ADMINISTRATIVE AND COMPARATIVE EU LAW

I. What administrative law is

Administrative law starts to exist after the **french revolution**, with the rise of a new mentality about the conception of the state (before the french Revolution in fact, the state was configured in the King). Then, with the rise of democracy there was an evolution of conception and now the state is associated with the nation, that is made by citizens.
So, administrative law is that part of public law that deals with the relationship between the citizens and the state, in a hierarchical way for which the state have a superior position that citizens.

The main tasks of Administrative law are: Defense, Police, Taxation and Education.

One of the most important accountability that frame contemporary administrative law system is the contestation of administrative action before the courts:

- The procedure: the right to contest administrative decisions in a trial-like proceeding before a state emerged in both civil law and common law systems as critical to the legitimacy of administrative authority. But, there are important differences: traditionally, one of the differences that separated the common law from civil legal systems was its reliance on procedural principles of fair play in judging the correctness of administrative action. The common law tended to equate important categories of administrative action with the adjudication of courts and to require analogous procedural safeguards. By contrast, the civil law was more focused on the substantive correctness of administrative decisions in deciding whether to let them stand. Common law countries have institutionalised the judicial model within the administrative process to a greater extent than other legal systems. In Britain and Australia this takes the shape of administrative tribunals, while in the United States it comes under the heading of “formal adjudication,” governed by the Administrative Procedure Act and handled by administrative law judges. This institutionalisation of dispute resolution stands in contrast with continental bureaucracies, where there is generally a right of appeal up the chain-of command to administrative superiors, but where the main opportunity for an independent hearing is in judicial review before a full-fledged court.
- Public administration must respect the purposes and limits set down in laws. The task of courts is to enforce those limits. The intervention of courts in the activity of bureaucracy can be seen to fall under three distinct categories: Policy rationality + **rule of law:** every man, whatever his rank or condition, is governed by the "ordinary law of the realm" and by the jurisdiction of the ordinary courts. It is the idea of a single law with a single judge, valid for both private subjects and public authorities.

- individual rights (the protection of basic liberties against government action): On this aspect of judicial review, let us dwell on Germany for a moment, where fundamental rights guarantees are particularly pervasive and administrative law has been thoroughly constitutionalised, more so than in other European systems and the United States. The German courts have developed a number of cross-cutting principles that are designed to limit administrative action to the benefit of individual liberties. Three in particular bear mention: proportionality, equality, and legitimate expectations. Any measure that interferes with a right must satisfy a proportionality test. In this sequential inquiry, the government must demonstrate that the measure is capable of achieving the declared public ends; that it is necessary to achieve those ends and that no other, equally effective and less rights-restrictive measures are available for accomplishing the same purposes; and that the public benefit from the measure outweighs the burden to the individual right.

II. France

The state main features:
1.is centralized (Paris is the central of everything);
2. Is hierarchical: the hierarchy is based in the center, with periphery and local authorities that are always under the tutel capability of the state
3. Is regulated by the law (etat de droit= rule of administrative law): the law is so important because it is that tool used to realize the general interest of the state (that is different than particular interest that belongs to individuals).
4. **Specialized administrative courts:** In France there is a specific regionality for administrative law (la method). There is this idea that administrative law is separated from private law.

Administrative law, and the approach to that, is different in France than private or civil law (is more complex): administrative law is not as civil law for which there is a specific code, because in administrative law there wasn't, initially, specific guide principles. To put an end to customary law (which, by definition, is unwritten), with napoleonic reforms was generated a law created by the courts: there was created a jurisdiction by the top of administrative court who developed general principles looking in this specific legislation and creating doctrines. Administrative justice was therefore the founder of administrative law and the Conseil d'État has been one of the essential, if not unique, mechanisms.

<u>The Administrative courts:</u>
In France, there are ordinary and specialist administrative courts.

