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BRICS LAW JOURNAL (BRICS LJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

The *BRICS Law Journal* is the first peer-reviewed academic legal journal on BRICS cooperation. It is a platform for relevant comparative research and legal development not only in and between the BRICS countries themselves but also between those countries and others. The journal is an open forum for legal scholars and practitioners to reflect on issues that are relevant to the BRICS and internationally significant. Prospective authors who are involved in relevant legal research, legal writing and legal development are, therefore, the main source of potential contributions.

It is published in English and appears two times per year. All articles are subject to professional editing by native English speaking legal scholars.

Notes for Contributors

Manuscripts must be the result of original research, not published elsewhere. Articles should be prepared and submitted in English. BRICS LJ doesn't accept translations of original articles prepared not in English. The BRICS LJ welcomes qualified scholars, but also accepts serious works of Ph.D. students and practicing lawyers.

Manuscripts should be submitted electronically via the website *www.bricslawjournal.com*. Articles will be subjected to a process of peer review. Contributors will be notified of the results of the initial review process within a period of two months.

Citations must conform to the *Bluebook: A Uniform System of Citation*.

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CHIEF EDITOR'S NOTE ON ADMINISTRATIVE JUSTICE IN BRICS COUNTRIES

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Administrative justice is a special type of dispute resolution concerned with the exercise of public power. To deal with disputes arising within this area, two different models for adjudicating cases are commonly found: administrative courts and specialized courts within the general courts system.

Most BRICS countries have adopted the specialized courts model, with the cases heard by their courts of general jurisdiction. None of the BRICS countries has adopted the administrative courts model.

In some countries, special laws regulate the proceedings. In Russia, China, and South Africa legislative acts on administrative procedure have been adopted. For Ibero-America, there is the Model Code of Administrative Procedure and Administrative Justice.

Administrative justice in a comparative context was the topic of the II Siberian Legal Forum, organized by Tyumen State University, from 29–30 September 2016. BRICS Law Journal as one of the organizers of the conference devotes this issue to the development of administrative legal proceedings in BRICS as well as in other countries. It is pleased to publish the national reports on administrative justice in Brazil, Argentina, Spain, France, Italy, Poland and Russia.

ARTICLES

DIMENSIONS OF LENIENCY POLICIES IN BRICS: A COMPARATIVE ANALYSIS OF INDIA, SOUTH AFRICA, BRAZIL AND RUSSIA

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A cartel is a group of similar, independent companies which join together to fix prices, limit production or share markets or customers among themselves. The most significant feature of this anticompetitive activity is its restriction of competition between the parties involved in the arrangement. The objective of a cartel is to raise prices above competitive levels, which can result in injury to consumers and to the economy. This is why cartels are considered not only harmful for the economy as a whole but also, as a catalysing factor, destructive for the idealized approach of maintaining a level playing field in the market. Thus various jurisdictions, or rather almost all competition regimes, declare cartels an illegal activity subject to severe fines and penalties. But it is well known that the enforcement mechanisms of laws against cartels differ from country to country, and yet the striking similarity is that almost all competition authorities face the same uphill task of detecting and busting cartels in a manner that leads to efficient and desired prosecution.

This paper focuses on an analysis of the newly introduced leniency regulations in India and the parameters of their effectiveness through a comparative analytical study of BRICS leniency regulations, specifically the experiences shared by South Africa, Brazil and Russia in the application of leniency tools and a marker system. The paper further considers the weaknesses of the existing leniency regulations in India and in BRICS and concludes by offering a future path for possible improvements in the form of certain recommendations.

Keywords: cartel; India; South Africa; Brazil; Russia; leniency policy; marker system.

Recommended citation: Deepankar Sharma, *Dimensions of Leniency Policies in Brics: a Comparative Analysis of India, South Africa, Brazil and Russia*, 3(2) BRICS Law Journal 6–20 (2016).

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1. Introduction

Hard-core cartels[1] are one of the most complex and serious forms of anticompetitive activity in the modern world. Cartelists take advantage of, and obtain undue benefit at the expense of, their counterparts and other parties. Consequently, almost all countries look at the ways and means available to stop the anticompetitive activity they engage in. Prosecuting and deterring cartels is the crux of their anti-cartel drive. But cartels have a particular feature in that that are very secretive – so much so that their identification and prosecution is difficult. But not impossible, for their identity can and does become known to enforcement agencies from within the cartels themselves, that is to say, through insider information leaked to the agencies. And this leads to one of the most efficient tools for detection of cartels, namely,

[1] 'Hard-core' cartel conduct has been defined by the Organisation for Economic Co-operation and Development (OECD) as, "[A]n anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce" (OECD 1998).

leniency programmes. These programmes incentivize the members of a cartel to leak information along with evidence in return for the certain substantial benefit of immunity from prosecution.

> Leniency is a generic term to describe a system of partial or total exoneration from the penalties that would otherwise be applicable to a cartel participant in return for reporting its cartel membership and supplying information or evidence related to the cartel to the competition agency providing leniency. The terms 'leniency', 'immunity' and 'amnesty' are used in many jurisdictions, but the definitions of these terms vary between jurisdictions. For example, under the United States leniency program, 'corporate amnesty' and 'corporate leniency' are used interchangeably to mean complete immunity from criminal conviction and fines. Other jurisdictions use 'leniency' to refer to any reduction in fines up to 100 per cent.[2]

A leniency programme is a system, publicly announced, of "partial or total exoneration from the penalties that would otherwise be applicable to a cartel member who reports its cartel membership to a competition [law] enforcement agency." The term 'leniency policy' is used to describe the written collection of principles and conditions adopted by a competition agency that governs the leniency process. A 'leniency programme' also includes internal agency processes, for example, how the competition agency implements its leniency policy, including processes for conferring and/or refusing leniency or lenient treatment.

1.1. Cartels

The most significant arrangement to adversely affect competition and achieve monopolistic influence is the formation of a cartel. It not only distorts the market share pattern but also restricts freedom of trade by obstructing the promotion of suitable and best quality products and reducing the accessibility to the market for the customer.[3] The parties to this anticompetitive arrangement obtain an undue advantage to regulate prices or output and thereby interfere with the existing market pattern.

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[2] International Competition Network, Anti-Cartel Enforcement Manual, Chapter 2: Drafting and Implementing an Effective Leniency Policy, Section 2.1, April 2014, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1005.pdf> (accessed June 15, 2016).

[3] S. Chaitanya Shashank, *Comparative Analysis of Cartel Laws of India and European Union*, Academike: Lawctopus Law Journal, available at <http://www.lawctopus.com/academike/cartel-laws-of-india-and-european-union/> (accessed June 3, 2016).

2. Important Prerequisites for Effective Leniency Policy

If a cartelist seeks an application for leniency, he first has to confess to cartel activity, cease his participation and subsequently cooperate with the authorities in providing adequate evidence that could lead to substantial prosecution. The anti-cartel enforcement agencies, on their part, show a commitment to a uniform and lenient pattern of punishment so as to induce more potential leniency seekers. Significantly, the unique part of this exercise is that leniency is available only to the first applicant and not to others, for if lenient treatment is given to more than one player, leniency policy might lose its attraction. Hence, to induce a cartel player to confess, the following conditions have to be fulfilled in a straightforward manner:

1) Anti-cartel enforcement has to be active in spreading a belief among cartel players that there is a high risk of detection if timely application for leniency is not made;
2) Penalties to be imposed on non-leniency application seekers should be harsh and predictably deterrent. This penalty should also show clear distinction between the self-confessing player and the non-leniency seeker where the latter receives much higher punishment;
3) The leniency programme should include the element of transparency and predictability where the applicant knows the treatment he can expect in advance;
4) To bust international cartels, the leniency programme should include confidentiality of information where the applicant and his information are not revealed to other cartelists.

Leniency programmes are designed in such a way that they induce cartel members to voluntary confession and harmonious cooperation with enforcement agencies. Programmes should develop a sense of mutual trust and benefit between potential applicants and enforcement agencies. They should reward one or only a few players with reduced penalties or immunity (in comparison to non-leniency seekers or still active cartel players). In other words, programmes aim at stimulating a rush to become the first whistle-blower rather than remain an active cartel player under threat of heavy penalty.[4]

3. Theory of Leniency Policy: Common Elements

Cartels can break down for many reasons and external shock or entry can be among them. According to the cartel literature, it has been observed that bargaining is a bigger reason for breakdown than cheating. The most successful cartels develop

[4] UNCTAD Note on The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries, TD/RBP/CONF.7/4, published on 26 August 2010, available at <http://unctad.org/en/Docs/tdrbpconf7d4_en.pdf> (accessed June 10, 2016).

mechanisms to accommodate external changes, thereby reducing the need to renegotiate.[5] Effective enforcement of antitrust laws also adds to the list of reasons for cartel breakdowns. However, despite tougher sanctions in the past decade, their continued discovery indicates that cartels remain under-deterred.[6] This occurs because in one location cartels may not be prosecuted to the level that they cause harm to the economy and in another location cartels in foreign markets, even if they cause harm there, may not be prosecuted by the other jurisdiction on legal grounds.

Leniency programmes aim to tackle cartels. Since cartels are illegal and if detected may lead to hefty fines or criminal sanctions, they are kept secret by the involved players. Members of cartels try to keep hidden or destroy evidence that might lead to their exposure. The leniency seeker of a cartel most often not only describes the modus operandi of the cartel, but also provides substantial information about the involvement of other players.

The most striking feature of any leniency policy is the expected increase in the amount of punishment after the detection of the cartel. There can be the instance where a few cartelists have received lesser penalties, but the fact that more cartels are brought under the scrutiny of the investigation depicts the success of the leniency policy. This not only compensates for the loss incurred owing to reduced penalties for some, but also leads to the situation of demoralizing potential cartelists from future participation in cartel activity.

But theory also leads to a point of distinction between leniency and settlement. Leniency, as it is used, is the pre-investigation tool where the actual trial has not yet begun and the involved player is induced to leak evidence that might be presented in court. In contrast, settlement is an agreement where the competition agency and the player resolve on certain issues at the time of adjudication itself. Settlement, by and large, aims at reducing the costs and latches in the adjudication process.

4. Leniency Programmes and Detection of Cartels

In the words of the International Competition Network Working Group recommendation concerning effective action against hard-core cartels, of 1998, "[H]ard core cartels are the most egregious violations of competition law."[7]

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[5] UNCTAD Note on The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries, TD/RBP/CONF.7/4, published on 26 August 2010, available at <http://unctad.org/en/Docs/tdrbpconf7d4_en.pdf> (accessed June 10, 2016).

[6] Connor and Lande, 2008, Cartel detection is not fading away, Pg 2216, Cited in UNCTAD Report TD/RBP/CONF.7/4, published on 26 August 2010.

[7] Defining Hard Core Cartel Conduct: Effective Institutions, Effective Penalties: Report by the ICN Working Group on Cartels; available at < http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf> (accessed 7 June, 2016).

It is for the detection of 'Hard Core Cartels' (HCC) that a leniency programme is used. A leniency programme attempts to regulate and detect cartels and offers an exemption or reduction in penalties, which could be substantial, in exchange for cooperation from the informant.

4.1. Benefits of Leniency Programmes

Detection of cartels through leniency programmes bolsters cartel deterrence by increasing the expected probability that sanctions will be applied; the leniency programme has a destabilizing effect on potential cartels, as only the first leniency applicant will be granted leniency; these programmes facilitate the investigation and prosecution of cartel participants as the leniency applicants provide evidence, which otherwise might not be available; and leniency programmes induce cooperating companies to provide useful information on the existence of other cartels, which can be investigated subsequently.[8] Thus, if we examine the role played by leniency policies, we can deduce the following benefits:

1. Improved collection of intelligence and evidence. It has been observed that there are three methods of obtaining evidence: 1) direct force, 2) threats against company staff of sanctions in case of non-cooperation and 3) offers of leniency. The third method has advantages over the other two in several respects. Firstly, leniency can be used to obtain all sorts of information and is not confined only to existing documents and records, as is the case in the first method. Secondly, leniency saves an equal amount of time and resources as the second method but does not suffer from the problem of reliability as is the case in the second method, because the applicants know that there is no reward for providing wrong information – on the contrary, this would invite penalties and a disqualification from being considered for leniency.

2. Increased difficulty of maintaining cartels. Maintaining a cartel is an enormous task; all the participants have to coordinate their behaviour on consistent and collusive strategies allowing the participants to increase their profits. A leniency programme can be very effective in situations like these: it increases the payoff from cheating for the deviator, thereby making it difficult for the cartel to sustain itself. The higher the incentive offered is, the higher will be the chances of cheating.

3. Lower cost of adjudication. Leniency is a cost-saving method that does not involve the time consumed in court proceedings, as the delinquent company would prefer not to be held liable and to receive an incentive in the form of a reduction in penalties or no penalty imposed at all.[9]

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[8] Gregory J. Werden, Scott D. Hammond, Belinda A. Barnett, Deterrence and detection of cartels: using all the tools and sanctions, 56(2)The Antitrust Bulletin (2011).

[9] Wouter P.J. Wils, Leniency in Antitrust Enforcement: Theory and Practice, available at <http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=456087> (accessed June 7, 2016).

5. Cartel Penalties in India: Optimal or Non-Optimal

The Competition Commission of India (CCI) is authorized by law to act on the information it receives, or it may even take action *suo mottu* on the basis of information it has against cartel activities. Upon reaching the conclusion of the existence of a cartel, the CCI, under Section 27 of the Competition Act 2002 (Competition Act or the Act), may impose on a cartel participant "a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher." Further, individuals involved in the relevant conduct of the company also face punishment.

Concerns have been raised time and again regarding the effectiveness and the authority of Indian laws in dealing with cartel activity. It has been noted that jurisdictions which have stricter cartel penalties as compared to India have been quite successful in detection of cartels.

Leniency provisions, considered to be perhaps the most efficient tool to detect cartels, may affect the anti-cartel enforcement mechanism in any jurisdiction to a great extent. Australia's example of imposing criminal sanctions for cartels has led to an increase in leniency applications. In contrast, Indian law has failed to attract leniency applications ever since its inception. Therefore, India has arrived at the point where there is an urgent need to revisit its laws for addressing this issue.

6. Leniency Programme in India (Lesser Penalty Regulations 2009)

In India, the Competition Act 2002 incorporates the leniency principle under Section 46. This section of the Act empowers the CCI to impose a lesser penalty in respect of violation of Section 3 with reference to cartel cases in accordance with the provisions of Section 46.

However, it is important to note that the power to impose a lesser penalty is not in the nature of a right of the party seeking leniency. In other words, the CCI has discretion in matters relating to imposing a lesser penalty, and hence parties cannot claim leniency as a matter of right. Discretion is not without guidance, as the Competition Act 2002 in its wisdom lays down the conditions for obtaining leniency, which in turn creates an atmosphere of transparency.

Under the Competition Act 2002, the overall responsibility for inquiring into contravention of the provisions relating to anticompetitive agreements, including cartels, is conferred on the CCI.[10]

[10] Section 19 of the Competition Act 2002.

6.1. Nature and Scope

Under Section 46 of the Act, more than one cartel member can avail itself of the benefit of a lesser penalty.[11] Hence, the lesser penalty provision may be applied by the CCI by way of full waiver of penalty (immunity) or less than full penalty (leniency). In other words, the concepts of immunity and leniency may be incorporated under the regulation for a lesser penalty.[12]

6.2. Applicability of Leniency Programmes

Also under Section 46, the following cartel members are eligible for invoking lesser penalty provisions, namely: any producer, seller, distributor, trader or service provider.

6.3. Procedure for Receiving Leniency Applications

Applications for a lesser penalty under Section 46 of the Competition Act 2002 may be made orally or in writing.

6.4. Procedure for Maintaining Confidentiality in Leniency Applications

Section 57 of the Act stipulates that information relating to an enterprise obtained by or on behalf of the CCI or the Competition Appellate Tribunal for the purposes of the Act will not be disclosed otherwise than in compliance with or for the purposes of the Act or any other law at the time in force. Further, any such disclosure will be with the previous permission in writing of the enterprise.

6.5. Appeals on Rejection of Leniency Application

Appeal against any direction, decision or order of the Competition Commission of India in relation to a lesser penalty provision will lie with the Competition Appellate Tribunal.[13]

6.6. Revocation of Leniency

A lesser penalty granted under Section 46 is subject to certain conditions. A conditional lesser penalty may be revoked if the CCI is satisfied that any cartel member in the course of proceedings had not complied with the conditions on which the lesser penalty was imposed and there upon will impose a penalty to which the member was liable had a lesser penalty not been imposed.[14]

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[11] Provided further that a lesser penalty will be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true and vital disclosures under this section.

[12] Competition authorities the world over provide leniency in terms of 100% immunity from fines or reduction in fines up to a certain percentage on the basis of various factors such as amount of knowledge or information available with competition authorities to initiate an investigation; time of making leniency application, i.e. before or after investigation; first to make application; etc.

[13] Section 53A of the Competition Act 2002.

[14] Fourth proviso to Section 46, Competition Act 2002.

6.7. Information Constituting Evidence

The information that makes a party eligible for leniency application is provided in a Schedule annexed to the Act. This includes:

- Relevant names and addresses.
- A detailed description of the alleged cartel arrangement.
- The goods or services involved.
- The geographic market covered.
- Commencement date and duration of the cartel.
- The estimated volume of business affected by the alleged cartel.
- Names and details of all individuals who, in the knowledge of the applicant, are or have been involved in the cartel, including on behalf of the applicant.
- Details of other competition authorities, forums or courts, if any, approached or intended to be approached in relation to the alleged cartel.
- A descriptive list of evidence provided in support of the application.
- Any other material information as may be directed by the CCI.

7. Practical Aspects of Administering Leniency: Marker System

A 'marker' system in the context of leniency policy relates to the means for leniency applicants to reserve their place for a defined period of time pending further investigations and to attempt to cement their place as the first applicant for leniency whenever the competition agencies determine this question. Markers are granted by the agencies with receipt of incomplete information at the initial phase or any evidence as provided by the leniency applicant.

The leniency applicant's position under the marker system is reserved for a fixed duration on the condition that the applicant will provide further information or corroborating evidence to the agency within the agreed time frame. Thus, the 'marker' provides certainty and clarity for potential leniency applicants. The marker system acts as a catalyst or additional inducement for reaching out to the competition agency with substantial information or evidence at the earliest available opportunity. If further investigations by the agency on the basis of supplied information by the prospective applicant fail to disclose a breach of the law, the marker may be withdrawn, revoked or allowed to lapse.

Some competition agencies extend the marker beyond the first informant under the leniency setup. These agencies provide for amassing information and queuing up the leniency seekers, as they consider such queuing helpful in ensuring sustained cooperation from the applicant that holds the first place in the marker system and in compelling them to provide further information from other parties.[15]

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[15] International Competition Network, Anti-Cartel Enforcement Manual, Chapter 2: Drafting and Implementing an Effective Leniency Policy, April 2014, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1005.pdf> (accessed June 15, 2016).

7.1. Extensions to the Marker Period

Certain jurisdictions grant markers for specific periods (28 days, for example) to encourage a company to further strengthen its leniency application. But this period may be extended at the discretion vested in the competition agencies on the likelihood that an extension will be a key factor in bringing to light additional information on the existence of a cartel. This obviously should be backed by the bona fide intention of the applicant along with the steps taken by him to retrieve the crucial information or evidence that may establish the existence of a cartel.

This may occur for a number of good reasons, for example if certain aspects of the investigation are not under the effective control of the applicant or evidence is outside the jurisdiction or the modus operandi is more complex than initially perceived. Having said that, it may also be noted that inflexible time frames for a marker may reduce the advantages of early reporting. Furthermore, for the prospective leniency seeker, it may even reduce the attraction of providing information early.

8. Role of Leniency in Busting Multiple Cartels: a Cue from the US Regime

Leniency programmes have been created to increase the incentivizing process of cartel reporting. This is based on the fact that a given cartel player may not be involved in one market only, but rather may have a presence in other markets as well, and thus information provided by any one given player can be useful for testing cartel activity in other markets also. Provisions in antitrust law mentioned by the US Department of Justice may further increase the chances of busting cartels in different domains:

a) 'Amnesty Plus' encourages a cartelist under the agency's scrutiny in the context of one particular cartel to apply for simultaneous leniency in the context of another cartel, and become the recipient of a penalty reduction not only for the newly disclosed cartel but also for the cartel already under examination by the agency;
b) 'Penalty Plus' increases the prospective penalty if the cartelist had the opportunity of taking advantage of 'Amnesty Plus' but never did so and the cartel was busted later and successfully prosecuted;
c) The 'Omnibus Question' is asked of persons who are witnesses under oath in a cartel investigation. They are asked whether they know about cartel activity in any other market than the one at hand. Being subject to perjury penalties, they have a greater willingness to disclose information about other cartels.

These provisions in the form of the carrot and stick approach have their successful impact. The leading example in is the vitamins cartels in twelve different markets that were discovered in a chain of investigation disclosures one after the other. Another example is the busting of the initially perceived lysine cartel that further

led to the citric cartel, and so on. Other jurisdictions may want to take a leaf out of the US agency's book and develop their laws accordingly.

8.1. Leniency Programmes in Developing Countries

Few countries, especially those with developing or emerging market economies, have taken the steps to fight cartel activity through the use of leniency programmes, but the fight against cartels should be taken up by virtually all countries. We have to note that while trying to extend the reach of leniency policies to a majority of countries it is pertinent to keep in mind that the model useful for developed countries may not be effective as the model for developing countries, simply because commercial perspectives cannot have a one-size-fits-all formula. For this reason we have undertaken an analysis of emerging market economies and their experiences with leniency programmes. One such category of emerging or like-minded markets is BRICS, where we have already mentioned the situation in respect of Indian law and now will deal in brief with the experiences shared by South Africa, Brazil and Russia.

9. BRICS Countries and Leniency: Glimpses from South Africa, Brazil & Russia

BRICS has been recognized as a strong grouping of the same category of economies termed 'emerging market economies' showcasing a remarkable increase in trade and business. Thereby the scope or rather the chances of market players indulging in anticompetitive activities like cartelization has increased. This makes it imperative for us to look at the approaches taken by the competition enforcement agencies of BRICS in busting cartels through the use of leniency programmes.

9.1. South Africa

The Competition Act of 1998 provides for "the establishment of a Competition Commission responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers … and, for prohibited practices, the imposition of administrative fines of up to "10% of the *firm's* annual turnover in the Republic and its exports from the Republic during the *firm's* preceding financial year". Cartel prosecution was not the highest priority in the early years of the modern institution established in 1999. Resources were focused on merger review, increasing public awareness of the new competition rules, and testing and establishing practices and procedures. In 2003, the Competition Commissioner announced that more attention and resources would be devoted to cartels. Significant penalties were agreed in settlements in a few cartel cases, notably R20 million (International Health Distributors) and R223,000 (Pretoria Association of Attorneys) during the course of 2003–2004. These high profile cartel settlements signalled that henceforth cartels

would attract serious penalties. In 2004, the Competition Commission South Africa instituted a leniency programme (revised in 2008) offering cartelists an alternative. The first application under the programme was received in the same year.[16]

The 2009 Competition Amendment Act, upon entering into force, criminalized cartel conduct and imposed individual liability. At the time, questions were raised as to whether this change would increase effectiveness in achieving the objectives assigned the Commission. The leniency policy allows for full leniency (immunity) only for the first qualifying applicant; subsequent applicants may receive a penalty reduction via a settlement agreement. The leniency policy was revised to, among other things, increase the predictability as to what would qualify applicants for leniency. Other changes allowed for oral or 'paperless' applications and introduced a marker system. Fifty-four leniency applications were received by September 2009; more than two-thirds of these in the twelve months ending 30 June 2009. Many were connected with the construction, energy and transport sectors.

9.2. Brazil

Cartels in Brazil are subject to both administrative law and criminal law. Administrative fines for cartels are 1 per cent to 30 per cent of total annual turnover, and fines on individuals are 10 per cent to 50 per cent of the fine imposed on the respective company. Other penalties can include exclusion from public procurement or access to official bank credit for five years. Criminal penalties include criminal fines and prison terms of two to five years.

Leniency for cartels was introduced in 2000 by way of a change in the law. The first leniency agreement was executed in 2003. By 2009, about 15 leniency agreements had been signed and at least 29 executives had been found guilty of cartel involvement by the criminal courts. The number of search warrants served to obtain evidence about cartels, an indicator of anti-cartel activity, accelerated: from 30 in 2003–2006 to 84 in 2007 and 93 in 2008.

The leniency programme allows applicants to receive a one-third to two-thirds reduction in financial penalties, depending on the effectiveness of the cooperation and good faith of the applicant. If the authority was unaware of the cartel when the application was received, full immunity may be granted, and it is possible for individuals to be granted immunity from administrative fines and criminal prosecution. The applicant must be the first to approach the authorities, not have been the leader, must confess, cease the cartel activity and effectively cooperate with the investigation. The applicant must apply to the Secretariat of Economic Law of the Ministry of Justice (SDE) and provide sufficient information to ensure conviction. To benefit from the company's leniency application, individuals must

[16] UNCTAD Note on The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries, TD/RBP/CONF.7/4, published on 26 August 2010, available at <http://unctad.org/en/Docs/tdrbpconf7d4_en.pdf> (accessed June 10, 2016).

sign the agreement to cooperate in the same manner as the company. Individuals may apply separately if the company does not apply. A marker system reserves a place in the queue for up to thirty days. The programme includes a 'Leniency Plus' provision.

9.3. Russia

Cartels are subject to administrative law penalties in Russia; criminal law provisions are inactive. In 2007, a leniency programme was introduced via legal amendment and eight companies self-reported under the programme. The Federal Antimonopoly Service of the Russian Federation (FAS), i.e. the competition authority, increased its level of activity in 2008 as compared to 2007, initiating 355 investigations of restrictive agreements or concerted practices (a broader category than 'cartels') in 2008, an increase of 54 per cent over 2007. Cartel fines totalled RUB1.5 billion in 2008, more than 359 times as much as in the previous year. However, the programme allowed simultaneous leniency applications. Consequently, for example, thirty-seven insurance companies applied simultaneously for leniency in the *Rosbank* case. Their applications were accepted and no fines were imposed. An amendment in 2009 to the Code on Administrative Violations limited the penalty reduction to the first applicant and disallowed simultaneous applications.

10. Competition Policy: Options for Enforcement Agencies in Context of Leniency Policy

While leniency programmes are undoubtedly one of the most effective cartel detection tools, their effectiveness increases when they are coupled with robust investigation and strict penalties. To benefit from existing leniency programmes, a jurisdiction must pro-actively fight against cartels. If this is not done, then all the efforts invested in developing clear and expanded leniency rules will be wasted.

With respect to leniency programmes the trend is towards restricting information originating, ultimately, from leniency applicants. Thus one country cannot rely on another country to generate information for follow-on domestic proceedings. In summary, fighting cartels may not be left to others.

The experience of BRICS countries shows that once the precondition of seriously fighting cartels is met, both domestic and international cartels can be detected by the countries using leniency programmes.

Some characteristics of developing countries may diminish the effectiveness of cartel leniency programmes. Close relationships among business people, a larger informal economy and a weaker 'competition culture' each sap the strength of a leniency programme's incentives. With respect to international cartelists, they prioritize applying for leniency in those jurisdictions where they are exposed to larger potential penalties, which may not include many developing countries. Developing

countries may have higher opportunity costs in building institutional capabilities. Further, their legal systems may offer settlement processes that provide an adequate substitute. In these circumstances, in some jurisdictions the costs of a cartel-specific leniency programme may outweigh the benefits.[17]

11. Concluding Remarks

The objective of antitrust laws is not only to prevent practices that have an adverse effect on competition, but also to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade. This is truly reflective of the changing economic conditions. Therefore, proper care and protection should be taken to ensure that the measures taken against anticompetitive practices do not go to the extent of interfering with the liberty of the traders and business people. A cooperative spirit should be adopted to safeguard the interests of the producers, the traders and the consumers. That way would truly promote the larger public interest. The law should bring within its purview all consumers who purchase goods or services regardless of the purpose for which the purchase is made. The competition law should be designed and implemented in terms of a dynamic competition policy of the state.

Indeed of all states. And here it seems appropriate that our final remarks relate to the first state to which our attention turned, India. Unfortunately, the anti-cartel enforcement activity of the Competition Commission of India has been wanting, largely as the result of the collection of inadequate evidence. In order to ensure an effective anti-cartel regime, it is essential to have a strong and robust leniency programme. The CCI's existing programme is unpredictable and does not incentivise whistle-blowers. In past cases, even the identity of the whistle-blower has not been protected. In contrast, in the European Union for example, over the last three years all cartel decisions have emanated from leniency applications. The advantage of an effective leniency regime is that it provides smoking-gun evidence, ensuring a finding of breach of law. Therefore, the CCI must redesign its leniency programme and follow international best practices.[18]

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[17] UNCTAD Note on The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries, TD/RBP/CONF.7/4, published on 26 August 2010, available at <http://unctad.org/en/Docs/tdrbpconf7d4_en.pdf> (accessed June 10, 2016).

[18] Naval Satarawala Chopra, Need for a strong, effective leniency programme, Business Standard: Need for Robust Competition Law, available at < http://www.business-standard.com/article/opinion/for-a-robust-competition-law-116022100753_1.html> (last visited on 15 June 2016).

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CONFERENCE PAPERS

The II Siberian Legal Forum, with the topic "Administrative Justice: Comparative and Russian Contexts", organized by Tyumen State University, West Siberian Commercial Court, Tyumen Regional Court and in association with the BRICS Law Journal, will be held on 29–30 September 2016 in Tyumen city, Russia.

The conference brings together leading researchers in the field of jurisprudence from the higher educational institutions of Europe, North and South America, Africa and Asia who will share their experience in foreign judicial specialization. The host country experts, in turn, will concentrate on the features of Russian judicial authority.

The mission of the Siberian Legal Forum is to create a platform for the discussion of legal trends, the exchange of experiences, and the establishment of close ties with scholars and experts in Siberia and other parts of Russia, Eurasia and countries of other continents.

CONTEMPORARY CHALLENGES IN LATIN AMERICAN ADMINISTRATIVE JUSTICE

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This study consists of a critical comparative analysis of the administrative justice systems in eighteen Latin-American signatory countries of the American Convention on Human Rights (Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, El Salvador, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic, Uruguay, and Venezuela). According to this article, the excessive litigation in Latin-American courts that has seriously hampered the effectiveness of the administrative justice systems may be explained as follows: as former Iberian colonies, the aforementioned countries have a Continental European legal culture originating in civil law but nevertheless have improperly integrated certain aspects of the unified judicial

system (generalized courts) typical of administrative law in common-law countries. This situation, according to the author, could be rectified through strengthening the public administrative authorities with respect to their dispute-resolution and purely executive functions by endowing them with prerogatives to act independently and impartially, oriented by the principle of legality understood in the sense of supremacy of fundamental rights, in light of the doctrine of diffuse conventionality control adopted by the Inter-American Court of Human Rights.

Keywords: administrative justice; fair trial; due process of law; Latin America.

Table of contents

1. Introduction

The excessive number of lawsuits filed in Latin America is extraordinary, which might leave a visitor surprised by the high productivity of the courts there. In Brazil, for example, each judge delivered an average of 1,500 judgments in 2014 alone.[1]

[1] On excessive judicial review of administrative decisions in Chile, see Supreme Court of Chile (Corte Suprema), Acta 176, 24 October 2014.

In the field of administrative law, judges are being forced to resolve highly similar and repetitive claims, which reduces their role to that of a manager of case files or a purely executive authority[2] at the cost of their judicial mission of resolving disputes and safeguarding rights.[3] This is so because most of the cases are artificial, i.e., not attributable to an administrative authority's actual rejection of an individual's request but rather to the structural impossibility of such authorities to reconcile the principle of legality (associated with the supremacy of fundamental rights) with the administrative principle of hierarchical subordination.[4] Moreover, in many cases it is the administrative authorities that resort to the Judiciary to enforce their claims against individuals, which is an outward sign of the consensus (among citizens and public authorities) that the administrative agencies cannot be relied on to enforce their own decisions, in flagrant contradiction with the attribute of *self-enforceability* (*autoexecutoriedade*) according to which administrative decisions can be enforced by the government itself without the intervention of the Judiciary.[5]

Although remarkable progress has been seen in Latin-American statutes and case law in terms of procedural principles guaranteeing a fair trial, the efforts to staunch the proliferation of repetitive claims, now called *artificial claims*, have failed for a number of reasons, ranging from the lack of specialized courts and procedural laws sensitive to the public-law nature of administrative disputes to the fact that administrative authorities lack the necessary independence and technical expertise to perform their institutional role.[6]

Against this backdrop, in search of ways to improve administrative justice in Latin America, we shall examine the current state of development of the right to judicial protection in administrative law cases and the corresponding judicial structures, without losing sight of the executive and dispute-resolution functions exercised by the administrative authorities. To that purpose, this article is intended to provide a critical comparative analysis of the administrative justice systems of Latin-American countries that were former Iberian colonies subject to the American Convention on Human Rights (Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, El Salvador, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic, Uruguay, and Venezuela). The sources drawn upon in this study include the case law of the Inter-American Court of Human Rights (I/A Court H.R.) and

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2 See in general Reis 2011, Silveira 2016, and Gubert & Bordasch 2016.

3 See in general Streck 2013.

4 Starting from section 3 of this text.

5 See in general Perlingeiro 2015.

6 *Repetitive claims* is an expression adopted by Judge Vânila in the Brazilian National Justice Council project *Research on Repetitive Claims* and in Article 976 of the Brazilian Code of Civil Procedure (Código de Processo Civil / Law No. 13.105, of 16 March 2015) entitled *Incidente de Demandas Repetitivas* (interlocutory proceeding for repetitive claims).

that of national courts; national laws of administrative procedure and administrative justice; the Model Code of Administrative Procedure and Administrative Justice for Ibero-America of the Instituto Iberoamericano de Derecho Procesal;[7] the Euro-American Model Code of Administrative Jurisdiction, of Fluminense Federal University in Niterói, in the state of Rio de Janeiro, and German University of Administrative Sciences Speyer, Germany[8] as well as the Code of Administrative Justice of the Russian Federation, since this article was originally written for the II Siberian Legal Forum devoted to the development of administrative legal proceedings in Russia.

At this point, in light of the terminological differences among the various national systems of administrative law, it is necessary to clarify the meaning and context of certain expressions used in this study: *primary administrative functions* refer to the executive tasks typically assigned to the public administrative authorities; *secondary administrative functions* refer to tasks of administrative dispute resolution, also called *administrative dispute-resolution functions*; *administrative jurisdiction* (administrative dispute resolution or adjudication) refers to the mechanism offered by the State to provide a (definitive and enforceable) solution to an administrative dispute;[9] *judicial administrative proceeding* refers to judicial proceedings (or a fair trial) intended to resolve administrative disputes, which, in Spanish and Italian, respectively, translates as *proceso administrativo* and *processo amministrativo*; *extrajudicial administrative proceeding* (or a fair hearing) refers to the hearings of disputes by quasi-judicial administrative authorities (U.S. administrative judges, administrative tribunals, quasi-independent bodies for the review of administrative decisions); for present purposes, *administrative procedure* means an extrajudicial administrative procedure that is incapable of offering the guarantees of due process of law (due to the lack of independence of the administrative authorities), which, in Spanish and Italian, respectively, translates as *procedimiento administrativo* and *procedimento amministrativo*.[10] For the sake of readability, the national laws regulating *judicial administrative proceedings* (fair trial) have been cited herein under the standardized name of *Laws of Administrative Justice*, and the laws on *administrative procedure* under the name of *Laws of Administrative Procedure*.

2. Right to a Fair Trial

The right to effective judicial protection, a primary focus of the rule of law in Latin America, is defined as follows under Articles 8.1 and 25 of the American Convention on Human Rights:

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7 See in general Grinover & Perlingeiro et al. 2014.

8 See in general Perlingeiro & Sommermann 2014.

9 Academic Project for a Masters (and Doctoral) Program in Administrative Justice – PPGJA/UFF 2008.

10 See Perlingeiro 2016, at 278–281.

> Article 8.1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, **or any other nature**.
>
> Article 25.1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, **even though such violation may have been committed by persons acting in the course of their official duties**.
>
> Article 25.2. The States Parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall enforce such remedies when granted.

In keeping with the Inter-American System of Human Rights, the right to effective judicial protection in administrative law cases, as established by the statutes and case law of most Latin-American countries, comprises the three dimensions set out below.[11]

2.1. Intensity

2.1.1. Complete Review of Administrative Decisions

The judicial protection must be complete. The review of procedural and substantive lawfulness must include, where appropriate, a verification of whether the administrative authority exceeded the limits of its discretionary powers.

Regarding the review of the points of fact and law in administrative decisions, the I/A Court H.R. has asserted that

> a judicial review is sufficient when the judicial body examines all the allegations and arguments submitted to its consideration concerning the decision of the

[11] The three dimensions of the right to a fair trial in administrative justice were formulated by Karl-Peter Sommermann and Ricardo Perlingeiro upon conclusion of the *Euro-American Model Code of Administrative Jurisdiction* research project (Perlingeiro & Sommermann 2–3 (2014). From a comparative perspective, three dimensions are also found in the fair trial clause enshrined in Article 4.1 of the Code of Administrative Justice of the Russian Federation (Кодекс административного судопроизводства Российской Федерации): "Every person is guaranteed access to courts in the defense of his violated or contested rights, liberties and legal interests, including in cases in which, in that person's opinion, impediments have been created to the exercise of his rights, liberties and legal interests, or an obligation has been unlawfully imposed on him."

> administrative authorities. To the contrary, this Court finds that no judicial review has occurred if the judicial body is prevented from determining the main object of the dispute, as in cases where the judicial body considers that it is restricted by factual or legal determinations made by the administrative body that would have been decisive to decide the case.[12]

The articles of the Euro-American Model Code of Administrative Jurisdiction regulating the complete judicial review of administrative decisions, the exercise of discretionary administrative powers, and acts involving an assessment of multiple interests read as follows:[13]

> Article 3 (Scope of review of the legality)
>
> (1) The court reviews the legality of the administrative authority's actions and omissions. The review of legality covers both errors of competence, procedure and form (formal or external legality) as well as errors of content (substantive or internal legality). Review of the content concerns examining both the legal grounds of the individual act or the regulations as well as the factual grounds for legal classification of the facts. The court also verifies whether the administrative authority has committed an abuse of power.
>
> (2) Even when the administrative authority has applied undefined legal concepts, the court examines whether they have been correctly interpreted and applied.
>
> Article 4 (Review of discretionary powers)
>
> (1) Whenever the administrative authority has exercised discretionary powers, the court shall examine, in particular:
>
> a) whether the administrative action or omission exceeded the limits of the authority's discretionary powers;
>
> b) whether the administrative authority acted in keeping with the purpose established by the norm that granted said powers;
>
> c) whether fundamental rights or principles such as equal treatment, proportionality, prohibition of arbitrary action, good faith and protection of legitimate expectations were violated.
>
> (2) The failure to exercise a discretionary power shall likewise be reviewed.

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[12] Inter-American Court of Human Rights, *Case of Barbani Duarte et al. v. Uruguay* (Judgment of 13 October 2011), para. 204.

[13] Perlingeiro & Sommermann 7–8 (2014). Also see Article 25 of the Model Code of Administrative Procedure and Administrative Justice for Ibero-America (Grinover & Perlingeiro et al. 2014, at 117).

> Article 5 (Review of acts involving an assessment of multiple interests) … the court shall review whether the act or regulation complies with the laws and, especially, whether it is justified and whether the administrative authority has not committed errors of assessment concerning the legally protected property, rights and interests that are at risk. Errors of assessment include non-assessment or improper assessment, failing to take relevant interests and property into account, attaching undue importance to certain property or interests (improper evaluation of property and interests) and the lack of proportionality in the overall assessment.

A similar opinion has been expressed by the Supreme Court of Justice of Costa Rica:

> [T]he administrative function, according to the constitutional criteria (Articles 33 and 49 of the Political Constitution), must be subject to a **complete and all-encompassing** review of legality, leaving no stone unturned, especially in the case of public service organisations created and put into operation in order to meet the needs of the citizens and entities under its administration.[14]

In the same way, in the opinion of the Federal Supreme Court of Brazil, "the principle of separation of powers is not violated by a judicial review that holds an administrative decision to be illegal or abusive after checking it for compliance with the factual and legal requirements, in which case the court may also evaluate the related questions of proportionality and reasonability"[15] and "such courts may apply a proportionality test not only to the means and ends of the administrative decision but also to the relationship between the administrative decision and the underlying reasons [as expressed in the statement of grounds for the decision]."[16]

Thus, the administrative authority's permissible range of action (discretionary power plus margin of appreciation)[17] is subject to judicial review with respect to

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[14] Constitutional Section of the Supreme Court of Justice of Costa Rica (Sala Constitucional de La Corte Suprema de Justicia de Costa Rica), Exp: 04-011636-0007-CO, Res. 03669-2006 (Judgment of 15 March 2006). See in general Jinesta 2014. Incidentally, according to Article 15 of the General Public Administration Act of Costa Rica (Ley General de la Administración Pública / Law No. 6.227, of 28 April 1978), the judge "shall act as comptroller to ensure the legality of the various aspects of the discretionary administrative decision and observance of the limits thereof." On the subject of substantive review of administrative decisions, see Article 51 of the Mexican Federal Law of Administrative Justice (Ley Federal de Procedimiento Contencioso Administrativo, of 4 October 2005).

[15] Federal Supreme Court of Brazil (Supremo Tribunal Federal), Agravo de Instrumento 800.892 (Judgment of 12 March 2013).

