COMPARATIVE ADMINISTRATIVE LAW

RESEARCH HANDBOOKS IN COMPARATIVE LAW

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Comparative Administrative Law

Edited by

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Susan Rose-Ackerman
Peter L. Lindseth

Comparative administrative law: an introduction

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Administrative law exists at the interface between the state and society – between civil servants and state institutions, on the one hand, and citizens, business firms, organized groups, and non-citizens, on the other. Civil service law and bureaucratic organization charts and rules provide an essential background, but our emphasis is on the law's fundamental role in framing the way individuals and organizations test and challenge the legitimacy of the modern state outside of the electoral process. There are two broad tasks – protecting individuals against an overreaching state and providing external checks that enhance the democratic accountability and competence of the administration.

Public law is the product of statutory, constitutional, and judicial choices over time; it blends constitutional and administrative concerns. The Germans speak of administrative law as 'concretized' constitutional law, and Americans often call it 'applied' constitutional law. The English, with no written constitution, refer to 'natural justice' and, more recently, to the European Convention on Human Rights (ECHR). The French tradition of *droit administratif* contains within it a whole conceptual vocabulary – *dualité de juridiction*, *acte administratif*, *service public* – that has been deeply influential in many parts of the world (notably francophone Africa, the Middle East, and Latin America). East Asia has a long tradition of centralized, hierarchical, and bureaucratic rule – a sort of 'administrative law' *avant la lettre*. And yet, in forging its own modern variants, East Asia has also drawn on Western (and particularly German and US) models.

Administrative law is one of the 'institutions' of modern government, in the sense that economists and political scientists often use that term (see, for example, North 1990: 3–5, March and Olsen 1989, 1998: 948). It is thus amenable to comparative political and historical study, not just purely legal analysis. Employing this broad perspective, we seek to illuminate both the historical legacies and the present-day political and economic realities that continue to shape the field as we proceed into the twenty-first century.

The distinction between public and private is essential to administrative law, a distinction that common law jurisdictions long sought to downplay by claiming that the same courts and legal principles should resolve both wholly private disputes and those involving the state. Nevertheless, even in the common law world, debates over the proper role and unique prerogatives of state actors are pervasive. Some scholars still assume that one can compartmentalize regulatory activities and actors into either a public or a private sphere. This may be analytically convenient, but it does not fit the increasingly blurred boundary between state and society. Recent developments have also strained another familiar distinction – between justice and administration. In Europe, for example, courts regularly apply the principle of proportionality – if a policy interferes with a right, then it must be designed in the least restrictive way. As a result, courts have begun to impose standards on government policymaking, at least when rights are at stake.

International legal developments are increasingly influencing domestic regulatory and administrative bodies. The project in Global Administrative Law centered at New York

University (Kingsbury et al. 2005), focuses on the administrative law of international organizations, such as the World Trade Organization. Nevertheless, it often draws on domestic models of the administrative process for inspiration. Our focus here is complementary. This collection emphasizes how the practices of multinational and regional bodies have both emerged out of and affected the administrative process in established states.

This volume attempts to capture the complexity of the field while also distilling certain key elements for comparative study. Because administrative law is intimately bound up with the development of the modern state, we begin with a set of historical reflections on its interactions with social and political change over the last two centuries. The remaining parts are broadly thematic. The first concentrates on the relationship between administrative and constitutional law – uncertain, contested, and deeply essential. We next focus on a key aspect of this uneasy relationship – administrative independence with its manifold implications for separation of powers, democratic self-government, and the boundary between law, politics, and policy. The next two parts highlight the tensions between impartial expertise and public accountability. They cover, first, internal processes of decision-making (including transparency, participation, political oversight, and policy or impact analysis), and, second, external legal controls on administrative decision-making (that is, 'administrative litigation' writ large). The final part considers how administrative law is shaping and is being shaped by the changing boundaries of the state. This part confronts two basic structural issues: the evolving boundary between public and private, and the similarly evolving boundary between the domestic and transnational regulatory orders. In considering this second question, the chapters focus on the EU, as the most evolved transnational regulatory order now operating.

1. Administrative law as historical institution

As Bernardo Sordi (chapter 1) stresses in his opening contribution, the emergence of administrative law in Europe was very much a modern phenomenon. It was tied to the increasing 'specificity and subjectivity' of public administrative power since the end of the eighteenth century. Sordi's fundamental claim is that 'administrative power' and 'administrative law' emerged contemporaneously – in other words, the new authority and its legal limitation arose together. This conjunction arguably holds true outside of Europe as well. As John Ohnesorge (chapter 5) notes, in East Asia, for example, the term 'administrative law' was unknown; nevertheless, the prevailing traditional system of government – with its commands from higher to lower level officials; its proliferation of regulatory mandates; its definition of competences; and its ambition for a 'professional, disciplined, meritocratic, and rule-bound' body of public servants – suggests that East Asia may well have been something of a pioneer.

But traditional East Asian law arguably lacked a realm of 'private' right distinct from the realm of public governance. In contrast, Sordi stresses that old regime monarchies in Europe ruled through a corporatist system of privileges and jurisdictions grounded in conceptions of right (notably 'property') that we would today clearly see as private. It was precisely the progressive extrication of 'public' authority from this corporatist old regime, as well as the development of a distinct corps of public servants to pursue and defend these new public prerogatives, that marked the emergence of administrative modernity in the Western world.