distributed knowledge accumulation) via organised reproduction in big firms towards postmodern network-like "epistemic communities" which provoke a fragmentation of the knowledge production. This transformation finds its repercussion in the shifting focus of the generation of

[292] Gunnar Folke Schuppert, Verwaltungskooperationsrecht (Public Private Partnership): Regelungs- und Handlungsoptionen eines Rechtsrahmens für Public Private Partnership – Expertise for the Federal Minister of Internal Affairs, 2001, Attachment E (containing a proposal of an amendment to the Administrative Procedure Act); for the US See the proposal of a "Draft Collaborative Governance Executive Order", appendix to Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, WISCONSIN LAW REVIEW 297 (2010) (the focus is on administrative values); the attempt to legalize and formalize cooperation is probably a misleading idea; see Freeman, *supra*, note 4 (1998), because it is a version of what one may call with Michael C. Dorf & Charles F. Sabel, *supra*, note 254, 318: "democratic experimentalism" that does not allow for ex ante delegation of competencies and legislative formulation of goals; see in the same vein for American attempts to raise the level of transparency in new types of flexible administrative procedures, William Funk, *Public Participation and Transparency in Administrative Law: Three Examples as an Object*, 61 ADMINISTRATIVE LAW REVIEW 171 (2009).

[293] See Lobel, *supra, note* 159; Freeman, *supra, note* 4.

[294] See for the "internal law of administration" which is a necessary infrastructure of administrative operations and that is largely neglected or wryly looked at as being a type of non-law or illegitimate altogether Mashaw, *supra*, note 6, 1636; id., *supra, note* 7,1413, 1461.

"order": from substantive rationality which supports the reproduction of rules to the management of conflicting group- and organisation-based knowledge by principles of balancing and the respect of proportionality – which are both open to the valuation of factual interests and positions – and finally the emergence of proceduralisation,[295] which consists of an increasing importance of the proactive stimulation of the process of generation of knowledge in private and public networks. This change ends in a process of fragmentation of different arenas and allows only a loose mode of coupling between the differentiated networks by broad rules which are oriented at the open co-ordination of the tangled web of the law within a complex "network of networks". One should epitomise that the emergence of the "networks of law" in the postmodern society develops more and more different arenas for the construction of order in which the combination of cognitive and normative rules varies to a considerable extent. The close co-ordination in fragmented networks excludes outsiders, while, at the same time, the complexity and future orientation of the postmodern law reduces the protection granted in former times by "rights"[296] because their frame of reference was, in the past (liberal society), also pre-structured by the general limitations imposed on subjective rights by other holders of rights: if the differentiation of the networks of operators increases, this will also change the general and universal frame of reference for the definition of the rules of co-ordination of rights of different subjects. At the same time, this evolution is - for the same reason - a challenge for the state, which loses its general frame of reference itself. The rules of co-ordination within the emerging "network of networks" of the law, which is much more loosely coupled than in the past, have not found their contours yet. This is why theoretical positions that question the legal character of the new self-organised norms which emerge in the differentiated range of rules that is characteristic of the postmodern normative "network of networks" miss the point: the increasing complexity of the cognitive embeddedness of legal norms demands a higher level of reflexivity of their mutual inter-dependence; a new constructive and selective dimension with regard to the fragmented cognitive rules and the construction of a whole domain of options (instead of the experimentation on a stable trajectory laid out by experience or the corporatist consensus based rules) has to be modelled. This is why the "internal" cognitive preparation of the administrative decision-making processes, which was more or less negligible in the outcome-oriented administrative law of the "society of individuals" has to be attributed normative character in different forms. This goes for administrative rule-making in the US, which uses "notice and comment"-procedures[297] for the set up of enforcement rules which can no longer be derived from the law or be pre-supposed as the product of internal (administrative) or external (social) experience – for example, with regard to the societal

[295] Karl-Heinz Ladeur, *Proceduralisation and its Use in a Post-Modern Legal Policy*, 53, in: GOVERNANCE IN THE EUROPEAN UNION (Olivier De Schutter et al., eds., 2001).