[16] Federal Supreme Court of Brazil, Recurso em Mandado de Segurança 24.699 (Judgment of 30 November 2004).

[17] On the difference between discretionary power, margin of appreciation, and vague legal terms, see Maurer 2012, at 21–52.

fundamental rights and the principle of proportionality.[18] This means that, in reality, the assertion that *the judge must not interfere with the authorities' margin of discretion*[19] is only relevant to very specific situations such as the review of administrative decisions involving technical matters that go beyond knowledge of the law, for which the judge is not qualified or is no more qualified (than the administrative authorities) to review the content (of the powers of discretion and margin of appreciation) of such decisions.[20]

2.1.2. Judicial Review of Government Acts

In principle, government acts should also be subject to judicial review, but this is still controversial in certain countries.

Otto Mayer never accepted the category of governmental actions (*actes du gouvernement*); according to him, state actions may be legislative, judicial or administrative but never governmental, which would only serve to justify an immunity.[21]

According to Ernesto Jinesta:

> The rule should be that any act attributable to Government bodies, including those of the highest rank and importance, which are subject to a legal system, should be reviewed by the administrative law courts, since they are responsible for verifying legality, and there is no justification for any area of judicial immunity for any reason whatsoever.[22]

The opposite point of view has been adopted by numerous Latin-American laws, however: Article 6 (c) of the Ecuadorian Law of Administrative Justice recognizes the category *political acts of government* and exempts them from judicial review;[23] Article

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18 Nobre Júnior 2016, at 21.

19 Article 6 (a) of the Ecuadorian Law of Administrative Justice (Ley de la Jurisdiccion Contencioso Administrativa / Law No. 35, of 18 March 1968) denies courts the right to review the exercise of discretionary powers by administrative authorities.

20 On the subject of German Federal Administrative Court precedents, see Blanke 2012, at 41. According to Fábio de Souza Silva, the degree to which courts should be allowed to interfere with the acts of administrative authorities depends on the 'trustworthiness' of the administrative decision in question (see in general Silva 2014). On the subject of judicial deference to administrative authorities from the standpoint of *discricionariedade técnica* (an administrative decision based on an expert opinion can only be challenged by means of a contrary expert opinion), see Jordão 2016.

21 Mayer 1982, at 3–5. On the subject of controversies involving the conflict between the 'government act' (*acte du gouvernement*) and administrative justice activities at the time, see Fernández Torres 2007.

22 Jinesta 2014, at 607–634.

23 Ecuadorian Law of Administrative Justice (Ley de la Jurisdiccion Contencioso Administrativa do Equador / Law No. 35, of 18 March 1968).

3 (II) (a) of the Bolivian Law of Administrative Procedure stipulates that "governmental acts based on the power to freely appoint and remove authorities" are not subject to the provisions of that same Law of Administrative Procedure;[24] according to Article 4 (b) of the Law of Administrative Justice of Honduras, administrative courts have no authority to examine issues raised by "actions involving the relationship between Branches of Government or occasioned by international relations, defense of the national territory or military command and organization;"[25] Article 4 (a) of the Law of Administrative Justice of El Salvador;[26] Article 21.1 and Article 21.2 of the Law of Administrative Justice of Guatemala;[27] and Article 17.1 of the Law of Administrative Justice of Nicaragua.[28]

2.2. Admissible Claims

The judicial protection must cover every type of conduct of public authorities. Judicial review must cover not only an administrative authority's acts or decisions that restrict a citizen's rights but also any negligence or culpable omissions on the part of that authority. In other words, procedural law must ensure that citizens are able to resort to the courts to challenge not only administrative decisions or acts that affect them adversely but also the authority's failure to reply to a request or to provide a benefit to which the claimant believes himself to be entitled. The court must have both the authority to rule on the administrative authority's obligations and the necessary powers of enforcement to guarantee that their ruling will actually be put into practice.[29]

According to the Inter-American Court of Human Rights, legislators should apply the following criteria when deciding whether it is necessary to adopt procedures enabling (administrative) courts to issue orders to perform or refrain from performing an action:

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[24] Bolivian Law of Administrative Procedure (Ley de Procedimiento Administrativo de Bolívia / Law No. 2341, of 23 April 2002).

[25] Law of Administrative Justice of Honduras (Ley de la Jurisdicción de lo Contencioso Administrativo de Honduras / Decree No. 189, of 31 December 1987).

[26] Law of Administrative Justice of El Salvador (Ley de la Jurisdicción Contencioso-Administrativa de El Salvador / Decree No. 81, of 14 November 1978).

[27] Law of Administrative Justice of Guatemala (Ley de lo Contencioso-Administrativo de Guatemala / Decree No. 119, of 17 December 1996).

[28] Law of Administrative Justice of Nicaragua (Ley de Regulación de la Jurisdicción de lo Contencioso Administrativo de Nicaragua / Law No. 350, of 18 May 2000).

[29] On the subject of the need to ensure means of enforcing judgments against the administrative authorities, see Inter-American Court of Human Rights, *Case of Maldonado Ordoñez v. Guatemala* (Judgment of 3 May 2016), para. 109.

> [W]hen evaluating the effectiveness of the remedies filed under the domestic administrative jurisdiction, the Court must observe whether the decisions taken in that jurisdiction have made a real contribution to ending a situation that violates rights, to guaranteeing the non-repetition of the harmful acts and to ensuring the free and full exercise of the rights protected by the Convention.[30]

In a 2001 judgment, the I/A Court H.R. held that "for the appeal for annulment to be effective, it would have had to result in both the annulment of the decision, and also the consequent determination or, if appropriate, recognition, of the [relevant statutory] rights."[31]

Regarding enforcement measures, the Euro-American Model Code of Administrative Jurisdiction provides as follows:[32]

> Article 58 (Measures)
>
> To ensure full implementation of the judgment or decision, the court may, at any time, at the request of either party, order appropriate enforcement measures and stipulate a time limit for enforcement if necessary. In particular, the court may:
>
> a) impose a coercive fine;[33]
>
> b) seize such of the administrative authority assets as are not indispensable to the performance of its public duties and the alienation of which would not compromise a public interest;[34]
>
> c) order that the action which the administrative authority failed to perform be carried out by a third party at the authority's expense.

Latin-American laws are beginning to incorporate judicial seizure of the public authorities' assets as recommended by the Euro-American Model Code, with the

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30 Inter-American Court of Human Rights, *Case of Barbani Duarte et al. v. Uruguay* (Judgment of 13 October 2011), para 201. Along the same lines: Articles 4 and 5 of the Peruvian Law of Administrative Justice (Ley que regula el Proceso Contencioso Administrativo / Law No. 27.584, of 22 November 2001); Article 9 of the Organic Law of Administrative Justice of Venezuela (Ley Orgánica de la Jurisdicción Contencioso Administrativa / Law No. 39.447, of 16 June 2010); Article14 of the Law of Administrative Justice of Nicaragua (Ley de Regulación de la Jurisdicción de lo Contencioso Administrativo / Law No. 350, of 18 May 2000).

31 Inter-American Court of Human Rights, *Case of Barbani Duarte et al. v. Uruguay* (Judgment of 13 October 2011), para. 211.

32 Perlingeiro & Sommermann 2014, at 23–24.

33 On the subject of coercive fines (*astreints*), see Articles 88.2 and 122.3 of the Code of Administrative Justice of the Russian Federation.

34 See Article 63 of the Model Code of Administrative Procedure and Administrative Justice for Ibero-America (Grinover & Perlingeiro et al. 2014, at 117).

proviso that the public interest must not be compromised by such debt-enforcement measures.[35]

On this point, however, national legislation in Latin America has proven incapable of establishing a distinction between the public interest and the interest of the administrative authorities; moreover, they fail to recognize the subtle difference between the effects of ruling in favor of the public interest by granting a petition for ***interim*** relief and the effects of doing so in a ***final*** judgment, as will be explained at the end of the next section.

2.3. Interim Relief

The third dimension of effective judicial protection concerns the timeliness of the protection. Judicial protection that comes too late is hardly helpful. Procedural law should therefore enable interim relief to be obtained quickly and easily in urgent cases, through petitions to prevent acts of undue interference by the administrative authority or to obtain declaratory judgments in case of danger in delay. The court should be able to order the administrative authority to perform or to refrain from performing an act. Interim relief should be available whenever interference with the citizen's rights could have irreparable consequences.

The Euro-American Model Code of Administrative Jurisdiction provides as follows:[36]

> 1) The court may grant interim relief. The court shall adopt all provisional measures necessary to safeguard or implement a legal position and any measure necessary to ensure the effectiveness of the judicial protection.
>
> 2) The interim relief measures shall be granted in a procedure based on the principles of priority and speediness whenever there is a serious doubt about the legality of the administrative proceeding in question (*fumus boni iuris*), and the need for protection is urgent (*periculum in mora*), in such a way as to ensure a balance between public and private interests.

The technique of using *generic interim relief measures*,[37] i.e., the absence of a specific predetermined procedure for each type of claim, providing judges with a greater

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[35] See Article 170 of the Costa Rican Code of Administrative Justice (Código Procesal Contencioso-Administrativo / Law No. 8.508, of 28 April 2006). On the subject of public interest (essential service to the community) as grounds for stay of execution of a judgment, see Article 41(a) da Law of Administrative Justice of El Salvador (Ley de la Jurisdicción Contencioso-Administrativa / Decree No. 81, of 14 November 1978). See also Article 110.2 of the Organic Law of Administrative Justice of Venezuela.

[36] Perlingeiro & Sommermann 2014, at 19. See also Articles 58–60 of the Model Code of Administrative Procedure and Administrative Justice for Ibero-America (Grinover & Perlingeiro et al. 2014, at 117).

[37] See Chiti 2013, at 170–174.

margin of discretion, has been adopted by certain countries, such as Argentina,[38] Brazil,[39] Colombia,[40] Mexico,[41] Guatemala,[42] and Venezuela.[43] Incidentally, in this area, statutory provisions that interfere with the judge's general power to provide provisional remedies, whether by restricting such measures or requiring that they be granted, should be considered 'teleologically' by the judges and authorities who interpret the law as merely indicative because, at any time, such interim relief measures are subject to weighing in light of the principles of due process, such as access to the courts and the right of defense.[44] *Necessity*, as a prerequisite for interim relief requires not only *periculum in mora* (danger in delay) but also *proportionality* between the request for interim relief and the protective or anticipatory nature of the principal claim.[45]

One peculiarity of interim relief in administrative law is that a demonstration of *periculum in mora* and *fumus boni iuris* does not suffice: it is also of fundamental importance to weigh the conflicting interests, even the interests of other essential public services that would be affected by the measure but are not direct parties to the dispute. Such weighing, based on proportionality *stricto sensu*, must show a prevailing public interest in favor of the claimant, i.e., it is necessary to demonstrate that it would be more harmful to the public interest to deny the claim than to grant it, in the words of Article 231.3 of the Colombian Law of Administrative Procedure and of Administrative Justice.[46]

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38 Article 232 of the Code of Civil and Commercial Procedure of the Nation of Argentina (Codigo Procesal Civil y Comercial de La Nacion / Law No. 17.454, of 18 August 1981).

39 Articles 300 to 310 of the Brazilian Code of Civil Procedure.

40 Article 230 of the Colombian Law of Administrative Procedure and Administrative Justice (Código de Procedimiento Administrativo y de lo Contencioso Administrativo / Law No. 1437, of 18 January 2011).

41 Article 24 of the Mexican Federal Law of Administrative Justice.

42 Article 18 of the Law of Administrative Justice of Guatemala (Ley de lo Contencioso Administrativo / Decree No. 119, of 17 December 1996).

43 Articles 69 and 103–106 of the Organic Law of Administrative Justice of Venezuela.

44 On the unconstitutionality of statutes prohibiting interim relief measures against administrative authorities, see Bedaque 1998, at 84.

45 Although Article 85.2 of the Code of Administrative Justice of the Russian Federation describes purely protective measures ("The court may suspend the effects of the challenged decision in whole or in part, prohibit carrying out certain acts, take certain preliminary measures of defense against administrative proceedings in the cases mentioned in subsection 1 of the present article, except to the extent that the present Code prohibits taking such preliminary measures of defense against predetermined categories of administrative affairs," or Article 85.4 ("Preliminary measures of defense against administrative proceedings must be correlative with and proportional to the stated claims," the requirement of a correlation between the principal claim and the precautionary measure should be interpreted as an open door to provisional relief measures of an anticipatory nature, too.

46 Article 231.3 of the Colombian Law of Administrative Procedure and Administrative Justice, imposes the following requirement for interim relief (measures), among others: "The applicant must have presented documents, information, arguments and justifications that make it possible to conclude, by weighing the relevant interests, whether it would be more harmful to the public interest to deny the interim relief than to grant it." For more on the subject of the weighing of public and private interests in interim relief measures, see Article 104 of the Organic Law of Administrative Justice of Venezuela.

For example, in the case of a request for interim relief by ordering the administrative authorities to dispense expensive pharmaceutical products, if the budget of other essential public services would be seriously compromised by doing so, it might be best for the claimant's fundamental rights to health and judicial protection to be sacrificed, temporarily, in favor of the fundamental rights of the community to continue benefiting from other equally essential services. An interim relief measure cannot be denied solely because a defendant claims that granting the measure would harm essential public services such as healthcare or education; rather, in each specific case, it is necessary to determine which public interest should prevail: the public interest in granting the interim relief or the public interest in safeguarding other fundamental values that the authorities are in charge of protecting.

Thus, it has been recently affirmed that laws that generally prohibit interim relief measures[47] and laws restricting such measures on the grounds of public interest (or synonymous expressions such as social well-being, public health, etc.) should be interpreted with certain provisos.[48] Finally, it should be noted that even if the judge denies a request for interim relief on the grounds of an overriding public interest, the principal claim may still be admissible because the claimant adversely affected by the overriding public interest may still be entitled to financial compensation for his personal sacrifice to the community.[49] Such financial compensation would not be justifiable within the scope of the ***provisional*** remedy.

2.4. Excessive Judicialization

Despite the significant advances made with respect to the right to effective judicial protection, in reality, Latin-American courts are faced with a major problem: the uncontrollable judicialization of administrative claims (exacerbated by thousands of pending lawsuits filed by individuals against public authorities, and vice-versa). This trend seems to be due to the increasing loss of credibility of the administrative authorities in the eyes of the general public, and the inability of the courts to respond to the enormous number of claims.

In Brazil, the number of lawsuits continues to rise in spite of the improved productivity of the judges, each of whom, on average, delivered 1,564 judgments

[47] See Article 7 of the Brazilian Law on Collective and Individual Writs of Administrative Procedure (Lei sobre o Mandado de Segurança individual e coletivo) / Law No. 12.016, of 7 August 2009).

[48] In Brazilian law, Article 15 of the Brazilian Law on Collective and Individual Writs of Administrative Procedure establishes that individual interests cannot prevail at the cost of serious injuries to public interests in social welfare, health, safety, and the economy. Along the same lines, Article 22 of the Costa Rican Code of Administrative Justice imposes the requirement that interim relief measures must be compatible with the budget allocations to the administrative authorities.

[49] On the subject of financial compensation for the individual losses suffered as a result of non-enforcement of a judgment, see Constitutional Court of the Republic of Colombia, Sentencia No. T-554/92 (Judgment of 9 October 1992). Also see Article 110.2 of the Organic Law of Administrative Justice of Venezuela.

in 2013.[50] According to the (latest) 2014 Report of the National Council of Justice (Conselho Nacional de Justiça – CNJ), the number of cases pending before the courts has reached 100 million (28.9 million new cases added to the previous backlog of 70.8 million cases).[51] According to the CNJ's study on the top 100 litigants in Brazil, administrative authorities account for 51.5% of the total caseload in Brazil, with the federal sector in the lead with 38.5%, followed by state (7.8%) and municipal (5.2%) authorities. This means that, overall, the three levels of administrative authorities account for more pending lawsuits than the other top 80 litigants combined, including the entire banking and telephony sectors.[52] The INSS (Brazilian National Social Security Institute), with a 22.33% share of the total outstanding caseload, occupies first place on that list of the top 100 litigants in Brazil.[53]

The Costa Rican courts have encountered a huge increase in the number of administrative cases since the enactment of their Code of Administrative Justice:[54] the number of pending cases increased from 1,195 in 2008 to 14,182 in 2015.[55] In Mexico, the multi-judge (circuit) courts [*tribunales colegiados de circuito*], single-judge circuit courts [*tribunales unitário de circuito*], and district courts [*juzgados de distrito*] received 283,843 new administrative lawsuits in 2013 and 302,500 in 2014.[56] In Argentina, 44,220 new lawsuits were added to the 220,174 already pending (versus 60,307 new lawsuits added to 118,018 cases already pending in 2006).[57] In Paraguay, 853 new administrative lawsuits were filed with the State Audit Tribunal (Tribunal de Cuentas) in 2015, versus 583 new cases in 2012.[58] In El Salvador, the Supreme Court of Justice (Corte Suprema de Justicia) was faced with 2,291 administrative law cases in 2015, as compared to 1,692 pending cases in 2011.[59] In Panama, 383 new administrative lawsuits were filed with the Supreme Court (Suprema Corte Judicial) in 1990, increasing to 963 new claims in 2010.[60] In Nicaragua, 14 lawsuits were filed with the Administrative Law Section (or Division)

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50 Conselho Nacional de Justiça 2014, at. 39.

51 See Cardoso 2015.

52 See Conselho Nacional de Justiça 2011.

53 See Conselho Nacional de Justiça 2011.

54 Costa Rican Code of Administrative Justice (Legislative Decree No. 8.548, of 28 April 2006 (entry into force on 1 January 2008).

55 See Poder Judicial da República de Costa Rica 2016.

56 Dirección General de Estadísticas Judicial de los Estados Unidos Mexicanos (2014).

57 Junta Federal de Cortes y Superiores Tribunales de Justicia de las Provincias Argentinas y Ciudad Autónoma de Buenos Aires 2006. Junta Federal de Cortes y Superiores Tribunales de Justicia de las Provincias Argentinas y Ciudad Autónoma de Buenos Aires (2014).

58 See Corte Suprema de Justiça del Paraguay 2016.

59 Corte Suprema de Justicia de la República de El Salvador 2016.

60 Órgano Judicial de la República de Panamá 2011.

of the Supreme Court (Sala de lo Contencioso Administrativo da Corte Suprema de Justicia) in 2006, increasing to 213 new cases in 2014 and 161 in 2015.[61]

The situation is better in Uruguay, Honduras and Bolivia, with statistics indicating stability.

In Uruguay, the statistics of the Tribunal for Administrative Dispute Resolution (Tribunal do Contencioso Administrativo) show that the number of pending cases has even decreased, from 985 in 1991 to only 791 cases in 2015.[62] In Honduras, in 2006, 221 new cases were filed with the Appellate Courts (Cortes de Apelaciones), 840 with the Administrative Courts of First Instance (Juzgados de Letras Contencioso Administrativo), and 27 with the Administrative Tax Court of First Instance (Juzgados de Letras Fiscal Administrativo); in 2015, 380, 449, and 37 new cases were filed with those same courts, respectively.[63] In Bolivia, in 2012, 4,619 actions were pending before the Supreme Court of Justice (Tribunal Supremo de Justicia), 3,972 before the Departmental Courts (of Justice) (Tribunales Departamentales de Justicia), 176 before the Agricultural/environmental Court (Tribunal Agroambiental), and 9,004 before the Courts for Review of Direct Tax Collection by Public Authorities (Juzgados Administrativo Coactivo Fiscal y Tributario). In 2014, there were 1,151 cases before the Supreme Court of Justice, 5,446 before the Departmental Courts (of Justice), 434 before the Agricultural/environmental Court, and 9,929 cases before the Courts for Review of Direct Tax Collection by Public Authorities.[64]

3. Challenges Related to the Judicial System

3.1. Historical Reasons for the Identity Crisis of the Judicial System

In reality, the excessive judicialization is related to the system of organization of administrative dispute resolution in Latin America: the Continental European legal traditions inherited by the former Iberian colonies are in conflict with the U.S. constitutionalist model that influenced the independence movements which, in the early 19th century, began expelling the Iberian colonial powers from Latin America.[65]

In *common law* countries, there are no courts that specialize in administrative law. As a result, in their *closed judicial review*, they tend to refrain from detailed examination of the *factual* grounds for administrative decisions.[66] Such *judicial deference* is made up for by the availability of dispute-resolution mechanisms within the government agency's organizational structure (administrative tribunals,

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61 Corte Suprema de Justicia de la República de Nicaragua, Sala de lo Contencioso Administrativo 2015.

62 Tribunal de lo Contencioso Administrativo de la República Oriental del Uruguay 2016.

63 Centro Electrónico de Documentación e Información Judicial de Honduras 2015.

64 Consejo de Magistratura de Bolivia 2012 and Consejo de Magistratura de Bolivia 2014.

65 See Perlingeiro 2016.

66 See Asimow 2015.

administrative judges, administrative bodies) which are endowed with quasi-judicial powers and sufficient independence to provide citizens with guarantees of due process of law and a fair hearing.[67]

In most Continental European legal systems (with *civil law* origins), in contrast, the courts have both a general law division and an administrative law division, which tend to have broad powers to review the factual grounds for administrative decisions (*open judicial review*). Such broad powers of review are intended to counterbalance the traditional absence of internal dispute-resolution mechanisms in the administrative authorities themselves.[68]

The Latin-American systems of administrative dispute resolution are therefore undergoing an identity crisis, because their laws of procedure and the corresponding interpretations are unsuccessfully attempting to reconcile the characteristics of the European and U.S. models.

Most Latin-American countries have adopted a system of *unified jurisdiction* (i.e., a system without a specialized jurisdiction for adjudication of administrative disputes). Out of the eighteen countries studied, thirteen have a unified jurisdiction system in general: Argentina,[69] Bolivia,[70] Brazil, Costa Rica,[71] Chile,[72] El Salvador,[73] Ecuador,[74] Honduras,[75] Nicaragua,[76] Panama,[77] Paraguay,[78] Peru,[79] and Venezuela.[80] Colombia,[81] Guatemala,[82] and

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67 See Cane 2011, at 96. See also Strauss 1989.

68 On the subject of European models of administrative justice, see Fromont 2006, at 120 et seq. See also Ziller 1993. The Russian Federation has adopted a system of unified jurisdiction as shown by Articles 1.1 and 17 of the Code of Administrative Justice of the Russian Federation.

69 See Mairal 1984, at 124–126.

70 Article 179 of the Bolivian Constitution (Constitución Política del Estado Plurinacional de Bolívia de 2008).

71 Costa Rican Constitution (Constitución Política de la República de Costa Rica de 1949).

72 See Vergara Blanco 2005, at 159–161.

73 Article 131.31 of the Salvadoran Constitution (Constitución de la República de El Salvador de 1983).

74 Articles 188.3 and 173 of the Ecuadorian Constitution (Constitución Política del Ecuador de 2008).

75 Constitution of Honduras (Constitución del Estado de Honduras de 1982).

76 Article 163 of the Law partially amending the Constitution of the Republic of Nicaragua (Constitución Política de la República de Nicaragua de 1987). See Corte Suprema de Justicia de República de Nicaragua 2016.

77 Article 206 of the Panamanian Constitution as amended in 2004 (Constitución Política de la República de Panamá de 1972).

78 Article 248 of the Paraguayan Constitution (Constitución Nacional de la República del Paraguay de 1992). On the 'judicialist' Paraguayan system in which the Judiciary exercises jurisdiction over administrative disputes, see Chase Plate 2007, at 1212.

79 Huapaya Tapia 2006, at 335.

80 See Brewer-Carías 1997, at 21 et seq.

81 Article 231 of the Constitution of Colombia (Constitucion Politica de Colombia de 1991).

82 Constitutions of Guatemala of 1945 (Article 164), 1956 (Articles 193 and 194), 1965 (Article 255) and 1985 (Article 221).

the Dominican Republic[83] are the only examples of countries with 'dual jurisdiction', i.e., divided into general courts of law and specialized administrative law courts, with three levels of authority (courts of first instance, courts of appeal, and a supreme court). The only country with an extrajudicial administrative tribunal is Uruguay.[84]

Mexico is in a class by itself because its Constitution adopts the unified judicial system while at the same time authorizing legislators to create administrative tribunals outside the judicial system[85] whose decisions can only be appealed through the judicial remedy of *amparo* in relation to constitutional issues.[86] In that respect, Mexican administrative tribunals are similar to Uruguay's Tribunal for Administrative Dispute Resolution (Tribunal do Contencioso Administrativo).[87]

On the model of the legal systems of *common law* countries,[88] procedural due process vis-à-vis administrative authorities has been adopted as a **prerequisite** for the enforcement of any administrative decision that restricts individual rights in the Constitutions of Brazil,[89] Colombia,[90] Ecuador,[91] Nicaragua,[92] the Dominican Republic,[93] and Venezuela,[94] and in statutes of Argentina,[95] Bolivia,[96] Peru,[97] and Uruguay.[98]

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83 Articles 164 and 165 of the Constitution of the Dominican Republic (Constitución Política de la República Dominicana de 2010).

84 Articles 307 to 321 of the Constitution of Uruguay (Constitución de la República Oriental del Uruguay de 1967).

85 Article 73 XXIX, 94, 116 V and 122 *Base Quinta* of the Mexican Constitution. On the nature of the Federal Administrative Tax Court, see Margáin Manautou 2009, at 2 et seq.

86 Article 107 IV and V (b) of the Mexican Constitution (Constitución Política de los Estados Unidos Mexicanos de 1917). On the subject of judicial review of the public administrative authorities in general, see Fernández Ruiz 2005, at 462–463.

87 On the nature of the 'autonomous tribunal' relative to the Judiciary of the administrative tribunals of Mexico and Uruguay, see Perlingeiro 2016, at 269.

88 U.S. Constitution Amendments V and XIV. On the origin of due process of law in the Magna Carta, see Mckechnie 1914, p. 377. On the application of due process of law in U.S. administrative law, see U.S. Supreme Court, *Murray's Lessee v. Hoboken Land & Improvement Co.* 59 U.S. 272 (Judgment of 19 February 1856); U.S. Supreme Court, *Goldberg v. Kelly,* 397 U.S. 254 (Judgment of 23 March 1970), and also see the Administrative Procedure Act (5 U.S.C. Subchapter II) of 11 June 1946.

89 Article 5 LIV and LV of the Brazilian Constitution (Constituição da República Federativa do Brasil de 1988).

90 Article 29 of the Colombian Constitution (Constitución Política de Colombia de 1991).

91 Articles 23, 27 and 76 of the Ecuadorian Constitution.

92 Article 34 of the Nicaraguan Constitution.

93 Article 69 of the Constitution of the Dominican Republic.

94 Article 49 of the Venezuelan Constitution (Constitución de la República Bolivariana de Venezuela de 1999).

95 Article 1 f) of the Argentine Law of Administrative Procedure (Ley de Procedimiento Administrativo / Law No. 19.549, of 3 April 1972).

96 Article 4 (c) of the Bolivian Law of Administrative Procedure.

97 Article IV 1.2 of the Peruvian Law of Administrative Procedure (Ley del Procedimiento Administrativo General / Law No. 27.444, of 21 March 2001).

98 Article 5 of the General Laws of Administrative Action and Regulation of Extrajudicial Procedure in the Central Administration of Uruguay (Normas generales de actuación administrativa y regulación del procedimiento en la Administración Central / Decree No. 500, of 27 September 1991).

According to the Supreme Court of Argentina, "the constitutional guarantees of due process and the right to a fair trial must be respected, without exception, in all proceedings, including in administrative procedures of a disciplinary nature – whether there is a preliminary investigation phase or not – so as to guarantee that the person accused will have an opportunity to be heard and to prove such facts as he believes will result in his acquittal".[99]

Nevertheless, such (extrajudicial) procedural due process is not implemented effectively, since the actual situation of the Latin-American administrative authorities is irreconcilable with the adoption of the independent or quasi-independent administrative dispute-resolution bodies typical of administrative justice in common law countries.

The title of Article 3.11 of the Law of Administrative Procedure of the Dominican Republic expressly refers to **independence**:

> 11. Principle of impartiality and independence. The civil servants of a public administrative authority shall refrain from any action that is arbitrary or might lead to preferential treatment for any reason and shall act objectively in the service of the public interest; it is prohibited for such civil servants to participate in any matters in which they, or their friends and relatives, hold any interest or in which there may be a conflict of interest.[100]

As may be observed, however, the article is misleading, because despite the express reference to *independence* in the title, the body of the text describes *impartiality*.

The few examples of Latin-American *quasi-judicial bodies* concern the right of access to official information, with the support of the *Model Inter-American law on Access to Public Information*.[101] Such quasi-judicial bodies are found in Chile,[102] El Salvador,[103] Honduras,[104] and Mexico.[105]

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[99] National Supreme Court of Justice, Argentina (Corte Suprema de Justicia de la Nacion), *Jueces Nacionales en lo Criminal y Correccional Federal de la Capital Federal s/ avocación.* S. 1492.95 (Judgment of 2 July 1996), at 1160.

[100] Article 3.11 of the Law of Administrative Procedure of the Dominican Republic (Ley del Procedimiento Administrativo / Law No. 107–13, of 3 April 2013).

[101] Organização dos Estados Americanos 2010.

[102] Consejo de Transparencia (Articles 31–44 of the Chilean Law of Access to Official Information [Ley sobre Acceso a la Información Pública / Law No. 20.285, of 20 August 2008]).

[103] Instituto de Acceso a la Información Pública (Articles 51–60 of the Law of Access to Information of El Salvador [Ley de Acceso a la Información Pública / Decree No. 534, of 2 December 2010]).

[104] Instituto de Acceso a la Información Pública (Articles 8–11 of the Law of Access to Information of Honduras [Ley de Transparencia y Acceso a la Información Pública / Legislative Decree of Honduras No. 170, of 30 December 2006]).

[105] Instituto e os Organismos Garantes (Articles 8 III and IV, 30 and 37–42 of the Mexican Law on Access to Information).

Thus, in Latin America, administrative dispute resolution tends to be concentrated in general courts of law which, however, do not include a specialized structure to that purpose.

3.2. The Extremes: Judicial Deference to Administrative Authorities and Open Judicial Review

The adoption of a judicial system with courts of general jurisdiction within a predominantly Continental European legal culture has led to the following situation in Latin America.

At one extreme, in courts of general jurisdiction, Latin-American judges are tempted to imitate the U.S. courts by refusing to review questions of fact underlying the challenged administrative decisions, merely checking for possible violations of the principles of legality and (above all) procedural due process.[106] Such deference to administrative authorities makes Latin Americans feel vulnerable vis-à-vis the immunity of the State, since their administrative authorities lack the prerogatives that would allow them to exercise their duties independently, without having to fear negative repercussions from other authorities.

At the other extreme, the broad powers of review of administrative decisions enjoyed by Latin-American courts, based on the European model, may paradoxically lead to undermining the effectiveness of judicial protection. Given the absence of specialized administrative courts, judges with excessively broad powers are able to rule on cases involving government agencies as though they were disputes between individuals, without due consideration for public interests; in other words, they tend to apply principles of private law and civil procedure to disputes with administrative authorities.[107] This is especially true in Brazil, which, to this very day, still has no general code of judicial procedure for administrative adjudication. As a result, claims involving issues of general interest, which are essentially public affairs, are treated in a fragmented, individual manner and therefore tend to multiply.[108]

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[106] U.S. Supreme Court, *Chevron U.S.A., INC, v. Natural Resources Defense Council, Inc*. 467 U.S. 837 (Judgment of 25 June 1984). On the subject of deference in various judicial systems, see in general Jordão 2016.

[107] Dicey was in favor of "the possibility of suing government officials in the ordinary courts according to principles of private law to be a element of the rule of law," which is now facilitated in common law systems by a fair hearing in the administrative phase (Cane 2011, at 44), and does not yet exist in practice in Latin America.

[108] On the subject of the inadequacy of the principles of civil procedure to conflicts of administrative justice and the resulting increase in repetitive claims, see Clementino 2016. See also Alves 2016. The Supreme Court of Chile advised the Ministry of Justice to consider drafting a bill providing for the creation of a specialization in administrative adjudication within the Judiciary and to draw up a single specialized code as an alternative to the legal uncertainty and excessive litigation (Supreme Court of Chile (Corte Suprema), Acta 176, 24 October 2014).

One example of a decision in which judges exercise (excessively) broad powers over the administrative authorities and take a private-law approach to typical public-law relationships is the enforcement of a judgment involving expropriation of public assets (in favor of the claimant) without considering the resulting risks of injury to public interests.[109] Another example is a court judgment that awards a public procurement contract to the claimant in a competition without considering the other candidates or interested parties.[110]

Litigation settlement agreements provide examples of both of the above-described consequences of the absence of specialized administrative courts. As an example of undue interference, judges are sometimes hostile to any form of consensual conflict-resolution involving the public administrative authorities (arbitration, mediation, settlement); availing themselves of a broad interpretation of *inalienable rights*, they tend to confuse the public interest with the interests of the public administrative authorities, despite the fact that various administrative sectors are already capable of promoting such agreements successfully. As an example of undue deference, judges sometimes uphold settlement agreements that do not comply with precepts of administrative law such as the principles of legality and equality before the law, making them prone to distorted interpretations and inconsistent conduct that compromise the very concept of effective judicial protection.

3.3. Credibility Thanks to Specialized Courts

In a judicial system that grants broad powers of review over government agencies despite the absence of specialized administrative courts, judicial decisions may lose credibility in the eyes of the public administrative authorities. Consequently, such authorities may be reluctant to enforce, *erga omnes*, a judgment in favor of an individual claimant in a case involving a question of general interest for other individuals.

Administrative authorities tend to resist judicial measures that they consider attributable to the judges' lack of technical expertise.[111]

The administrative authorities' mistrust of the Judiciary is also expressed by the continued existence of laws of procedure that deviate from the principle of equality of arms, such as those that grant the administrative authorities more favorable time limits for submissions and that make the enforceability of a trial court judgment

[109] See Souza 2016; see also El Nacional Web 2016. In Italy, it is sometimes permissible for an ordinary (civil) court to issue enforcement orders (including orders to pay a certain amount) against the public administrative authorities in private-law cases, but only through the 'guidizio di ottemperanza', which can intervene only if public-law issues are involved in the enforcement phase (see Clarich 2013, at 302–303).

[110] CERS Curso OnLine 2016.

[111] See Catanho 2016; G1Rio 2016.

against an administrative authority conditional on confirmation by the appellate courts.[112]

3.4. Are Repetitive Claims Really Individual?

The Code of Administrative Justice of the Russian Federation has created an advanced system specific to class actions in administrative disputes, establishing a rule of procedural jurisdiction (*competence*) that takes into account the nature and scope of the challenged administrative decision (Articles 17, 19, 20, and 21); class actions at the initiative of the public prosecutor's office or of government agencies and associations for the protection of diffuse interests in which the specific beneficiaries are unidentifiable (Articles 39 and 40);[113] and class actions at the initiative of the individual claimants themselves, to protect homogeneous individual interests of a certain group of persons (Article 42). In this last case, the legislator was concerned with the need for equal treatment of all members of the group (Article 42.1(4)),[114] insofar as the substantive issue involves administrative acts that affect the general public (Article 42.1(3)).[115]

Such concerns have pushed certain Latin-American legislators in the same direction, with procedures aimed at equal treatment of repetitive individual claims (i.e., involve identical issues) in administrative matters, such as the *Proceso Unificado*[116] (joinder of similar proceedings) in Costa Rica, the concentration of dispute resolution to rule on individual claims based on issues of general interest and the effectiveness *erga omnes* of a judgment that annuls an administrative decision with general effect in Nicaragua,[117] or the *Incidente de Demandas Repetitivas* (interlocutory proceeding for repetitive claims) in Brazil.[118] Similar provisions may be found in Article 44 of the Euro-

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[112] Roque et al. 2015. The Brazilian Code of Civil Procedure grants administrative authorities the following procedural prerogatives (privileges): differentiated procedural time limits (Article 183); the enforceability of a judgment is conditional on confirmation by the court of appeals (Article 496).

[113] Article 39 "The public prosecutor is entitled to refer administrative claims to the courts in defense of the rights, liberties and legal interests of the citizens, of an indefinite group of persons or the interests of the Russian Federation, constituent entities of the Russian Federation, municipal bodies, and in such other cases as are provided for by federal law." Article 40.1 "In the cases provided for by federal constitutional law, by the present Code and by other federal laws, government bodies, officials, the Commissioner for Human Rights of the Russian Federation, and the commissioner for human rights of a constituent entity of the Russian Federation, may resort to the courts in defense of the rights, liberties and legal interests of an indefinite set of persons and of public interests."

[114] Article 42.1(4) "all members of the group must use the same means of defense of their rights."

[115] Article 42.1(3) "availability of the general administrative defendant (administrative co-defendants.)"

[116] Article 48 of the Code of Administrative Justice of Costa Rica.

[117] Article 36 and Article 95 §1° of the Law of Administrative Justice of Nicaragua.

[118] Articles 976 to 987 of the Brazilian Code of Civil Procedure.

American Model Code of Administrative Jurisdiction[119] and Article 57 of the Model Code of Administrative Procedure and Administrative Justice for Ibero-America.[120]

One of the main causes of administrative claims that are repetitive is that individuals file separate claims regarding matters of general interest. The Judiciary should not be instrumentalized to circumvent the duties of the public administrative authorities to treat all claimants equally.[121] Since a decision involving a question of general interest can only benefit the individual claimant, the other citizens in the same factual circumstances will naturally feel encouraged to file identical court claims.

In administrative law cases, however, neglecting the concept of proportionality sometimes leads the courts to violate the principle of equal treatment under administrative law[122] on the grounds that judges are free to decide differently and that the litigants are entitled to seek out the best procedural channels to support their arguments and claims. In cases in which a constitutionally legitimized judge rules on an individual claim based on a question of general interest, it would be incompatible with the principle of the *judge predetermined by the law* (predetermined objective rules of procedural jurisdiction) for a different court to rule on the same question, whether concurrently or subsequently, even in reference to different litigants.

In that respect, diffuse control of constitutionality or legality (as opposed to concentrated review) does not mean that the legal system has to tolerate contradictory judicial decisions. In fact, diffuse review assigns jurisdiction to all judges, but once one of them happens to have been selected to decide the case, he should remain the *judge predetermined by the law* for that same dispute, even if the same conflict reappears in other types of proceedings:

> The laws of procedure should prevent different judicial bodies from having jurisdiction to try a given case, unless the defense of *lis alibi pendens* is capable of preventing contradictory decisions. **The** territorial and subject-matter **jurisdiction** of the judicial bodies **should take into consideration the general and individual nature of the challenged acts, as well as the extent of their effects**. … If it is found that different claimants have **identical cases**, with the same subject matter and cause of action, jurisdiction to try the case that was initiated second should be transferred to the judicial body that tried the case that was initiated first. The above rules are applicable, **even if the parties are different, to challenges, through direct channels, of the same**

[119] Perlingeiro & Sommermann 2014, at 19.

[120] Grinover & Perlingeiro et al. 2014, at 117.

[121] See Moraes 2016a and Moraes 2016b.

[122] Perlingeiro 2012, at 217–227.

> **general administrative act or decision – whether abstract or concrete – and to the orders to perform or refrain from an action, likewise through direct channels, based on the same diffuse or collective interest**. … If it is possible for a decision on the legality or illegality of a general administrative act or its interpretation, or any other form of conduct by the administrative authorities might affect a large number of disputes, the judicial body should refer the relevant issue to the judge who should, through direct channels, rule on the challenge of the general administrative act, requiring a referral for a preliminary ruling and suspension of the original trial for a reasonable period pending the final decision. The decision on the referred issue shall be effective *erga omnes*.[123]

Moreover, too much confidence should not be placed in class actions as an alternative to repetitive individual claims in administrative justice. Class actions, which are typical of private law and have their origins in *common law*,[124] lack the necessary degree of sensitivity to issues of administrative law (especially when opt-ins and opt-outs are involved). For example, the rule of *res judicata secundum eventum litis* under Article 33 of the Model Code of Class Action for Ibero-America[125] fails to consider the frequent tensions (not always visible) between interests in the administrative law cases, which should be decided in favor of the prevailing public interest according to the principle of proportionality.

In fact, class actions are not even necessary in administrative justice, because individual claims based on administrative acts having a general impact are essentially claims which, if granted, impose a duty – of a moral nature, in particular – on the administrative authority to extend the favorable effects of the judgment to everyone in the same factual situation.[126] Nevertheless, since there are defects in the rules of procedural jurisdiction (*competence*) allowing more than one judge to rule on the same (substantive) issue (on the merits), it is understandable that the administrative authorities resist such a *duty* to extend the effects of a judgment to third parties because they nourish hopes that a judgment to the contrary that is more favorable to their interests will be delivered in another trial.

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123 Perlingeiro et al. 2008, at 253–263. On the subject of the 'referral for a preliminary ruling on legality', see Article 20.1 of the Euro-American Model Code of Administrative Jurisdiction (Perlingeiro & Sommermann 2014, at 12).

124 See Redish 2003.

125 Grinover et al. 2004, at 7, 20.

126 See Perlingeiro 2012, at 217–227.

4. Challenges Related to Administrative Authorities

4.1. Primary Administrative Functions

In Latin America, the principle of administrative legality is still confused with strict legality;[127] in practice, the administrative authorities do not review the legality of their own decisions from the perspective of compliance with the provisions of the constitution and international human rights conventions, and they are incapable of protecting fundamental rights whenever doing so would require an interpretation that goes beyond the strict letter of the law.