1. Conseil d'Etat is the top of the administrative justice hierarchy:
Conseil d'État *= The Conseil d'Etat is the highest administrative court. It rules, without further possibility of appeal, on appeals on points of law lodged against judgments rendered at the*

last instance by the various administrative courts and tribunals and on cases that are referred to it as a court of first instance or as an appeal court.
The *Conseil d'État* is composed of seven sections. Six of these are administrative, now known as consultative sections or *chambres consultatives* (interior; finances; public works; social; reports and studies; administration) while the seventh is the *section du contentieux* or litigation chamber. This division of labour into sections is a consequence of the *Conseil*'s operational duality, being both the government's legal adviser and the supreme adminstrative court.
First, the *Conceal* hears cases at first and last instance against national acts, disputes arising abroad or litigation for which the territorial jurisdiction covers both administrative courts. Such cases usually concern specific decrees, orders or regulatory acts of ministers issued once the *Conseil* has given its opinion. Next, it may sit as a court of appeal, although this is now more of a residual activity. such is the case of litigation concerning the calling of local and municipal elections or preliminary rulings. Lastly, and this is its main activity, the *Conseil d'Etat* is the final court of appeal for decisions handed down by the administrative courts of appeal, the specialist administrative courts and certain decisions of administrative tribunals for which the possibility of appeal has been ruled out.

2. The administrative Courts and administrative Courts of appeal:
They are the ordinary administrative courts, created with the purpose to unburden the work of the cONSEIL D'etat with litigation.

3. The Specialist Administrative Courts: Courts of auditors, the Commission Nationale du drift d'asile, the Conseil superior de la magistrature + professional assosiactions (if considered as such).

<u>Principles Governing the Organisation of Justice :</u>
We can count at least three: independence, impartiality, and collegiality.
The principle of judicial independence must be reaffirmed with greater force with regard to administrative justice. That independence was reiterated by the *Conseil d'Etat* and implies, on the one hand, that a court does not have to take instructions from any authority whatsoever and, on the other hand, that a member of an administrative court cannot participate in judging an act where they have taken part in elaborating that same act.
The principle of collegiality is also part of the guiding principles of administrative proceedings: judges bear collective responsibility for the decisions they adopt.
The principle of impartiality said that judges must ensure that their professional judgement is not compromised, and cannot reasonably be seen to be compromised, by bias, conflict of interest, or the undue influence of others.

III. UK

The state main features:
1. Minimal services: the state is there to provide often minimal services.
2. Is decentralized (for example this point is evident if we talks about the Police, that in UK is at the dependence of municipality counties. For example, Scotland Yard is not the local police, is the police for the king)
3. Is non-hierarchical
4. There is the principle of "Rules of law": the **rule of law** is the political philosophy that all citizens and institutions within a country, state, or community are accountable to the same laws, including lawmakers and leaders).

Before the Welfer state, in UK according to the civil law model there was only two government powers: the legislative one and the executive one. The rise of a significant administrative law in UK is detectable in twentieth century with the rise of the welfare state because it was only then that state regulation became significant. From that moment, there was a development of a specific jurisprudence for administrative law.
In 1832, with the First Reform Bill there was the birth of a new administration for 'Boards': progressive establishment of a series of central offices aimed at implementing the new legislation (Poor Law Board; Board of Trade; Local government Board; Board of Health).
From that period, both in UK and USA was born a third branch of public power similar to the 'administrative' one of the continental countries BUT there are relevant differences because, contrary to the continental administrations, the Anglo-American ones:

- they are not 'one', but many and are developed outside any predefined general programme;
- are not assisted by any general immunity: in particular, there is the judicial review power of the courts = the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the constitution. Actions judged inconsistent are declared unconstitutional and, therefore, null and void. The institution of judicial review in this sense depends upon the existence of a written constitution
- precisely for this reason they do not have a general power of command, but only those 'enumerated powers' expressly granted to them by the respective institutive laws;
- they do not constitute a characterizing presence of the constitutional system: they are a function not of the State, but of the changing needs of society.