[296] See for Germany Wolfgang Kahl, *Über einige Pfade und Tendenzen in Verwaltungsrecht und Verwaltungswissenschaft – ein Zwischenbericht*, 42 DIE VERWALTUNG 471, 473 (2009).

[297] Sean Farhang, THE LITIGATION STATE:PUBLIC REGULATION AND PRIVATE LAW SUITS, 21 (2010).

approach to "danger".[298] This is also the reason why more and more interests are transformed into rights to be heard, and to be protected from private or public interference below the level of the classical conception of "infringement" and "harm".[299]

This is a problematical side-effect of the fragmentation of the "networks of the law",[300] which leads to a phenomenon which Sean Farhang[301] has called the "litigation state": the courts are involved in a much more intense mode in the process of enforcement of legal norms.[302] This is why the procedure and the reflection of the "internal" side of administration necessarily get a new normative dimension. The focus on the "publicness" of rules, or the search for a secondary layer of control of primary rules in the sense of H.L.A. Hart,[303] misses this point, and it also transcends the horizon of H.L.A. Hart's conception of law. This increasing importance of the "internal side" of the processing of decision-making can also be observed in private law. Michael Power, in particular, has drawn our attention to this phenomenon: the rise of "risk" as a challenge has found its repercussion in the "precautionary principle",[304] which is not limited to the environmental law, but finds a parallel, for example, in financial market regulation where "negligence" and the liability have shown to be insufficient for the management of complex risks. This reflexivity of both private and public law beyond the classical limits of "rights", on the one hand, and stable behaviour-oriented norms, on the other, leads to a transformation of normativity in postmodernity. The traditional criteria for the definition of law, as opposed to factual rules, are no longer adequate for the observation of the dynamic of a fragmented self-reflexive legal system that necessarily expands the field of relevance and includes the procedural rules of construction of administrative decisions.

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[298] Ladeur, *supra,* note 82.

[299] Urbinati, *supra,* note 134.

[300] See Karl-Heinz Ladeur, *Die Netzwerke des Rechts,* 143, in: NETZWERKE IN DER FUNKTIONAL DIFFERENZIERTEN GESELLSCHAFT (Michael Bommes & Veronika Tacke, eds., 2010).

[301] Farhang, *supra*, note 297.

[302] In my view Sean Farhang, *supra, note* 297, 45 et seq., overestimates the impact of the specific institutional setting of the US (tension between Congress and the presidential control of administrative agencies in particular. The phenomenon can be observed in other countries with different institutions, as well. It is rather due to the fragmentation of the cognitive basis of society.

[303] Kingsbury, *supra, note* 9 (2009); Teubner, see the references *supra, note* 23; for a critique (of Kingsbury) See Alexander Somek, *The Concept of Law in Global Administrative Law*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 985, 986 (2009), who criticizes the theoretical limitations of the New York approach to global administrative law in as much as its focus is on rather broad concepts of "accountability" and not on "legal relationships" and "rights"; see also Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework of Global Governance Activities*, 9 GERMAN LAW JOURNAL 1375 (2008) available at: www.germanlawjournal.com/pdf/Vol09No11/PDF_Vol_09_No_11_1375-1400_Articles_von%20Bogdandy_Dann_Goldmann.pdf. – but this is a position which neglects the possibility that the concept of law itself might undergo a process of transformation; for an analysis of the problems with the identification of a "legal source" in postmodernity, see also Zumbansen, *supra*, note 202,142.

[304] Sadeleer, *supra, note* 138.