There are two main reasons for this.

First of all, because the public administrative authorities are still subordinate to the Government in Latin-American legal culture, so that civil servants are appointed to key positions more for political reasons than for their technical qualifications. The second reason is that civil servants still adhere to the prevailing dogma that they owe a greater commitment to their hierarchical superiors than to legality, and many of them are afraid to protect fundamental rights by challenging a literal interpretation of the law, because they might be accused of *official misconduct*.

Consequently, public administrative authorities are incapable of handling claims for public welfare services or benefits that depend on the enforcement or interpretation of fundamental rights; such claims must be referred to the Judiciary if they are to have any chance of success.

In fact, the prior request to the administrative authority as a condition precedent for bringing an action in court[128] involves rights which, in order to be claimed, depend on information possessed only by the claimant, and the administrative authorities are under no obligation to provide the corresponding services or benefits until they are provided with such information. The prior request is not a condition precedent for interim relief, however,[129] and may be replaced by (direct) filing of a judicial action in cases in which it may be taken for granted that the administrative authority will deny the claim (e.g., because it would be required to interpret or enforce the law in a manner contrary to the rules established by its hierarchically superior authority).

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127 Article 9 (a) of the Argentine Law of Administrative Procedure merely presents statutory provisions defining the principle of administrative legality from the perspective of law in the broadest sense (including constitutional law and international treaties); similarly, the laws of Costa Rica (Article 6 of the General Public Administration Act), Peru (Article V (2)(1) and (2)(2) of the Peruvian Law of Administrative Procedure), and the Dominican Republic (Article 3.1 of the Law of Administrative Procedure of the Dominican Republic).

128 On the obligatory prior administrative request, see Article 30 of the Argentine Law of Administrative Procedure. On the subject of the distinction between the prior administrative request and preliminary administrative objection proceedings, see Federal Supreme Court of Brazil, Recurso Extraordinário 631.240 (Judgment of 3 September 2014).

129 Article 33 of the Euro-American Model Code of Administrative Jurisdiction (Perlingeiro & Sommermann 2014, at 15).

For administrative authorities to be endowed with independent decision-making powers they must have the necessary prerogatives for freedom of action within their respective spheres of authority, which means being free from hierarchical subordination (in terms of disciplinary actions, career incentives (promotions and benefits), and the employee recruitment system).

According to the I/A Court H.R., being independent means being "autonomous in every aspect of its jurisdictional performance, with the powers to decide without the influence of other bodies of the State – or any external authority – the actions brought before it, autonomy which must not only be enshrined in the laws governing judicial procedure (i.e., the Constitution and secondary laws) but also guaranteed by the actual situation in which the decision-maker acts."[130]

This means that a civil servant with decision-making powers should not be guided in the exercise of his activities by any motive other than his technical evaluation, without prejudice to imposing further limitations on his decision-making powers based on rules clearly delineating the various spheres of administrative authority, in order to safeguard the coherence of the administrative operations.

4.2. Secondary Administrative Functions

Independence is also necessary in secondary administrative functions (i.e., dispute-resolution functions performed by the public administrative authority itself) and is a prerequisite for impartiality. A lack of independence therefore creates serious risks of a corresponding lack of objective impartiality and fosters widespread distrust of extrajudicial administrative proceedings among the citizens, as is generally the case in Latin America.

This situation encourages individual claimants to try their luck in court if the government agencies refuse to enforce judgments favorable to the claimants when they believe that the judicial decisions against them are attributable to the lack of technical expertise on the part of the judge. In addition, the current situation justifies laws of procedure that make the Judiciary play the role of the *long arm of the administrative authorities* to enforce administrative decisions restricting individual rights, as in the case of judicial enforcement of decisions by the tax agencies, in flagrant contradiction with the principle of *self-enforceability of administrative actions*, according to which administrative agencies are entitled to enforce their decisions without judicial intervention.[131]

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[130] Inter-American Court of Human Rights, *Case of Palamara Iribarne v. Chile* (Judgment of 22 November 2005). Concurring opinion of Judge Sergio García Ramírez on the Judgment, para. 9 (c).

[131] Laws providing judicial tax enforcement: Article 653 of the Venezuelan Organic Tax Code (Código Orgánico Tributario da Venezuela / Decree No. 1.434, of 17 November 2014); Brazilian law on tax enforcement (Law on Judicial Collection of Outstanding Tax Claims of the Public Authorities / Law No. 6.830, of 22 September 1980). In contrast, for the admissibility of tax enforcement by the public

Incidentally, the concept of *self-enforceability* has always been resisted in Brazil; for example, the tax authorities are denied the right to expropriate a delinquent taxpayer's property, on the grounds that such authorities are not properly structured for such enforcement activities.[132] In Argentina, the Supreme Court struck down as unconstitutional a statute[133] allowing tax collectors to seize funds and securities on the taxpayer's bank accounts, arguing that it violated the principle of separation of powers.[134]

Cases may also be found in which administrative authorities filed claims in court to annul their own decisions when they generated effects favorable to individual claimants, as has occurred in Bolivia,[135] Costa Rica,[136] El Salvador,[137] Honduras,[138] and Paraguay,[139] which is incompatible with the administrative power of *autotutela* (i.e., self-governance, including the power of the administrative authorities to declare their own decisions and regulations null and void). Further evidence of the impotence of administrative authorities to discipline their own ranks is provided by the petitions in Brazil for a declaration of *improbidade administrativa* (administrative dishonesty), where citizens resort to the courts to impose civil and disciplinary penalties on corrupt civil servants.

Another demonstration of the inadequacy of the extrajudicial administrative proceeding (hearing) is that the citizens' claims often prove to be *no better than trying to draw water from a dry well*[140] and that torrents of national legislation have defined judicial appeals of administrative decisions as an option rather than as a condition

authorities themselves, see: Articles 98–101 of the Colombian Law of (Judicial and Extrajudicial) Administrative Procedure; Article 3 of the Chilean Law of Administrative Procedure; Article 149 of the General Public Administration Act of Costa Rica; Article 145 (1) of the Mexican Federal Tax Code; Article 69 (1) of the Tax Code of the Dominican Code (Código Tributário de la República Dominicana / Law No. 11, of 16 May 1992).

132 See Duarte 2005, Erdelyi 2007, Vasconcellos 2012 and Branco 2016.

133 Article 92 et seq. of the Tax Code (*Ley de Procedimiento Tributario*) of 1978.

134 National Supreme Court of Justice, Argentina (Corte Suprema de Justicia de La Nación), *Case of Administracion federal de ingresos publicos c/ intercorp S.A. s/ ejecucion fiscal* (Judgment of 15 June 2010).

135 The Bolivian Constitutional Court has ruled as follows: "In order to ensure stability, administrative decisions granting rights cannot be suspended within the administrative authority" (Bolivian Plurinational Constitutional Court (Tribunal Constitutional Plurinacional), Sentencia Constitutional Plurinacional 0584/2013. Exp: 02569-2013-06-AAC (Judgment of 21 May 2013)).

136 Article 10.5 of the Code of Administrative Justice of Costa Rica.

137 Articles 7(b) and 8 of the Law of Administrative Justice of El Salvador.

138 Article 15 of the Law of Administrative Justice of Honduras.

139 The Tax Court of Paraguay (Judgment 280 of 18 April 2002) confirmed that a judicial action is needed to reverse (an administrative decision favorable to an individual claimant), arguing that the dispute concerning the nullification of such decisions must be settled by an impartial 'third-party'.

140 Cassagne has pointed out the precedent-setting judgment of the Constitutional Section of the Supreme Court of Costa Rica in the 'Fonseca Ledesma' case, according to which a prior administrative request was equivalent to "draw[ing] water from a dry well," in light of the fact that the hierarchically superior administrative bodies rarely modify the lower authorities' decisions (Cassagne 2012, at 75).

precedent for filing a claim in court.[141] Even in the rare laws that impose such a condition precedent for access to the courts[142] it is considered optional whenever there is a risk of danger in delay, in which case the claimants may apply for *judicial* interim relief, even without completing the *extrajudicial* administrative hearing.[143]

Finally, it should be pointed out that the courts' powers of open review over the decisions issued in extrajudicial administrative proceedings is really based on the premise that such proceedings are merely optional for the citizens and the administrative authorities themselves, which means that they could be eliminated and entirely replaced by judicial action.

5. Diffuse Conventionality Control Vis-à-Vis the Administrative Authorities

The Latin-American countries' incorporation of the doctrine of *diffuse conventionality control* established by the I/A Court H.R. is currently the key to the fulfillment of the administrative authorities' duty to protect fundamental rights, although, to do so, it is necessary to overcome unconstitutional laws.

Mac-Gregor argues as follows:

> [T]he expression 'conventionality control', however, was first used by Judge García Ramírez in his separate opinions in cases such as Myrna Mack Chang v. Guatemala (which followed the Barrios Altos precedent). Ramírez stated[,] '[A]t the international level, it is not possible to divide the State, to bind before the Court only one or some of its organs, to grant them representation of the State in the proceeding – without this representation affecting the whole State – and excluding other organs from this treaty regime of responsibility, leaving their actions outside the 'conventionality control' that involves the jurisdiction of the international court.' The idea was further developed in Tibi v. Ecuador: "[I]f constitutional courts oversee 'constitutionality', the international human

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141 Binding Precedent 89 (*Súmula 89*) of the Brazilian Superior Court (Superior Tribunal de Justiça). See also Article 32 of the Euro-American Model Code of Administrative Jurisdiction (Perlingeiro & Sommermann 2014, at 15).

142 There are examples of a prior administrative request as a prerequisite for filing a claim in court: according to Article 70 of the Bolivian Law of Administrative Procedure, a prior attempt at extrajudicial resolution of any administrative dispute is a prerequisite for applying for judicial review. It is also worth mentioning Article 4.3 of the Code of Administrative Justice of the Russian Federation, which provides for the possibility of legislators, in certain cases, to make access to the courts conditional on completing an extrajudicial administrative objection procedure: "If, in certain categories of administrative affairs, federal law requires following obligatory pre-judicial procedures for the settlement of administrative disputes or certain other public disputes, then access to the courts shall be possible after complying with such procedures."

143 Articles 23 (a) and 9 of the Argentine Law of Administrative Procedure. See also Article 32.3 of the Euro-American Model Code of Administrative Jurisdiction (Perlingeiro & Sommermann 2014, at 15).

> rights court decides on the 'conventionality' of those acts'; and, finally, in Vargas Areco v. Paraguay, which highlighted that the 'control of compliance [is] based on the confrontation of the facts at stake and the provisions of the American Convention." Later, Judge Cançado Trindade also referred to conventionality control as a mechanism for the application of international human rights law at the national level.[144]

That doctrine was initially addressed to *all national judges*,[145] but it was later agreed that, within their respective spheres of authority, "all authorities and bodies of a Signatory Nation of the Convention have the obligation to exercise conventionality control."[146] According to the I/A Court H.R., "*[t]he conventional obligations [of a] Signatory Nation are binding on all branches and bodies of the State,* meaning that all the Branches of Government (Executive, Legislative, Judicial, and other branches of public power) and other public or state authorities, of any level, including their highest courts of justice, have a duty to comply with international law in good faith."[147]

The *duty of conventionality* proposed by the I/A Court H.R. has four characteristics: it is exercised (a) *ex officio*; (b) in compliance with the **interpretation** (of the provisions of the relevant conventions) as formulated by the I/A Court H.R., i.e., it is subject to a "forced adherence to the Inter-American Court's interpretations;"[148] (c) by authorities who exercise such 'control' independently of their hierarchical status, rank, amount in dispute, quantity or subject-matter jurisdiction assigned to them by domestic law; and (d) by administrative authorities and judges even if they do not have jurisdiction for constitutionality control, which does not necessarily imply opting to apply the conventional provisions or case law while ceasing to enforce the national laws, rather it means, first and foremost, trying to harmonize the provisions of national law with those of the Convention, by means of a 'conventional interpretation' of the national law.[149] The I/A Court H.R. explains this point as follows:

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144 See Mac-Gregor 2015.

145 Inter-American Court of Human Rights, *Case of Cabrera García and Montiel Flores v. Mexico*, opinion of Eduardo Ferrer Mac-Gregor Poisot, ad hoc Judge (Judgment of 26 November 2010), para. 33.

146 Inter-American Court of Human Rights, *Case of personas dominicanas y haitianas expulsadas v. República Dominicana* (Judgment of 28 August 2014), para. 497.

147 Inter-American Court of Human Rights, *La sentencia de supervisión del cumplimiento en el* caso Gelman v. Uruguay (Judgment of 20 March 2013), para. 59.

148 A *block of conventionality* (forced adherence to the Inter-American Court's interpretations), as recommended by the Inter-American Court of Human Rights, would be incompatible with the constitutional court precedents of certain European countries. On the supremacy of the national constitution over human rights conventions, see the Russian Federal Constitutional Court Ruling No. 21 of 14 July 2015 (with references to precedents of the constitutional court precedents of Germany, Italy, and Austria).

149 See Inter-American Court of Human Rights, *Case of Cabrera García and Montiel Flores v. Mexico*, opinion of Eduardo Ferrer Mac-Gregor Poisot, ad hoc Judge (Judgment of 26 November 2010), para. 33–35, 37, 42, 44, 59.

> [B]y contrast, the intensity of 'diffuse conventionality control' will diminish in those systems that do not permit 'diffuse constitutionality control' and, therefore, not all judges have the authority to not apply a law to a specific case. In these cases it is obvious that judges who lack such jurisdiction will exercise 'diffuse conventionality control' with less intensity, *without this implying that they cannot do so* 'within their respective jurisdictions.' This means that they may not suspend application of the law (since they do not have that power), and will, in any case, make a 'conventional interpretation' of it, i.e. a 'compliant interpretation,' not only of the national Constitution, but also of the American Convention and the associated case law. This interpretation requires a creative effort in order to ensure compatibility between the national standard and the conventional parameter, thereby guaranteeing the effectiveness of the right or freedom in question, with the greatest possible scope in terms of the *pro homine* principle.[150]

However, in case of absolute incompatibility,

> where no 'conventional interpretation' is possible, if the judge lacks the authority to suspend the rule, he is limited merely to indicating its non-compliance with the Convention or, where appropriate, 'calling into question its conventionality' before other competent courts within the same national legal system so that they can exercise 'conventionality control' with greater intensity. Thus, the reviewing judicial bodies will have to exercise that 'control' and disregard the rule or declare it invalid based on its non-compliance with the Convention.[151]

Regarding a new paradigm for contemporary administrative law, Ernesto Jinesta points out the following:

> [T]he diffuse conventionality control exercised by the administrative courts ostensibly broadens the dimension of legitimacy which should be substantially adopted to the administrative conduct, resulting in a reformulation of the sources of administrative law by incorporating the 'block of conventionality' as a benchmark, which might possibly lead to a *common* system of administrative law.[152]

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150 See Inter-American Court of Human Rights, *Case of Cabrera García and Montiel Flores v. Mexico*, opinion of Eduardo Ferrer Mac-Gregor Poisot, ad hoc Judge (Judgment of 26 November 2010), para. 37.

151 Inter-American Court of Human Rights, *Case of Cabrera García and Montiel Flores v. Mexico,* opinion of Eduardo Ferrer Mac-Gregor Poisot, ad hoc Judge (Judgment of 26 November 2010), para. 39.

152 Jinesta 2015, at 47 et seq.

In Mexico, the doctrine of diffuse conventionality control is considered to be the inspiration for the 2011 amendment of the Constitution, in which Article 1 was reworded thusly: "[**A**]**ll authorities**, within their respective spheres of authority, must comply with a series of human rights obligations."[153]

Moreover, in harmony with the case law of the I/A Court H.R., the Mexican National Supreme Court of Justice ruled as follows:

> [T]he administrative authorities are not empowered to perform any type of constitutional control, whether concentrated or diffuse; this means that they cannot declare a certain law null and void and refuse to enforce it, not even by arguing that they are marking reparations for a human rights violation, since that would involve disregarding the statutory conditions precedent for filing a defense, which must be fulfilled before any judgement may be delivered on the merits of the case. In any case, statutory provisions must be interpreted in the sense most favorable to individuals, but not at the cost of ignoring the powers and duties to be exercised within the bounds of the respective spheres of authority. To accept otherwise would create legal uncertainty in patent violation of other human rights such as legality, due process, and legal certainty, guaranteed by Articles 14 and 16 of our Constitution.[154]

It is also worth mentioning here that the Ibero-American Institute of Procedural Law, in its Model Code of Administrative Procedure and Administrative Justice for Ibero-America, adopted the *doctrine of diffuse conventionality control* by stipulating that it is the duty of administrative authorities, whenever faced with unconstitutional or anti-conventional laws, to request a preliminary ruling on constitutionality from the appropriate court of law or competent administrative authority.[155]

6. Certain Organizational Prospects for Administrative Justice

In the search for an organizational model for administrative justice adapted to the peculiarities of the judicial system in force in Latin America, two considerations merit attention: (a) institutional guarantees for the administrative authorities, within their respective spheres of authority and in the exercise of the primary executive functions, should be guided by the principle of the rule of law, that is to say, the supremacy of fundamental rights; (b) independent adjudication of administrative

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153 Article 1 of the Mexican Constitution (Constitución Política de los Estados Unidos Mexicanos).

154 Mexican National Supreme Court of Justice (Suprema Corte de Justicia de la Nación de México), Amparo directo en revisión 1640/2014 (Judgment of 13 August 2014).

155 Article 2 (single paragraph) of the Model Code of Administrative Procedure and Administrative Justice for Ibero-America (Grinover & Perlingeiro 2014, at 111).

disputes should be provided not only by the Judiciary, but also by the administrative authorities themselves.

According to the Inter-American Court of Human Rights, the obligation of effective judicial protection is applicable not only to the courts but also to the administrative authorities, and on two different levels: (a) in the case of administrative dispute-resolution functions performed by the authorities themselves in which the decision is final (not subject to subsequent judicial review), the authorities must be competent, independent, impartial, pre-established, and attentive to procedural due process;[156] (b) in the case of a public administrative authority's purely executive functions and the equivalent (such as the adjudication of disputes subject to full judicial review), the authorities must comply with Article 8.1 of the American Convention on Human Rights **only to a sufficient extent** to prevent an arbitrary administrative decision.[157]

This means that, from the human rights perspective, legislators have sufficient powers of policy-making to assign dispute-resolution functions (adjudication) to the administrative authorities, to make them subject to the same requirements as those applicable to courts of law, while reducing the courts' field of action accordingly. In addition, it may be inferred from the I/A Court H.R. precedents that administrative functions of a purely executive nature must be exercised by administrative authorities which have the necessary degree of independence and technical expertise to base their decisions not only on the strict letter of law but also on an analysis of fundamental rights.

7. Closing Considerations

After over two centuries of a judicial system consisting solely of courts of general jurisdiction, it would not seem the best option at this point to start discussing specialization of the courts. Indeed, the future of Latin-American administrative justice depends on guaranteeing procedural due process in the administrative sphere, based on the U.S. model imported in recent decades, in order to make up for the lack of specialized administrative courts in our judicial systems.

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[156] According to the I/A Court H.R., "[N]ational legislation should ensure that the officials who are legally authorized to exercise jurisdictional functions meet the requirements of impartiality and independence applicable to any public authority which, through its decisions, determine[s] individual rights and obligations of individuals ..." (Inter-American Court of Human Rights, *Case of Vélez Loor v. Panama* (Judgment of 23 November 2010), para. 108). Moreover, in the case of *Barbani Duarte et al. v. Uruguay*, the I/A Court H.R. treats the Uruguayan 'Tribunal do Contencioso Administrativo' as a court of law despite the fact that it is an administrative dispute-resolution authority external to the judicial branch of the Uruguayan government.

[157] Inter-American Court of Human Rights, *Case of Claude-Reyes et al. v. Chile* (Judgment of 19 September 2006), para. 118 and 119. The judgment of that case was reversed by the I/A Court H.R. as a baseless, arbitrary judgment that is exemplary of an arbitrary decision (para. 120).

Moreover, the case law of the I/A Court H.R. on *diffuse conventionality control* by the national administrative authorities would be compatible with the creation of an administrative structure with institutions similar to the *quasi-judicial bodies* or *administrative tribunals* typical of *common law* systems, which would require independence and impartiality, as well as adjudicators with sufficient legal expertise to take human rights conventions and the constitution into account in their decisions.

Against this backdrop, administrative decisions should be subject to limits imposed by the rules clearly demarcating the spheres of administrative authorities, based on the following criteria:

> 1) the distinction between a) an *interpretation according to the* constitution and the American Convention on Human Rights and b) *a declaration of unconstitutionality and anti-conventionality* (due to an act or omission), and
>
> 2) the extent of the impact of the challenged administrative act or decision. This would prevent the legal uncertainty that is generated by contradictory court rulings and facilitate the understanding that, as soon as a court grants a petition to reverse an administrative authority's decision in favor of the claimant, the benefits of that ruling should extend to all individuals (even if not directly parties to the dispute) in the same factual situation.

In fact, the required degree of administrative specialization in the Judiciary is inversely proportional to the abilities of the administrative authorities to play their role properly: the more effectively the administrative authorities protect fundamental rights, the greater the citizens' confidence in those authorities, and the greater the judicial deference shown to government agencies, the less it is necessary for the Judiciary to specialize in administrative law. In any case, it is imperative to change the rules of procedural jurisdiction in such a way as to prevent contradictory court rulings on a given administrative act challenged by different claimants.

Thus, it is not fair to blame the focus of the judicial system and the laws governing judicial proceedings as the only causes of the excessive litigation and ineffectiveness of the administrative justice system; on the contrary, Latin America needs to accept the reality of its judicial system with general jurisdiction over both private and administrative cases, while gradually reducing the courts' powers of review through an administrative reform based on the precept of *diffuse conventionality control* established by the precedents of the Inter-American Court of Human Rights. Such a reform would ensure that the administrative authorities respect fundamental rights in their executive and adjudicative actions by forcing them to act as an instrument of expression of the public interest, rather than as an end in themselves or as agents protecting their own temporary political and financial interests.

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AN OVERVIEW OF ADMINISTRATIVE JUSTICE IN ARGENTINA

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This article provides an overview of the federal administrative justice system in Argentina. It begins with an explanation of how the power to enact procedural law and to organize administrative courts is distributed between the federal state and the local states. It then describes the core constitutional and statutory principles and structures of administrative jurisdiction and the courts, and discusses the lack of a general special procedure to deal with actions involving the federal state and federal subject matter issues (except for interim measures and 'amparo' proceedings). The article goes on to provide an explanation of what is currently happening regarding class actions within this context, and it ends with remarks by the author on some provisional conclusions.

Keywords: administrative justice; Argentina; class actions; provisional measures against the state; federal jurisdiction; 'Amparo' proceeding.

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1. Introduction

Argentina is a federal republic, whose central state coexists with twenty-three local states called provinces and with the Autonomous City of Buenos Aires, which has a very particular status recognized by the Supreme Court of Justice (SCJA). As in the U.S., from which we have copied the institutional design of our Federal Constitution (AFC), federal government powers are only those that have been expressly delegated by the local states. As a consequence, the political system assumes that powers not delegated remain in the hands of the local states.

As far as we are concerned with the organization of administrative courts and judges, we should take into account that Article 5 of the AFC establishes as a condition for recognizing the autonomy of the provinces that they must organize their own administrative justice system, a task that includes the enactment of procedural regulations and, of course, the institutional framework regarding courts and judges. Also, when it comes to the enactment of codes, the provision on this in the AFC leaves aside procedural codes (Art. 75, para. 12 of the AFC).[1]

So, we have at least twenty-five different procedural systems in Argentina, each of which has a different approach to the topic of our discussion. In this general context, our focus is on the federal jurisdiction, which, according to Article 108 of the AFC, has to be performed by the ASCJ and other courts regulated by Congress.

2. Organization of Administrative Courts and Judges

Determined and limited by the constitutional context briefly described in the Introduction, administrative justice in Argentina is completely exercised by judges appointed by the executive power with Senate agreement, without the popular vote,[2] and after a proceeding regulated by the Judicial Council that includes public competition for selection. This Judicial Council has constitutional status and its own organic regulation passed by Congress.[3]

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[1] The delegation to the federal state in that constitutional provision includes the power to enact civil, commercial, criminal, mining, labor and social security codes, as well as regulations on bankruptcy, jury trials, currency falsification and public documents.

[2] Act No. 26.855 modified Act No. 24.937 regarding the composition of the Judicial Council and the proceedings to elect its members, allowing the popular vote for that purpose. However, this Act was declared unconstitutional by a majority of the SCJA in a class action filed by a member of the Federal Capital Bar Association, in "Rizzo, Jorge Gabriel (Apoderado Lista 3 Gente de Dcho.) s/ acción amparo c/ P.E.N. ley 26.855 – medida cautelar (EXpte. No. 3034/13)," file No. R.369.XLIX, opinion delivered on 06/18/13.

[3] Art. 114 of the AFC and Act No. 24.937. For a general overview of this constitutional body and its political implications, see among others Gelli María A. El Consejo de la Magistratura en contexto político institucional, LL 2009-D-1349; Quiroga Lavie Humberto, El Consejo de la Magistratura de la Nación, LL Sup. Act. 11.07.2006; Jeanneret De Pérez Cortés María, El Consejo de la Magistratura, la independencia del Poder Judicial y la prestación del servicio de justicia, LL 1995-E-817.

The territorial distribution of courts and judges is currently organized in the following way:

1) A federal general administrative jurisdiction located and concentrated in the City of Buenos Aires that comprises an appellate court divided into five chambers (*salas*) of three judges each and twelve courts of first instance.

2) In addition to this 'general' administrative jurisdiction, also in Buenos Aires there are six courts of first instance specialized in fiscal and tax enforcement. and two special administrative forums to address social security cases and electoral complaints (the former is organized around a Social Security Appellate Court, divided into three chambers, and ten courts of first instance; the latter is concentrated in a National Electoral Court, which was once a chamber of the Administrative Justice Court of Appeals and gained autonomy in 1971 through Act No. 19.277).[4]

3) A federal administrative jurisdiction decentralized across the whole national territory that comprises fifteen appellate courts with jurisdiction in territories that do not necessarily match with the political division into provinces.[5] Some of these courts are also divided into chambers.[6] These courts are vested with a multi-subject matter jurisdiction which includes civil, commercial, criminal, labor, social security, electoral and administrative cases. They review opinions from a total number of eighty-five courts of first instance.[7]

4) Additionally, of course, there is the SCJA. The Court has been defined and developed in a quite similar way to the U.S. Supreme Court, except for the manner in which it usually exercises its jurisdiction and in the number of cases it deals with each year.[8] It is composed of five justices.[9]

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[4] Passed by Congress on 10.01.71.

[5] Federal appellate courts are located in the cities of Bahía Blanca, Comodoro Rivadavia, Córdoba, Corrientes, General Roca, La Plata, Mar del Plata, Mendoza, Paraná, Santa Fe, Misiones, Resistencia, Salta, San Martín y Tucumán.

[6] Córdoba, La Plata, Mendoza, Santa Fe, Salta and San Martín.

[7] The distribution, and number, of federal courts of first instance, excluding those with exclusive criminal subject matter jurisdiction, is: Bahía Blanca (3), Comodoro Rivadavia (7), Córdoba (8), Corrientes (3), General Roca (6), La Plata (7), Mar del Plata (7), Mendoza (7), Paraná (4), Santa Fe (9), Misiones (3), Resistencia (6), Salta (6), San Martín (4), y Tucumán (5).

[8] In 2012, the SCJA delivered 9,586 opinions in 'no social security cases' and 6,452 in social security cases; while in 2013 the total number was 15,792 opinions. In 2014 (last available public statistics), the total number of opinions was 23,183. For a comprehensive and detailed analysis of the SCJA in exercising its appellate jurisdiction, see Giannini Leandro, El Certiorari. La jurisdicción discrecional de las cortes supremas (La Plata, Librería Editora Platense 2016).

[9] For a revision of the institutional role of the SCJA, see Oteiza Eduardo, La Corte Suprema: entre una justicia sin política y una política sin justicia (Editora Platense, La Plata 1994). Also see the papers gathered in Oteiza Eduardo, Hitters Juan C., Berizonce Roberto O. (coordinadores), El papel de los Tribunales Superiores (Rubinzal Culzoni ed., Santa Fe 2006).

3. Fundamental Principles and Scope of Administrative Jurisdiction

Federal administrative jurisdiction, as well as any other subject matter under federal jurisdiction, is exceptional and restricted to those cases expressly enumerated in Articles 116 and 117 of the AFC. It is also privative and, because of that, exclusionary of provincial jurisdiction. Because of this particular feature, federal jurisdiction can be declared *ex officio* in any stage of the proceedings.[10]

Moreover, it should be mentioned that federal administrative jurisdiction is mandatory regarding the subject matter, even though in certain cases it can be obviated (when the federal jurisdiction is determined by the persons involved in the dispute).

According to the aforementioned constitutional requirements, federal jurisdiction deals with 'cases or controversies' related to (conf. Art. 116 of the AFC):

1) Issues specified by the AFC or regulated by national laws and international covenants and treaties;

2) Complaints concerning ambassadors, public ministries and foreign consuls;

3) Admiralty and sea jurisdiction;

4) Actions involving the federal state;

5) Actions involving two or more provinces;

6) Actions involving neighbors of one province against neighbors of other provinces, or against other provinces;

7) Actions involving provinces or their neighbors against foreign states or citizens.

Additionally, Article 117 of the AFC provides that this kind of exceptional jurisdiction has to be performed originally and exclusively by the SCJA when the case involves ambassadors, ministries and foreign consuls, as well as when there is a province as a party to the dispute. Otherwise, the jurisdiction of the SCJA will be exercised through appellate proceedings regulated by Congress.

Within this constitutional framework, proceedings before administrative courts, including the SCJA when appropriate, are governed under:

1. Act No. 27, the first Judiciary Act, which regulates the general nature and functions of the federal judges and courts as well as the jurisdiction of the SCJA.[11]

2. Act No. 48, which regulates the jurisdiction of the SCJA and, particularly, the situations in which it is possible to file an extraordinary appeal to reach that instance.[12]

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[10] For a historical revision of administrative jurisdiction and the separation of powers between the federal state and the local states, see Gordillo Agustín, La protección judicial. Derecho procesal administrativo ('lo contencioso administrativo') Vol. 9, Chapter XIV of the Tratado de derecho administrativo y obras selectas. Primeros manuales (1st ed., Buenos Aires, FDA 2014).

[11] Passed by Congress on 10.13.1862.

[12] Passed by Congress on 08.25.1863.

3. The National Civil and Commercial Procedural Code, which regulates the general proceedings in this field, including both ordinary and extraordinary appeals before the SCJA.[13]

4. Decree-Act No. 1285/58, the principal regulation organizing the national and federal courts, which contains provisions regarding both institutional frameworks and proceedings.[14]

4. Administrative Proceedings

Even though, as noted, there are special courts to deal with administrative cases in Argentina, there are no general special proceedings established in which to deal with the specificities and complexity of cases directly involving the federal state or other situations specified by Article 116 of the AFC.

Several legislative initiatives have been introduced in the Senate and the Chamber of Deputies to establish such proceedings in the federal arena.[15] However, up to the present time we are still discussing administrative complaints with the procedural rules enacted to deal with private actions: the National Civil and Commercial Procedural Code.

There are two relevant exceptions to the application of this general procedural code:

1. The 'amparo' proceeding regulated by Act No. 16.986, enacted in 1966,[16] which provides for an exceptional, fast and effective device in cases of apparent illegal or arbitrary conduct by the State, with a proceeding characterized by a simplified structure, tight periods of time to exercise procedural rights, limited appeals and defenses, as well as particular provisions regarding interim measures. This legislation should be urgently reformed and improved in order to be an adequate regulation of this proceeding, which acquired constitutional status in the 1994 AFC reform.

2. The Interim Measures against the State Act No. 26.854, enacted in 2013,[17] which regulates interim measures in cases involving the federal state and its agencies as

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[13] Ordinary appeal in Arts. 254/255, the extraordinary appeal in Arts. 256/258. The ordinary appeal was declared unconstitutional in a recent decision of the SCJA, *in re "Anadon, Tomás Salvador c/ CNC"* (File No. A.494.XLIX), opinion delivered on 08.25.15.

[14] Passed by the *de facto* regime on 02.04.58 and modified by several democratic amendments passed by Congress.

[15] Among others, files No. 0025-PE-2006; 0037-PE-2000; 0057-PE-2001; 2185-D-2010; 2967-D-2013; 3119-D-2001; 3943-D-2002; 4318-D-2007; 4628-D-2012; 4877-D-2009; 5070-D-2002; 6117-D-2004; 7474-D-2002. The complete text of these and other legislative initiatives in this field can be found at <http://www.diputados.gov.ar/sesiones/proyectos/index.html> (Chamber of Deputies) and <http://www.senado.gov.ar/parlamentario/parlamentaria/> (Senate) (accessed Aug. 14, 2016).

[16] Passed by Congress on 10.18.66.

[17] Passed by Congress on 04.24.13.

plaintiffs or defendants. This Act is quite restrictive and covers a number of issues in this particular field, such as special requisites to obtain these types of orders, a temporal limitation, the sort of guarantees that have to be provided for their entering into effect, some prohibitions depending on the object of the measure, a suspensive effect for the appeal (similar to what is required for the 'amparo' proceeding), and exceptions to many of these provisions when there are certain kinds of fundamental rights or disadvantaged groups at risk.[18] Several of these restrictions have been declared unconstitutional by different federal courts around the country, alleging that they imply an undue restriction of access to effective justice.[19]

5. Class Actions

In Argentina, it is not possible to find a systematic and comprehensive procedural mechanism to deal with mass administrative complaints.[20] The lack of adequate procedural devices at the federal level is particularly problematic due to the fact that, since the 1994 reform to the AFC, standing to sue to enforce collective rights has acquired constitutional pedigree, as well as some collective substantive rights labeled 'collective incidence rights'.[21]

In this respect, since 1994 Article 43, 2nd paragraph of the AFC explicitly recognizes that different social actors (the 'affected' person and certain kinds of NGOs) and the Ombudsman have the right to bring 'amparo colectivo' on behalf of groups and against "any kind of discrimination and with regard to the rights that protect the environment, free competition, users and consumers, as well as rights of collective incidence in general." Article 86 of the AFC, in turn, is even more explicit about the

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[18] For a general analysis of this Act, see Oteiza Eduardo, El cercenamiento de la garantía a la protección cautelar en los procesos contra el Estado por la ley 26.854, LL Sup. Esp. Cámaras Federales de Casación. Ley 26.853, 05.23.2013, at 95. For a specific analysis regarding its implications in the field of collective redress, see Verbic Francisco, *El nuevo régimen de medidas cautelares contra el Estado Nacional y su potencial incidencia en el campo de los procesos colectivos,* LL Sup. Esp. Cámaras Federales de Casación. Ley 26.853, 05.23.2013, at 155.

[19] For an overview of case law regarding the Act, including these declarations of unconstitutionality, see Diegues Jorge A. Medidas cautelares contra el Estado. Aplicación jurisprudencial de la ley 26.854, LL 04/20/16.

[20] Verbic Francisco, *Access to justice of disadvantaged groups and judicial control of public policies through class actions*, draft in progress.

[21] For an explanation of the problem, see Oteiza Eduardo, La constitucionalización de los derechos colectivos y la ausencia de un proceso que los 'ampare', in Oteiza Eduardo (coordinador), Procesos Colectivos (Rubinzal-Culzoni ed., Santa Fe 2006). For a survey of some of the most relevant precedents in the area of collective redress in Argentina and further discussion about the problems entailed in the absence of adequate procedural means, particularly after the 1994 reform to the AFC, see Giannini Leandro J. La Tutela Colectiva de Derechos Individuales Homogéneos (Librería Editora Platense, La Plata 2007); Salgado José M. La corte y la construcción del caso colectivo, L.L. 787 (2007-D); Verbic Francisco, Procesos Colectivos (Astrea Ed., Buenos Aires 2007).

Ombudsman (it plainly states that the figure 'has standing to sue'). We can add the Public Ministry to the list of collective plaintiffs, because Article 120 of the AFC states that it has 'functional autonomy' and freedom to allocate its budget in order to fulfill its constitutional mission: protect the general interest of the population.

On top of that, Articles 41 and 42 of the AFC (also incorporated into the text by the 1994 reform) recognize several environmental and consumers' and users' substantive rights, while Article 75, section 17 vests Congress with the power to enact protective legislation on indigenous peoples. These and other collective rights have been expressly recognized by the 1994 reform to the AFC. The scope of the class action litigation field gets even wider if we take into account the constitutional status recognized by Article 75, section 22 of the AFC of several international covenants subscribed by Argentina (in whose texts we could easily find rights that belong to certain kinds of disadvantaged groups).[22]

Aside from those constitutional provisions, there are only two federal regulations available to deal with collective actions involving groups of people in Argentina, the General Environmental Act and the Consumer Protection Code.[23] Both of them were passed by Congress and can be characterized as 'substantive' laws. However, in both of them we can find certain isolated procedural provisions applicable, in principle, to dealing with collective administrative complaints involving those particular areas of substantive law.

Here, it is worth mentioning that, due to the institutional relevance and the public interest involved in class actions, the SCJA put in motion its inherent powers and created different administrative regulations to amplify and strengthen citizens' involvement, improve publicity and increase transparency in those kinds of cases.[24] Notwithstanding the relevance of these regulations, their implementation has been far from positive. For example, since 2004 only eight decisions have been published by the SCJA allowing the intervention of *amici curiae*. Other *amicus curiae* briefs have been filed in other cases, for example in the leading case *Halabi*, but the number of official publications (which operate as a public notice) may show that the SCJA is not comfortable with opening up for discussion every public interest proceedings.

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[22] Among others, the American Convention on Human Rights.

[23] See Lorenzetti Ricardo, Justicia colectiva 275–276 (Rubinzal Culzoni ed., Santa Fe 2010) (arguing that the CPA establish an 'acción colectiva', but in a "very insufficient way taking into account the abundant comparative law materials completely omitted by the legislator").

[24] Among these regulations we can present: 1) Acordada No. 36/2003, which regulated the proceeding to provide priority treatment to cases of 'institutional transcendence'; 2) Acordada No. 28/2004 (amended by Acordada No. 7/2013), regulating the *amicus curiae*; 3) Acordada No. 30/2007, providing for public hearings; 4) Acordada No. 36/2009, creating an Economic Analysis Unit to perform 'economic studies' ordered by the Court to assess the eventual impact of its decisions; 5) Acordada No. 1/2014, creating an Environmental Justice Office for a better treatment of environmental cases; 6) Acordada No. 36/2015, creating the Judicial Secretary of Consumers Relationships; and 7) Acordada No. 42/2015, creating the Secretary of Communication and Open Government.

Something similar happens concerning public hearings. From their creation in 2008 to today only twenty-five of these hearings have been conducted.[25] This is far from a significant number if we take into account the cases of institutional, social, political and economic relevance the SCJA has decided during this period.

Two other administrative regulations must be particularly considered because they have carried into the law in force several requirements and standards established by precedents:[26]

1) Acordada No. 32/2014, creating the Collective Proceedings Public Registry and establishing in its Article 3 a sort of 'certification stage', because it demands federal judges to deliver an opinion on admissibility requirements, notice and adequacy of representation before communicating the existence of the case to the Registry.

2) Acordada No. 12/2016, to be in effect for cases filed after the first workday of October 2016, enacting a Regulation of Collective Proceedings that contains provisions on jurisdiction, appeals, registration and *lis pendens*, among others.

It is difficult to sustain the constitutionality of these last two regulations because they provide for procedural law that should be enacted by Congress. However, it is hard to believe that the SCJA would review in such a way its own administrative acts. Furthermore, it is worth mentioning that these regulations came about to occupy a statutory empty space, which implies huge problems of legal certainty as well as severe difficulties of coordination between overlapping and parallel litigation (just to mention a couple of critical issues).

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[25] See the SCJA special website at <http://www.cij.gov.ar/audiencias.html> (year / number of hearings: 2008 – 5 / 2009 – 4 / 2010 – 2 / 2011 – 2 / 2012 – 6 / 2013 – 2 / 2014 – 2 / 2015 – 2) (accessed Aug. 8, 2016).

[26] The leading case being *"Halabi, Ernesto c/ P.E.N. – Ley 25.873 y dto. 1563/04 s/ amparo ley 16.986"*, opinion delivered on 02.24.2009, *Fallos* 332:111. When deciding this case, the majority of the SCJA asserted that in Argentina it was possible to file class actions (which it labeled 'acción colectiva') with "analogous characteristics and effects to the US class actions." It also plainly held that Art. 43 AFC provisions are clearly operative and must be enforced by the courts, even in the absence of legislation. Moreover, in this opinion the SCJA enunciated constitutional requirements for obtaining a valid collective opinion under due process of law standards. After underscoring the lack of an adequate procedural regulation enacted by Congress on class actions, the Court delivered several remarks to provide guidance to protect the due process of law of absent members in future uses of the 'acción colectiva'. In this respect, the SCJA held that the 'formal admissibility' of any 'acción colectiva' must be subject to the fulfillment of the following requirements: 1) there has to be a precise identification of the group of people that is being represented in the case; 2) the plaintiff must be an adequate representative of the class; 3) the claim has to focus on questions of fact or law common and homogeneous to the whole class; 4) there has to be a proceeding capable of providing adequate notice to all persons that might have an interest in the outcome of the case; 5) that notice proceeding has to provide members of the class an opportunity to opt-out or to intervene; and 6) there should be adequate publicity and advertising of the action in order to avoid two different but related problems – on the one hand, the multiplicity or superposition of collective proceedings with similar causes of action and, on the other hand, the risk of different or incompatible opinions on identical issues (Verbic Francisco, Access to justice of disadvantaged groups and judicial control of public policies through class actions, draft in progress).