So, there is a general consideration of administrative law: for civil law system, we can say that is considered like "a special law", expression of the sovereignty of the State, of the supremacy of the State over the citizens, a law with its own rules, different from the others.
In common law systems, which find their archetype in the English model, the speciality of public/administrative law is denied: the administration is a subject of common law like any other. The fact that it looks after public interests and exercises powers does not give it a

position of supremacy. Disputes between citizens and the public administration are brought before the ordinary judge, the same one that resolves disputes between private individuals. The democratic, liberal and equal intent is strong: all are equal before the law; in a dispute between the administration and the citizen, the two parties are, before the judge, in an equal position. Strong is the search for the elimination of any form of superiority of the administration. While in civil law system, the law is largely the result of the work of the legislator (often in the form of codes), the administration is a distinct power, heir to the sovereign power and often placed in a privileged and superior condition with respect to citizens.

SPAIN

The history of public administration in Spain provides an example of continuity and of the historical durability of its main elements. This has occurred in spite of the high levels of political instability: the Spanish administration has been able to maintain a certain distance and independence from the extreme political changes that have taken place around it.

Main features:

- The boundaries between public and private sectors have traditionally been blurred;
- lack of a clear dividing line between politicians and civil servants and between the bureaucratic and the political system
- Spain also stands out with respect to other southern European cases because the administrative corps has kept its position of power; it still sets the agenda on policy and it continues to be the main recruiting ground for both the administrative and political elites.
- The state is centralised and it is based upon the Napoleonic tradition.

In particular, the following three elements of the Napoleonic model became the basis of the administrative tradition:

1. centralism was employed as a tool to manage a country that had had a developed state from as early as the 15th century, but was not a unified state;
2. uniformity was introduced to combat the singularities of Spain's own provincial system and to fight against the old privileges, defend equality before the law and to apply legal principles;
3. the professional civil service sought to prevent the instabilities of the old spoil system and keep public employees away from the political manoeuvrings of the time.

In 1939 Franco starts a civil war to establish a militaristic regime: during the **Franco's regime** the administrative system of Spain was characterized by a strong isolation and inaccessibility of its bureaucracies.

With **democratization,** starting in the late 1970s, Spain initiated reforms that sought to modernize the administration and build a new relationship with its citizens, in particular was started a wide-ranging decentralization process: Spain shifted dramatically from a centralized bureaucracy to a multilevel system of governance with 17 regional bureaucracies; while the nucleus remained in the center, many powers passed to the local level.
But the Napoleonic model was not abandoned but it was reproduced by the 17 regional governments.
So basically, for Spain there was a process of change only partially: the bureaucracy appears to be an unreformed historical survivor inherited by every new government that comes to power, whether it be monarchy or republic, dictatorship, or democratic system.

The principal actions to reform administrative system after Franco were:

- stabilize bureaucratic organization;
- professionalizzazione the civil service;
- creation of incentives to improve the efficiency of the system;
- adjust the bureaucracy to the new economic conditions and capitalist cycles;
- dismantle the old fascist apparatus of Francoism;
- break the power of the bureaucratic elite and its organization in the Special Corps;
- face the challenge of a profound political decentralization process (and the inaugura tion of a semi-federal system);
- improve the synergies of Spain's integration into the European Union;
- build a bridge with citizens and develop strategies for a more open, responsive and efficient administration.

So, these new policies have established a highly decentralized political system – federal in some respects and with variable geometry by region in several cases. In this new context regional governments have been empowered to administrate key areas such as education, health, welfare policies, justice, police, culture, industry, and agriculture. They have been provided with administrative autonomy and administrative organizations that have responsibility of managing over 65 per cent of the total public expenditure.
Very important new law of State Agencies of 2006, based on the following reforms:

1) transparency of public services (citizens should easily be able to identify which bureaucratic organization is responsible for each task, and which services they should deliver);
2) to implement New Public Management (NPM) techniques of managing by results;

3) to develop a complementary system alongside ‘let the manager manage’, namely: ‘make the manager manage’;
4) to improve policy design and project management tools within the agencies;
5) to develop inter-administrative and inter-institutional cooperation and collaboration;
6) to highlight the evaluation of public services.

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