This development finds a correspondence in the increasing internal fragmentation of the private firm and the decline of the traditional hierarchical "control project", *i.e.*, the rise of heterarchical versions of intra-organisational distribution of competencies. It is reflected in the overarching establishment of public control of the internal processes of knowledge generation within companies.[305]

V. OUTLOOK

The paper has tried to show that the evolution of administrative law is characterised by periods of creative construction of new forms, instruments and procedures of administrative law in the administrative decision-making procedures. Court control of these processes should not be interpreted as being the only legal source of administrative law ("judge made law") before the partial codification of general administrative law could be brought about in Europe and the US. If one bears this evolution in mind, it comes as no surprise that the new hybrid postmodern forms of decision-making in both domestic and global public-private networks cannot easily be subsumed under established administrative rules because the experimentation with, and the search for, new forms and procedures of transnational decision-making has not yet come to a conclusion. This constellation is not new in the evolution of administrative law, and it cannot be reduced to the process of globalisation alone:[306] it is one of the phenomena of the emergence of a new paradigm of (administrative) law: the law of the "network society".[307]

This process demonstrates that also global administrative law cannot be conceived as a mere challenge to the sovereign nation state and the permeability of its territorial borders. Its evolution is a consequence of a deeper transformation of both the economic system and the nation state. As has been demonstrated, the central components of the classical liberal legal system were dependent on stable concepts of property and the territory and their paradigmatic role. The evolution of administration and the economic system is characterised by the rise of the information and of knowledge as the main resource and frame of reference for decision-making. The dynamic of the postmodern "knowledge society" is at the bottom of the rapid self-transcendence of the environment of the legal system. Not only the territorial borders of the state, but also the traditional conceptual and institutional separations on which administrative law was founded have been severed.

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[305] See Michael Power, THE AUDIT SOCIETY. RITUALS OF VERIFICATION (1999), who demonstrates also the disfunctionalities of this new approach.

[306] See for the dense relationship between domestic institutions and globalization Jude C. Hays, GLOBALIZATION AND THE NEW POLITICS OF EMBEDDED LIBERALISM 8, 11 (2009).

[307] See Ladeur, *supra*, note 300, 143.

As a consequence both for the domestic layer of administrative law and the emerging global administrative law, new forms, procedures and meta-rules for an administration beyond the nation state have to be designed.[308] Considering the dynamic nature of the administration in, and of, networks, more evaluation[309] *ex post* and more indirect rule-making will be necessary: "steering" administrative practice *ex ante* by statutes or by the "application" of informal rules of experience will not be sufficient. The new knowledge base of the "society of networks" will allow for more self-organised rules and patterns, while, at the same time, the decreasing relevance of stable norms in both senses should lead to a focus on procedural norms which are designed with regard to the generation of new knowledge that will be useful for the evaluation *ex post*.

We are still in the process of experimentation which will generate new forms of action, new procedures, new types of co-ordination between public and private actors. It may well be the case that the role of the judiciary in this new evolutionary process will be negligible, not to mention codification by the legislator. What should be conceivable is a new type of co-operation between domestic agencies and the legislator, with the prospect of coupling transnational procedures of decision-making and domestic legitimation and accountability of decision-makers.[310] New elements of an inter-twinement of domestic and transnational law might be developing.[311]

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[308] For the necessity to spread administrative rules in countries of the "Third World" see www.transparency.org./global_priorities/aid_corruption; Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Measuring Corruption: Myths and Realities*, The World Bank Institute. Development Outreach, Januar 2007, www1.worldbank.org/devoutreach; Susan Rose-Ackerman, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM IX (1999); Migai Akech, *Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 829 (2006); with a focus on strengthening accountability through administrative law (834).

[309] For a theoretical perspective on "evaluation" as second order knowledge that reuses the same knowledge that has already been referred to in the decision making process Rudolf Stichweh, *Wissensgesellschaft und Wissenssystem*, 30 SCHWEIZERISCHE ZEITSCHRIFT FÜR SOZIOLOGIE, 147, 155 (2004).

[310] David Dyzenhaus, Accountability and the Concept of (Global) Administrative Law, IILJ Working Paper 2008/7, at http://www.iilj.org/publications/2008-7Dyzenhaus.asp, 13.

[311] For new forms of accountability that emerge at the global level See Helmut Willke, SMART GOVERNANCE: GOVERNING THE GLOBAL KNOWLEDGE SOCIETY 50 (2007).