6. Final Remarks

Argentina is going through a profound transformation of the kinds of administrative complaints that the judiciary deals with, processes and adjudicates. This transformation is mostly due to the Copernican change produced by the AFC reform in 1994, which established a new institutional framework that demands reshaping the traditional separation of powers paradigm. This is a challenge that should include a serious discussion of proceedings, structures and the role of the judiciary within contemporary Argentine democracy.

This is a complex phenomenon that finds its roots in the constitutional status given by the reform to several international human rights covenants, treaties and conventions, and also – as we have seen – to the explicit recognition of collective standing to sue granted to citizens, NGOs and the Ombudsman for acting in defense of 'collective incidence rights'. By doing so, the reform has recognized the judiciary's power to take collective decisions when these kinds of rights are affected.

In this landscape, current Argentine civil procedure appears each day more and more inadequate to provide for an open, robust, transparent and informed discussion for the sort of socially, politically and economically complex collective actions that affect groups of people. Because of that, it is also failing to provide judges with an adequate method to address, to process and to deliver politically legitimate decisions for society.

In this regard it is worthwhile to mention that at the time of this writing, the SCJA delivered a 112-page opinion on a class action filed against the federal government for the rise in natural gas rates nationwide, implemented by two administrative acts that did not comply with a prior public hearing requirement mandated by regulations governing this public service and Article 42 of the AFC. The Court confirmed that the acts were void for lack of that requirement. The implications of the decision are still to be measured. What does appear quite clear from this, though, is that the 'amparo' proceeding is far from a reasonable means by which to address actions of this sort.[27]

If the need for a specific proceeding to deal with ordinary actions involving the State is evident (as almost every province of Argentina has recognized by enacting special judicial administrative proceedings,[28] and the federal state as well by enacting

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[27] SCJA *in re "Centro de Estudios para la Promoción de la Igualdad y la Solidaridad y otros c/ Ministerio de Energía y Minería s/ amparo colectivo"* (File No. FLP 8399/2016/CS1), opinion delivered on 08/18/16. The complete opinion and a short overview are available at <https://classactionsargentina.com/2016/08/18/la-sentencia-colectiva-de-la-csjn-en-la-causa-cepis-limitacion-subjetiva-de-sus-alcances-audiencias-publicas-como-requisito-constitucional-y-la-cuestion-de-las-costas-fed/>.

[28] Tucumán, Act No. 4537; Santiago del Estero, Act No. 2296; Santa Fe, Act. No. 11.330; Santa Cruz, Act. No. 2600; San Luis, Act. No. VI-0156-2004; San Juan, Act No. 3784; Salta, Act No. 5.348; Neuquén, Act No. 1284; Misiones, Act No. I-89; Mendoza, Act No. 3909; La Rioja, Act No. 1005; La Pampa, Act No. 952; Jujuy, Act No. 1886; Formosa, Act No. 1.390; Entre Ríos, Act. 7.061; Corrientes, Act No. 3460; Córdoba, Act No. 7182; Chubut, Act No. I-18; Chaco, Act No. 1140; Catamarca, Act No. 3559; Ciudad Autónoma de Buenos Aires, Act No. 189; Buenos Aires Province, Act No. 12.008.

special provisions regarding interim measures), this need is even more compelling if we recognize and face the aforementioned phenomenon regarding the 'new' kind of (collective) actions that are being addressed every day before Argentine courts.

The urgent need for reform encompasses not only procedural rules, but also the institutional structures in charge of processing cases raised by these kinds of collective actions (which are, at least for that characteristic, social and political actions). This institutional change should be aimed at making judges more accountable for the huge amount of power they have gained due to the development of constitutional and conventional review of public policies and administrative decisions. It is a power they exercise very frequently, particularly since 2009 thanks to the scope that the SCJA gave to the 'case or controversy' doctrine in *Halabi* by recognizing the existence of 'collective cases and controversies' that allow the judiciary to exercise its jurisdiction over these sorts of issues.

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ADMINISTRATIVE JUSTICE IN ITALY

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This essay describes the organization of administrative courts in Italy, as a set of courts distinguished from ordinary courts that deal with civil and commercial cases. Since the 19th century Italy has adopted a dual system of jurisdiction, and has never abandoned the traditional criterion according to which ordinary jurisdiction and administrative jurisdiction are established: this criterion, having regard to the entitlement claimed by the plaintiff, is unique to Italy and, leaving aside its distinctiveness, it is quite enigmatic and difficult to apply in practice. Reference is made to the procedure followed before administrative courts, a procedure recently updated through the enactment of the Code of Administrative Procedure.

Keywords: Regional Administrative Tribunals; Council of State; subjective rights; legitimate interests; Code of administrative procedure.

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1. Introduction

To offer a simple, yet comprehensive picture of administrative justice in Italy is not an easy task: administrative courts have existed in Italy since the second half of the 19th century, that is, since the unification of the nation and the establishment of the Kingdom of Italy in 1861.[1] Certainly, it is not possible to summarize in an essay the changes that administrative justice has experienced in more than a century, even though it has been argued that the present state of administrative justice is the product of a progressive 'stratification' that has contributed to the development of a system in which nothing is destroyed and any new components pile up on top of the old ones.[2]

This essay will concentrate on the present organization of Italian administrative courts and on the legal sources that – in this author's opinion – are the most significant ones and that can outline the basic features of Italian administrative justice for the benefit of the reader unfamiliar with the Italian legal system.

2. Administrative Justice Through the Lens of the Italian Constitution

The Constitution of the Italian Republic (enacted at the end of 1947 and entered into force on 1 January 1948) contains a number of principles governing administrative justice. According to Article 103, sec. 1, 'The Council of State and the other bodies of judicial administration have jurisdiction over the protection of legitimate rights before the public administration and, in particular matters laid out by law, also of subjective rights.' The official translation into English[3] of the constitutional rule at hand is not completely accurate, insofar as it mentions the 'protection of legitimate rights': a better, more faithful translation would make reference to 'legitimate interests' (*interessi legittimi*, in Italian) as the counterpart of 'subjective rights' (*diritti soggettivi*). The distinction between two different forms of entitlement that every individual can claim against a public entity is at the base of the institutional arrangement of jurisdiction in Italy: in fact Italy has adopted a dual system of jurisdiction, according to which – at least in principle – subjective rights can be enforced by ordinary courts, while legitimate interests must be claimed before administrative courts. The distinction between the two forms of entitlement just

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1 For an historical overview, see e.g. B.G. Mattarella, *Administrative law in Italy: An historical sketch*, Rivista trimestrale di diritto pubblico 1009–1053 (2010); F.G. Scoca, *Administrative Justice in Italy: Origins and Evolution*, 1 Italian J. of Pub. L. 118–161 (2009).

2 F. Patroni Griffi, *Una giustizia amministrativa in perenne trasformazione: profili storico-evolutivi e prospettive*, Rivista trimestrale di diritto e procedura civile 115–142, at 117 (2016).

3 The English version of all the articles of the Italian Constitution cited in this essay is the one that is published on the website of the Senate of the Republic, available at <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf >, accessed June 2016.

mentioned will be elucidated further on in this essay. For now, it is worth mentioning that the category of 'legitimate interests' is unique to the Italian legal system,[4] which makes it difficult to explain in languages other than Italian what 'legitimate interests' are about, and probably also accounts for the reasons why the official translation into English of the constitutional rules having a bearing on the administration of justice at large rely on different concepts. This is the case, for instance, of Article 103, mentioned above, but most of all of Article 24, which enshrines the right of access to courts in providing that,"Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law." The reference to the 'rights under … administrative law' is an elegant way to avoid mentioning the 'legitimate interests' that appear in the Italian text of the rule.[5]

One way to make the dual system of jurisdiction (the jurisdiction of ordinary courts and the jurisdiction of administrative courts) more understandable, circumventing the complex distinction between 'subjective rights' and 'legitimate interests', is to emphasize an important point: the fact that a public entity or administration is a party to a case does not mean that the court having jurisdiction over the case itself is always an administrative court, since jurisdiction is determined by the entitlement claimed by the plaintiff. As the Italian Constitutional Court has clarified in several judgments, the mere fact that the public administration is involved in a judicial proceeding is not sufficient to establish the jurisdiction of administrative courts; by the same token, a generic element of public interest in a case does not imply necessarily that the case at stake would fall within the jurisdiction of administrative courts.[6]

Going back to the constitutional rules establishing administrative justice, Article 103 indicates the structure of administrative courts, mentioning the Council of State and 'other bodies of judicial administration': at present, these are the Regional Administrative Tribunals (henceforth, TARs), established in 1971 as administrative courts of first instance. There are twenty TARs, one for every Region. Each TAR sits in the capital city of the Region; the most populated Regions have 'detached divisions' of the local TAR.[7]

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[4] The concept of 'legitimate interests' appears in the Spanish Constitution of 1978, too, but in the context of the rules governing the so-called *recurso de amparo*, namely, the constitutional complaint that individuals can lodge with the Constitutional Court claiming the violation of fundamental rights and liberties (see Art. 162, sec. 1b) of the Spanish Constitution). Apparently, the concept has not been developed any further, neither has it had any practical applications: G. Leone, Elementi di diritto processuale amministrativo 37 (3d ed., Cedam, 2014).

[5] The Italian text reads, 'Tutti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi.'

[6] See, for instance, judgments No. 204 of 2004 and No. 191 of 2006. All the decisions issued by the Constitutional Court can be read (only in Italian) on the official website of the Court, available at http://www.cortecostituzionale.it, accessed June 2016.

[7] The establishment of Regional Administrative Tribunals (Statute No. 1034 of 1971) implemented the provision of Article 125 of the Constitution, according to which, "Administrative tribunals of the first instance shall be established in the Region, in accordance with the rules established by the law of the Republic. Sections may be established in places other than the regional capital."

The Council of State (sitting in Rome) acts as appellate court for the judgments issued by the TARs. Therefore, the Council of State can be considered the supreme administrative judicature, even though it cannot be qualified as a supreme court in absolute terms. In fact, according to Article 111, sec. 8 of the Constitution, 'Appeals to the Court of Cassation against decisions of the Council of State and the Court of Accounts are permitted only for reasons of jurisdiction', which means that against the judgments issued by the Council of State there is yet another avenue of appeal to the Court of Cassation, although limited to a single ground of appeal, namely, lack of jurisdiction. Consequently, the Court of Cassation, which is the final court of appeal for civil and criminal cases, is also entrusted with the power to settle the conflicts of jurisdiction arising between ordinary courts and administrative courts.

Article 103 of the Italian Constitution (at sec. 2) contemplates another administrative court as well, the Court of Accounts, and provides that, 'The Court of Accounts has jurisdiction in matters of public accounts and in other matters laid out by law.' The Council of State and the Court of Accounts share a common feature, that is, they are multifaceted bodies, as it is made clear by yet another constitutional rule, Article 100, insofar as it states that

> The Council of State is a legal-administrative consultative body and it oversees the administration of justice.
>
> The Court of Accounts exercises preventive control over the legitimacy of Government measures, and also ex-post auditing of the administration of the State Budget. It participates, in the cases and ways established by law, in auditing the financial management of the entities receiving regular budgetary support from the State. It reports directly to Parliament on the results of audits performed.
>
> The law ensures the independence from the Government of the two bodies and of their members.

Both the Council of State and the Court of Accounts consist of a number of divisions, some of which perform exclusively judicial functions. In particular, out of the seven divisions that operate within the Council of State, four are entrusted with the power of appellate review. As far as the Court of Accounts in its capacity as a judicial body is concerned, it is comprised of regional divisions acting as courts of first instance, and central divisions (sitting in Rome) acting as appellate courts.

Finally, it is necessary to emphasize the constitutional rule that closes the circle, so to say, of the fundamental principles granting judicial protection against the authoritative powers of public bodies. According to Article 113,

> The judicial safeguarding of rights and legitimate interests before the bodies of ordinary or administrative justice is always permitted against acts of the public administration.

Such judicial protection may not be excluded or limited to particular kinds of appeal or for particular categories of acts.

The law determines which judicial bodies are empowered to annul acts of public administration in the cases and with the consequences provided for by the law itself.

3. The Code of Administrative Procedure

At present, the most important legal source of the rules governing administrative justice is the Code of Administrative Procedure (hereinafter, CPA): it is the youngest Italian code, since it entered into force in September 2010.[8] The enactment of the CPA satisfied the need for a complete restatement of the many rules that shape the procedure before administrative courts.[9] These rules were scattered over a variety of sources, some of which dated back to the beginning of the 20th century. Coordination and consistency were lacking, also because legislators were used to adding new rules oblivious to the fact that they were at odds with old ones. Furthermore, important principles ensuing from the case law of the Italian Constitutional Court and the Court of Cassation, as well as of the European Court of Justice, did not fit in well with the hodgepodge of legislation in force. Dissatisfaction with the current state of administrative justice was widespread in legal circles, and so was the call for a thorough reform aimed at modernizing a multitude of outdated and disorganized procedures. The increasing interference of public law in the lives of citizens made it essential to guarantee an efficient and effective protection of individual rights and interests before the courts in charge of scrutinizing the lawfulness of administrative action. Procedures before administrative courts had to conform to the principles of due process and the reasonable length of judicial proceedings, both enshrined in the Constitution.

One feature showing the modernity of the CPA can be found in the fact that the Code is quite short, at least in comparison with other codes in force and, in particular, with the Code of Civil Procedure,[10] which is the closest 'term of reference' for administrative procedure. In fact, not only does the CPA refer to specific rules of the Code of Civil Procedure, but its structure makes it clear that the procedure before

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[8] The CPA was enacted by a statutory instrument (*decreto legislativo*) passed on 2 July 2010. Since then, it has been amended a few times. An updated version of the CPA (in Italian) can be found on the institutional website of the administrative courts, available at <https://www.giustizia-amministrativa.it/cdsintra/cdsintra/Codiceamministrativo/index.html>, accessed June 2016.

[9] A. Quaranta-V. Lopilato (a cura di), *Il processo amministrativo – Commentario al D. Lgs. 104/2010* (Giuffrè Editore, 2011); A. Pajno, Il codice del processo amministrativo ed il superamento del sistema della giustizia amministrativa. Una introduzione al Libro I, Diritto processuale amministrativo 100–132 (2011); A. Travi, Prime considerazioni sul Codice del processo amministrativo: fra luci e ombre, Il Corriere giuridico 1125–1128 (2010).

[10] The CPA is comprised of 137 articles, followed by three appendices, while the Code of Civil Procedure contains 840 articles, to which one must add a set of regulations for the implementation of the Code itself and, most of all, a multitude of procedural rules included in special statutes.

administrative courts is, to a large extent, a 'variation on a theme' of the procedure followed by ordinary courts in dealing with civil and commercial cases.[11]

The first three articles of the CPA are devoted to the 'General principles' of administrative justice. Article 1, under the heading 'Effectiveness', provides that administrative justice shall guarantee full and fruitful judicial protection, according to the principles of the Italian Constitution and the law of the European Union. Article 2 is devoted to due process, insofar as it states that administrative proceedings shall abide by the principle of the equality of arms, pledging to enforce the right to be heard and the other rights enshrined in Article 111 of the Constitution.[12] The second section of Article 2 is very interesting, since it provides for a duty of cooperation between the court and the parties so as to safeguard the reasonable length of proceedings. Finally, Article 3 announces that any judgments and orders issued by administrative courts shall include an opinion in which the reasons for the decision arrived at are explained.[13] The same Article also lays down an innovative principle, that is, the principle providing that all the documents of the proceeding, whether they are court orders or pleadings and motions submitted by the parties, shall be concise and written in a synthetic and clear language. This principle, which finds its first official recognition in the CPA itself, is becoming more and more influential, well beyond the boundaries of administrative procedure. As a matter of fact, from 2012 on the case law of the Court of Cassation, followed by the case law of a few inferior courts, has repeatedly upheld the doctrine according to which concise pleadings (as well as concise court judgments and orders) are instrumental in reducing the length of proceedings, since 'the general canon of clarity and brevity in any written documents of judicial proceedings is one of the pillars of due process … and is consistent with the guarantees laid down by Article 6 of the European Convention on Human Rights (my translation)'.[14] This is a remarkable example of 'cross-fertilization' of administrative and civil procedure.[15]

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[11] According to the explanatory report accompanying the statutory instrument by which the CPA was enacted, the source of the fundamental principles governing procedure at large is the Code of Civil Procedure, which implies that the CPA, in spite of its autonomy, must adhere to the same principles, unless the particular features of a litigation between a private individual and a public entity require a departure from those principles.

[12] Article 111 of the Italian Constitution reads: 'Jurisdiction is implemented through due process regulated by law. All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials.'

[13] It must be emphasized that this rule reflects the constitutional principle according to which, 'All judicial decisions shall include a statement of reasons' (Art. 111, sec. 6).

[14] Court of Cassation, judgment No. 34 of January 5, 2016, with reference to the relevant court's case law, inaugurated by judgment No. 11199 of 4 July 2012. Specific limits to the length of both pleadings and judgments have been established by the statutes on the implementation of E-justice.

[15] On the relationship between the efficiency of judicial procedures and the huge amount of paperwork that civil cases involve as a rule, see e.g. B. Capponi, *Sulla 'ragionevole brevità' degli atti processuale civili,,* Rivista trimestrale di diritto e procedura civile 1075–1091 (2014); G. Finocchiaro, *Il principio di sinteticità nel processo civile,* Rivista di diritto processuale 853–869 (2013).

4. Legitimate Interests

Mention has been made already of the fact that the jurisdiction of administrative courts comes into play when the entitlement claimed by the plaintiff against a public entity can be qualified as 'legitimate interests', while the judicial enforcement of 'subjective rights' falls in principle within the jurisdiction of ordinary courts. The distinction between the two forms of entitlement is very elusive, and the lack of a normative definition of the mysterious 'legitimate interests' does not help. Rivers of ink have flowed from the pens of scholars in an attempt to clarify the concept, and over time different schools of thought have prevailed.[16] In light of that, and also keeping in mind that for Italian legal professionals interested in deciding whether to lodge a case with an ordinary court or an administrative court an elementary but useful rule of thumb is to browse through the case law of the Court of Cassation in its capacity as the final judge in charge of settling conflicts of jurisdiction, this author has decided to keep things simple, relying on what can be inferred from Article 7 of the CPA. According to this rule, legitimate interests may arise every time a public entity exercises (or fails to exercise) an authoritative power affecting individuals. Since public authorities cannot act capriciously, individuals are entitled to expect that the action taken by public authorities is consistent with the rules and the principles governing the exercise of the powers bestowed on them: when such expectation is not satisfied, it is possible to turn to administrative courts and ask for redress. Redress means in principle that the administrative act affecting the claimant, once found unlawful, shall be annulled by the court. It must be emphasized, though, that the court may also award damages to the claimant. The possibility to receive monetary compensation for the harm caused by unlawful acts performed by public bodies in violation of the claimant's legitimate interests is a new feature of administrative justice. Disregarding the traditional approach that limited the availability of damages only when the harm suffered by the claimant resulted from the infringement of his subjective rights perpetrated by a public authority, a groundbreaking judgment issued by the Court of Cassation in 1999 inaugurated the doctrine according to which even the violation of legitimate interests can be restored by an award of damages.[17] Subsequently, this

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[16] Some basic readings are G. Greco, *Il rapporto amministrativo e le vicende della posizione del cittadino,* Diritto amministrativo 585–626 (2014); F. Trimarchi Banfi, *L'interesse legittimo: teoria e prassi* Diritto processuale amministrativo 1005–1020 (2013); A. Falzea, *Gli interessi legittimi e le situazioni giuridiche soggettive*, Rivista di diritto civile 679–688 (2000); B. Sordi, *Interesse legittimo*, Enciclopedia del diritto, Annali 709–729 (II, 2, Giuffrè Editore 2008); F.G. Scoca, *Attualità dell'interesse legittimo?,* Diritto processuale amministrativo 379–418 (2011); F.G. Scoca, *Interessi protetti (diritto amministrativo)*, Enciclopedia giuridica Treccani 1–28 (XIX, Istituto della Enciclopedia Italiana 1990); E. Cannada-Bartoli, *Interesse (diritto amministrativo)*, Enciclopedia del diritto 1–28 (XXII, Giuffrè Editore 1972).

[17] Judgment of the Court of Cassation (sitting *en banc*) no. 500 of July 22, 1999. On the topic of the availability of an action for damages brought against a public entity for the infringement of legitimate interests, *ex multis*, see C. Volpe, *La tutela risarcitoria innanzi al giudice amministrativo: in particolare, l'influenza del diritto europeo,* Giustamm.it (Issue No. 10), 6 (2013), available at <https://www.giustamm.it>;

doctrine was incorporated into some pieces of legislation and eventually it became a general principle specifically stated by the CPA, in Article 7, sec. 4.

5. The Jurisdiction of Administrative Courts

According to a well-established distinction, the jurisdiction of administrative courts embraces different powers.[18] First of all, administrative courts have a general power to review the lawfulness of any administrative acts that are allegedly affected by lack of competence, violation of the law or excess of power. In Italian, this general power that an administrative court can exercise is defined as *giurisdizione generale di legittimità* (general jurisdiction as to the lawfulness of the administrative action). Only the so-called 'political acts', namely, the decisions made by the Government exercising political powers, cannot be reviewed by administrative courts. The administrative act, once found unlawful, is declared null and void.

In exceptional cases, administrative courts have the authority to scrutinize the merits of administrative acts as well (*giurisdizione di merito*). In the context of administrative jurisdiction, the word 'merits' alludes to the opportunity and usefulness of the action taken by a public entity: insofar as this type of review is allowed by specific statutory provisions, the court can not only declare the act under scrutiny null and void, but it can also issue a decision that will replace such act.

Finally, administrative courts have been granted in particular matters a jurisdiction called 'exclusive' (*giurisdizione esclusiva*): while, as a rule, subjective rights are only actionable in front of ordinary courts, as regards certain matters administrative courts are in charge of the judicial protection of both subjective rights and legitimate interests. This peculiar type of jurisdiction is called 'exclusive' because it excludes the case from the jurisdiction of ordinary courts.

6. The Procedure before Administrative Courts: Some Basic Notions

It is not possible to concentrate in a single paragraph the contents of a whole code, namely, the CPA; at the same time, it seems pointless to offer the reader

H. Simonetti, *La parabola del* risarcimento per lesione degli interessi legittimi. dalla negazione alla marginalità, Il foro amministrativo T.A.R. 731–752 (2013); F.D. Busnelli, *La responsabilità per esercizio illegittimo della funzione amministrativa vista con gli occhiali del civilista,* Diritto amministrativo 531–565 (2012); A. Fiorillo, *La natura giuridica della responsabilità della pubblica amministrazione per lesione degli interessi legittimi prima e dopo il Codice del processo amministrativo,* Giurisprudenza italiana 602–607 (2012); M. Franzoni, I danni da lesione di diritti e di interessi, La responsabilità civile 725–734 (2011); D. Sorace, *La responsabilità risarcitoria della pubbliche amministrazioni per lesione di interessi legittimi dopo dieci anni*, Diritto amministrativo 397–411 (2009); F.G. Scoca, *Divagazioni su giurisdizione e azione risarcitoria nei confronti della pubblica amministrazione,* Diritto processuale amministrativo 1–13 (2008).

[18] See Article 7 CPA, which distinguishes among three forms of the authority bestowed on administrative courts.

a detailed description of a procedure that, like most judicial procedures in any legal system, can be understood only from within.[19]

With a good measure of approximation, one may say that administrative procedure mirrors the procedure followed before ordinary courts in charge of civil and commercial cases. Both procedures share common principles, such as the principles of party initiative and party prosecution. In spite of that, a few particular features of administrative procedure depend on the fact that in the introductory pleading the plaintiff does not have to state a cause of action, since the relief he seeks against the defendant-public entity is (at least in principle) the annulment of the administrative act that he claims has adversely affected his legitimate interests. Furthermore, even though the principle of equality of arms permeates the whole proceeding, there is all the same a certain asymmetry between the parties. For instance, often the evidence that would be relevant for the disposition of the case is in the exclusive possession of the defendant-public entity. Therefore, the general rule providing that the court may rely only on evidence offered by both parties is mitigated by the so-called 'method of acquisition' according to which the court, even on its own motion, can order the defendant-public entity to make available to the court any documents or any other sources of information relevant for the decision of the case and in possession of the public entity.

The proceeding develops along an introductory stage, followed by the proof-taking stage. The CPA lays down analytical rules on the taking of evidence and on evidence itself. Evidence (including the testimony of witnesses or experts) is essentially documentary.

A variety of interim measures can be granted by administrative courts: interim measures are particularly important and popular. In fact, the length of administrative proceedings can be such that, absent provisional relief, the final judgment, even though it finds for the plaintiff, would not benefit him.

After the closing statements by the parties, the court issues its judgment. Judgments rendered by the TARs as courts of first instance are subject to appeal to the Council of State. Against appellate judgments a further appeal to the Court of Cassation can be brought, but only for lack of jurisdiction. The CPA provides for

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[19] To this author's knowledge, no references in English are available on the subject of administrative procedure in Italy. For those who are familiar with Italian, here is an essential bibliography: CE Gallo, Manuale di giustizia amministrativa (7th ed., Giappichelli Editore 2014); F.G. Scoca (a cura di), Giustizia amministrativa, (6th ed., Giappichelli ed. 2014); A. Travi, Lezioni di giustizia amministrativa (11th ed., Giappichelli Editore, 2014); A. Sandulli (a cura di), Diritto processuale amministrativo (2nd ed., Giuffrè Editore, 2013); M. Sanino, Le impugnazioni nel processo amministrativo (Giappichelli Editore, 2012); R. Dipace, *L'annullamento tra tradizione e innovazione: la problematica flessibilità dei poteri del giudice amministrativo*, Diritto processuale amministrativo 1273–1397 (2012); F. Merusi, *Il codice del giusto processo amministrativo,* Diritto processuale amministrativo 1–24 (2011); A. Pajno, *Il codice del processo amministrativo ed il superamento del sistema della giustizia amministrativa. Una introduzione al Libro I,* Diritto processuale amministrativo 100–132 (2011).

other, particular forms of appeal, known as 'revocation' (*revocazione*) and 'third party opposition' (*opposizione di terzo*).

It is worth mentioning a special preceding that can be commenced for the enforcement of a judgment that the public administration has failed to comply with (*giudizio di ottemperanza*). The noteworthy feature of this proceeding is the power of the court to substitute its judgment for the action that the administrative entity was expected to perform or to appoint, as an alternative, an 'officer *ad acta*' in charge to act in lieu of the defaulting entity.[20]

7. Ordinary Courts and Public Entities

Public entities can be summoned to appear before an ordinary court when the plaintiff alleges that an administrative act has adversely affected his subjective rights.[21] That being the case, it is necessary to draw attention to the strict limits that the powers of ordinary courts are faced with if they find for the plaintiff. To find for the plaintiff means to ascertain that the administrative act did harm the plaintiff's subjective rights since it was unlawful. The court, though, cannot declare the act null and void, it can only disregard it, and decide the case as if the act had never existed. A further limit concerns the type of judgment ordinary courts can issue: a public entity can only be ordered to pay damages to the winning plaintiff.[22]

Particular categories of disputes fall within the jurisdiction of ordinary courts. This is the case, first of all, of labor disputes concerning public servants,[23] as well as some other less significant matters, such as disputes arising out of the exacting of administrative sanctions.

8. Administrative Remedies

The landscape of Italian administrative justice would not be complete if mention were not made of the administrative remedies that individuals who claim to have

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[20] A. Travi, *Giudizio di ottemperanza*, Enciclopedia Treccani – Diritto Online (2013), available at <http://www.treccani.it/enciclopedia/giudizio-di-ottemperanza_(Diritto-on-line)>, accessed June 2016; M. Asprone, L. Cilmi, *L'esecuzione della sentenza del giudice amministrativo nei paesi europei: giudizio di ottemperanza in Italia, l'astreinte in Francia e lo Zwangsgeld in Germania*, Amministrativ@mente (2013), available at <http://www.amministrativamente.com/article/view/10031>, accessed June 2016; M. Antonioli, *Spigolature sul nuovo giudizio di ottemperanza,* Diritto processuale amministrativo 1291–1320 (2011).

[21] On the criterion upon which the dual system of jurisdiction rests, see above, para. 4.

[22] G. Leone, Elementi di diritto processuale amministrativo 413–420 (3d ed., Cedam 2014); C.E. Gallo, Manuale di giustizia amministrativa 19–32 (7th ed., Giappichelli Editore, 2014); S. Tassone I poteri del giudice ordinario nei confronti della pubblica amministrazione, in R. Caranta (a cura di), Il nuovo processo amministrativo 73–112 (Zanichelli Editore 2011).

[23] L. Galantino, Diritto del lavoro pubblico (6th ed., Giappichelli Editore, 2014), 311–318; E.A. Apicella, *Lineamenti del pubblico impiego "privatizzato"* (Giuffrè Editore, 2012); P. Sandulli-A.M. Socci, La disciplina processuale del lavoro privato, pubblico e previdenziale 485–555 (2nd ed., Giuffrè Editore 2010).

been aggrieved by the activity of public bodies can resort to, sometimes before turning to a court (whether administrative or ordinary), other times as an alternative to judicial protection.[24]

Even though these remedies can proceed faster and are cheaper than a court case, they are not very popular, since they are handled within the apparatus of the public administration and the general belief is that bureaucrats tend to stick together and rarely overturn a decision issued by their peers.

9. Final Remarks

It should be time to draw some conclusions from what has been written on the topic of administrative justice in Italy. Well aware that this paper is merely descriptive, this author feels that, being a scholar in civil procedure with limited expertise in administrative procedure, any conclusions she could venture could sound arbitrary. Therefore, she has decided to close by submitting to the reader the questions that periodically recur in the literature addressing the topic of the present state of Italian justice at large[25] and that occasionally reach new heights in the political and institutional debates. Does it still make any sense to have a dual system of jurisdiction? Is a controversy opposing a private individual to a public entity so peculiar as to justify the existence of a special set of administrative courts, or is the weight of history the only reason that accounts for maintaining a separate system of courts whose operation overlaps to a large extent the operation of ordinary courts? Obviously, these are difficult questions. The non-committal approach chosen by this author advises her to say that any answers would be premature.

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[24] A. Carbone, *Il ricorso straordinario al Presidente della Repubblica come rimedio giustiziale alternativo alla giurisdizione,* Diritto processuale amministrativo 54–107 (2015); C.E. Gallo, Manuale di giustizia amministrativa 1–18 (7th ed., Giappichelli Editore 2014).

[25] See, e.g., A. Police, *Administrative Justice in Italy: Myths and Reality*, Italian J. of Public L. 34–59 (2015); L. Ferrara, *Attualità del giudice amministrativo e unificazione delle giurisdizioni: annotazioni brevi,* Questione giustizia (Issue 3, 2015), available at <http://questionegiustizia.it/rivista/2015>, accessed June 2016; *A. Travi, Luci ed ombre nella tutela dei diritti davanti al giudice amministrativo*, Questione giustizia (Issue 3, 2015), available at <http://questionegiustizia.it/rivista/2015>, accessed June 2016; R. Villata, *Giustizia amministrativa e giurisdizione unica,* Rivista di diritto processuale 285–297 (2014).

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ADMINISTRATIVE JUSTICE IN FRANCE. BETWEEN SINGULARITY AND CLASSICISM

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The administrative justice in France oscillates between classicism and singularity. Multiple factors explain how administrative justice has come to occupy a particular place in French administrative law. Administrative justice has not only settled disputes between administration and private persons, but as well, built the French administrative law. One of the main tasks during 19th and 20th century consisted in strengthen the independence from the executive branch and the efficiency in order to satisfy the idea of good justice. Many reforms have been led since the 1990's. That is why we propose to depict the French system and evaluate the activity of French administrative justice concerning the judicial organization, its jurisdiction and the remedies before the administrative judge. We will enlighten also our paper with a comparative approach and some statistical elements.

Key words: administrative justice; French civil procedure.

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1. Introduction

If there is a country where it can be difficult to distinguish between administrative justice and substantive administrative law, it is France. The judicial body and the subject matter are inextricably linked to its existence and, probably for a long time yet, to its future. Historical foundations, cultural reflexes, national legal tradition – multiple factors explain how administrative justice has come to occupy a particular – and preponderant – place in French administrative law.

Under the *Ancien Régime*, what could be termed administrative matters were the purview of the *intendants* and of the *Conseil du Roi* (King's Council). The Edict of Saint-Germain 1641 thus forbade that the *parlements*[1] should hear cases concerning State affairs. More specifically, it provided that the *parlements* and the Court of Paris *"have been established only in order to give justice to our subject"* and that the King had issued to them *"very express inhibitions and prohibitions, not only to hear, in future, cases similar to those heretofore set, but generally those which may concern the state, administration and government."*[2] Nevertheless, the *parlements* did not abandon their judicial activism. In the name of the separation of powets under Article 16 of the Declaration of the Rights of Man and of the Citizen,[3] the French Revolution continued that trend by distinguishing between that which belongs to the judicial order and that which belongs to the administrative order, and therefore to the State and the Executive respectively. The Law of 16–24 August 1790 on judicial organisation, which is still in force, thus prescribes at Article 13 that *"judicial functions are separate and shall always remain separate from administrative functions. Courts shall not, on pain of forfeiture, disrupt in any way the operation of administrative bodies, or summon administrators to appear before them by reason of their duties/functions."*[4] This rule was reaffirmed – as it had not been respected – by the Decree of 16 Fructidor Year III, according to which *"iterative prohibitions are made to the courts to review administrative acts, of whatever kind, subject to the penalties provided by law."* The foundations of the specificity of administrative justice were thus laid. The State's administrative activities/actions must not be hindered by a court that does not know about those activities and the judicial branch cannot involve itself in matters relating to the exercise of executive power. It is unsurprising, therefore, that in order to settle disputes that arose, it was the minister himself, as the higher authority and guarantor of the proper operation

[1] It is not Parliament within the meaning given to it today. The *Parlements* under the *Ancien Régime* were ordinary courts.

[2] Recueil général des anciennes lois françaises, depuis l'an 420 jusqu'à la Révolution de 178, t. XVI 529 (Isambert et Taillandier, Paris 1829).

[3] Art.16: "*Any society in which the guarantee of rights is not assured, nor the separation of powers, has no Constitution.*"

[4] This legislation was the subject of a *question prioritaire de constitutionnalité* (QPC) which was not passed on by the Court of Cassation (Cass. Civ., 2e, 21 June 2012, No. 1342 of 21 June 2012).

of his ministry (and, beyond that, of the general interest), had to rule on a given case. This is the theory of the minister as judge.[5]

The essential function/role of the *Conseil d'État*, which institution was established in 1799 by Napoleon Bonaparte,[6] consisted at that time in advising the holder of executive power – be it the Emperor, the King or the Government, depending on the period. However, the executive branch generally followed the opinions given by the *Conseil d'État*, and to such an extent that it might be said that in practice, decisions were made by the *Conseil d'État* itself. The Law of 24 May 1872 formalised that role/function, thus poutting an end to the existing justice system in order to adopt one based on delegated justice. From that point on, the *Conseil d'État* ruled "*In the name of the French people*." The theory of the minister as judge was definitively abandoned by judicial decision of the *Conseil d'État*, in 1889, in *Cadot*.[7]

While the administrative courts had been established, the task was far from complete. Administrative *justice* and, therefore, administrative *law* had yet to be constructed. The central question lay in whether the law applicable to the Administration's activities ought to be separate from private law. Were administrative activities to obey a different rationale to that which governed relations between private individuals? The answer was given in a judgment that remains famous even today: the *Blanco*[8] decision, according to which *"the liability that may be incumbent on the State for damage caused to private individuals by actions performed by persons that it employs in the civil service, may not be governed by principles established in the Civil Code, with regard to relations between private individuals."* This liability, according to the *Tribunal des conflits* (Court of Jurisdictional Conflict) "*has its own special rules, which vary depending on the department's requirements and the need to reconcile the rights of the State with private rights.*"[9] Administrative case law therefore created, constructed, forged administrative law. In the main, the foundations of administrative law were developed and laid by the courts. Here lies the highly original nature of French administrative law. France, the nation of legal codification and written law, where one of the contributions made by the Napoleonic reforms was precisely to put an end to customary law (which, by definition, is unwritten), generated a law created by the courts. Be it the liability of public authorities, the rules applicable to the civil

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5 Cf., Bigot Grégoire, Introduction historique au droit administratif depuis (Paris 1789, PUF 2002); Soleil Sylvain, *Le* modèle juridique français dans le monde: une ambition, une expansion (XVI–XIXe siècle) (Paris, Institut de recherche juridique de la Sorbonne, coll. Les voies du droit 2014).

6 Article 52 of the Constitution of the Year VIII (1799) provided that *"under the direction of the consuls, a Council of State is responsible for drafting the draft laws and regulations of public administration, and resolve difficulties that arise in administrative matters."*

7 CE, 13 December 1889, *Cadot*, Rec. 1148.

8 TC, 8 February 1873, *Blanco*, Rec. 61. And before : CE, 6 décembre 1855, Rec. 707.

9 *Id.*

service, administrative contracts, the conditions of admissibility for judicial review applications, or even civil liberties, the *Conseil d'État* has often taken the initiative.

However, we must not think that the administrative courts were alone in undertaking this exercise in disciplinary construction. Jurisprudence supported it in its mission to summarise and create law. One thinks quite naturally of the epic quarelles between Léon Duguit and Maurice Hauriou, who each based administrative law on very different concepts. For Duguit, inspired by the sociology of Emile Durkheim, State legitimacy rests on the fact that law is the direct product of intersocial solidarity. Conversely, Hauriou based administrative law on public authority, where the latter is merely the expression of State power. These two divergent opinions are a deeper expression of a social choice and a concept of relations between those who govern and those who are governed. Despite this, the administrative courts, and particularly the *Conseil d'État*, have not always been officially partial to jurisprudence.

Administrative justice was therefore the founder of administrative law and the *Conseil d'État* has been one of the essential, if not unique, mechanisms. Admittedly, the *conseils de Préfectures* (prefecture councils) were established by the Law of 28 Pluviôse Year VIII, since replaced in 1953 by the administrative courts. The administrative courts of appeal were introduced in 1987. If the administrative branch is now complete, with three levels of appeal and a classic judicial organisation, the *Conseil d'Etat* continues to occupy a highly unusual place. More so even than the French Court of Cassation, it has much greater authority over the lower courts.

Despite these challenges, it must be said that the *Conseil d'État* has been able to imbue the Republic with a certain degree of stability. It has adapted and adjusted administrative law to legal developments and the globalisation of law. It has made administrative justice an institution that is essential to the operation of the state – so much so that, despite the non-recognition of its existence in the 1958 French Constitution, the Constitutional Council granted it constitutional status in 1980[10]. The administrative courts and the administrative process therefore constitute, even now, a fundamental impulse point for developments in substantive and procedural administrative law – in short, for administrative justice.

2. Judicial Organisation

Unlike the singular which is sometimes used, the administrative court is by no means single and solitary. It consists of several types of courts and different categories of judges, but all give justice in the name of the State.[11] In any case, their unity is

[10] CC, No. 80–119 DC, 22 juillet 1980, *Loi portant validation d'actes administratifs*. Since 2008, 1958 Constitution refers to *Conseil d'État* (art. 39) ; cf., CE, 16 avril 2010, *Association Alcaly et autres*, req. No. 320667.

[11] CE, Sect., 24 February 2004, *Popin*, Rec. 127.

guaranteed by the *Conseil d'État*, which is placed at the top of the administrative justice hierarchy.

2.1. The Administrative Courts

In France, there are ordinary and specialist administrative courts.

2.1.1. The Ordinary Administrative Courts

The discussion will be limited to those courts that deal with the majority of cases, namely the *Conseil d'État* and the administrative courts and administrative courts of appeal.

2.1.1.1. The *Conseil d'État*

Established by the Constitution of the Year VIII, the *Conseil* is composed of some 300 people of which only 2/3 are actually active. The others are usually lawyers, politicians or else occupy key posts in the French administration. The *Conseil d'Etat* is chaired in practice by the Vice President, the President being – formally – the Prime Minister. The latter, however, is never involved in the *Conseil*'s work.

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. As legal adviser, the *Conseil d'État* must be consulted to advise on bills or constitutional bills[12]. It must also must necessarily be consulted with regard to draft ordinances under Article 38 of the Constitution or for certain types of regulatory acts called *décrets pris en Conseil d'État* or, literally, "orders in Council of State"[13]. However, it is purely a consultation and the Government is not bound to follow the position adopted by the *Conseil d'État*.

The *Conseil d'Etat*'s judicial powers are governed by Article L. 111-1 of the *Code de justice administrative* (CJA – Administrative Justice Code) that *"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*

[12] The opinions of the Conseil d'État were not public. They could, however, be disclosed when significant public interest was involved. However, a draft constitutional law of 19 January 2015 (No. 2499) wished to make *Conseil d'Etat* opinions public. And in fact, without waiting for its adoption, the President of the Republic has wanted to make them public and include them in legislative dossiers since March 2015.

[13] Since *Loi organique No. 2011–333 du 29 mars 2011 relative au Défenseur des droits* [Organic Law on the Defender of Rights] (art. 19), the Defender of Rights may also apply to the *Conseil* for a study on an issue that presents difficulties. This was the case for its opinion of 20 September 2013 concerning the application of the principle of religious neutrality in public services.

instance or as an appeal court." First, the *Conseil* 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.[14] Lastly, it must be noted that the *Conseil d'État* may give an opinion (*avis contentieux*) on a new point of law which poses serious difficulty and is likely to be raised in many cases (art. L. 113-1 CJA). This procedure, introduced by the Law of 31 December 1987, allows trial judges to refer points of law to the *Conseil d'État*, and a dozen such decisions are handed down each year.[15]

2.1.1.2. The Administrative Courts and Administrative Courts of Appeal

Administrative courts were created by a Decree of 30 September 1953 (except the court at Strasbourg, founded in 1903) and replaced the *conseils de préfectures*. They are the ordinary administrative courts. Administrative Courts of Appeal were added to the judicial hierarchy by the Law of 31 December 1987 primarily for the purpose of unclogging a *Conseil d'Etat* overloaded with litigation. These two levels of jurisdiction operate on a collegial basis, even if the latter, like the judicial judge, tends to be undermined by the development of the single judge created to accelerate the processing of cases and according to a managerial logic, so much so that most decisions are taken by the single judge.

Like the *Conseil d'Etat*, administrative courts also have administrative powers. They may be consulted by the Prefect on points of law.[16] The implications of this functional duality are surprising to say the least for administrative courts. For example, they have the power to give a taxpayer permission to replace a territorial public entity for the purposes of legal action.[17]

This abovementioned power offers the opportunity to highlight those criticisms that have punctuated the functional duality of administrative courts, in which the *Conseil d'Etat* is at the forefront. The duality now collides with that same separation. Is the combined role of court and legal advisor compatible both with the principle of

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[14] This is the case, for example, for decisions handed down in the context of *référé-liberté* proceedings.

[15] For instance, CE, avis No. 315499 du 16 février 2009, *Hoffman Glemane*.

[16] Laidié Yves, *La fonction consultative des tribunaux administratifs*, in Mercuzot Benoît (dir.), La loi du 28 pluviôse An VIII deux cents ans après: survivance ou pérennité? 249 (Paris, PUF 2000).

[17] Similarly, the Law of 12 July 1983 conferred the appointment of some *commissaires-enquêteurs* to the presidents of administrative courts. These consultative functions are in practice rarely used.

the separation of powers and the rules to ensure a fair trial as they arise in particular from Article 6 ECHR? In practice, it must be recognised that the *Conseil d'Etat* has always acted impartially. Only, to quite the English saying, justice must not only be done, it must also be seen to be done. Various cases have therefore indirectly raised the issue of the *Conseil*'s objective impartiality before the ECtHR.[18] It took the 2006 decision in *Sacilor Lormines v France* for the ECtHR to consider that the functional duality did not *per se* violate the principle of judicial impartiality.[19]

2.1.2. The Specialist Administrative Courts

It is not possible to paint a full picture here, suffice it to say that the *Cour des comptes* (Court of Auditors) and regional audit chambers, the *Commission nationale du droit d'asile* (National Commission for the Right of Asylum), or the *Conseil supérieur de la magistrature* (High Council of the Judiciary) are, in some respects,[20] specialist administrative courts. Professional associations have also been considered as specialist administrative courts although, in France, they are private entities and concern professions governed by private law.[21] These professional associations, according to the logic of functional duality that governs the functioning of the administrative courts, also have non-judicial duties relating to the rules and organisation of the relevant profession.

The status as a court recognised to such bodies has not always made sense. For the purposes of characterising them as such, the administrative court may refer – typically – to a body of evidence, examining the nature of the body, its functions, the measures it adopts and the status of its members.[22] Be that as it may, from the time when the body in question is recognized as a court, all the general rules of trials will apply, whether it is respect for the rights of defence, the obligation to state reasons, independence and impartiality or an appeal before the *Conseil d'Etat*. These rules are often the general principles of law and are applicable, even in the absence of legislation, not to mention the binding framework set by Article 6 (1) ECHR.[23]

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18 ECtHR, *Procola v Luxembourg*, Application No. 14570/89, 28 September 1995.

19 ECtHR, *Sacilor Lormines v France*, Application No. 65411/01, 9 November 2006, pts. 70 et s. In essence, the Court considered that "*As in the case of the Council of State in the Netherlands, there is no cause to apply a particular constitutional law theory to the situation of the French Conseil d'Etat and to rule in abstracto on the organic and functional compatibility with Article 6 § 1 of the consultation of the Conseil d'Etat with regard to draft legislation and implementing decrees,*" adding that *"the principle of the separation of powers is not decisive in the abstract."*

20 It is an administrative court where it acts in its disciplinary capacity against judicial magistrates.

21 This is the case, for example, for the *Conseil national des barreaux*.

22 For a historical decision, see CE, ass. 7 February 1947, *D'Aillières*, Rec. 50; CE, ass., 12 juillet 1969, *L'Etang*, rec., 388.

23 Cf. below on fundamental principles.

2.2. Administrative Judges

Even restricting the discussion to the ordinary administrative courts and excluding special administrative courts from our examination of the status of administrative judges, their lack of unity is no less striking. The founding distinction between the *Conseil d'Etat* and trial courts extends to the status of their members.

2.2.1. Members of the Conseil d'État

Members of the *Conseil d'Etat* are traditionally recruited through the *Ecole nationale de l'administration* (ENA – National School of Administration) – often described as the *voie royale* or royal road. Founded in the immediate aftermath of the Second World War, the ENA was designed to train high-level administration officials. It is therefore perfectly logical – but in a very French sense – that ENA graduates should enter the *Conseil d'Etat* and, having learned the fundamentals of being the perfect senior official, become judges. Admittedly, the quality of recruitment is not at issue and the adaptability of ENA graduates has always been outstanding. The fact remains that in a liberal democracy, the process is curious to say the least. On joining the *Conseil d'Etat*, young recruits acquire the status of *auditeur* (trainee – literally, 'listener'); after a few years, they become *maîtres des requêtes* ('masters of requests') and, from the age of 45, they can aspire to become *conseillers d'Etat* ('state councilors'). These are customary career rules and make it possible to ensure the independence of members of the court and promote what is called, according to the enshrined phrase, an *esprit de corps*; an elegant expression which is, in practice, equivalent to corporatism. However, recruitment by ENA competitive exam is not the only path. It is possible to enter the venerable institution by the '*outer tower,*' i.e. by an appointment by the *Conseil des ministres* (Cabinet)[24]. Similarly, a new procedure was introduced in 2012 whereby an official may be seconded to the *Conseil d'Etat* as *maître des requêtes en service extraordinaire* ("master of requests in extraordinary service").[25] The first person to have benefited is a professor of public law who has since permanently joined the *Conseil* staff.

Members of the *Conseil d'État* are not legally considered as judges in the image of the judiciary. The CJA simply provides that "*he status of the members of the Council of State is governed by this book and, provided they do not contradict it, by the statutory provisions governing the State public service"* (Art. L. 131-1). The law governing public service therefore applies fully to administrative judges sitting at the *Conseil d'État*. This reluctance to be called judges is mainly due to the *Conseil*'s functional duality.

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[24] The appointments are made, under Art. L. 133-8 CJA *"on the basis of a proposal by the Vice-President of the Conseil d'État, who deliberates with the Section Presidents, after taking the opinion of the Superior Council of Administrative Tribunals and Administrative Courts of Appeal"* so as to avoid any abuse. It concerns 1/3 -1/4 of the appointments.

[25] Article L. 133-9 CJA.

Generally, the fear of a Vice President of the *Conseil d'Etat*, after the parliamentary elections and the formation of a new government, is a significant number of departures from the *Conseil* towards ministerial offices. This series of departures does nothing to help in managing caseloads and, in more practical terms, the smooth running of administrative justice.

2.2.2. Judges of the Administrative Courts and Administrative Courts of Appeal

Judges sitting at the administrative courts and administrative courts of appeal are known as *Conseillers* (Councillors). They belong to a single body, separate from the *Conseil d'Etat*. While in principle they too are recruited on graduating from the ENA, this process accounts for the recruitment of one-quarter of councillors. In reality the main recruitment method is based on an competitive examination, which became permanent in 2012.

Councillors have no status as magistrates within the meaning of Article 64 of the Constitution; this has been the case for some time. Despite their wish, the Conseil d'État has opposed granting them that status.[26] However, what could not be obtained through case law was secured by law. The Law of 12 March 2012 added their status as magistrates to the CJA.[27] While no provision is made for tenure in the same way as sitting judges in the judicial courts, this omission does not raise difficulties from the viewpoint of the independence of administrative judges. The CJA provides that they cannot be given a new posting without their prior consent, which is equivalent to a form of tenure.[28] Lastly, career management is ensured, slightly in the image of the *Conseil supérieur de la magistrature* (CSM – Supreme Council of the Judiciary) for the ordinary courts, by the *Conseil supérieur des TA et CAA*.

3. The Jurisdiction of the Administrative Courts

The scope of the jurisdiction of the administrative courts overlaps with the issue of the content of administrative law and the question of whether there is a criterion of administrative law. The administrative courts have built their own jurisdiction whilst developing their law. Today, their jurisdiction is no longer in any doubt and even enjoys a degree of protection.

3.1. The Principle of Separation

The separation of the judicial and administrative courts generally poses few if any difficulties in terms of litigation. Nevertheless, this question has long stirred up

[26] CE, Ass., 2 February 1962, *Beausse*, Rec. 82.

[27] Art. L. 221-1 CJA.

[28] Art. L. 231-3 CJA.

jurisprudence insofar as it was closely related to the disciplinary area of administrative law. The adage "*la compétence suit le fond*" (*"the jurisdiction follows the substance"*) presupposes knowledge of the applicable law (civil or administrative) to determine the competent court (civil or administrative). This reasoning is also contained in the *Blanco* decision.[29] It is also that of the jurisprudential disputation between Duguit, and especially Gaston Jèze, and Hauriou. For Duguit – Jèze, only activities and acts with a public service purpose required public law rules and, therefore, the jurisdiction of administrative courts. For Hauriou, only the activities and actions expressing public authority required public law rules and therefore the jurisdiction of administrative courts. Without being able to examine every development in case law, it can be said that today the two are complementary, so much so that it no longer any criterion for the jurisdiction of the administrative courts other but grounds of jurisdiction. However, this is not because the jurisdiction of administrative courts is of common law when the administration is concerned that the judicial courts are systematically disregarded. Exceptions remain.

3.1.1. Grounds of Jurisdiction

If one were to give an especially brief summary, it would appear that two criteria serve in understanding the jurisdiction of the administrative courts: an organic criterion and a material criterion. The organic criterion concerns the public or private nature of the person involved in the dispute. The material criterion concerns either the nature of the activity (is it a public service?),[30] or the nature of the act adopted (did this involve the exercise of public powers?).[31] Despite some uncertainties in case law, the public service criterion remains the benchmark. However, a distinction was made between *services publics administratifs* (SPA – administrative public services), which fall largely within the remit of the administrative court; and *service public industriel et commercial* (SPIC – industrial and commercial public service), which is predominantly subject to the jurisdiction of the ordinary courts.

Lastly, it should be noted that, even if it is true that in most cases the adage "*the jurisdiction follows the substance"* is well and truly respected, it is not systematically so. For example, the administrative court applies competition law, which is primarily composed of private law rules. It may also apply criminal law to the administration, not to condemn it as a legal person, but to annul an act that would otherwise place

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[29] Cf., above.

[30] TC, 28 March 1955, *Effimief*, Rec. 617 ; CE, Sect. 20 avril 1956, *Bertin et Grimouard*, Rec. 167 et 168.

[31] CE, 31 July1912, *Société des granits porphyroïdes des Vosges*, Rec. 909. The CC also considered, in its decision of 23 January 1987, *Conseil de la concurrence*, that the cancellation and reformation of "decisions taken in the exercise of public authority" fell within the jurisdiction of the administrative courts. The articulation of these two criteria is not always simple: CE Sect., 28 June 1963, *Narcy*, Rec. 401; CE, Sect., 22 February 2007, *APREI*, Rec. 92.

the public official in a position of infringing criminal law provisions.[32] Conversely, the judicial court have jurisdiction to hear cases involving the liability of the judicial police and applies general rules of administrative liability.[33]

3.1.2. Exceptions to Jurisdiction

As mentioned above, the judicial courts have jurisdiction in principle to hear disputes between a SPIC and a user. However, beyond this scenario – and many other special cases[34] – there are two situations in which the ordinary courts will have jurisdiction even though logic dictates that it should fall to the administrative courts. Firstly, the judicial courts have jurisdiction for litigation involving judicial justice. This situation is explained by the principle of the separation of judicial and administrative courts. Owing to the fact that justice is a public service, judicial jurisdiction is not absolute. This is a thorny question to day the least as, whilst remaining a public service, the constitutional independence of the judiciary must not lead to a subordination of the judicial courts with regard to the administrative courts. The separation of powers was set down long ago by a decision of the *Tribunal des conflicts* (Court of Jurisdictional Conflict) in *Préfet de Guyane,*[35] according to which the judicial courts have jurisdiction for all that relates to the operation of the judicial public service; the administrative courts have jurisdiction for matters relating to the organisation of the judicial public service. The difference is sometimes tenuous.[36] The trend, however, is to have a broad view of the jurisdiction of the administrative courts and the decisions that are considered as inseparable from the organisation of the public service that is the justice system. Thus, the State's liability may be incurred before the administrative courts for the activities of the judicial police related to the judicial public service.[37] Purely judicial acts continue to fall within the remit of the judicial courts, as is the case of the appointment of assize court presidents by the President of the Court of Appeal, the decisions of legal aid services or acts for

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32 CE, Ass. 6 December 1966, *Société Lambda*, Rec. 466.

33 Cass. Civ. 23 November 1956, *Giry*, Bull. II. 407. For a recent application concerning police controls, cf., Cour d'appel de Paris, 24 June 2015, No. 13/24277.

34 Mention should be made of those cases in which the criminal court has jurisdiction to assess the lawfulness of an administrative act without being able to annul it. Similarly, the judicial courts have jurisdiction to assess the damage suffered as a consequence of compulsory treatment ordered by the administration which takes place without consent.

35 TC, 27 November 1952, *Préfet de la Guyane,* Rec. 642*;* CE, Ass., 17 December 1953, *Falco et Vidaillac*, Rec. 175.

36 Case law gives the administrative court the exact jurisdiction that it considers detachable from the enforcement of judgments, such as the amnesty decrees with the decision in *Dalmas de Polignac* of 22 November 1953. However, the decrees declaring clemency for a convicted person fall outside the jurisdiction of the administrative court, being the exclusive power of the Head of State.

37 TC, 9 March 2015, *Consorts C-R*, req. No. 3990.

enforcing judgments. As regards the decisions of enforcement judges, these may fall either to the administrative or judicial courts depending on their content.[38]

Secondly, the judicial courts have jurisdiction for disputes involving the violation of certain fundamental rights. These are exceptions that fall to the judicial courts as guarantors of individual freedom and the right of property. They concern assault[39] and illegal expropriation.[40] Assault, traditionally defined as an act manifestly not linked to the administration,[41] est an infringement of the right of ownership or to individual freedom.[42] In *Bergoend,*[43] the *Tribunal des conflits* gave a stricter definition of the scope in which only the total extinction of property rights may constitute a violation of property rights and not a mere infringement. Illegal expropriation is there to punish violations to real property. As it did for assault, the *Tribunal* has restricted the scope of illegal expropriation.[44] Again, only definitive dispossession constitutes an illegal expropriation. Temporary dispossession therefore falls within the remit of the administrative courts. The establishment of *référé-liberté* proceedings (essentially an application for the protection of fundamental freedoms) by the Law of 30 June 2000, however, has resulted in a decline in the value and utility of such remedies.[45]

3.2. Protecting the Separation

Aside from the constitutionalisation of the administrative courts by the Constitutional Council,[46] the *Tribunal des conflits* – composed of an equal number of members from the *Conseil d'État* and the Court of Cassation – is tasked with preserving jurisdictional duality. It must rule on conflicts of jurisdiction between ordinary courts and administrative courts.[47] It has also just undergone significant

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38 A temporary absence granted to a prisoner is an administrative decision; however, decisions concerning the duration or nature of sentences fall to the judicial courts.

39 TC, 8 April 1935, *Action Française*, Rec. 1226.

40 TC, 17 March1949 *Société Hôtel du vieux Beffroi*, Rec. 592.

41 CE, 18 November 1949, *Carlier*, Rec. 490.

42 TC, 25 January 1988, *Fondation Cousteau*, Rec. 484.

43 TC, 17 June 2013, *Bergoend c/ ERDF*, req. No. 3911.

44 TC, 9 December 2013, *Panizzon* , req. No. 3931.

45 Under the Law of 30 June 2000, the *référé-liberté* provides that "*receiving a request in this sense justified by urgency, the judge may order any measures necessary to safeguard a fundamental freedom which a public entity or a private entity responsible for the management of a public service may, in the exercise of its powers, have seriously and manifestly infringed unlawfully. The judge shall decide within forty-eight hours.*"

46 CC, 23 janvier 1987, *Conseil de la concurrence* (préc.).

47 This was provided by the Constitution of the Second Republic. It was then abolished and reinstated by the Law of 24 May 1872.

reform.[48] Aside from those rare cases in which it rules on substantive aspects,[49] the greater part of the *Tribunal*'s work lies in resolving conflicts of jurisdiction between ordinary courts and administrative courts. It can hear cases of negative or positive conflict. There are negative conflicts when neither court considers that it has jurisdiction to hear the case brought before it. There are positive conflicts when both courts consider that they have jurisdiction. In the latter situation, further to proceedings, the Prefect will raise the conflict of jurisdiction and apply to the *Tribunal des conflits*. Where there is a negative conflict, the decree of 25 July 1960 provides that, if a court declines jurisdiction in a decision that then becomes final, the second court, if it too considers that it does not have jurisdiction, shall refer the matter to the *Tribunal*. The disadvantage of this procedure is that the applicant must previously have applied to both courts. That is why there are other referral methods. The *Conseil d'État* and the Court of Cassation can thus apply to the *Tribunal* when they consider that a serious question of jurisdiction has arisen in a case before them. The difficulty is that this referral is for supreme courts, which means that the applicant has passed all stages of proceedings before both courts, and therefore they had the financial means to 'afford' such proceedings. This is why the 2015 reform opened the referral for serious jurisdiction issues to all lower courts.

We will conclude by saying that there is one last technique for protecting the separation of the different types of court: referrals for preliminary rulings. This is not the same as referrals made by national courts to the European Court of Justice. It is a referral for a preliminary ruling, made by the judicial court to the administrative court where the former court is required to rule first on a question of administrative law.[50] The judicial court cannot in fact assess the lawfulness of an administrative act and cannot interpret an individual administrative act the meaning of which is not clear.[51] The preliminary ruling given by the administrative court is binding on the judicial court ruling in the main proceedings. It should be noted that adjustments have been made to this procedure by case law, particularly where EU law is at issue,[52] but also owing to the Law of 16 February 2015.

Citizens can challenge the lawfulness of acts adopted by the administration or assert rights against the latter through various remedies. The current classification of appeals available in the administrative courts comes history. It was forged by the courts and the systematisation of jurisprudence. Two main classifications have been put forward.

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48 Law of 16 February 2015 and Decree No. 2015-233 of 27 February 2015.The presidency of the *Garde des sceaux* has been abolished.

49 It is not particularly active, giving only some fifty decisions every year.

50 TC, 16 June 1923, *Septfonds*, Rec. 498.

51 It may, however, interpret a regulatory administrative act.

52 TC, 17 October 2011, *SCEA du Chéneau*, Rec. 498; TC, 12 December 2011, *Société Green Yellow*, Rec. 592.

The first classification is formal. Developed in the nineteenth century,' it is derived from the synthesis of the work of two state councillors, Leon Aucoc[53] and Edouard Laferrière,[54] who distinguished different types of litigation on the basis of the powers recognised to the court when considering the merits of the claim. They identified four types of litigation: actions brought on grounds of *ultra vires*, in which the court may only annul the challenged decision; full litigation or (the terms are synonymous) full jurisdiction litigation, in which the judge can reform the administrative act; litigation on interpretation or validity, through a referral for a preliminary ruling made the judicial court to the administrative court, in which the latter rules on the lawfulness of an act without settling the dispute between the parties; and enforcement litigation, in which the court can order a citizen to repair the damage caused to the public domain.

The second classification is material. It results from the work of Léon Duguit who, in the late 19th century, established the distinction between different types of litigation on the basis of the nature of the issue put to the court.[55] This criterion serves to identify objective litigation, which concerns the lawfulness of an act (such as appeals brought on grounds of *ultra vires*, actions involving an assessment of lawfulness, or certain other cases such as tax or electoral disputes); and subjective litigation, in which the court must rule on the existence of individual rights which the applicant derives from a single situation, such as contractual or liability disputes.

These classifications, the primary value of which is educational, are not contradictory and may be combined. In practice the formal classification is the most important, however, because it helps to understand the different facets of the role played by the administrative court. Depending on the case concerned, the legal rules applicable to the appeal will not be the same. Within this classification, the appeal on grounds of *ultra vires* and full remedy actions hold a special place because they are predominant in the jurisdictional activity of the administrative courts. This distinction has evolved over time. To this must be added litigation concerning the implementation of the *question prioritaire de constitutionnalité* (priority preliminary ruling on constitutionality), to challenge the constitutionality of a law already in force.

4. The Remedies Available before the Administrative Court

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53 Aucoc Léon, Conférences sur l'administration et le droit administratif 361 (Dunod, 1st éd., tome 1, Paris 1869).

54 Laferrière Édouard, Traité de la juridiction administrative et des recours contentieux 15 (Berger-Levrault, 2d éd., tome 1, Paris 1896).

55 Duguit Léon, Traité de droit constitutionnel 458 (de Boccard, 3d éd., tome 2, Paris 1928).

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[56] Aucoc Léon, Conférences sur l'administration et le droit administratif 361 (Dunod, 1st éd., tome 1, Paris 1869).

[57] Laferrière Édouard, Traité de la juridiction administrative et des recours contentieux 15 (Berger-Levrault, 2st éd., tome 1, Paris 1896).

[58] Duguit Léon, Traité de droit constitutionnel 458 (de Boccard, 3d éd., tome 2, Paris 1928).

4.1. The Distinction between Actions on Grounds of Ultra Vires and Full Remedy Proceedings

4.1.1. Actions on Grounds of Ultra Vires

The action on grounds of *ultra vires* was created and perfected by the *Conseil d'Etat*. '*Trial in action*,'[59] in the words of Edouard Laferrière, the action on grounds of *ultra vires* is an instrument of French political liberalism developed from the last third of the nineteenth century. It has long appeared as "*the most effective weapon, the most practical, most economical that exists in the world to defend individual freedoms.*"[60] Open against any administrative act, even in the absence of legislation,[61] this action allows any citizen to ensure that administrative action is lawful. This explains why, in assessing the lawfulness of the act, the court considers the situation of law and fact existing at the date the administration adopted its decision. The decision to annul, having the authority of *res judicata*, is binding on all. In addition, litigants are under no obligation to engage a lawyer; their interest in bringing proceedings is assessed broadly, without having to prove the infringement of a right, and in the event of withdrawal it is possible to do so under relatively flexible conditions.

The court's powers have long been restricted to the annulment of the act at issue, which occasionally results in the decision having only limited effects for litigants. This is not the case in the context of full remedy proceedings.

4.1.2. Full Remedy Proceedings

Full remedy proceedings, unlike actions on grounds of *ultra vires*, are not homogeneous. There are at least two kinds of full remedy proceedings. Firstly, the court can hear subjective full remedy proceedings, the purpose of which, as the name suggests, is to have an individual right recognised. It mainly concerns contractual disputes and litigation involving administrative liability. On the other hand, there are objective full remedy proceedings, which admittedly concern the lawfulness of an act but in which the court's powers are not limited to annulment (cases concerning taxation, penalties, listed buildings, etc.).

Different full remedy proceedings are designed to secure the restoration of a legal situation. The court therefore rules in light of the situation of law and fact existing on the day when it hands down its decision; it holds a wide range of powers allowing it to alter the decision at issue or to substitute its judgment for that of the administration.

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[59] Laferrière Édouard, Traité de la juridiction administrative et des recours contentieux 561, *Id.*

[60] Jèze Gaston, *Les libertés individuelles* 162–186 (Annuaire de l'Institut International de droit public, PUF, Paris 1929).

[61] CE, ass., 17 February 1950, ministre de l'agriculture c/ *Dame Lamotte*, Rec. at 110.

4.2. Developments in the Distinction

Since the 1970s, the administrative courts, especially under the influence of European laws, have searched for a better guarantee of citizens' rights and, concomitantly, the increased effectiveness of legal actions. These factors have changed for the action on grounds of *ultra vires* and overhauled full remedy proceedings.

4.2.1. The New Action on Grounds of Ultra Vires

The major deficiency in the action on grounds of *ultra vires* was linked to the inability to fully resolve the applicant's situation when bringing the action. Annulment could sometimes not be sufficient, specifically if the applicant sought to challenge a refusal[62] or, on the contrary, a decision that was excessive in light of the general interest. The court's powers were therefore enhanced. On the one hand, in order to improve the effectiveness of this remedy for citizens, the Law of 8 February 1995[63] gave the courts a power of injunction with regard to the administration, subject to a fine where applicable. The courts may therefore indicate to the administration all the consequences to be drawn from the annulment decision. Furthermore, to better reflect the general interest, the *Conseil d'Etat* has, in its case law, granted new powers to courts hearing such cases: they can now avoid the annulment of a decision which may have a different legal basis (change of legal basis or grounds)[64] or temper the effects of their decisions over time by derogating from the principle of retroactivity.

4.2.2. Overhauling Full Remedy Proceedings

Full remedy proceedings have been overhauled. On the one hand, owing to the court's powers, the scope of full remedy proceedings has increased. The legislature has opened this remedy against various sanctions, including those adopted by regulatory authorities.[65] Equally, the *Conseil d'Etat* switched some areas, initially falling within the remit of actions on grounds of *ultra vires*, to that of full remedy proceedings, such as cases involving administrative penalties[66] or points on driving licences.[67] On the other hand, and in parallel, the various powers of courts hearing full

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62 The applicant did not obtain the decision expected from the administration, merely the annulment of the refusal.

63 Loi No. 95–125 du 8 février 1995 *relative à l'organisation des juridictions et à la procédure civile, pénale et administrative* [Law No. 95–125 of 8 February 1995 on the organisation of the courts and on civil, criminal and administrative procedure], JORF du 9 février 1995, at 2175.

64 CE, 6 Feb. 2004, *Hallal*, Rec. 2004, at 48.

65 Article L. 311-4 CJA.

66 CE, ass., 16 Feb. 2009, *Société Atom*, Rec., at 25.

67 CE, avis, 9 July 2010, *Berthaud*, Rec., at 287.

remedy proceedings have also been extended and refined. The administrative courts can now ensure a better balance of interests between lawfulness and legal certainty for the benefit of the latter objective. Thus, in opening full remedy proceedings to third parties in order to challenge administrative contracts, the *Conseil d'Etat* also stated that the court hearing the case may decide on the continuation of the contract; invite the parties to regularise or amend the contract; order the termination or cancellation of the contract, with deferred effect where applicable; or compensate a party.[68]

These developments tend to blur the distinction between actions brought on grounds of *ultra vires* and full remedy proceedings, as the courts hearing *ultra vires* actions have acquired a kind of power of reform.[69] Only a few procedural differences remain, such as the date chosen by the court in order to assess the lawfulness of the contested decision.

4.3. The Emergence of the Question Prioritaire de Constitutionnalité

Very belatedly compared to other European states, France instituted a process for the *a posteriori* constitutional review of laws. The Constitutional Law of 23 July 2008[70] introduced the specific mechanism of the *question prioritaire de constitutionnalité*, which allows a litigant to apply to the Constitutional Council for the repeal of laws that infringe rights and freedoms guaranteed by the Constitution. Under the terms of Article 61-1 of the Constitution, the *question prioritaire de constitutionnalité* involves the lower courts, administrative or judicial, which must, during ongoing proceeding, ensure in particular that the issue is not devoid of merit and that its resolution will allow judgment to be given in the case between the parties. If this is so, the matter is forwarded to the *Conseil d'Etat* (for the administrative courts) or the Court of Cassation (for the judicial courts), both of which act as filters. Neither can declare a law contrary to the Constitution. Their only role is to ensure that the matter is sufficiently serious. If so, the matter is forwarded to the Constitutional Council which will decide on the constitutionality of the law, declaring it either contrary to or consistent with the Constitution. If the answer is negative, the matter will be dismissed by the *Conseil d'Etat* or Court of Cassation and the case will resume its course; this is tantamount to the latter courts declaring that the law is consistent with the Constitution

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68 CE, ass., 4 Apr. 2014, *Département du Tarn-et-Garonne,* Rec. at 70.

69 Melleray Fabrice, *La distinction des contentieux est-elle un archaïsme?* 30–34 JCPA 1296 (2005).

70 Loi constitutionnelle No. 2008-724 du 23 juillet 2008 *de modernisation des institutions de la Ve République* [Constitutional Law No. 2008-724 of 23 July 2008 modernising the institutions of the Fifth Republic], JORF du 24 juillet 2008, at 11890

5. Fundamental Principles Applicable to Administrative Proceedings

The concept of 'basic principles' applicable to proceedings before the administrative courts is not an enshrined term. Case law has mentioned "*general principles that govern the operation of administrative courts*"[71] and the doctrine of '*general principles*' in relation with the theory of general principles of law[72] or even '*guiding principles*'.[73] It took the CJA to draw out the legal consequences by introducing what was dubbed a "decalogue" within its opening provisions. Articles L.1 to L.11 actually set down the fundamental principles of administrative proceedings that govern the proceedings as a whole. They are diverse and among them we can distinguish the principles governing the organisation of justice (A) and the principles relating to the fairness of the proceedings (B).

5.1. Principles Governing the Organisation of Justice

These are structural principles that do not necessarily appear in the 'Decalogue' but are implied by the existence of administrative justice and the very idea of justice. 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. It is well known how difficult it is to gain greater independence from and we cannot overstate that "*to judge the administration is still to administer.*" 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[74] 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.[75] Often the principle of independence has an organic content and essentially extends to issues of an organisational nature of the court or the work of the court. It is however not always easy to distinguish the principle of independence from its corollary, the principle of impartiality. Indeed, "*ignorance of the requirement of independence mechanically leads to a violation of the principle of impartiality but the reverse is not*

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71 CE, Ass., 28 June 2002, *Magiera*, Rec. 248.

72 Chaudet Jean-Pierre, Les principes généraux de la procédure administrative contentieuse (Paris, LGDJ 1967).

73 Guyomar Mattias et Seiller Bertrand, Contentieux administratif 332 (Dalloz, coll. HyperCours, Paris 2014) ; Gonod Pascale et alii (dir.), Traité de droit administratif 549 (tome 2, Dalloz, Paris 2011).

74 CE, Ass. 6 December 2000, *Trognon*, Rec. 427 ; CC, 20 February 2003 (No. 2003- 466 DC); CC, 28 December 2006 (No. 2006-545 DC).

75 CE, 26 May 2010, *Marc-Antoine*, req. No. 309503.

true."[76] The fact remains that in one case as in the other, these requirements weigh on both the court as an institution and the members of courts.

While it is not new in itself, the principle of impartiality has undergone a significant development in terms of case law, primarily related to the case law of the ECtHR. Impartiality is generally split into two categories: objective and subjective impartiality. The latter focuses on the person of the judge. Thus a relationship with a party or links to an earlier case will call that impartiality into question. If it is ever proven, a party may request the disqualification of the judge considered impartial only if there are serious grounds to do so. In the most serious cases, and if the impartiality concerns all of a court, use can be made of legitimate suspicion proceedings.[77] Objective impartiality has led to substantial changes in administrative proceedings. This form of impartiality consists in criticising the organisation of the court and proceedings which can lead to – or suggest – a decision which might not appear to be fully impartial. It has been said that the structural duality of the *Conseil d'Etat* has been indirectly challenged before the ECtHR but that the latter has not considered it, even in principle, as contrary to the requirements of Article 6 (1) ECHR.[78] However, the position of the former government commissioner has not benefited from the clemency of the ECtHR. It is worth noting that the government commissioner was responsible for submitting, in the form of reasoned submissions, the solution to the legal problem raised by the litigation, a bit like an Advocate General within the European Court of Justice. The ECtHR was shaken by *Kress v/ France* in which the Court held that the presence of the government commissioner at the deliberations was in violation of the requirement of impartiality under Article 6 (1) ECHR.[79] The Court added, as part of the grounds of its judgment, the fact that the commissioner spoke at the end of the hearing without the parties being able to reply.[80] French jurisprudence voiced its deep disagreement with the ECtHR by remarking that the latter had given way to the tyranny of appearances. The Decrees of 1 August 2006 and 7 January 2009 nevertheless drew the necessary consequences and amended French procedure in line with the recommendations of the ECtHR. The most recent Decree took the opportunity to change the name of the institution and remove any risk of confusion on the part of litigants; it is now known as the *rapporteur public*.[81]

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[76] Guyomar Mattias et Seiller Bertrand, Contentieux administratif 722, cited above.

[77] CE, 6 October 1999, Pinault, req. No. 200386. This option is still possible, even in the absence of any law, owing to general rules of procedure.

[78] Cf., above

[79] ECtHR, Application No. 39594/98, 7 June 2001.

[80] ECtHR, *Martinie c/ France*, Application No. 58675/00, 12 April 2006.

[81] Art. L.7 CJA provides that "*A member of the court, appointed to act as consultant judge, presents his or her opinion, in public and with total independence, on the issues that must be decided by the court, that arise from the applications or appeals, and on the possible solutions.*"

The principle of collegiality is also part of the guiding principles of administrative proceedings. It features explicitly in the CJA, at Art. L. 3. Collegiality is considered – rightly – as a guarantee of fair and impartial justice. It carries with it the concept of peer review and is one of the keys to high-quality justice. It must be recognized, however, that the scope of the principle of collegiality is increasingly limited. Sacrificed on the altar of efficiency and budget savings, it was necessary to remove it from certain proceedings requiring a decision from the single judge. Moreover, the Constitutional Council found that the single-judge proceedings were not in themselves contrary to the Constitution;[82] it could scarcely do otherwise given the proliferation of such proceedings, be it in the judicial or the administrative sphere … It should be noted that the ECtHR also rules as a single judge - and increasingly so. Many areas now fall within the remit of the single judge procedure. This is so for vases involving social benefits, pensions, the disclosure of administrative records, local taxes, refusals to use the police to execute a court decision or disputes relating to unsafe buildings. This is also the case for referrals.

5.2. Principles Relating to the Fairness of Proceedings

The fairness of proceedings before the administrative court is guaranteed by a number of general principles or rules of the trial. These include the principle of equality of arms, the adversarial principle and, in general, the reliability of proceedings.

The concept of equality of arms is little used in French positive law. Jurisprudence is quicker to resort to it, probably given the influence of the ECtHR, which has held that the principle of equality of arms *"is one aspect of the broader concept of a fair trial before an independent and impartial tribunal."*[83] Under ECHR law, the principle of equality of arms has mostly been applied in law enforcement, and criminal law in particular. In administrative proceedings, the idea that innervates this principle consists in ensuring that the frequent imbalance between the parties does not lead to an unbalanced treatment of the case where the administration would be preferred. The inquisitorial trial before an administrative judge is the first guarantee of the equality of arms. However, the adversarial principle naturally remains central. It is a general principle of law[84] and is the essence of equality of arms, of the rights of defence and, more generally, the reliability of the trial.

The adversarial principle, while being the essence of judicial proceedings, is not limited to it. Indeed we know that this principle is also applied before independent

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82 CC, 14 October 2010, QPC No. 2010-54, *USMA*.

83 ECtHR, *Delcourt*, Application No. 2689/65, 17 January 1970, pt. 27

84 CE, 16 January 1976, *Gate dubosc*, Rec. 39 ; CE, Ass. 12 October 1979, *Rassemblement des nouveaux avocats de France*, Rec. 370.

administrative authorities owing to the application of Article 6 (1).[85] But it is obviously before the court that this principle has been acclaimed. It applies in the context of preliminary proceedings, with the disclosure of the case file to the official subject to disciplinary sanctions, for example.[86] At the litigation stage, it results in the obligation to submit briefs to the parties and the court shall transmit them any item of additional information received. If information filed by a party is subject to confidentiality, and in particular medical confidentiality, the court will not consider evidence of which the other party has no knowledge.[87] This naturally raises difficulties as regards the war on terror.[88] Lastly, this also constituted grounds for France's condemnation by the ECtHR in respect of the inability of the parties to know the meaning of the *rapporteur public*'s conclusions, which justified the adoption of the Decree of 7 January 2009.[89] The adversarial principle is subject to restrictions in the context of emergency proceedings.[90]

Fair judicial proceedings cannot be so without compliance with publicity and, more broadly, transparency requirements. The idea of transparency is at the heart of the very idea of justice. Here we see the rationale of the publicity of hearings, which features under Article L. 6. In other words, not everything need be made public but, if a hearing should be held, the latter will necessarily be public[91] and notified to the parties. The public nature of hearings is therefore, according to the *Conseil d'État*, a means for ensuring the respect of the rights of defence.[92] Therefore, and more generally, it is the reliability of the trial and transparency of the proceedings that guarantee the fairness of those proceedings and, therefore, the right to an effective judicial remedy. The principle of reliability, which has not been formalised *per se* in the sphere of proceedings before administrative courts, is guaranteed in practice by compliance, in particular, with the rules mentioned above and others, such as the fairness of legal argument, the requirement that reasons be given for a judgment (Art. L.9 CJA)[93], or

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85 CE, 3 December 1999, *Didier*, Rec. at 399 ; Cass., 5 February 1999, *COB c/ Oury*, No. 97-16.441.

86 Cf., Article 19 of the Law of 13 July 1983 concerning the rights and obligations of civil servants.

87 CE, Ass., 6 November 2002, *Moon Sun Myung*, Rec. 380.

88 This is also because of this that the Tribunal's Rules of Procedure of the European Union was revised in 2015 and in particular Article 105 on the processing of information or documents relating to the Union's security or that one or more of its Member States or the conduct of their international relations.

89 On this point, see above.

90 In certain cases the judge can do without, especially "*When the application is not urgent or if it is clear, in the light of the application, that it does not fall within the jurisdiction of the administrative court, that it is inadmissible or unfounded*" (art. L. 522-3 CJA). Similarly, cf., Art. L.5: *"Certain requirements flow from the fact that both parties are represented; if the case is urgent, these former requirements will be adapted to those of the urgent situation."*

91 Thus the Law of 29 December 1983 belatedly abolished *in camera* hearings for taxation cases.

92 CE, Sect. 26 July 1978, *Auguste*, Rec. 336.

93 CE, Sect. 5 December 1924, *Platon*, Rec. 270.

even the obligation to give judgment within a reasonable timeframe. Ultimately, this requirement of reliability and transparency embodies the very concept of justice, according to which justice must not be an abstraction, but rather a tangible reality.

6. A Comparative Approach

Administrative justice, as it exists in France, is found in other European countries, with a more or less pronounced degree of similarity. Also, included in a globalised legal space, administrative justice is now largely influenced by European laws, be it the law of the EU or that of the European Convention on Human Rights, or even the national administrative laws of other European states.

6.1. The Influence of French Administrative Justice in Europe

Administrative justice is not a French exception, although it is sometimes presented as such. It is widely present elsewhere in the various European states. Nevertheless, France has been a pioneer in rapidly developing a complete model of administrative justice,[94] characterised by full judicial dualism, from base to summit, and the creation of the *Conseil d'Etat*, the supreme administrative court which has the 'particularity' of combining judicial and advisory functions.[95] The advanced nature of French administrative justice, in the early 19th century,' has therefore produced a *'remarkable export product'*.[96]

Initially, the duplication of the French model was largely restricted for the most part to countries under French rule following the Napoleonic wars. From this point of view, the *Conseil d'Etat*, the centerpiece of the Napoleonic regime, is traditionally presented as '*one of the best' export items "of the Napoleonic administration in Europe."*[97] Under the influence of Napoleon, many '*satellite Conseils d'Etat*'[98] emerged in annexed countries. This was the case, for example, in Italy in 1805[99] or Spain in 1808. These states, on regaining their independence, sometimes returned to creating their own

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94 Fromont Michel, *La justice administrative en Europe. Convergences* 197–208 (*Mélanges René Chapus. Droit administratif*, Montchrestien, Paris 1992).

95 See above, I.

96 Gaudemet Yves, *L'exportation du droit administratif français. Brèves remarques en forme de paradoxe* 432 (Mélanges Philippe Ardant. Droit et politique à la croisée des cultures, LGDJ, Paris 1999).

97 Fougère Louis, (dir.), Le Conseil d'Etat : son histoire à travers les documents d'époque 157 (Éditions du Centre national de la recherche scientifique, Paris 1974).

98 *Id*.

99 Bellagamba Ugo, *Le contentieux administratif en Italie au XIX siècle: modèles et pratique* 247–262 (J. Hautebert et S. Soleil (dir), *M*odèles français, enjeux politiques et élaboration des grands textes de procédure en Europe, Editions juridiques et techniques, tome 1, Paris 2007).

administrative justice or, conversely, decided to retain the legal organisation whilst adapting it to their legal culture.

Today, administrative justice continues to occupy a significant place in Europe: 16 of the 28 Member States of the European Union have an administrative justice system.[100] The French system is however not reproduced identically and jurisdictional duality does not necessarily imply the presence of a *Conseil d'Etat*. There are four categories.[101] Firstly, the Supreme Administrative Court, which has exclusive jurisdictional powers; this is the case in Germany. Secondly, the *Conseil d'Etat* with judicial and advisory responsibilities; this is the French model. Thirdly, the single Supreme Court including a specialist administrative chamber; this is the Spanish example. And, more recently, the Supreme Court, a single and undivided entity, where the same court formation hears administrative, civil, criminal or social cases; this is the British model.

6.2. The Influence of European Laws on the French Administrative Justice

The French administrative justice first had to evolve under a battering from the laws of the European Union and European Convention on Human Rights. In addition, it could no longer ignore other national administrative laws (European in particular), which now influence the judgments of administrative courts.

6.2.1. The Influence of EU and ECHR Law on Administrative Justice

While the French administrative courts only belatedly agreed to that European law should prevail over national law,[102] the primacy of EU law, as interpreted by the European Court of Justice, and the acceptance of ECtHR case law, are now assured overall. The influence of these two European sources has caused significant changes to French administrative justice.

6.2.1.1. The Extension of the Administrative Court's Powers

The desire to apply the law of the European Union effectively and uniformly, with a view to ensuring the establishment of free and undistorted competition between economic operators, rather quickly resulted in a framework for the institutional and procedural autonomy enjoyed by Member States. EU law has been a transformation factor for national administrative law including *"the conditions for fulfilling the court's mission;"*[103] this is reflected in various areas.

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[100] Olson Terry, *Justice administrative et Constitution en Europe: état des lieux*, 37, Nouveaux Cahiers du Conseil constitutionnel (2012).

[101] Aguila Yann, *La justice administrative, un modèle majoritaire en Europe. Le mythe de l'exception française à l'épreuve des faits, A.J.D.A.* 290–294 (2007).

[102] CE, ass., 20 Oct. 1989, *Nicolo*, Rec. at 190

[103] Mehdi Rostane, *Le contentieux administratif* 143–175 (Droit nationaux, droit communautaire: influences croisées. En hommage à Louis Dubouis, La documentation française, Paris 2000).

Generally, in the name of the effective judicial protection of EU citizens,[104] the French administrative courts have been forced to acquire powers, in particular to set aside national legislative provisions which are obstacles, even temporarily, to the full effectiveness of EU law. This same law then requires Member States to establish interlocutory proceedings affording the possibility for the court to issue interim measures to remedy the alleged violation. In *Factortame*[105] and *Zuckerfabrik,*[106] the Court of Justice even identified a principle of effective provisional judicial protection requiring the suspension of the operation of a national rule that is incompatible with EU law. Consequently, the suspension of proceedings existing in French administrative disputes was revised because of overly restrictive conditions for granting the suspension. This ultimately resulted in the creation of *référé suspension* proceedings under the Law of 30 June 2000.[107]

Specifically, in the area of administrative contracts, two 'remedy' Directives[108] concerning the award of public supply and public works contracts have required that Member States set up "*means of effective and rapid remedies in the event of infringement of Community law on public procurement or national rules implementing that law.*" Thus, the French legislature established a *référé précontractuel* (pre-contractual application or hearing) in public procurement matters,[109] which allows the administrative court to neutralise or redirect the conclusion of a public procurement contract that is on the point of being concluded, where it does not respect competition rules. In the same vein, the *Conseil d'Etat* established a new remedy in *Société Tropic Travaux signalisation* de 2007[110] giving a competitor foreclosed from the market the right to bring a full remedy action. This case law has since been extended to all third parties to administrative contracts.[111]

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104 ECJ, Case 14/83, *Von Colson and Kamman* [1984], ECR 01891. See also Article 47 of the Charter of Fundamental Rights of the European Union.

105 ECJ, Case C-213/89, *Factortame* [1990] I-02433.

106 ECJ, Joined cases C-143/88 and C-92/89, *Zuckerfabrik* [1991] ECR I-00415.

107 Cassia Paul, L'impact du droit communautaire sur le contentieux administratif 1017–1029 (J.-M. Auby et J. Dutheil de la Rochère, Droit administratif européen, 2ème éd., Bruylant, Bruxelles, 2014).

108 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJEC – L 395/33 of 30 December 1989), amended by Directive 92/50/CEE, known as 'classic sectors'; Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJEC – L 76/14 of 23 March 1992), known as 'excluded sectors'.

109 Loi No. 92-10 du 4 janvier 1992 relative aux recours en matière de passation de certains contrats et marchés de fournitures et de travaux [Law No. 92-10 of 4 January 1992 on remedies in matters concerning the conclusion of certain contracts and markets for supplies and works], JORF du 7 janvier 1992, at 327.

110 CE, ass., 16 July 2007, *Société Tropic Travaux Signalisation*, Rec. at 360.

111 CE, ass., 4 April 2104, *Département du Tarn-et-Garonne*, *Id*.

6.2.1.2. Changes to Administrative Trials

Many of these requirements, related to effective judicial protection, in terms of access to the courts but also the conduct of the trial, are shared by the European Convention on Human Rights.

Although the standards drawn the European Convention on Human Rights do not have the same contentious properties as EU law, they influence French administrative disputes in no small way by establishing minimum standards. Articles 6 (1) and 13 respectively enshrine the right to fair trial and the right to an effective remedy; the European Court has gradually defined the contours thereof and set requirement levels so that they are respected. While Article 6 (1) in principle covers *'civil rights or obligations'* and *'any criminal charge',* the European Court has interpreted these concepts broadly so to include administrative cases within the scope of that provision.[112] Moreover, the European Court has taken a broad approach to the concept of 'court', impervious once again to national qualifications.

The standard of protection required by the European Convention has prompted changes in French administrative disputes. Regarding the effective access to the courts,[113] the French administrative courts have agreed to hear cases previously deemed inadmissible, in order to meet the requirements of a fair trial. Owing to their effects or their gravity, certain disciplinary sanctions against prisoners or soldiers have been removed from the category of internal measures to become administrative acts that are open to challenge.[114] Similarly, the administrative courts have extended their oversight of certain acts owing to the requirements of the European Convention, leading for example to passing from the review of manifest errors of assessment to normal review of disciplinary sanctions within the civil service.[115]

Furthermore, the jurisprudence of the European Court has also resulted in amendments to the course of administrative proceedings. While the application of Article 6 (1) essentially led to adjustments, without the functional duality of the *Conseil d'Etat*[116] or the institution of government commissioner (now the *rapporteur public*[117]) being called into question on principle, the duty to make hearings public has been generalised, breaking with French legal tradition in administrative cases.[118]

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112 Concerning the civil nature: ECtHR, *Ringeisen v Austria,* Application No. 2614/65, 16 July 1971; and regarding criminal charges, ECtHR, *Engel v Netherlands*, Application No. 5100/71, 8 June 1976.

113 ECtHR, *Golder v United Kingdom*, Application No. 4451/70, 21 February 1975.

114 CE, ass., Hardouin et Marie, 17 February 1995, Rec. at 82 et 85.

115 CE, ass., 13 novembre 2013, *Dahan*, Rec. at 279.

116 ECtHR, *Sacilor-Lormines c/ France*, *Id*. Cf. above, I

117 Though this may have been thought initially following the decisions in ECtHR, *Kress v France*, Id.; ECtHR, *Martinie v France*, Application No. 58675/00, 12 April 2006. The changes made by France, establishing the *rapporteur public* and abolishing their participation in the debliberations was approved by the ECtHR: *Etienne v France,* Application No. 11396/08, 15 September 2009.

118 As regards the publicity of decisions handed down by social welfare courts, see CE, sect., 29 July 1994, *Département de l'Indre*, Rec. at 363.

The influence of European law has also paved the way for State liability for judicial activity.

6.2.1.3. State Liability for the Activities of Administrative Justice

State liability may be incurred as a consequence of the malfunctions of administrative justice.[119] The scenarios in which a litigant may be entitled to compensation have been expanded under the influence of European law. EU law, on the one hand, set down as a guarantee of the full effectiveness of its norms the introduction of a remedy conferring entitlement to compensation for the litigant whose rights have been infringed in the content of a breach of Community law by a Member State,[120] including those instances where the breach may be imputed to a supreme court.[121] This case law was received in French law by the *Conseil d'Etat*, which enshrined the possibility that State liability may be incurred where the content of a judicial decision, even where this is final, is vitiated by a manifest breach of EU law intended to confer rights to private individuals.[122]

The law of the European Convention has also led to the creation of a new compensatory remedy. Article 6 (1) requires, in compliance with the right to a fair trial, that court decisions be delivered within a reasonable period of judgment.[123] Now, the violation of this period by the administrative and judicial courts allows litigants to secure a ruling as to the liability of the State,[124] and damages awarded by the *Tribunal des conflits* since the reform introduced by the 2015 Law.[125]

6.2.2. French Administrative Justice under the Influence of European Administrative Laws

French administrative law is often presented as a model and considered historically unresponsive to comparative law. In fact, comparative law has always had its place in the debate in French administrative jurisprudence. However, today, comparative law no longer serves so much to legitimise the French model as it does to destabilise it.[126] In addition, the comparative law argument is now widely used by

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119 CE, ass., 29 December 1978, *Darmont*, Rec. at 542.

120 ECJ, Joined cases C-6/90 and C-9/90, *Francovich and Bonifaci* [1991] ECR I-05357.

121 ECJ, Case C-224/01, *Kobler* [1993] ECR I-10239

122 CE, 18 June 2008, *Gestas*, Rec. 230.

123 As regards France, cf. e.g. ECtHR, *X. v France*, Application No. 18020/91, 31 March 1992.

124 CE, ass., 28 June 2002, *ministre de la justice c/ Magiera*, Rec.

125 Loi No. 2015-177 du 16 février 2015 *relative à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures* [Law No. 2015-177 of 16 February on the modernisation and simplification of law and procedures in the fields of justice and internal affairs], JORF du 17 février 2015 at 2961

126 Melleray Fabrice, *Les trois âges du droit administratif comparé ou comment l'argument de droit comparé a changé de sens en droit administratif français* 13–22 (Melleray Fabrice (dir.), L'argument de droit comparé en droit administratif français, Bruylant, Bruxelles 2007).

the administrative courts in resolving disputes.[127] This trend can be explained by the desire to develop a more efficient administrative justice, both from the perspective of economic issues and the protection of citizens' rights, so that the French system remains attractive amongst the array of European administrative laws. Faced with legal issues of increasing complexity, covering fundamental rights, constitutional review, international and European law, not to mention emerging fields such as bioethics,[128] the administrative courts, and specifically the *Conseil d'Etat*, do not hesitate to adopt or adapt precedents generated by their European and international counterparts[129]. The use of comparative law is brought about by the inclusion of the French administrative justice in the European area.[130]

The use of comparative law has become almost a judicial reflex in resolving the most important issues decided by the *Conseil d'Etat,*[131] essentially taking the form of reading the findings of *rapporteurs publics*. Important developments in administrative contracts,[132] administrative liability[133] or even the conventionality review,[134] were all developed on the basis of foreign examples.[135] Since 2008, the *Conseil* has even had a comparative law unit, consisting of a team of lawyers specialising in foreign law under the stewardship of the *centre de recherches et de diffusion juridiques* (centre for legal research and dissemination). This particular unit has permitted an intensification in the use of comparative law, since about 80% of the decisions handed down by the *Conseil d'Etat* sitting in its court formation (*Assemblée et Section*

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127 Lichère François, *The Use of Comparative Law before the French Administrative Law Courts: Or the triumph of castles over pyramids* 253–265 (Ademas Mads and Fairgrieve Ducan. (eds), Courts and Comparative Law, Oxford University Press 2009).

128 As regards the lawfulness of the decision to withdraw treatment for a quadriplegic patient in a vegetative state, CE, ass., 14 February 2014, *Lambert* Rec. at 32 and CE, ass., 24 June 2014, *Lambert*, Rec. at 175.

129 In doing so, its role edges closer to that of the administrative court in a common law system. *Cf.* Stirn Bernard, *Le Conseil d'État, so British?* 815 (M. Ademas Mads and Fairgrieve Ducan, eds, Tom Bingham and the Transformation of the Law: a Liber Amicorum, Oxford University Press 2009).

130 Cf. Dutheillet de Lamothe Olivier, *Comparative Law as an Essential Feature of French Public Law : The Influence of the European Union and of the European Convention on Human Rights* 235–421 (Ademas Mads and Fairgrieve Ducan, eds, Courts and Comparative Law, Oxford University Press 2009).

131 A. Bretonneau, S. Dahan, D. Fairgrieve, *Comparative Legal Methodolog of the Conseil d'Etat : Towards an Innovation Judicial Process?* 242–252 (Ademas Mads and Fairgrieve Ducan, eds, Courts and Comparative Law, Oxford University Press 2009).

132 Regarding the opening of full remedy proceedings to a foreclosed competitor with a view to challenging an administrative contract, see CE, ass., 16 July 2007, *Société Tropic Travaux Signalisation*, *Id*.

133 Regarding State liability in the event of laws adopted contrary to France's international commitments, CE, ass., 8 February 2007, *Gardedieu*, Rec. at 78.

134 Regarding the constitutionality review of administrative acts transposing European Directives, CE, ass., 8 February 2007, *Société Arcelor Atlantique et Lorraine*, Rec. at 55.

135 Cf. Melleray Fabrice, *L'utilisation du droit étranger par le Conseil d'État statuant au contentieux* 779–793 (Mélanges en l'honneur du Président Bruno Genevois. Le dialogue des juges, Dalloz, Paris 2009).

du contentieux – Assembly and Litigation Section) benefited from comparative legal research in 2014.[136] The comparative law unit's role is not limited to the *Conseil d'Etat*'s litigation functions since it also has a part to play in the context of the *Conseil*'s advisory functions. Studies of various social topics such as electronic cigarettes or same-sex marriage were conducted out by the administrative sections. This recourse to foreign law by the administrative courts, however, has its limits in areas heavily influenced by national legal culture which preclude a comparative analysis.

Lastly, comparative law has a number of functions within the *Conseil d'Etat*. Firstly, it serves to strengthen or reverse the legitimacy of established case law, particularly in the context of the integration of European norms. The finding of an isolated position in relation to other foreign courts regarding the interpretation of the law of the European Union may for example lead to a long overdue reversal of precedent.[137] Conversely, an analysis of judicial decisions handed down by the European courts adopting a divergent position can strengthen the *Conseil d'Etat* in its stance by wanting to mark stand apart on particular issues. Lastly, the comparative law argument can drive the creative force of the administrative courts and bring about changes in the state of the law on a sensitive social issue.

7. Statistical Elements

The *Conseil d'Etat* publishes an annual report on the advisory and litigation activities of administrative courts. This illustrates those activities in numbers.[138]

7.1. The Conseil d'Etat's Advisory Activities in 2015

118 bills, 68 draft orders, 4 draft laws, 800 decrees and 32 opinions were examined by the *Conseil d'Etat*. The average time taken to review bills is relatively short: 25% of the texts were examined in less than 4 days and 99% of texts were examined in less than two months. It is the same for the average time devoted to reviewing draft decrees: 19% were examined within four days and 86% in less than two months.

7.2. The Jurisdictional Activities of the Administrative Courts in 2015

Before the *Conseil d'Etat*, 8727 cases were filed, a decrease of 28% compared to 2014 and 9712 cases were tried, a decrease of 20.7% compared to 2014. In addition, 160

[136] For a very recent example, concerning the export to Spain of the gametes of the applicant's dead husband so that she may proceed with a post-mortem insemination in that country, CE, 31 May 2016, Mme C., No. 396848.

[137] Regarding the direct effect of European Directives, see, CE, ass., 30 October 2009, Perreux, Rec. at 407.

[138] Conseil d'Etat, *Le Conseil d'Etat et la justice administrative*, Bilan d'activité 2015, available at <http://www.conseil-etat.fr/content/download/61676/554062/version/2/file/bilan2015.pdf>.

questions prioritaires de constitutionnalité were decided. The average time for judgment was 6 months and 23 days, a reduction of 38.5% between 2005 and 2015.

Before the administrative courts of appeal, 30,597 cases were filed, an increase of 2.5% compared to 2014 and 30,540 were decided, an increase of 2% compared to 2014. The average time of judgment is 10 months and 25 days, a 25% reduction between 2005 and 2015. Lastly, 78.9% of the decisions of administrative courts of appeal have confirmed the decisions of administrative tribunals. 96.6% of judgments handed down by administrative courts were final, i.e. no appeal was brought against them.

Before the administrative courts, 192,007 were filed, a decrease of 1.8% compared to 2014 with 188,783 cases decided, an increase of 0.3% compared to 2014.The average time of judgment is 10 months and 9 days, a reduction of 36.4% between 2005 and 2015.

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THE ADMINISTRATIVE JUSTICE IN SPAIN: CURRENT SITUATION AND CHALLENGES

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Since the Spanish Constitution of 1978 there has been a full and effective administrative justice. The citizens have the possibility to request a judicial review of decisions taken by the public Administrations, while being either the owners of a subjective right or of a legitimate interest. The interim judicial protection is not limited to the suppression of the act or general provision and the Courts are invested with direct powers to enforce their sentences. However, different problematic issues about the inactivity of the public Administrations and the enforcement of sentences are the new challenges to ensure the administrative justice. To this it must be added that there are problems regarding the inefficient work of Courts.

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7. The Enforcement of Judgments Between its Judicialisation and its Limits

1. Introduction

There are two articles in the 1978 Spanish Constitution both referring to the submission of the public Administration to the legal system and the subsequent control for the Courts: the article 103.1 states that the main role of the Administration is to serve the general interest with objectivity and, in order to do that, it must be fully subject to justice and the law; as for the article 106.1 it assigns the Courts to control the regulatory power and the legality of administrative acts as well as its compliance with the objectives which justify it.

It is thus established the constitutional nature of the judicial control in terms of administrative activity in Spain which is the base to overcome the limitations, exemptions and immunities in the previous model of administrative justice. This is also the premise for the demand of the full administrative justice as a crucial element of the State of Law.

When the Spanish Constitution (hereinafter SC) of 1978 was passed, an Act of 1956 regulated the proper operation and powers of the administrative Courts. This Act was not abolished until 1998 when the current Administrative-Contentious Jurisdiction Act was passed. The period of time for this Act which was passed under a non-democratic government before the SC was so extended due to its great improvement in the protection of specific people, its better possibilities to control the administrative activity – e.g. the regulated elements of the discretionary acts and the technique of misuse of power – and its rules of locus standing marked the beginning of the current situation. However, the Act of 1956 had some considerable limitations for an effective judicial control of the Administration.

The passing of the current Act 29/1998, 13th of July about regulating the Jurisdiction for the Judicial Review (hereinafter the Act) was the result of the organic restructuring needs of the administrative Courts which were addressed in 1985 when the Organic Act on the Judiciary was passed and of the main demands from the enforced decisions by the Constitutional Court under the protection of the article 24.1 in the SC which recognises the right to the effective protection of the judges and Courts in the execution of their rights and legitimate interests, and in no case may there be a lack of defence. That way, the Spanish administrative justice has since then been regulated by a modern rule. It enshrined permanently a model of administrative justice under the characteristics as follows: a full control of the activity of the Administration as a defining element, protection of citizens' legitimate rights and interests as a teleological element and the expansion of the activity of the administrative Courts to the execution of sentences and the perfection of the judicial protection of the legal situations submitted to trial as elements of efficiency.

These are the positive aspects of the Spanish model of administrative justice, although there are also some disadvantages. A normative and structural outlook of this model is presented below with both its positive and negative aspects.

2. Some Interesting Notes on the Situation of the Spanish Administrative Justice

The task of the administrative Courts represents the 3% of the total litigiousness in Spain. The number of cases ranges from 200,000 to 300,000 per year, depending on a higher or lower economic activity in the country. These numbers are high considering the population in Spain and most importantly the contrast with the numbers in other European countries.

Moreover, the administrative Courts have the worst rate of pending cases[1] compared to the rest of Spanish Courts which causes a longer period of time for the proceedings with an average of 500 days. However, it is necessary to clarify that while in single-judge administrative Courts the average duration of a proceeding is around 14 months, in the collegiate bodies it may range from 20 to 30 months. It is also important to bear in mind that the collegiate bodies solve those cases with more complexity or relevance, thus being responsible for approximately 35% of the total of issues handled.

There are currently 241 single-judge Courts (there were just 24 in 2003) and 23 collegiate bodies, the latter has a total of 334 magistrates. The judicial career in Spain consists of 5,847 judges and magistrates, so 8% of them are the ones dealing with the administrative justice.

The estimated rate of the disputes or complaints submitted to the administrative Courts ranges from 40 to 50% for the sentences passed by the single-judge Courts (where the majority of complaints are concentrated against local entities); although the rate is significantly lower when it comes to collegiate bodies since it ranges from 30 to 40%.

The most common issues handled by the administrative Courts are those related to immigration, sanctions, urban and territorial management, administrative contracts, tax complaints and Administration employees' issues and pecuniary responsibility with no specific order.

3. Some Organisational Characteristics of the Spanish Administrative Justice and Other Elements to Access It

The constitutional position of the administrative Jurisdiction in comparison to that of the Administration in Spain attends to a range of organisational matters resulting in the establishment of a specialised judicial system.

[1] The result to divide the number of unsolved cases by the number of cases resolved.

The article 117.5 in the SC demands the existence of only an organisational structure of the Judiciary in Spain except for some Courts specifically indicated in the Constitution itself as the case with the Constitutional Court.

This demand is responsible for the fact that members of the administrative Courts share with the civil, criminal and labour Courts the regime to have access to the judicial profession as well as their guarantee of independence and, in addition, they are under the regulations of the General Council of the Judiciary. The regime of all Courts is regulated by the Judiciary Organic Act (JOA) and all of them including the administrative ones are the part of the ordinary Jurisdiction.

Although there is an organizational unity of Spanish Courts, the JOA establishes their specialisation according to their matters. Even though there have been problems in the past when determining the jurisdiction that administrative Courts have particularly in relation to civil Courts in patrimonial responsibility of the Administration and also to labour Courts in Social Security matters, some recent reforms have finally determined the sphere of activity of each one of them.

There are no administrative Courts consisting of lay people; all judges are legally qualified. In addition to the professionalism of their members in this field, they are also specialised in administrative law matters although certain professional sectors consider it necessary to have a greater specialization in certain legal areas when recruiting judges and administrative magistrates. The JOA established a series of special tests to proceed to their designation, which is not considered for civil and criminal judges.

The administrative Courts are divided into three levels: the provincial level consisting of the Single-judge Administrative Court, the regional or 'autonomous' level consisting of the Administrative Division of the Superior Courts and, finally, the state or national level consisting of the Single-judge Central Administrative Court, the Administrative Division of the National Court and the Administrative Division of the Supreme Court. This structure is the result of a considerable physical distance between Courts and those who may be interested in applying for their protection.

Actually, this analysis of the administrative justice in Spain would not be complete without indicating that the citizens have to exhaust internal administrative remedies in the proper Administration bodies before going to Court. In certain matters (such as taxes or sports), there are also para-judicial instances to which a complaint has to be subjected before filing the administrative justice. For all these reasons, the Spanish law uses the term 'contentious-administrative jurisdiction' to refer to the judicial sphere of control of the Administration.

Finally, it is also important to note the peculiar organization of Spain in terms of politics and territories which makes it a decentralised country divided into regions called *Comunidades Autonomas* ('Autonomous Communities'). The Constitution grants them a self-organisational capacity, so each one of them has their own administrative structures which are also subject to the control of administrative Courts as it is the case with the rest of the state and local Administration.

4. Type of Control Granted to the Administrative Courts and Its Scope

It must be remembered that the article 106.1 in the SC already mentioned expands the control of administrative Courts to the supervision of the regulatory powers, the legality of the activity of the Administration and the subjugation to its purposes. A simple 'objective' – and basically declaratory – control of the activity of the Administration is apparently established. However, the Constitutional Court again applying the article 24.1 in the SC has also established the constitutional basis of what may be called a 'subjective' promoted control-regarding the rights and interests of the citizens.

The Act 28/1998, in line with these constitutional requirements, sets the 'object of the judicial review' and indicates which activity of the Administration may be brought before the Court, the reasons why and which request may be filed by the applicant in this regard. These actions are listed below.

1. The Courts will be able to take control of legality upon general provisions by means of a direct challenge (art. 25.1), a challenge of their special acts of application and a complaint that they are not lawful (art. 26.1).

The direct challenge of the general provision will allow the applicant to request that the Courts declare such provision as unlawful and to render it quashed (art. 31.1). However, with an indirect challenge the claimant will be able to request that the Courts recognise a legal situation specific to an individual and to demand the full reinstatement of that situation if necessary (art. 31.2).

In the latter case, the Court will be able to order the pronunciation of an administrative act. However, it will not be possible to demand the determination of the wording of a quashed general provision or, if it were the case, the discretionary content of the administrative case (art. 71.2). If the Administration has to pay a compensation for a damage (art. 31.2), the Court will determine the amount (art. 71.1).

2. It is also possible to have judicial control over special administrative acts which end the internal administrative proceeding and, in certain cases, over prior acts (art. 25.1).

In those cases, the complaint will basically consist of the application for annulment of the contested act for not being in accordance with law and, according to circumstances, it is possible to recognise and re-establish the legal situation specific to a an individual (art. 31.1 and 2).

Here the Court may also order the Administration to pronounce an administrative act with the same limitations aforementioned if a legal situation specific to an individual is recognised.

3. The citizen may bring the inactivity of the Administration to Court by agreeing to a series of requirements (art. 25.2). This may be the case when the Administration is required to provide a specific compensation for one or several specific people

according to a general provision that do not need implementing acts or according to an administrative act, contract or agreement (art. 29.1). The request for the Court will be to enforce its obligations (art. 32.1).

The sentence in these cases will state that the proper activity is performed the way it is indicated in the general provision, in the administrative act, contract or agreement. Moreover, for such purpose, the sentence will agree on the necessary measures for its compliance and will even set a deadline (art. 71.1).

4. There may also be the case where the person concerned states that the Administration has not executed its final acts (art. 29.2). Even though the Act states that its execution has to be before the Administration in the first place, the person will be able to request the Administration to face the sentence (art. 32.1) by means of a fast-track proceeding designed for the least complex issues.

5. Finally, the administrative Courts may also admit that the Administration has committed the mistake of doing a constitutive material activity of an unlawful conduct (art. 25.2). This action will mean reporting that the administrative activity is unlawful due to the lack of the jurisdiction of the Administration or to the lack of a proceeding.

In this case, the request for the Court will have to apply for the cessation of the constitutive activity of an unlawful conduct before stating that it is not legal (art. 30 and 71.1, a). In addition, if it were the case, the request will also apply for the recognition of an individual a judicial situation which is affected by such activity and its restitution (art. 32.2).

Based on the above, it is possible to conclude that the Act 29/1998 allows the general control of the administrative activity no matter the way in which it is presented, although there may be some cases that are not under control and that are indicated in the Act due to equal constitutional relevance. However, the problem is the scope of the powers of the Court when complying with such control.

The conclusion regarding the matter depends on the sphere of knowledge allowed for the administrative Court and on its actual powers to replace the will of the Administration and, if it is the case, to recognise or restore the rights and interests of the claimant. Regarding the former, apart from the aforementioned, it is worth mentioning that the Court will be able to expand ex-officio the case by means of the assessment of more motives of control than those plead by the applicant (art. 33.2). Regarding the latter, there is a serious technical obstacle mentioned in the article 71.2 ("Judicial authorities may not determine how the precepts of a provision must be worded to replace quashed general provisions and may not determine the discretionary contents of quashed acts justified in the field of the administrative discretion which prevents the Court from being able to define new judicial realities or situations without taking the risk for its actions to be considered as 'an excessive exercise of jurisdiction'. In an attempt to balance this situation once again, the Supreme Court in Spain reaffirms that "it is clear that such discretion cannot be

exercised arbitrarily, since it is always subordinate to the rational demands resulting from the principle of interdiction of the arbitrariness of public authorities."

5. Some Operational Aspects of the Administrative Justice: Legal Standing, Proceeding and Appeals

The legal standing to promote judicial control of the administrative activity is built on a regime of the situations which allow the citizens to act as the claimants (art. 19). However, there is no *actio popularis* regime except for very specific matters. Citizens do not have the authority to promote the control of the legality of the general provisions; and in case of singular activity of the Administration for their challenge citizens have to affirm the ownership of a subjective right or of a legitimate interest as the basis of its standing. Certain legal provisions have allowed the access to administrative Courts for some groups that represent collective interests and the defence of general interests (particularly, the right to equality between men and women).

This standing system also considers those cases in which the control of the administrative activity may be pressed by another public authority and even by another Administration.

In regards to the guidelines for the handling of issues, the Act 29/1998 presents two proceedings: the written 'first or only instance proceeding' and the verbal 'fast-track proceeding', although the latter may be handled without an oral hearing or without any evidence other than the documentary.

The main difference between both proceedings is the simplification of formalities in the case of the fast-track proceeding. Contrary to the ordinary proceeding, the fast-track proceeding begins with the application and without being necessary for the claimant to have the administrative case file before, since it will be sent afterwards in order to expand on the allegations in the oral hearing.

The Act states the cases in which the fast-track proceeding may be used in reference to its minor complexity, the amount of money (less than 30,000 Euros) or the solution for certain issues with no third parties involved (Administration employees' issues, asylum request, immigration or doping in sports).

In the rest of the situations, the 'first or only instance proceeding' must be used. In this case, a written memo for the Court is compulsory before filing the application. This is for the Court to claim the administrative case file and for the Administration to prepare a series of activities for the proper development of the proceeding (especially, the citation of third parties for the case, art. 49).

When it comes to mass acts in tax matters and to the Administration employees, there is also a possibility to have a simplified declarative proceeding. This is to agree on the effects of a favourable judgment for the third parties which has been passed in another proceeding for those people in the same legal situation as the applicants in the first procedure.

There are some special proceedings and it is worth noting the judicial protection of fundamental rights whose characteristics are the reduction of waiting times and a preferential processing by the Court (art. 114). In 2013, a 'proceeding for the market unit guarantee' was introduced to challenge those acts of the Administration that may be opposite to the freedom of establishment or movement.

When passing the sentence of the first instance, the general criterion is the possibility to appeal both in the second instance and in a cassation appeal before the Supreme Court.

However, the sentences passed by the single-judge Courts are not appealable in those cases with a total amount of money less than 30,000 Euros or in those dealing with electoral processes. In some cases, such as the challenge of general provisions, conflicts between different Administrations or the judicial protection of fundamental rights, it will be possible to appeal (art. 81).

The remedy of appeal will not prevent the provisional enforcement of the sentence and it may be based on any plea considered by the parties. However, they could only apply for the evidence that was denied or was not practised in the first instance for causes that are not imputable to the same parties.

In July 2015 – and with effect from July 2016 – there was an important reform in terms of a cassation appeal. Using this remedy, both the sentences passed in the first instance by the single-judge Courts and the sentences against those who passed in the only instance or appealed by the collegiate Court are appealable in cassation. In other words, every sentence passed by the lower Court is subject to appeal in cassation to the Supreme Court, thus modifying the structures followed up to date.

The effective access to the Supreme Court will be possible according to the alleged legal infringement and the presence of a 'cassation interest' (normally a matter upon which there is a conflicting Case Law and an appeal may help to ensure a uniform application of Law). When there is a sentence passed by a single-judge Court, there will be an exclusive access to cassation if it is reported that such sentence provides a doctrine that may be considered damaging for the general interests and when its effects affect the third parties (art. 86.1, II). When it comes to the sentences of the collegiate Courts it will only be possible to appeal in cassation on the basis of the infringement of the State law or European Union rules if such infringement is relevant and determining for the challenged verdict. This will only be possible when they have been properly plead during the proceeding or considered by the Court that passed the sentence (art. 86.2). Regarding the 'cassation interest', the Act determines the scope of this concept (art. 88.2); although the Supreme Court has plenty of power for the purpose of declaring the cassation appeal inadmissible.

The same reform in 2015 created an 'autonomic' or regional cassation appeal. Its main characteristics are that the High Court of Justice in every Autonomous Community has jurisdiction to resolve this cassation appeal and it is used to report those judgments which have infringed the law of the region. However, apart from

the infringement of rules in the Autonomous Community, the fact of reporting such infringement in the State law and/or the European Union is not considered. This may make the Supreme Court to adopt criteria in that regard, as it has already been done in the field of civil proceedings.

The new regime of the cassation appeal before the Supreme Court entails the suppression of the previous extraordinary appeals for doctrine unification against certain judgments. This happened when such judgments included different pronouncements to solve facts, fundaments and petitions that are substantially equal. This new regime also entails the suppression of the extraordinary appeal in the interest of the Law against judgments that were not appealable in ordinary cassation and that could be considered damaging for the general interest.

6. The Improvement of the Interim Judicial Protection

The Constitutional Court in Spain considers the interim judicial protection as an essential element of the right to an effective judicial protection in the article 24.1 of the SC, thus considering that the legislator has the duty to foresee precautionary measures that may be applied in all the judicial spheres and for all kinds of controversies.

In this sense, the current Act which regulates the administrative justice is a significant advance for both technical and political-judicial reasons, since it constitutes a model that may be described as universal and flexible.

In a way that is consistent with the claims that may be issued before the administrative Court, the interim judicial protection is not limited to the suppression of the act or general provision. In that case, a regime of undetermined precautionary measures is chosen in order to apply for the most suitable measure regarding the main request of the proceeding ('precautionary measures to be taken to ensure ruling efficacy', art. 129.1). The precautionary measures may be taken in any field or sector of the administrative activity.

Among the measures that may be taken it is worth mentioning the suppression of the act or general provision, the judicial deposits of movables properties, the judicial intervention for asset management, the preventive annotations in public registers…

In order for the petitioner to take the measure applied for the Court will have to conduct a previous 'circumstantiated evaluation of all the conflicting interests' and this evaluation will be used by the petitioner when its execution 'may render review moot' and when it does not cause 'a serious disturbance of general or third-party interests' (art. 130). The petitioner may also take appropriate measures 'ordered to avoid or palliate the injuries' of any nature for the parties (art. 133).

According to one particular author (Ortells Ramos) there is still the problem of which criteria must be taken into account in order to determine whether it is the

interest of the petitioner or the interest of the Administration (and a third party) that has to prevail. This same author suggests paying those compensations that are less expensive as a decisive criterion.

These elements prevent the precautionary proceedings from becoming a way to solve the case in advance since taking a precautionary measure will not depend on the prognosis of the protection requested which in fact is the most required criterion for this protection to be granted. With this regime of the interim judicial protection, it is difficult to avoid altering the regime of the administrative acts when using these measures, both in the suspension of the execution and in the field of the inactivity of the Administration or of the unlawful conduct.

As a general criterion, taking the measure will lead the Administration to face a hearing. However, one of the most important aspects in precautionary matters is the possibility that the measures are taken urgently in those cases in which the administrative activity is imminent and their execution may carry out the damage that is intended to prevent. In these cases, the Court may observe the urgent circumstances stated by the petitioner. Therefore, it will be possible to agree to a precautionary measure without the Administration facing a hearing, although it will be allowed to present allegations once the measure is taken and it will allow the Court to reconsider its decision (art. 135).

7. The Enforcement of Judgments between Its Judicialisation and Its Limits

The article 117.3 in the SC states that the Courts are responsible for 'passing judgment and having judgments executed'. This has two immediate consequences: firstly, the execution of all the sentences has a clear jurisdictional element; secondly, the relations between the constitutional powers are defined, particularly between the Judiciary and the Executive power, always in favour of the supremacy of the former over the latter.

In addition, according to the Constitutional Court in Spain, ensuring compliance with the order, which contains the legal ruling and the right to enforce the final judgment by the terms considered, forms a manifestation of the right to judicial protection in the article 24.1 of the SC. However, the Constitutional Court notes that the law may exceptionally allow the Courts to modify the terms of executions in their pronouncements although the complete failure to comply with the judgment is not possible (the Sentence 211/2013, 16th of December could be a good example of the current status of the constitutional doctrine in this regard).

The article 118 in the SC also states the obligatory nature to comply with the judgment and the duty to collaborate in this regard.

Although the Spanish model of the enforcement of administrative sentences provided non-jurisdictional notes up until the Constitution in 1978, the administrative

Courts now have some more effective mechanisms for the enforcement but with some significant shortcomings. Moreover, apart from legal difficulties, the performance of the administrative Courts has to be taken into account as well, since they do not always take an advantage of the improvements made. This situation makes it even more common among legal practitioners to think that there are still features in the enforcement of administrative rulings which are more related to other previous models. Particularly, urban planning and environmental issues are those in which the enforcement of the sentence is less satisfactory.

The enforcement of the sentence has to have as a base the recognition of a judicial situation specific to an individual and the imposition of a sentence or duty of compensation to have an effective protection. The problems about the enforcement of sentences are related to the effectiveness of the regime of the executive activity once those problems dealing with constitutional matters have been overcome. In addition, there is also a modality of inappropriate execution for those cases in which 'the ruling quashes all or part of a general provision or an administrative act' (art. 107).

The Act does not regulate an actual enforcement of rulings but it contains a series of isolated provisions for the enforcement of the sentences according to their content. There is not an organised regulation for a common way to end with the adoption of specific measures which are suitable for the effective enforcement of the sentence. An act similar to the executive claim is not planned and an accurate regulation of the enforcement orders and its requirements is not established; there are many differences with the regulation of the enforcement in the Civil Procedure Act whose implementation is dismissed by the administrative Courts in some cases.

The starting point, unless another one is decided, is that the Administration has to comply with the sentences voluntarily within two or three months when it comes to compensations. After this period of time, the claimant will be able to urge the Court to act in order to ensure the enforcement.

The enforcement of economic compensations is specifically stated in the article 106 and it is indicated that the Administration has to pay according to the provisions in its budgets, otherwise these provisions will have to be included to these effects.

The main obstacle for these types of enforcements may be the economic situation of the Administration or the refusal to comply with the enforcement, and in this case the general criterion of immunity from seizure of properties of public domain (art. 132 in the SC) may lead to a refusal of the enforcement. In these cases, it is questionable that other measures such as those mentioned below might be taken but the Administration will be able to incur procedural interests because of the delay. The Court will also be able to agree to a credit compensation of the Administration for the claimant. Moreover, in the event of it being an "inconvenience" for the Administration due to its financial situation, the Court will be able to agree to a less burdensome payment plan.

Regarding the sentences of the Administration which lead to perform an activity or to pass an act, the Act establishes direct and indirect measures of enforcement (arts. 108 and 112). In the former the Court may take these measures on its own (basically when it comes to regulated elements of the administrative activity) or with a third party (art. 108.1) acting as a commissioner of the Court. In the latter, if these direct measures are not appropriate the measures will basically involve executing means of coercion on those who have to comply with the enforcement by threatening with penalty payment or by demanding criminal responsibility (art. 112).

In the event of a fraudulent enforcement or the unnoticeable non-compliance with the sentence, the Court may invalid the administrative acts that were passed in this regard (art. 103.4 and 108.2). However, just as in the precautionary measures field, the Act provides the Court with a wide range of possibilities to take 'the necessary measures to ensure the effectiveness of what was ordered' (art. 112.1).

There are no specific provisions when the judgment requires the Administration to stop carrying out certain actions.

For its part, the article 105.2 states the possibility for the Administration to allege 'attendant causes making it physically or legally impossible to execute a ruling', although the Court will be in charge of evaluating the impossibility of such ruling which will involve the appropriate compensation. Likewise, the legitimate rights and interests recognised in the sentence may be expropriated due to public or social interest reasons, as it is stated in the Act itself.

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ADMINISTRATIVE JUSTICE IN POLAND

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This article begins with an analysis of the development of administrative justice in Poland over the last centuries. In particular, the author examines administrative jurisdiction before 1918, when Poland regained its independence, the period of the Duchy of Warsaw, the Kingdom of Poland, and the practice on Polish territory under Austrian and Prussian control. The author then moves to modern law by presenting the judicial system in Poland in general, especially the differences between the separate systems of general courts and administrative courts, and analyses the jurisdiction of voivodship (regional) administrative courts, and the basic principles of judicial and administrative proceedings. The focus of study is mainly devoted to judicial and administrative procedure, rather than an administrative process of citizens before administrative authorities regulated in a separate Code of Administrative Procedure. The article describes the role of the judge (pointing out the differences between the active role of first instance judges and the limited capabilities of the judges of the appeal) and the powers of the Supreme Court, in particular its power to adopt resolutions, which has a great importance for the unification of the jurisprudence. A brief analysis is given to class actions, which in the Polish legal system are inadmissible in court and administrative proceedings. The articles provides a statistical cross-section illustrating the role of administrative jurisdiction. The author concludes with observations pointing up the progress of administrative jurisdiction in Poland, not only in the legal sense, but also in the cultural sense.

Keywords: administrative justice; administrative jurisdiction; administrative courts; principles of administrative procedure; Supreme Administrative Court of Poland; voivodship (regional) administrative court; class actions; cassation appeal.

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1. Introduction

In every country administrative justice, or to be more precise, the administrative court system, its operation in practice, is in a sense an indicator as to the extent a society is actually a democratic and civil society. This is because in most non-democratic societies there very well may be courts of law providing minimum protection to private interests, or even to commercial interests. Even a totalitarian society cannot do without the drawing up of contracts, the preparation of wills or the semblance of property holdings. At the same time, a state in which power at any level is not controlled by the society does not need administrative justice, because the Government always knows and does what is best and cannot be restrained by anyone or anything. "In democratic countries of law, the objective of creating a mechanism for judicial control of public administration (the executive) has been and still is to provide citizens with a real protection of their rights and liberties against the activities of the State (its officials)."[1] It does not matter what model of administrative justice is selected – the Anglo-Saxon or Continental – the control functions on public administration or the executive need to be carried out.

At the moment, in Poland the administrative judiciary has strong constitutional empowerment. In accordance with Article 173 of the Constitution of the Republic of Poland, "The courts and tribunals shall constitute a separate power and shall be independent of other branches of power."[2] Accordingly, "the courts and tribunals shall pronounce judgments in the name of the Republic of Poland" (Art. 174 of the Constitution). The abovementioned fundamental principles of the democratic state ruled by law should be related as a whole also to the system of administrative courts,

[1] The Supreme Administrative Court, Warsaw 2010, ed. II, at 5.

[2] The Constitution of the Republic of Poland of 22 April 1997, 79 J. of L. 483.

which are an integral part of the justice system. Paragraph 1 of Article 175 of the Constitution states that "the administration of justice in the Republic of Poland shall be implemented by the Supreme Court, common courts, **administrative courts** and military courts." The Polish Constitution introduces sort of a presumption of the competence of common courts in Article 177: "The common courts shall implement the administration of justice concerning all matters save for those statutorily reserved to other courts." Quite naturally, other courts have restricted powers. Administrative courts and tribunals are no exception in this regard. The Supreme Administrative Court and other administrative courts exercise, to the extent specified by statute, control over the performance of public administration. Such control also extends to judgments on the conformity to statute of resolutions of organs of local government and normative acts of territorial organs of government administration (Art. 184 of the Constitution). Highlighting local government is not accidental. Although Poland is a unitary state and does not have any regions with special territorial or any other elements of federalism, there is local self-government. "The self-governing nature of units of local government shall be protected by the courts" (Art. 165 para. 2 of the Constitution). Apart from the possibility of violating the rights of citizens by the local government bodies, the Government may also attempt to limit the rights of the local government. The administrative courts settle jurisdictional disputes between units of local government and units of government administration (Art. 166 para. 3 of the Constitution). In addition, we have to agree that in the application of the law the authority body combines both the quality of a party, as well as the decisive arbiter on behalf of the state regarding the rights and duties of an individual. In this process, the administrative body, ruling on the legal situation of the individual, has always a dominant position. This unequal status ceases in the proceedings before the court, in proceedings in which an independent court decides the dispute between the individual and the administration.[3]

2. Outline of the History of Administrative Justice in Poland

The story of the early history of administrative justice in Poland leaves one uncertain in the sense of where to begin, for we can start from the introduction on the Polish lands of more modern forms of administrative justice that continue to affect even today's legislation or we can try to trace the forms of judicial and administrative control even during the times of the royalty and gentry in Poland. What complicates the situation is the fact that in the late 18th century Poland lost its sovereignty, so virtually throughout the 19th century we should be talking about foreign influence and legislation on Polish territory. Inevitably, in different partitions

[3] Speech by Professor J. Trzciński – President of the Supreme Administrative Court opening the Jubilee Session on 6 December 2005 at the Royal Castle in Warsaw, 1 [Zeszyty Naukowe Sądownictwa Administracyjnego] Scientific Papers of Administrative Justice] 8 (2006).

(into which Poland was divided) different legal systems were in force. Without denying the deep historical traditions, J. Borkowski points out the lack of continuity and uniformity of legislative solutions, which is not conducive to consolidating in legislative practice and public awareness one model of judicial administration and to providing the lasting value of the legality of public administration related to it.[4] Considering this situation, we should pay attention only to a few select events in administrative jurisdiction before 1918, when Poland regained its independence.

Starting from 1613 the Sejm, acting as the parliament of the gentry democracy, and for the purpose of controlling the state treasury, began invoking a series of commissions which took the name Radom Commission (Komisja Radomska) from their seat in the Polish city of Radom. In 1717, the Commission transformed into a permanent Treasury Court (the so-called Radomski) that formed the treasury judiciary in relation to the debtors of the state treasury and dealt with matters concerning tax exemptions relating to natural disasters or war damage, as well as typical administrative military cases.[5] The Court operated for forty-seven years (1717–1764). Then from 1764 until 1795 the Sejm again invoked a series of treasury commissions, whose powers were identical to those of the prior court.[6] There is also the view in the doctrine that the origins of administrative jurisdiction in Poland should be associated with other collegial administrative and judicial bodies, such as the famous Commission of National Education (Komisja Edukacji Narodowej, 1773–1795) and the Military Commission of the Two Nations (Komisja Wojskowa Obojga Narodów, 1788–1793).[7]

After the disappearance from the map of an independent Poland at the end of the 18th century, the concept of administrative jurisdiction appears in the Constitution of the Duchy of Warsaw.[8] It should be noted that the history of the Duchy was quite short, lasting for only seven years, from 1807 to 1815, but its influence on the further development of administrative procedure in Poland was huge. Chronologically, its development corresponds to the development of Napoleon's personal career.[9] Moreover, the Duchy was not an independent state, but depended on the power of Napoleon. The Constitution of the Duchy introduced in Poland the French model,

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[4] J. Borkowski, *Reforma polskiego sądownictwa administracyjnego [Reform of the Polish administrative courts*], 5 PiP 4 (2002).

[5] Cf. Lecture of Professor, Ph.D. Janusz Borkowski, *Sądownictwo administracyjne na ziemach polskich [Administrative jurisdiction on the Polish territory]*, 1 Scientific Papers of Administrative Justice [Zeszyty Naukowe Sądownictwa Administracyjnego] 13–14 (2006).

[6] *Id.*, at 14.

[7] Cf. Summary of views: W. Piątek, A. Skoczylas in: *The system of administrative law*, 10 System prawa administracyjnego [Sądowa kontrola administracji] 7 (R. Hauser, Z. Niewiadomski, A. Wróbel eds, Warsaw 2014).

[8] 1(1) Dziennik Praw Księstwa Warszawskiego [Official Journal of the Duchy of Warsaw].

[9] Cf. J. Bardach, B. Leśnodorski, M. Pietrzak, *Historia państwa i prawa polskiego [The History of the Polish State and Law Warsaw]* 353 (1976).

which undoubtedly survived the short-lived political entity of the Duchy. First of all, it introduced the Council of State (Rada Stanu;[10] the Consiel d'Etat in France) as the court of appeal, and just as in France prefectural councils were established, which were the courts of first instance.[11] It should be emphasized that, despite the introduction of the French model, there was no possibility of its complete reception, for there were far-reaching differences in comparison to the French practice. Often, well-designed French structures did not fit the Polish reality. According to Article 14 of the Constitution, the Council of State consisted of the king, a viceroy or president appointed by the king and ministers. However, Article 16 stipulated, too, that the Council comprised four registrars who dealt with administrative matters, whereas the Council "gives judgments, as the Court of Cassation".[12] Jankiewicz notes, "In the first instance the Council adjudicated in disputes on agreements concluded by the ministers themselves for the needs of the entire country."[13] In addition, the Constitution obliged the Council to deal with issues concerning conflicts of jurisdiction between the courts and other administrative bodies.[14]

After doing away with the Duchy of Warsaw and the organization of the so-called Polish Kingdom, combined with the Russian Empire, the Council of State should have still operated. Article 73 of the Constitutional Act of the Polish Kingdom of 27 November 1815 virtually did not mention its powers in the sphere of administrative justice, apart from the right to adjudicate in competence disputes.[15] Against this background, the disputes as to the future of administrative courts began.[16] Nevertheless, from 1816 to 1822 the administrative jurisdiction on behalf of the Council of State was carried out by [the] Delegation of Administration, a supreme administrative court adjudicating as the second and final instance of appeal from the judgements of the administrative courts exercised by the prefectural council and the provincial committees.[17]

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[10] 1(1) Dziennik Praw Księstwa Warszawskiego [Official Journal of the Duchy of Warsaw], Arts. 14–18.

[11] W. Piątek, A. Skoczylas in: 10 System prawa administracyjnego, Sądowa kontrola administracji [The system of administrative law, Judicial review of the administration] 8 (R. Hauser, Z. Niewiadomski, A. Wróbel eds, Warsaw 2014).

[12] 1(1) Dziennik Praw Księstwa Warszawskiego [Official Journal of the Duchy of Warsaw], Arts. 14–18.

[13] A. Jankiewicz in: XXV-lecie Naczelnego Sądu Administracyjnego na tle dziejów sądownictwa administracyjnego w Polsce [35th anniversary of the Supreme Administrative Court on the background of the history of administrative courts in Poland] 18 (Warsaw 2005).

[14] 1(1) Dziennik Praw Księstwa Warszawskiego [Official Journal of the Duchy of Warsaw], Art. 17.

[15] 1(1) Dziennik Praw Królestwa Polskiego [Official Journal of the Polish Kingdom], Art. 42.

[16] Cf. Lecture of Professor, Ph.D. Janusz Borkowski, *Sądownictwo administracyjne na ziemach polskich [Administrative jurisdiction on the Polish territory]*, 1 Scientific Papers of Administrative Justice [Zeszyty Naukowe Sądownictwa Administracyjnego] 16 (2006).

[17] A. Jankiewicz in: XXV-lecie Naczelnego Sądu Administracyjnego na tle dziejów sądownictwa administracyjnego w Polsce [35th anniversary of the Supreme Administrative Court on the background of the history of administrative courts in Poland] 19 (Warsaw 2005).

In 1822, the Delegation of Administration was closed down, and thereafter the judicial and administrative functions again were performed by the Council of State, until 1842, when its competence as a body of second instance was passed to the general meeting of the 9th and 10th Warsaw departments of the Governing Senate.[18] Despite the inclusion of the departments in the judicial system of the Russian Empire, until their liquidation the departments were located in Warsaw, adjudicated in accordance with Polish law and procedures, had Polish judges, and experienced a relationship with the Senate ruling in St. Petersburg that was minimal.[19]

Within the Prussian partition of Poland, three instances of judicial and administrative proceedings were introduced based on laws enacted between 1872 and 1883:

– district departments as the first instance;

– district administrative courts as the second, but sometimes as the first instance (Bezirksverwaltunggsgerichts); and

– the Higher Administrative Court in Berlin (Oberverwaltungsgericht) as the third instance, composed of professionals, and without a citizen factor.[20]

On most of the Polish territory occupied by the Austro-Hungarian Empire, Austrian legislation was introduced, and on a small part Hungarian legislation. Without a doubt, the greatest influence on future Polish law was the operation of the Administrative Court with its headquarters in Vienna, which is an example of one-instance administrative jurisdiction. The strong influence of Austrian practice on Poland after regaining its independence in 1918 can partly be explained by the fact that almost 10 percent of the judges of the Court in Vienna at the turn of the 19th century were Poles.[21]

After the declaration of independence by Poland in 1918 it was not possible to immediately create a native administrative jurisdiction, so for the needs of the time models inherited from the systems of foreign invaders were modified. Still and all, this state of affairs was considered a transition that could not be reconciled with the need for creating the legal system of an independent nation.

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[18] *W*. Piątek, A. Skoczylas in*: System prawa administracyjnego [The system of administrative law]*, 10 Sądowa kontrola administracji [Judicial review of the administration] 8 (R. Hauser, Z. Niewiadomski, A. Wróbel eds, Warsaw 2014).

[19] A. Jankiewicz in: XXV-lecie Naczelnego Sądu Administracyjnego na tle dziejów sądownictwa administracyjnego w Polsce [35th anniversary of the Supreme Administrative Court on the background of the history of administrative courts in Poland] 19 (Warsaw 2005).

[20] W. Piątek, A. Skoczylas in: *System prawa administracyjnego [The system of administrative law]*, 10 Sądowa kontrola administracji [Judicial review of the administration] (R. Hauser, Z. Niewiadomski, A. Wróbel eds, Warsaw 2014).

[21] Lecture of Professor, Ph.D. Janusz Borkowski, *Sądownictwo administracyjne na ziemach polskich [Administrative jurisdiction on the Polish territory*], 1 Zeszyty Naukowe Sądownictwa Administracyjnego [Scientific Papers of Administrative Justice] 16 (2006).

After the adoption of the so-called March Constitution, of 17 March 1921, the problem of a constitutional judiciary took on new meaning. Article 73 of this Constitution[22] provided that a separate bill should create administrative courts whose organization would be based on the cooperation of (lay persons) citizens and (professionals) judges, culminating in a Supreme Administrative Court, and which should adjudicate on the legality of administrative acts in the sphere of state and local government. This constitutional statement was implemented by the Act of 3 August 1922 on the High Administrative Tribunal.[23] According to the provision of the first sentence of Article 1 of the Act, for adjudicating on the legality of orders and decisions falling within the administration of the Government, and local government, a Supreme Administrative Court was created. At the same time, the second clause of Article 1 specified that as to the establishment of lower-level administrative courts with the participation of the civil factor, the Supreme Administrative Court, as the only instance of judicial review, would recognize complaints on the adjudications and judgments issued in the last instance by the administrative authorities of the central or local government, as long as this action did not exclude rights in respect of submitting a complaint. The Supreme Administrative Court had no right to examine the validity of laws duly announced. The literature indicates that, as a rule, the Austrian system was adopted.[24] The above-described model referred primarily to the former Austrian and Russian districts, while in the former Prussian district lower instance courts were maintained, although the Supreme Administrative Court had competence with regard to the issues of this district as well. The wording of the law indicated that such a one-instance model was considered a transitional state; however, up until the outbreak of World War II in 1939 there were no fundamental changes in the judicial system (though the new Constitution of 1935 did not even refer to the need for a two-instance system). Perhaps here we should mention the creation in 1935 of the Invalid Administrative Court as a special court to the Supreme Administrative Court. This Court was a temporary solution established to relieve the Supreme Administrative Court of such cases (i.e. cases on providing for military invalids, payment for their pensions, etc.).

According to Article 3 of the pre-war Act on the High Administrative Tribunal, the Supreme Administrative Court did not adjudicate on matters within the jurisdiction of general courts or special courts, regarding appointment to public offices and positions, unless it came to violations stipulated in the Act for the filling of positions or the nomination of candidates, matters relating to the representation of the state and citizens against states and foreign authorities, and in matters relating to military

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22 44 J. of L., item 267.

23 67 J. of L., item 600.

24 Lecture of Professor, Ph.D. Janusz Borkowski, *Sądownictwo administracyjne na ziemach polskich [Administrative jurisdiction on the Polish territory]*, 1 Zeszyty Naukowe Sądownictwa Administracyjnego [Scientific Papers of Administrative Justice] 17 (2006).

operations, the system of military force and mobilization, with the exception of matters of supply and supplement of the army, and in disciplinary matters.

After the end of World War II and in the beginning of the years of the socialist changes in Poland, administrative jurisdiction was not revived. In the course of the next thirty-five years ideas and projects were submitted, but the Government did not see the point in setting limitations for itself. It was only on 31 January 1980 with the Law on the Supreme Administrative Court amending the Act that the Code of Administrative Procedure was passed.[25] Here, we probably cannot speak of a continuation, but rather a new stage of administrative judiciary in Poland. The enactment of this law is the beginning of a new stage, which actually still persists today. It is of little significance that the contemporary start has its roots back in socialist times, although in the initial period the competence of the courts was quite limited. In fact, the Supreme Administrative Court began its operations on 1 September 1980. Article 1 of the Act bringing to life the Supreme Administrative Court specified that it operate in Warsaw and city branches created for one or more provinces. This wording actually indicated that it was a one-instance court, although having city branches. The Court had jurisdiction over complaints against administrative decisions and procedures laid down in the Code of Administrative Procedure and other regulations. The newly created Court was supervised by the Supreme Court. In accordance with § 1 of Article 196 of the Code of Administrative Procedure, in the former wording, the decision of the state administration may be appealed to an administrative court because of its illegality. It should be stressed that the local government had not yet been reactivated. In turn, § 2 of Article 196 of the Code exhaustively lists the decisions that could be appealed, e.g. in matters of construction works, prices, public roads, expropriation of real estate, employment and social affairs, among others. In other words, the Act did not provide for a general clause on the right of appeal against an administrative decision in principle, but provided a list of decisions against which the appeal was allowed. This was a sign of the mistrust the authorities had towards administrative jurisdiction.

Actions could be brought by a party, a social organization, which participated in the administrative proceedings, or by a public prosecutor (Art. 197 of the Code of Administrative Procedure). What is interesting is that the complaint to the administrative court was not brought directly, but rather through the state administration, which issued the contested decision in the last instance. The administration authority was obliged to pass the complaint to the Court.

Only in 1990 were there significant changes, consisting primarily in the introduction of a general clause. According to the amended § 1 of Article 196 of the Code of Administrative Procedure, the decision of the state administrative body could be appealed to an administrative court on the grounds of its illegality. The approach

[25] 4 J. of L., item 8.

and the scope of the control had clearly changed, and challenging any administrative decision now happened as a rule. Only in § 4 of Article 196 did the Code provide for exceptions to the general clause, or situations where it was not possible to challenge an administrative decision. The list of exceptions had an exhaustive nature. Despite the changes it was obvious that this would not end the evolution of administrative jurisdiction in Poland. For at this time, after the events of 1989, the state entered into a phase of economic and political transformation.

The next step in reform was the adoption on 11 May 1995 of the comprehensive Act on the Supreme Administrative Court, which entered into force on 1 October 1995.[26] The Act can be called comprehensive because it regulated the organization of the Supreme Administrative Court, its jurisdiction and its scope, as well as court proceedings. The provisions concerning judicial and administrative proceedings were excluded from the Code of Administrative Procedure. Nevertheless, the Court was still a single instance, since Article 2 stated that the Court acted in Warsaw and in city branches of the Court created for one or more provinces, so consequently the city branches of the Court could not be considered separate courts of first instance. The Supreme Administrative Court was divided into chambers and, finally, withdrawn from accepting complaints presented to the Court through intermediary bodies: an authorized entity would now submit a complaint directly to the Court.

The adoption of the new Constitution of the Republic of Poland of 2 April 1997,[27] which entered into force on 17 October of the same year, was a stimulus for subsequent changes in administrative jurisdiction. In the introduction to this study we partially mentioned the provisions of the Constitution on administrative jurisdiction, but the wording of Article 176 of the Constitution is worth mentioning, in particular: "Court proceedings shall have at least two stages." The same article also states that: "The organizational structure and jurisdiction as well as procedure of the courts shall be specified by statute." In addition, in accordance with Article 185 of the Constitution, "The President of the Supreme Administrative Court shall be appointed by the President of the Republic for a 6-year term of office from among candidates proposed by the General Assembly of the Judges of the Supreme Administrative Court." In Chapter XIII, Final and Transitional Provisions, Article 236 paragraph 2 states:

Statutes bringing Article 176 paragraph 1 into effect, to the extent relevant to proceedings before administrative courts, shall be adopted before the end of 5 years from the day on which the Constitution comes into force. The provisions relating to extraordinary review of judgements by the Supreme Administrative Court shall remain in effect until the entry into force of such statutes.

Thus, after the adoption of the Constitution, the work on new laws that actually determine the shape of today's administrative jurisdiction in Poland started. After

[26] 74 J. of L., item 368.

[27] 78 J. of L., item 483.

a wide debate in many legal groups the drafts were submitted to the Chancellery of the President of the Republic of Poland. On 22 October 2001, the President submitted a draft to the Parliament (more precisely to the Sejm, the lower house of the Polish Parliament). The first Act – the Law on the System of Administrative Courts – was adopted by the Sejm on 25 July 2002, the Act on Proceedings before Administrative Courts and the Act on Proceedings before Administrative Courts, Rules (implementing regulations) introducing the Act on Proceedings before Administrative Courts were adopted on 30 August 2002. All three acts reforming administrative jurisdiction in Poland entered into force on 1 January 2004.[28] From that moment the era of two-instance administrative proceedings began in Poland.

3. System of Administrative Courts and Judges in Poland

First of all it should be mentioned that in Poland, in the light of the Constitution, the judiciary consists of two separate branches or hierarchies of courts:

- courts of general jurisdiction and military courts headed by the Supreme Court, and
- administrative courts headed by the Supreme Administrative Court.

The structure of administrative courts consists of voivodship[29] (regional) administrative trial courts, established to consider all court-administrative cases not reserved for the Supreme Administrative Court, and the Supreme Administrative Court, established to consider appeals against the judgments of the voivodship administrative courts. A Provincial Administrative Court is formed for each province or for a number of provinces. Thus in contrast with the general judiciary, there are no district courts. Sixteen voivodship administrative courts exist in Poland.

Immediately it should be noted that the supreme supervision over the administrative activity of the administrative courts is exercised by the President of the Supreme Administrative Court.[30] This is of great importance because the administrative court cannot in the slightest way be dependent on the government administration. Additionally, the administrative courts are not supervised by the Supreme Court. On the other hand, courts of general jurisdiction in the field of administration (not as to adjudication) are supervised by the Ministry of Justice.

The Supreme Administrative Court consists of the President of the Supreme Administrative Court, vice-presidents and judges. The bodies of the Supreme

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[28] 153 J. of L., items 1268, 1270, 1271.

[29] Voivodship (*województwo*) – in practice a region, the largest unit of territorial division. The most basic unit is the *gmina* (commune), and Poland also has a 'middle' unit, equivalent to a county – *poviat*, which encompasses several communes. Poland does not have any autonomous regions.

[30] Law on the System of Administrative Courts, 25 July 2002, Consolidated text, J. of L. (2014), item 1647, as amended, Art. 12.

Administrative Court are the President of the Supreme Administrative Court, the General Assembly of the Judges of the Supreme Administrative Court, and the College of the Supreme Administrative Court. The Supreme Administrative Court is divided into the Financial Chamber, the Commercial Chamber, and the Administrative Chamber. Each chamber is headed by a vice-president appointed by the President of the Supreme Administrative Court.

From the point of view of sentencing in administrative courts, the most vital role is played by judges and court assessors, whom the Act on the System of Administrative Courts guarantees independence in the exercise of their offices. In accordance with §§ 1 and 2 of Article 5 of the Act, the judges of administrative courts are appointed by the President of the Republic of Poland, at the request of the National Council for the Judiciary. The judges of administrative courts are appointed to the position of regional administrative court judge, with the appointment place (seat) of the judge, or as a judge of the Supreme Administrative Court.[31]

Article 6 of the Act states that a person may be appointed judge of a voivodship (regional) administrative court who meets the following requirements:

1) has Polish citizenship and enjoys full rights as a citizen;

2) is of good character;

3) has completed a higher law studies program in Poland and obtained a Master's degree or foreign degree recognized in Poland;

4) is able, i.e. in good health, to perform the duties of a judge;

5) has attained the age of 35;

6) is distinguished by a high level of knowledge in the field of public administration and administrative law and other areas of law relating to the operation of public administration bodies; and

7) has remained for least eight years a judge, prosecutor, president, vice-president, senior counsel or counsel in the offices of the Attorney General of the Treasury, or at least for eight years has practiced as an advocate, legal counsel or notary public, or for ten years has remained in government positions related to the use or creation of administrative law and worked as an assessor in the provincial administrative court for at least two years.

However, the requirements of this section do not apply to people with the title of professor or the academic degree of Doktor habilitowany in law[32] (not an ordinary Ph.D. in law). In addition, in exceptional cases, the President of the Republic of Poland, at the request of the National Council for the Judiciary, may appoint a candidate to the post of a judge, despite shorter periods of remaining in the positions mentioned

[31] Law on the System of Administrative Courts, 25 July 2002, Consolidated text, J. of L. (2014), item 1647, as amended.

[32] Doktor habilitowany – recommended by a fully qualified faculty board and granted by the Central Commission for Academic Titles and Degrees. Doctor of law (Ph.D. in law) is granted by a fully qualified faculty board. Doktor habilitowany (dr hab.) is a post-doctoral degree.

in point 7 or in practice as an advocate, legal counsel or notary public (Note: the same requirements, except points 5 and 7, apply to court assessors).[33]

A person appointed to a Supreme Administrative Court position must be one who:

1) has Polish citizenship and enjoys full rights as a citizen;

2) is of good character;

3) has completed a higher law studies program in Poland and obtained a Master's degree or foreign degree recognized in Poland;

4) is able, i.e. in good health, to perform the duties of a judge;

5 is distinguished by a high level of knowledge in the field of public administration and administrative law and other areas of law relating to the operation of public administration bodies; and

6) is at least 40 years of age and has remained at least for ten years a judge, prosecutor, president, vice-president, senior counsel or counsel in the offices of the Attorney General of the Treasury, or at least has practiced for ten years as a lawyer, solicitor or notary public. The requirement of 40 years of age does not apply to a judge who for least three years has remained a judge of a provincial administrative court.[34]

However, the requirements of this section do not apply to people with the title of professor or the academic degree of Ph.D. in law. In addition, in exceptional cases, the President of the Republic of Poland, at the request of the National Council for the Judiciary, may appoint a candidate to the post of judge, despite shorter periods of remaining in the positions mentioned in point 6 or in practice as an advocate, legal counsel or notary public.

With regard to the assessors, we immediately should mention that the institution of the assessor in the Polish judiciary has undergone an evolution, especially when it comes to the common courts. In short, the court assessor can be described as a probationary judge.

The Constitutional Court in its judgment of 24 October 2007[35] found that the delegation of the judicial duties of judges to assessors violated the Constitution. Although the legislation on the common jurisdiction courts of law was found unconstitutional, the literature reveals the view that entrusting the assessor with the duties of a judge in the provincial administrative court has a similar nature, as in the district courts, and therefore under the Constitution the performance of judicial duties by the assessors on the basis set out in the provisions governing the organization and proceedings of administrative courts must be regarded as allowed, up to the time specified by the Constitutional Court of an eighteen-

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[33] Law on the System of Administrative Courts, 25 July 2002, Consolidated text, J. of L. (2014), item 1647, as amended.

[34] Law on the System of Administrative Courts, 25 July 2002, Consolidated text, J. of L. (2014), item 1647, as amended, Art. 7.

[35] SK 7/06 (OTK-A ZU 2007, No. 9, item 108).

month deferment period.[36] The Constitutional Court may specify a different date for the end of the binding force of a normative act. Although this view aroused controversy in the doctrine, due to differences between the general jurisdiction courts and administrative courts (different methods of appointing the assessor), the institution of assessor was practically dead in respect of the administrative judiciary. As a result of amendments to the legislation, which came into force on 1 January 2016, the legislator attempted to restore this institution. This was not about an unconstitutional action, as Section 6.1 of the Court's ruling indicated that in the ruling on the unconstitutionality the Constitutional Court did not rule out the possibility of the existence of the institution of assessor – it only questioned its prescriptive form, taking into account entrusting (by the Minister of Justice, and therefore the representative of the executive) assessors with rulings, i.e. the performance of the constitutional functions of the judiciary, without the necessary constitutional guarantees of independence enjoyed by judges.

After the reform, the present situation is that the assessors are appointed by the President of the Republic of Poland, at the request of the National Council for the Judiciary. Court assessors are appointed for five-year terms, with the appointment place (office) of the assessor in the provincial administrative court.[37] In addition to the basic requirements common for judges and assessors, as mentioned above, the assessor must have at least four years work experience as a judge, prosecutor or president, vice-president, senior counsel or counsel in the offices of the Attorney General of the Treasury or have practiced for at least four years as an advocate, legal counsel or notary public, or remained for six years in government positions related to the use or creation of administrative law. Traditionally, in the Polish legal system such requirements of work or occupation positions do not concern people with the academic title of professor or the academic degree of Doktor habilitowany in law.

According to Article 10 of the Act on the System of Administrative Courts, apart from the judges and the assessors, the administrative courts employ senior court registrars, court registrars, senior assistants of judges, assistants of judges, clerks, and other employees of the court.

4. Scope of Administrative Jurisdiction

First of all, it should be noted that in the Polish legal system the Code of Administrative Proceedings is in force, which, despite the name, cannot be used as a procedural law regulating the procedure itself before administrative courts. The Code of Administrative Proceedings governs the proceedings before competent public administration

[36] M. Masternak-Kubiak in: T. Kuczyński, M. Masternak-Kubiak, The Law on Administrative Courts (Prawo o ustroju sądów administracyjnych), Commentary to Art. 4.

[37] Law on the System of Administrative Courts, 25 July 2002, Consolidated text, J. of L. (2014), item 1647, as amended, Art. 5.

authorities (not administrative courts) in individual cases to be determined by way of administrative decisions. Also, the Code should be applicable in cases before other state authorities and other entities appointed to decide on cases mentioned above by operation of law or on the basis of agreements. The Code of Administrative Proceedings also governs the proceedings regarding letters of dissatisfaction and proposals before state authorities, authorities of units of self-government, and before the bodies of social organizations.[38] In other words, it is primarily about the relationship between the authority body and the person in the issuing of individual decisions affecting that person. Poland (for a country with a socialist past) has a fairly long tradition of the codification of administrative proceedings. Comparing administrative law and court administrative law we can conclude the following:

These two areas of law supplement each other; the former serves to implement the substantive law in issuing individual administrative decisions, while the latter aims to control the compliance of administrative rulings with the law. The purpose of the law on court - administrative proceedings is not to implement the substantive law, but to monitor how the substantive law is being implemented.[39]

Therefore, court and administrative proceedings are regulated by the Law on Proceedings before Administrative Courts, rather than by the Code of Administrative Proceedings.

As mentioned above, cases within the jurisdiction of the administrative courts are addressed at the first instance by voivodship administrative courts. The Supreme Administrative Court exercises supervision over the activities of voivodship administrative courts regarding judgments in the manner prescribed by the law, and in particular considers the appeals from the decisions of those courts and adopts resolutions clarifying legal issues.[40] Thus, the administrative courts serve justice by the control over the operation of public administration and the settlement of conflicts of competence and jurisdiction between local government bodies and local government appeals boards, and between those authorities and the authorities of the government administration.[41] According to § 2 Article 3 of the Law on Proceedings before Administrative Courts, the control over the activities of the public administration by administrative courts includes adjudicating on complaints relating to:

– administrative decisions;

– decisions issued in administrative proceedings, which can be appealed against or which terminate the proceedings, as well as the decisions concluding the case on the merits;

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38 Code of Administrative Procedure of 14 June 1960, Consolidated text, J. of L. (2016), item 23.

39 M. Bińkowska, A. Chełchowski, R.A. Walawender, The Code of Administrative Proceedings XI (Warsaw 2010).

40 Law on the System of Administrative Courts, 25 July 2002, Consolidated text, J. of L. (2014), item 1647, as amended, Art. 3.

41 Law on the System of Administrative Courts, 25 July 2002, Consolidated text, J. of L. (2014), item 1647, as amended, Art. 1.

– decisions issued in enforcement proceedings and proceedings to secure claims, which are subject to appeal, with the exception of the decisions of a creditor on the inadmissibility of a submitted claim, and decisions the object of which is the position of the creditor on the claim submitted;

– written interpretations of the tax law issued in individual cases, advance protective tax decisions, and the refusal to issue such decision;

– acts of local law of the local government bodies and local organs of government administration;

– acts of supervision over the activities of local government bodies; and

– failure to act or excessive length of proceedings.

It should be noted that the administrative courts are not competent to decide on the following cases:

– those resulting from organizational superiority and subordination in relations between public administration bodies;

– those resulting from the dependence between supervisors and their subordinates;

– refusal to appoint for positions or appointment to serve in public administration bodies, unless the obligation of nomination or appointment is stipulated by the law;

– visas issued by consuls (in principle); and

– authorization to cross the national borders as part of the local border traffic issued by consuls.[42]

5. Powers of the Supreme Administrative Court

The Supreme Administrative Court recognizes appeals on decisions of the voivodship administrative courts. These include cassation appeals and complaints. Cassation appeal can be exercised for judgments issued by the voivodship administrative courts or decisions terminating the case. The basis for the cassation appeal may be a violation of substantive law by its erroneous interpretation or incorrect interpretation or application of proceedings provisions if the defect could affect the outcome of the case.[43] The literature is dominated by the view that the cassation appeal in court and administrative proceedings, unlike proceedings before courts in civil and criminal cases, is the ordinary means of appeal.[44] The decisions of the Supreme Administrative Court are not subject to cassation appeal or any other means of appeal. As mentioned above, the Supreme Court is not a court of a higher level for the Supreme Administrative Court. Additionally, the Supreme Administrative

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[42] Law on Proceedings before Administrative Courts of 30 August 2012, J. of L. (2016), item 718, Art. 5.

[43] Law on Proceedings before Administrative Courts of 30 August 2012, J. of L. (2016), item 718, Art. 174.

[44] M. Niezgódka-Medek in: B. Dauter, A. Kabat, M. Niezgódka-Medek, Prawo o postępowaniu przed sądami administracyjnymi, Komentarz [Law on proceedings before administrative courts, Commentary] 741 (Warsaw 2016).

Court is in no way a part of the common judiciary. Cassation appeal to the Supreme Administrative Court can be brought by a party, a prosecutor, the Ombudsman or the Ombudsman for Children after being served with a copy of the judgment along with the justification.[45] Thus, in the current legal environment the cassation appeal is not an extraordinary revision, as was the case with a one-instance court and administrative proceedings.

The complaint, as a second means of appeal, applies explicitly to decisions and orders mentioned in the Act (i.e. the Law on Proceedings before Administrative Courts). It is a means for stay of judgment and with relatively devolutive effect, and it also exhibits characteristics of a means for rehearing.[46]

For the unification of judicial practice, the power of the Supreme Administrative Court to adopt two types of resolutions is of great importance:

– resolutions aimed at clarifying legal provisions, the use of which caused a divergence in the case law of administrative courts; and

– resolutions including decisions on legal issues raising serious doubts in a particular court and administrative case.[47]

In Polish literature, the first resolutions are called abstract resolutions and the second are called concrete resolutions. We must agree that the ability to adopt such resolutions complements the supervisory powers of the Supreme Administrative Court which it has in relation to the courts of first instance.[48] Each of these resolutions, although at different levels, aims at unifying the case law of the court and administrative judicature.

A concrete resolution occurs in the situation where in the recognition of a cassation appeal a legal issue emerges that raises serious doubts. The Supreme Administrative Court may adjourn the proceedings and submit the issue to be resolved by a panel of seven judges of the Court. The resolution by the panel of seven judges is binding in the case;[49] there is no possibility that the panel ruled otherwise in a similar case; there is no possibility of the use of the so-called 'breaking method', i.e. a means by which to break the force of a resolution (this will be discussed below). As described in the literature, the exclusive competence to act in this regard lies in the Supreme Administrative Court's recognizing the cassation appeal.[50] Neither the parties nor the

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45 Law on Proceedings before Administrative Courts of 30 August 2012, J. of L. (2016), item 718, Art. 173.

46 W. Piątek in: A. Skoczylas, P. Szustakiewicz, Prawo o postępowaniu przed sądami administracyjnymi, Komentarz [Law on proceedings before administrative courts, Commentary] 361 (Warsaw 2016).

47 Law on Proceedings before Administrative Courts of 30 August 2012, J. of L. (2016), item 718, Art. 15.

48 W. Sawczyn in: A. Skoczylas, P. Szustakiewicz, Prawo o postępowaniu przed sądami administracyjnymi, Komentarz [Law on proceedings before administrative courts, Commentary] 33 (Warsaw 2016).

49 Law on Proceedings before Administrative Courts of 30 August 2012, J. of L. (2016), item 718, Art. 187.

50 W. Piątek in: A. Skoczylas, P. Szustakiewicz, Prawo o postępowaniu przed sądami administracyjnymi, Komentarz [Law on proceedings before administrative courts, Commentary] 348 (Warsaw 2016).

regional administrative courts have such powers. These resolutions are adopted by seven-judge panels; however, the seven-judge panel may – in the form of a decision – pass the legal issue to be resolved to the full chamber, and the chamber may pass it to the full panel of the Supreme Administrative Court. This primarily regards more complicated cases or cases of a greater systemic importance.

Abstract resolutions, on the other hand, are adopted by the Supreme Administrative Court at the request of the President of the Supreme Administrative Court, the Attorney General, the Ombudsman or the Ombudsman for Children. The President of the Supreme Administrative Court refers the application to the panel composed of seven judges, the entire chamber or the full panel of the Court.[51] Resolutions (concrete and abstract), upon their announcement, bind the administrative courts (at all levels) in all unsettled cases in which the interpreted provision could be applied.[52] Of course, the Supreme Administrative Court may – in the form of a decision – refuse to adopt a resolution, especially when there is no need to clarify doubts.

It is clear that there is no basis for treating resolutions as sources of law which are generally applicable, because resolutions are not binding for courts of general jurisdiction, but only for administrative courts. In the Polish legal system, a precedent is not a source of law, but in relation to the resolutions we can find the term 'factual precedent' in the literature. The validity of resolutions is not absolute; it is possible to break the force of a resolution. According to Article 269 of the Law on Proceedings before Administrative Courts, if any panel of the administrative court (which may be a court of any instance) recognizes that the case does not share the view expressed in the resolution of seven judges, the whole chamber or the full Supreme Administrative Court, it refers the resulting legal issue to be resolved by an appropriate panel. This applies to both abstract and concrete resolutions. In such a situation, the panel of seven judges, the chamber or the full panel of the Supreme Administrative Court will adopt another resolution. If the panel of a chamber of the Court, in explaining the legal issue, does not share the view expressed in the resolution of another chamber, it refers this issue to be resolved by the full panel of the Supreme Administrative Court. The new resolution may endorse the previous one, or quite the reverse – it may break the resolution. In this way courts can depart from the previously expressed position. The new resolution is absolutely binding in respect of the specific case in relation to which the challenged resolution was adopted. However, even if the resolution 'stays', other courts in relation to other cases may try to challenge the resolution in the same manner. After a certain time, some resolutions may grow even to the rank of principles in specific cases.

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[51] Law on Proceedings before Administrative Courts of 30 August 2012, J. of L. (2016), item 718, Art. 264.

[52] A. Skoczylas in: A. Skoczylas, P. Szustakiewicz, Prawo o postępowaniu przed sądami administracyjnymi, Komentarz [Law on proceedings before administrative courts, Commentary] 468 (Warsaw 2016).

6. Fundamental Principles

The issue of the court and administrative proceedings is arguable in the Polish science of law. Although a part of the rules recognized as principles was expressed explicitly in the Act on the System of Administrative Law, there are divergences, because no statutory list of principles is stated in one specific article. The literature also notes that some proponents of the doctrine emphasize the elements of the system characteristic of the court and administrative proceedings, some put more weight on procedural matters related to the course of the proceedings, and still others, apart from the procedural matters, try to highlight the place of judicial control of the administration in the Polish justice system.[53] For our purposes, it should be useful to review the classification provided in Volume 10 of the System of Administrative Law (System Prawa Administracyjnego),[54] which is one of the most significant studies of law and administrative procedure and the courts and administrative proceedings. It should be emphasized, however, that this is only a presentation of the views, shared by others, of one legal scientist.

I. Basic or general principles, whose role is not limited to court and administrative proceedings: these are often constitutional principles or related to human rights.

a. The principle of two instances

b. The principle of legality

This rule stems directly from the Constitution of the Republic of Poland, as in accordance with Article 7, "The organs of public authority shall function on the basis of, and within the limits of, the law," while Article 184 stipulates that, "The Supreme Administrative Court and other administrative courts shall exercise, to the extent specified by statute, control over the performance of public administration." Therefore, the supervision of administrative courts is based on only one criterion – the legality, which is widely understood as compliance with the law, and the courts may not also use other criteria, such as the integrity, economic viability or appropriateness.[55]

c. The principle of legal assistance to the parties

According to Article 6 of the Law on Proceedings before Administrative Courts, "[I]n … [the] event of a justified need the administrative court shall provide the parties appearing in the case without a lawyer, legal counsel, tax advisor or patent attorney

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[53] J.P. Tarno in: System prawa administracyjnego [The system of administrative law], 10 Sądowa kontrola administracji [Judicial review of the administration] 207–208 (R. Hauser, Z. Niewiadomski, A. Wróbel eds, Warsaw 2014).

[54] J.P. Tarno in: System prawa administracyjnego [The System of Administrative Law], 10 Sądowa kontrola administracji [Judicial review of the administration] 7 (R. Hauser, Z. Niewiadomski, A. Wróbel eds, Warsaw 2014).

[55] P. Szustakiewicz in: A. Skoczylas, P. Szustakiewicz, Prawo o postępowaniu przed sądami administracyjnymi, Komentarz [Law on proceedings before administrative courts, Commentary] 3 (Warsaw 2016).

the necessary instruction as to the procedural actions and the consequences of their negligence." There are a number of detailed rules governing the granting of assistance by the court in a particular case. The Supreme Administrative Court in its decision of 7 September 2011 pointed out that the "required guidance, referred to in article 6 of the proceedings before the administrative courts, is the guidance of the court, without which a party not using legal assistance would not have an influence on the ongoing case and therefore could not exercise its rights … This does not mean, however, that the court is obliged to instruct the party in detail for any possible behavior or warn the party against not caring for the party's own interests and recommend such actions, which every adult and thrifty man takes on their own based on their own life experiences."[56]

d. The principle of procedural economy (speed)

According to Article 7 of the Law on Proceedings before Administrative Courts, the administrative court should take action in order to quickly decide on the case and seek its settlement. Actually, from this article arises the principle of concentration of evidence. The presiding judge should prepare the material in such a way that the case could be addressed during one hearing, after which a substantive decision could be made.[57] Without a doubt, the length of proceedings (not only in the case of the court and administrative proceedings) is a huge problem assuming the proportions of a social problem, arousing the particular interest of citizens. Polish legislation in a comprehensive manner regulated the institution of the complaint on the length of proceedings by enacting a separate Act of 17 June 2004 on complaints on the violation of the right to hear the case in preparatory proceedings conducted or supervised by the prosecutor and the judicial proceedings without undue delay.[58] Article 4 of the Act states that if the complaint concerns the excessive length of the proceedings before the voivodship administrative court or the Supreme Administrative Court, the court competent to hear it will be the Supreme Administrative Court.

e. The principle of openness

This principle stems from the above-cited provisions of the Constitution (Art. 45 para. 1, Art. 184) and the international obligations of Poland. The principle also has constitutional legitimacy, as Article 45 of the Constitution stipulates that everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial, and independent court and exceptions to the public nature of hearings may be made for reasons of morality, state security, public order or protection of the private life of a party, or other important private interest.

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[56] The Supreme Administrative Court decision of 7 September 2011, I OZ 649/11.

[57] P. Szustakiewicz in: A. Skoczylas, P. Szustakiewicz, Prawo o postępowaniu przed sądami administracyjnymi, Komentarz [Law on proceedings before administrative courts, Commentary] 15 (Warsaw 2016).

[58] 179 J. of L., item 1843, as amended.

Judgments shall be announced publicly. Of course, there is the possibility of holding the hearing or any part thereof behind closed doors if the public hearing of the case threatens morality, state security or public order, and if classified information could be disclosed during the hearing. In addition, a party may request a closed session because of the protection of private life or other important private interest (cf. Art. 96 of the Law on Proceedings before Administrative Courts). In fact, this is in regards to the exclusion of openness to the public, not to the party. Additionally, each party may invite two persons of trust, despite the fact that the meeting is held behind closed doors, e.g. for the sake of minors.

f. The principle of access to the court

Apart from constitutional aspects and ratified international agreements, this principle is understood in the doctrine as the right to a fair trial, and is composed of the following elements:

– the guarantee of access to a court;
– the authority conducting the proceedings has all the qualities of a court;
– ensuring and compliance with relevant procedures;
– the effectiveness of the enforcement of judgments of the court.[59]

g. The adversarial principle

At present, this principle is present in procedures in a large number of countries. Examples of the application of this principle may include court and administrative proceedings that are initiated on a complaint by an authorized entity (not *ex officio*) and that the recognition of the case by the Supreme Administrative Court generally takes place within the complaint submitted.

II. Principles included in the second group, which are strictly procedural principles, specific to the proceedings before the administrative courts:

a. The principle of equality of parties.
b. The principle of availability.
c. The principle of the primacy of settling the case in the administrative proceedings.
d. The principle of material truth.
e. The principle of adjudicating in accordance with the state prevailing at the date of adoption of the contested act or actions.
f. The principle of not being bound by the limits of the complaint (here the principle of formality is manifested, as opposed to the adversarial principle), although the court is bound by the limits of the case. The appeal to the Supreme Administrative Court mentioned above is different. In other words, in the administrative judiciary in various instances there are adjacent and mutually exclusive principles in particular cases.

[59] This is adopted by J.P. Tarno with reference to other authors in: *System prawa administracyjnego [The system of administrative law]*, 10 Sądowa kontrola administracji [Judicial review of the administration] 7 (R. Hauser, Z. Niewiadomski, A. Wróbel eds., Warsaw 2014).

g. The principle of being bound by the legal assessment expressed in the final judgment of the court.[60]

7. Class Actions

Poland and many European countries have enacted changes to legislation introducing the hitherto unknown institution of the class action lawsuit. However, the special Act of 17 December 2009 on pursuing claims in group proceedings[61] regulates only civil proceedings in cases in which there are claims of one type, with at least ten people, based on the same factual basis. The Act is applicable in cases concerning claims for the protection of consumers in respect of liability for damage caused by dangerous products, and tort, with the exception of claims for protection of personal rights. In other words, it is about civil proceedings held in general jurisdiction courts. The institution of class action lawsuits in its own sense does not apply to the administrative court and administrative proceedings.

At the same time, it should be emphasized that Article 51 of the Law on Proceedings before Administrative Courts stipulates that several authorized persons may bring an action in one case and act as the applicants if their complaints concern the same decision, ruling or any other act or action, or failure to act, of a body or the length of proceedings. Such participation takes place only on the side of the applicants. Just as in civil proceedings, the participation may have a formal or a material nature.[62] The material participation occurs when in one case there is a commonality of rights and obligations of the participants. However, if the subject of the dispute is claims or liabilities of the same type, then we are dealing with formal participation.[63]

8. Statistics

A look at the statistical data relating to administrative jurisdiction is not only interesting, but also desirable in light of the obligations imposed on jurisdiction in the Act. According to Article 7 of the Law on Proceedings before Administrative Courts, the administrative court should take action in order to quickly decide on the case and seek to decide on it during the first hearing. At the same time, making statistical

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60 J.P. Tarno in: System prawa administracyjnego [The system of administrative law], 10 Sądowa kontrola administracji [Judicial review of the administration] 208 (R. Hauser, Z. Niewiadomski, A. Wróbel eds, Warsaw 2014).

61 J. of L., 18 January (2010).

62 A. Kabat, Commentary to Article 51 of the Law on proceedings before administrative courts (Lex 2013).

63 Cf. M. Sieradzka in: A. Skoczylas, P. Prawo o postępowaniu przed sądami administracyjnymi, Komentarz Szustakiewicz [Law on proceedings before administrative courts, Commentary] 112 (Warsaw 2016).

comparisons or drawing conclusions is often difficult owing to the relatively significant changes in the scope and structure of administrative jurisdiction. It is methodologically erroneous to compare, for example, the number of outstanding cases from 1985 with the number of such cases from 1995 or 2005, because in the socialist days the competence of the Supreme Administrative Court was limited, and after 1990, despite the strong extension of the powers, there still were no two-instance proceedings. In addition, this comparison cannot be made, because the small number of judges before 1990 cannot be compared with the number of judges in 2000.

In this situation, it seems advisable to compare statistics from selected years of three periods of operation of the administrative jurisdiction in Poland:

– since its revival to 1990, the so-called socialist period,
– from 1990 to 2004, after the extension of competence, and
– the current period of two-instance proceedings.

In 1981, which was the first complete year of operation of the Supreme Administrative Court (court cases had been filed throughout 1980 as well), there was a clear tendency to increase the number of cases brought literally every month. In 1981, a total of 7,926 cases of various nature were submitted. Back then cases were divided into so-called procedural and non-litigious cases. The procedural cases concerned complaints against administrative decisions or failure to act by state administration bodies in cases settled by a decision, and in turn the non-litigious cases related to the activities of these bodies in other legal forms than the decisions or activities of the bodies and organizational units not included in the state administration apparatus.[64] The Supreme Administrative Court did not have jurisdiction to deal with non-litigious complaints; moreover, the procedural complaints in 1981 already constituted 83.2% of all cases, and non-litigious complaints only 16.8%. This was only a matter of the lack of adequate information of citizens about the characteristics and scope of activity of administrative jurisdiction.[65]

In 1982, the number of complaints to the courts increased by about on-third. In the procedural method 8,829 cases were brought. This number does not include the filing of judicial documents subject to settlement in the non-litigious method, mainly by referring them to the competent authorities and providing the interested parties with explanations.[66] In terms of their nature, complaints related to public utilities and housing (33.6%), agriculture and forestry (25.4%), construction (13.7%), tax and

[64] Naczelny Sąd Administracyjny, Sprawozdanie z działalności NSA za okres 1981 r. [The Supreme Administrative Court, the Report on the activity of the Supreme Administrative Court for the period of 1981] 4 (Warsaw 1982).

[65] Naczelny Sąd Administracyjny, Sprawozdanie z działalności NSA za okres 1981 r. [The Supreme Administrative Court, the Report on the activity of the Supreme Administrative Court for the period of 1981] 4–5 (Warsaw 1982).

[66] Naczelny Sąd Administracyjny, Sprawozdanie z działalności NSA za okres 1982 r. [The Supreme Administrative Court, the Report on the activity of the Supreme Administrative Court for the period of 1982] 2 (Warsaw 1983).

customs duties (12.2%), employment and social affairs (1.3%), health and social care (1.2%), crafts and services (0.9%), and environmental protection (0.8%).[67]

The upward trend persisted almost to the time of the collapse of the socialist system, but between 1988 and 1990 the number of cases was slightly lower, yet already in 1991 it was higher by a quarter.[68] Such fluctuations can be explained by political changes.

Table 1. Complaints received by the Supreme Administrative Court and their settlement between 1989 and 1991[69]

Year	Cases remaining from the previous year	Complaints received	Cases settled	Remaining cases for the next year
1989	4,672	13,722	14,881	3,513
1990	3,513	12,504	13,304	2,713
1991	2,713	15,575	14,732	3,556

In subsequent years there has been a dramatic increase in the number of cases, as well as the backlog. At the same time, it cannot be stated statistically that the cases left for the next year were overdue, as they could have been brought even during the previous year.

Table 2. Complaints received by the Supreme Administrative Court and their settlement between 1992 and 1994[70]

Year	Cases remaining from the previous year	Complaints received	Cases settled	Remaining cases for the next year
1992	3,556	24,336	18,851	9,041
1993	9,041	30,278	23,144	16,175
1994	16,175	34,344	29,892	20,627

[67] Naczelny Sąd Administracyjny, Sprawozdanie z działalności NSA za okres 1982 r. [The Supreme Administrative Court, the Report on the activity of the Supreme Administrative Court for the period of 1982] 4 (Warsaw 1983).

[68] R. Hauser in: XXV-lecie Naczelnego Sądu Administracyjnego na tle dziejów sądownictwa administracyjnego w Polsce [35th anniversary of the Supreme Administrative Court on the background of the history of administrative courts in Poland] 48 (Warsaw 2005).

[69] Table 1 is a modification by the author of the table in the report on the activities of the Supreme Administrative Court for 1991: Naczelny Sąd Administracyjny, Informacja o działalności NSA w roku 1991 [The Supreme Administrative Court, information about the activities of the Supreme Administrative Court in 1991] (Warsaw 1992), Table 1.

[70] Table 2 is a modification of the table in the report on the activities of the Supreme Administrative Court for 1994: The Supreme Administrative Court, information about the activities of the Supreme Administrative Court in 1994, (Warsaw 1995), Table 1.

The year 2003 – the last year of the operation of the Supreme Administrative Court as a one-instance court before the reform of administrative jurisdiction – closed with the submission of 69,011 complaints.[71]

After the introduction of the two-instance proceedings, we should focus primarily on the filing of cases to the voivodship administrative courts as the courts of first instance. For example, in 2005 all the operating voivodship administrative courts received 62,909 complaints, while as much as 96.53% were complaints on acts and other activities, while only 3.47% were complaints on the failure to act by an authority. At the same time, the Supreme Administrative Court settled 6,535 cassation appeals, and for the subsequent year 6,263 remained.[72]

In 2015, all voivodship administrative courts received 83,529 complaints.[73]

Table 3. Complaints against acts and other actions and failure to act, and excessive length of proceedings of authorities settled by voivodship administrative courts between 2004 and 2015[74]

Year	Number of cases to consider in total (remaining + filed)	Cases settled	Remaining cases for the next year
2004	151,471	83,217	68,254
2005	131,163	87,383	43,780
2006	106,216	78,660	27,556
2007	86,184	66,942	19,242
2008	76,686	58,730	17,956
2009	77,058	59,500	17,558
2010	85,388	64,121	21,267
2011	91,118	69,281	21,837
2012	93,997	71,865	22,132
2013	103,766	75,969	28,070
2014	112,231	81,242	30,989
2015	114,520	81,353	33,167

[71] R. Hauser in: XXV-lecie Naczelnego Sądu Administracyjnego na tle dziejów sądownictwa administracyjnego w Polsce [35th anniversary of the Supreme Administrative Court on the background of the history of administrative courts in Poland] 48 (Warsaw 2005).

[72] Naczelny Sąd Administracyjny, Informacja o działalności sądów administracyjnych w 2005 roku [The Supreme Administrative Court, information about the activities of the administrative courts in 2005] (Warsaw 2006), Table I, Table X.

[73] Naczelny Sąd Administracyjny, Informacja o działalności sądów administracyjnych w 2015 roku [The Supreme Administrative Court, information about the activities of the administrative courts in 2015] 311 (Warsaw 2016).

[74] Naczelny Sąd Administracyjny, Informacja o działalności sądów administracyjnych w 2015 roku [The Supreme Administrative Court, information about the activities of the administrative courts in 2015] 316 (Warsaw 2016).

Table 4. Cassation appeals settled by the Supreme Administrative Court between 2004 and 2015[75]

Year	Number of cases to consider in total (remaining + filed)	Cases settled	Remaining cases for the next year
2004	6,167	2,918	3,249
2005	12,798	6,535	6,263
2006	16,700	8,788	7,912
2007	17,342	9,347	7,995
2008	18,114	9,389	8,725
2009	19,185	10,013	9,172
2010	20,848	10,922	9,926
2011	24,595	11,352	13,243
2012	28,260	12,276	15,984
2013	32,764	13,493	19,271
2014	37,058	14,994	22,064
2015	40,698	14,892	25,806

Analyzing the above data, we can talk about a certain stabilization of the judiciary after the reforms, and the constantly increasing number of cases and the resulting pressure on administrative jurisdiction. Inevitably, the length of proceedings has become a systemic problem which, however, is being fought. The literature has reported a moderate success in this field: "It should be noted in this context that in 1999, proceedings before an administrative court lasted an average of 42 months, in 2003 it was 36 months, in 2006 about 11 months and in 2009 proceedings before provincial administrative courts last only three to six months."[76] Once again it must be emphasized that the comparison of one-instance proceedings with the practice of provincial courts of first instance, for example from 2009, is a methodological error.

9. Role of the Judge – a Note

The role of the judge can be described at various levels, including the purely administrative level, and even the systemic and political levels when it comes to, for instance, the presidents of the various administrative courts or the President of the Supreme Administrative Court. However, at this point we would like to draw attention, only briefly, to the differences in the powers of the judge concerning the handling

[75] Naczelny Sąd Administracyjny, Informacja o działalności sądów administracyjnych w 2015 roku [The Supreme Administrative Court, information about the activities of the administrative courts in 2015] 339 (Warsaw 2016).

[76] A. Skoczylas in: Handbook of Polish Law 401 (W. Dajczak, A.J. Szwarc, P. Wiliński eds, Poznań 2011).

of complaints in the Regional Administrative Court and the cassation appeal in the Supreme Administrative Court. In § 1 of Article 134 of the Law on Proceedings before Administrative Courts there is the stipulation that the court decides within the limits of the case without being bound, however, with the accusations and motions of the complaint and established legal basis. From this rule there are exceptions, which are discussed below. In one of the judgments of the Supreme Administrative Court it was pointed out that from the settled jurisprudence it turns out that not being bound by the limits of a complaint does not mean that the court may make the subject of its considerations and assessments all aspects of the complaint, regardless of the content of the contested act or activity. This means, though, that the court has the right and even the duty to assess the legality of the contested administrative act even if the objection was not raised in the complaint. And in this regard the court is not bound by the wording of the complaint, arguments used, nor motions filed, objections or requests. So, even omitting the considerations regarding unjustified allegations in the justification for the judgment is not a violation of administrative court proceedings.[77] At the same time, the activism of the court in this regard cannot be understood in the sense that the voivodship administrative court will control a particular administrative act not at all involved in the case. The case law also shows that the recognition of the limits of the voivodship administrative court determines the administrative case, the content and the scope of which are determined by the standards of the substantive law.[78]

On the other hand, the limits of the administrative court case are determined by the administrative court relationship subject to settlement by the particular decision which was subject to appeal (an act or activity).[79] The binding nature of a decision by a court of first also consists in the fact that the court delivers a judgment on the basis of the case file, that is, the evidence collected. The complaint to the administrative court is filed through the body whose action, failure to act or excessive length of proceedings is the subject of the complaint. Accordingly, this body will forward the complaint to the court along with the complete and ordered case file, and answer to the complaint within thirty days of its receipt (Art. 54 of the Law on Proceedings before Administrative Courts). Starting from 11 February 2017, the complaint in the form of an electronic document will be submitted to the electronic delivery mailbox of that authority.[80]

From the above-described principle of not binding the voivodship administrative court with the allegations and motions of the complaint there is a statutory exception:

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77 Judgment of the Supreme Administrative Court in Warsaw on 14 February 2013, II GSK 1113/12.

78 Judgment of the Supreme Administrative Court in Warsaw on 14 February 2013, II GSK 1113/12.

79 P. Szustakiewicz in: A. Skoczylas P. Szustakiewicz, Prawo o postępowaniu przed sądami administracyjnymi, Komentarz [Law on proceedings before administrative courts, Commentary] 244 (Warsaw 2016).

80 Article 54 § 1a added by the Act of 10 January 2014 (J. of L. (2014), item 183), which enters into force on 11 February 2017.

a complaint on a written interpretation of tax law issued in an individual case, advance protective tax decisions and the refusal to issue such decision may be based solely on the grounds of the violation of proceedings, an error of interpretation or incorrect assessment as to the application of a rule of substantive law. The Administrative Court is bound by the allegations of the complaint and established legal basis (Art. 57a of the Law on Proceedings before Administrative Courts). We should also point out the realization of the *reformationis in peius* prohibition in Polish law: the court may not issue a judgment against the applicant unless it finds a violation of the law resulting in the annulment of the contested act or acts (§2 of Article 134 of the Law on Proceedings before Administrative Courts).

A completely different situation exists with respect to consideration of a cassation appeal by the Supreme Administrative Court. The Court hears the case within the limits of cassation appeal; however, it takes into consideration *ex officio* the elements that made the proceedings in front of the lower court null and void. Parties may cite new justifications for the basis of cassation (§ 1 of Art. 183 of the Law on Proceedings before Administrative Courts). The invalidity of proceedings occurs in very specific situations (for example, if the judicial path was inadmissible), and in the remaining situations the Court cannot go beyond the limits of cassation. If the applicant has indicated a specific provision of substantive or procedural law which allegedly was violated, the Court cannot examine whether or not it violated another provision even if the collected material demonstrates this.[81] Of course, such a rule is not absolute. With a resolution by a panel of seven judges the Supreme Administrative Court has decided that in a situation in which after the lodging the cassation appeal by the party the Constitutional Court ruled on the unconstitutionality of a normative act on the basis of which a decision is under appeal, if the unconstitutional provision was not indicated in the grounds of cassation, the Supreme Administrative Court should directly apply the provisions of the Constitution (Art. 190 paras. 1 and 4 of the Constitution of Poland) and take into account that the judgment of the Court is not bound by the limits of the cassation appeal.[82] The established constitutional norms stipulate that the "judgements of the Constitutional Tribunal shall be of universally binding application and shall be final" and a judgement of the Constitutional Tribunal on the non-conformity to the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective judgement of a court, a final administrative decision or settlement of other matters was issued, shall be a basis for reopening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings.

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[81] B. Dauter in: B. Dauter, A. Kabat, M. Niezgódka-Medek, Prawo o postępowaniu przed sądami administracyjnymi, Komentarz [Law on proceedings before administrative courts, Commentary] 828–829 (Warsaw 2016).

[82] Resolution by the panel of seven judges of 7 December 2009. OPS 9/09, ONSA WSA 2010, No. 2, item 16.

10. Cultural Observations

After many years of operation of administrative jurisdiction in Poland, we can definitely say that it has become not only a part of the Polish legal tradition, but something more in society. Administrative jurisdiction entirely contradicts the *Princeps legibus absolutus est* principle, not creating an absolute control mechanism of power, which would not be possible, but giving practical tools for the control of administration activities. In fact, the activity of administrative courts stripped away once and forever the assumption that public power is infallible. Actually, the increase in administrative jurisdiction of the courts, especially the changes in the political and systemic turning point of 1989, can be considered one example of the democratization of the society, and the recognition as demagoguery the belief that the Government always knows and does what is best. The citizen has got the right to stand on the same level with the authority in matters concerning him.

Additionally, the following observations can be made:

– The adoption of the current two-tier model of administrative jurisdiction should be regarded as successful and corresponding to Polish realities.

– In Polish society, there is no vital political force that proposes the abolition or substantial reduction of the jurisdiction of administrative courts. In the current political situation of acute conflict with the Constitutional Court, the constitutional and general judiciary receives far more criticism.

– The criticism of administrative jurisdiction is present in the public discourse, but it is more about the problems in the style of the excessive length of proceedings, among other things, than about the fundamental negation of the very idea of administrative justice. This does not mean that larger systemic changes are impossible.

– Appealing against decisions or failure to act by broadly understood administration does not raise any surprise and is considered a normal practice.

– No evidence exists of the authorities' actions aimed at the violation of the independence of judges and exerting pressure on them.

– Abolition of the judicial supervision by the Supreme Court on the administrative courts and equipping administrative jurisdiction with its own procedure should be considered successful.

In a sense, we can speak of the existence of a separate culture of administrative jurisdiction.

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PARTY AUTONOMY IN ADMINISTRATIVE (JUDICIAL) PROCEEDINGS

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In 2015 in Russian Federation the new Administrative Procedure Code was adopted. The Code uses the legal terms of action proceedings (administrative claim, administrative counterclaim, administrative plaintiff and defendant etc.) and determines "dispositive" rights of parties of administrative proceedings.

The author's intention is to analyze the scope of applying of the principle of party autonomy in administrative (judicial) proceedings. The article contains the comparative analysis of the principle in civil and administrative proceedings.

Key words: administrative proceedings; civil procedure; party autonomy; dispositive principle.

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Abbreviations

AdmPC – The Administrative Procedure Code of the Russian Federation
CivPC – The Civil Procedure Code of the Russian Federation
ComPC – The Commercial Procedure Code of the Russian Federation

In 2015 the new Administrative Procedure Code of the Russian Federation[1] was adopted. Courts of general jurisdiction are now rendering justice guided by three codes: Civil Procedure Code[2], Criminal Procedure Code and AdmPC. AdmPC came

[1] The Administrative Procedure Code of the Russian Federation, hereinafter – AdmPC.

[2] The Civil Procedure Code of the Russian Federation, hereinafter – CivPC.

into force on the 15th of September 2015 and governs the proceedings over disputes with public element in the courts of general jurisdiction (so called administrative cases such as validity of the regulatory and individual acts, compensation for judicial delays, collection of taxes and fees etc. excluding cases concerning administrative offences). The administrative cases concerning economic (entrepreneurial) matters are adjudicated by commercial courts under the Commercial Procedure Code of the Russian Federation.[3]

The administrative (judicial) proceedings are not new to Russian judicial process. During long time ordinary administrative cases were adjudicated both by the courts of general jurisdiction and commercial courts under the special rules which were part of the CivPC and ComPC accordingly. The proceedings in which administrative cases were adjudicated were called public matters proceedings. Special character and differences from ordinary proceedings of the rules and proceedings are explained by the features of the public legal relationship. Disputes in administrative case arise between two unequal subjects (one of which is state authority) about public matters. The rules that govern the settlement of such disputes serve to equalize such parties. The court in such cases does not only settle disputes, but also plays an essential role in the system of divisions of powers. The courts execute control functions over the executive bodies. It explains why a court has more active role in administrative proceedings than in civil one.

The AdmPC determines the following administrative cases that should be adjudicated under its regulation by the courts of general jurisdiction:

- avoidance of the regulatory acts in whole or in part;
- avoidance of the decisions, actions (inaction) of state bodies, other state bodies, military administration bodies, local government bodies, officials, public and municipal employees;
- challenging the decisions, actions (inaction) of non-profit organizations, endowed with certain state or other public authority, including self-regulatory organizations;
- challenging the decisions, actions (inaction) of the qualifying boards of judges;
- challenging the decisions, actions (inaction) of the High Examination Committee and examination boards;
- protection of electoral rights and the right to participate in a referendum;
- compensation for the violation of the right to trial within a reasonable time or right for performance of a judicial act within a reasonable time.
- the suspension of operations or liquidation of a political party;
- termination of the activities of the media;
- the recovery of sums of money for the payment of statutory compulsory payments (including tax) and penalties on individuals;
- the hospitalization of an individual to a medical organization and others.

[3] The Commercial Procedure Code of the Russian Federation, hereinafter – ComPC.

It could be seen from this list that all administrative cases that should be adjudicated under the AdmPC are the cases related to public relationship between state bodies and persons (legal entities). When CivPC and ComPC governed the adjudication of the cases with such public elements, these Codes did not use terms of the proceedings which is initiated by means of the claim (suit-based proceedings). There were no such terms as claim, plaintiff (claimant), defendant, counterclaim, amicable agreement etc. The legislator distinguishes the civil proceedings between two equal persons concerning a civil substantive right and a claim and the public matters proceedings related to a public substantive right. In the latter the court has active role, and subject of the proceedings is not private, but public interest.

The new AdmPC was drawn up in resemblance with CivPC. But for the framework authors took not the rules concerning public matter proceedings, but rules regulated ordinary suit-based proceedings. Thus legal terms related to action-based proceedings can be found now in the AdmPC that results some confusion especially when we analyze party autonomy in administrative proceedings.

Party autonomy is one of the principles of civil procedure law and international arbitration. Traditionally it is explained by way of the possibility to freely dispose one's civil law substantive rights (which are subject of the dispute). In Russian civil procedure theory we called it *dispositive* principle, which in the first place means the possibility to dispose one's civil substantive rights during the judicial proceedings. The substantive civil rights do not change its 'dispositive' nature even when they are challenged or defended in the court. Therefore the one who has substantive right can freely renounce it, defend it, change it, transfer it etc. The only one difference between a disposing rights in substantive legal relations and during court proceedings is that during court proceedings disposing of substantive rights has to have established procedural form. The disposition of substantive rights during civil proceedings has both substantive and procedural effects. For instance the decision of the plaintiff to renounce his substantive right would cause the termination of the proceedings; a cession results replacement of a plaintiff by his procedural successor etc.

The main rights that constitute the substance of the party autonomy in civil procedure, are the right to defend substantive right before court (bring an action), the right to determine a claim, a remedy, a defendant, a basis of the claim and cost of action, right to conclude agreement, right to change the claim or to renounce it. All these possibilities related to the claim. The claim itself (even before bringing an action before the court) is a part of any substantive private civil right. It is admitted that any claim that form a civil suit has substantive nature. It derives from substantive civil right.

Parties and first of all plaintiff who is subject of the civil private right determine the scope of adjudication in civil procedure. Ordinarily a judge has passive role or no authority concerning this matter (*judex ne eat ultra petita partium ultra petita non co*gnoscitur). All mentioned above consequences of private law party autonomy

come to the procedural right to dispose 1) substantive right and consequent claim (res in judicium deducta) 2) procedural mechanisms (instruments) of defend and offence (Rechtsmittel, Beweismittel). Thus two sides of the party autonomy can be allotted – substantive and formal (procedural) one.[4]

Likewise an action has two sides – substantive one (related to the substantive claim brought before court) and procedural one (concerning the demand to the court to settle a case), the party autonomy principle also has two sides. The substantive part of the dispositive principle refers to the possibility to freely dispose *substantive (private/civil)* claim during civil process. The procedural part of the principle more refers to the procedural form of such disposition. In modern civil procedure theory this procedural side of the principle of party autonomy also includes some procedural 'dispositive' rights that are not related to the claim but influence the process itself. This is right to appeal, right for enforcement proceedings, the right to choose a form of the dispute settlement and the right to choose a forum (prorogation).

Party autonomy premises that the parties are in control of specific aspects of the proceedings: the institution and continuation of the proceedings; the scope of the legal dispute; taking part in the proceedings. Party autonomy does not apply to the course of the proceedings. This is rather a matter of collaboration between the parties and the court. The principle of judicial activity implies that the court must act with restraint in respect of those aspects of the proceedings over which the parties have control under the principle of party autonomy. Party autonomy and judicial activity are limited where public policy provisions apply.

UNIDROIT Principles of Civil Procedure[5] distinguish the principle of the party initiative and scope of the proceeding. According to this principle the proceeding should be initiated through the claim of the plaintiff, not by the court acting on its own motion. The scope of the proceeding is determined by the claims and defenses of the parties in the pleadings, including amendments. A party, upon showing good cause, has a right to amend its claims or defenses upon notice to other parties, and when doing so does not unreasonably delay the proceeding or otherwise result in injustice. The parties should have a right to voluntary termination or modification of the proceeding or any part of it, by withdrawal, admission, or settlement. A party should not be permitted unilaterally to terminate or modify the action when prejudice to another party would result. At the same time UNIDROIT Principles of Civil Procedure define the principle of the court responsibility for direction of the proceeding. Commencing as early as practicable, the court should actively manage the proceeding, exercising discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed.

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[4] Васьковский Е.В. Учебник гражданского процесса [E. Vaskovski, Civil Procedure Textbook] 97 (Moscow 1917).

[5] ALI / UNIDROIT Principles of Transnational Civil Procedure, available at <http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf>.

Usually the principle of the judge's case management (or active role of the judge) is considered along with the principle of adversarial proceedings. Meanwhile active or passive role of the judge during a party's disposition of substantive or procedural rights is determinant characteristic of the proceeding itself.

When we proceed to examine the principle of party autonomy in administrative proceedings we should start from this basic conception of this principle in civil procedure. It is obvious that the nature of private and public rights is different. There is the possibility to dispose public rights (for instance to refrain from disposition of a public right), but the scope of such disposition is incomparably less than for civil rights[6].

Public relations by the legal nature are subordinated. Russian scholars admit that public right unlike private one does not include the possibility to claim something from the state body. The private person has only right to appeal to the court for protection against unlawful acts of public authorities and official[7]. It means that the public autonomy in administrative proceedings can be described only from the procedural side.

The AdmPC contains the list of principles that governs administrative justice (art. 6), which includes such principles as independence of the judiciary; equality before the law and the courts; the legality and justice of adjudication of administrative cases; the implementation of the administrative proceedings within a reasonable time and the enforcement of judgments in administrative cases within a reasonable time; transparency and openness of the trial; the immediacy of the trial; equality of parties and adversarial administrative proceedings with the active role of the court.[8] The principle of party autonomy is not mentioned in this list. Russian scholars acknowledge that in some extent this principle should be applied to the adjudication of administrative cases.[9] Meanwhile this principle is confined (in more extent than in civil procedure) by the idea of the active role of the judge. The active role of the court in administrative justice is manifested in the implementation not only of the principle of adversarial proceedings but also other principles. In particular, the

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[6] More about the nature of the disposition of civil and public rights refer to Третьяков С.В. О проблеме догматической квалификации «правомочия распоряжения». Основные проблемы частного права [Tretyakov S.V. About a problem of the dogmatic classification of the 'possibility of disposition'. Main problems of private law] 317–344 (Moscow 2010).

[7] Рожкова М.А., Глазкова М.Е., Савина М.А. Актуальные проблемы унификации гражданского процессуального и арбитражного процессуального законодательства [Rozhkova M.A., Glazkova M.E., Savina M.A. Contemporary problems of unification of the civil and arbitrazh procedure legislation] (Infra-M 2015).

[8] It is worth to mention that neither ComPC or CivPC can boast of such list.

[9] Комментарий к Кодексу административного судопроизводства Российской Федерации (постатейный, научно-практический) [Annotation to the Code of administrative procedure] (V.V. Yarkov ed., Statut 2016); Воронов А.Ф. Гражданский процесс: эволюция диспозитивности [Voronov A.F. The evolution of the dispositive principle] (Statut 2007).

specificity of the party autonomy principle in administrative proceedings assumes, in contrast to the civil proceedings, that the court overseeing the development of the judicial process and the disposition of the substantive rights.

The definition of the party autonomy principle can be found in the decision of the Russian Constitutional Court: "... party autonomy means that procedural relationships arise, change and terminate mainly on the initiative of those directly involved into substantive relations at issue, and which have the possibility to dispose of procedural rights by means of the court."[10] The Constitutional Court noted that the restriction of the principle of party autonomy, due to the specifics of a administrative disputes is permissible only in cases where the nature of the dispute public relations does not imply the possibility of free disposal of substantive right.

Analysis of the position of the Constitutional Court leads to several important conclusions. Firstly, procedural relationships arise, change and terminate mainly on the initiative of those directly involved into controversial substantive relations. Secondly, within the framework of proceedings party of the disputed substantive relations can dispose of both the procedural rights and controversial substantive right. Thirdly, the court plays active role and controls over the disposition of rights. Fourthly, the party autonomy can be applied in administrative proceedings only to the cases where substantive right can be disposed.

The party autonomy principle in civil procedure includes several so-called dispositive rights such as

- the right to choose a form of the dispute settlement;
- the right to choose a forum (prorogation);
- the right to apply to the court (nemo judex sine actore; nemo invitus agere cogitur)
- the right to determine a claim, a respective remedy and suitable grounds of the claim;
- the right to claim prejudgment remedies which can guarantee the enforceability of the judicial decision
- the right for recalling or renunciation of a claim;
- the right to change a claim (claim itself, grounds of the claim and its size);
- the right to bring counterclaim;
- the right of the defendant to accept a claim;
- the right to conclude an amicable agreement;
- the right to appeal (incl. the right to determine the scope of appealing proceedings);
- the right for enforcement proceedings and others.

Further we would analyze if some of these dispositive rights can be exercised in administrative procedure in comparison with civil procedure.

[10] The Decision of the Constitutional Court of Russian Federation on 16 July 2004 No. 15-П.

The right to bring an administrative action, to determine claim and its basis. In civil procedure a plaintiff has the right to determine the scope of adjudication by defining the claim, the specific remedy and the underlying grounds of the claim. For instance, in case of non-performance of the contract the seller has opportunity to choose between claims to perform a contract or to cancel an agreement and demand his property back. The basis of the claim is usually arisen from the substantive law that defines the legal factual circumstances that origin the substantive right. In some rare cases the substantive law involves different basis for the origin of the same right. In this case a plaintiff has possibility to choose the basis of the claim. Also in civil procedure a plaintiff can define the cost of the claim and can combine several claims. As a rule a court has no right to overstep the limits of the claim(s) that is defined by a plaintiff.[11] Here we have a logical trap. In civil procedure the court *ex officio* applies law. Law defines the specific remedy to defend the substantive right and underlying grounds to be basis for the claim. Thus by applying law a judge can qualify if the remedy and the basis were determined right by the plaintiff. And if not, can the court *ex officio* change the remedy (in case of the competition of actions) or the basis for the purpose of just adjudication. There is not a one-valued decision of this problem. The balance between a party autonomy and the active role of a judge should be examined in every different case.

In administrative proceedings there is also strict rule that there is no adjudication without a claim. In all kind of cases, which are arisen in administrative procedure, the court needs an administrative action from an administrative claimant to commence proceedings. *De jure* administrative claimant similar to civil procedure has right to determine his claim and underlying grounds of it. But *de facto* the AdmPC defines almost all possible claims that can be brought before the court and its possible grounds.

First of all mentioned above the list of cases that are heard by the court in administrative proceedings is formed on the basis of sorts of claims that can be brought before court. Thus there is no opportunity to choose a specific remedy, because each case has its own fixed formal statement of claim that initiates proceedings. For instance, a claim of an avoidance of the regulatory acts in whole or in part; a claim of an avoidance of the decisions, actions (inaction) of state bodies, other state bodies, military administration bodies, local government bodies, officials, public and municipal employees; a claim for compensation for the violation of the right to trial within a reasonable time or right for performance of a judicial act within a reasonable time etc. Thus in civil procedure a remedy can be chosen by a plaintiff from remedies established by substantive law. In administrative proceedings the

[11] There is some exclusion, which is determined by the substantive law. For instance, art. 166 of the Civil Code of Russian Federation determines that the court may apply the consequences of the invalidity of a void transaction on its own initiative, if it is necessary for the protection of public interests, and in other cases provided by law.

formal statement of claim is define in formulas in the AdmPC. That does not mean any restriction of the party autonomy. It just reveals that the substance of substantive public rights in administrative legal relations that gives no choices of remedy for a claimant.

The same can be said about the choice of a basis of a claim. Determined by the AdmPC claims have fixed by this Code grounds. For instance, the basis for the claim of an avoidance of the regulatory acts in whole or in part is determined by the art. 209 of the AdmPC (to avoid an act a plaintiff should indicate the fact of application of the challenged normative legal act to the plaintiff or the fact that a plaintiff is subject to administrative relations regulated by this act; the fact of violation of the rights, freedoms and legitimate interests of the person who filed a lawsuit; the fact that normative act contradicts the act that prevails the challenged act in legal force). Further the court is not bound by the grounds, indicated by a plaintiff. Art. 213 of the AdmPC determines the facts, that should be ascertained by the court whatever grounds were specified by a plaintiff. For instance in for the claim of an avoidance of the regulatory acts the court should found out 1) whether the rights, freedoms and legal interests of the plaintiffs were violated; 2) whether the normative legal acts conforms established requirements concerning a) the competence of the body for the adoption of regulatory legal acts; b) the form of the normative legal acts; c) the procedure for adoption of the contested normative legal act; g) the order of publication, state registration (if the state registration of normative legal acts of data provided by the legislation of the Russian Federation) and their entry into force; 3) compliance of the contested normative legal act with a normative legal acts with higher legal force.

Right to choose a defendant. In civil procedure it is essential right of a plaintiff to choose a person to which its claim is addressed. In administrative proceedings there is some exclusion from this general rule. The art. 221 of the AdmPC sets that in the administrative case in which the decisions, actions (inaction) of an official, state or municipal employee is challenging the court has to bring to the trial as the second defendant the appropriate administrative authority, where official, state or municipal employee holds an office.

The art. 43 of the Code establishes that if during pre-trial stage of the adjudication the court determines that the plaintiff brought an action against wrong person, the court can replace the defendant with the plaintiff's consent. If the administrative claimant does not agree to replace the administrative defendant the court may, without the consent of the plaintiff's bring to trial that person as the second defendant.

These rules violate the traditional principle of party autonomy and grant the court the right to define defendant in administrative cases or, in other words, to bring a new action itself without consent of the administrative claimant. The court prejudges the final conclusion about the person who holds public obligations.

The right to renounce a claim. According to the art. 46 of the AdmPC administrative plaintiff is entitled to renounce a claim in whole or in part before a judicial act that terminates the proceedings in a court of first instance or appellate court.

The Court does not accept the renunciation it contradicts the AdmPC, other federal laws or violating the rights of others.

The article 194 of the AdmPC determines that the renunciation of a claim leads to the termination of proceedings (means the plaintiff could not bring the same action before court).

The same rules can be found in CivPC and ComPC. We can see in these rules the balance between the principle of active judge and the possibility to freely dispose of substantive rights. A judge has to control the legitimacy of the plaintiff's actions. AdmPC and ComPC determine that the right to renounce of a claim can be dispose only before a judgement has res judicata effect (in first and appellate instances). CivPC does not impose such restrictions.

The article 213 of the AdmPC determines that if a court adjudicates a case concerning an avoidance of the regulatory acts in whole or in part, renunciation of a claim does not entail the obligation of the court to terminate proceedings. In such cases a court fulfil obligation not only to adjudicate a dispute, but to carry out control over state executive authority. In such cases an administrative plaintiff has right to renounce but at the same time the court has two options: 1) to terminate proceedings in case if there are no public interests that prevent a court from taking this renunciation or 2) to continue adjudication.

Rights of a defendant for counterclaim and acceptance of a claim. The CivPC determines the right of a defendant to bring a counterclaim in case when 1) counter-claim is directed to set off the initial requirements; 2) satisfaction of the counterclaim excludes fully or partly satisfaction of the initial claim; 3) there is mutual relationship between the counterclaim and the initial claims their joint adjudication will lead to a more rapid and proper settlement of the dispute.

The art. 131 of the AdmPC determines the same grounds of bringing an administrative counterclaim. De facto, virtually none of the administrative cases gives possibility to bring a counterclaim.

Amicable agreement. The art. 39 of the CivPC defines the right of the party to conclude an amicable agreement (compromise settlement of the dispute). The new AdmPC determines so called agreement on reconciliation that can be concluded by the parties. The art. 46 of the AdmPC sets that the court does not accept the agreement for reconciliation, if such agreement is expressly prohibited by law, contrary to the merits of the administrative proceedings or violate the rights of others. According to the art. 137 of the AdmPC reconciliation of the parties can only affect their rights and obligations. Such agreement is allowed only in the case of the admissibility of mutual concessions of the parties. The Court does not approve the agreement on the reconciliation of the parties, if the conditions are contrary to the law

or violate the rights, freedoms and legitimate interests of others. After approving of the reconciliation agreement the administrative proceedings are terminated in whole or in relevant part. The reconciliation agreement is prohibited in the cases concerning avoidance of the regulatory acts in whole or in part (art. 213 of the AdmPC).

The amicable agreement in civil procedure is a civil law agreement between two parties. The legal nature of the reconciliation agreement in administrative proceedings is to be found. Some Russian scholars doubt that the subject matter of the administrative proceedings is substantive right.[12] The possibility to reconciliation between parties of the public matter proceedings is a new idea for the Russian procedural law. The act of the Plenum of the Supreme Court of Russian Federation defined that the question of the legality of an act of public authority cannot be affected by any agreement between the applicant and state body.[13] Procedural rules determine only the possibility and the form of a reconciliation agreement. It is questionable what law will regulate the content of such agreements and what would be their subject. The Act of the Plenum of the High Commercial Court defined that only some procedural aspects can be subject of such agreement: "…arbitration courts should take into account that according to the reconciliation agreement may include: recognition of the circumstances of the case, the parties' agreement on the circumstances of the case; the parties' agreement containing qualification of transaction made by a person involved in the case, or the status and nature of the activities of that person; partial or full waiver, a partial or complete acceptance of the claims requirements an agreement of the assessment of the circumstances as a whole or in separate parts."[14]

Right to appeal. The AdmPC grants right to appeal to parties of administrative proceedings. The main difference between civil and administrative proceedings in this matter is that in administrative procedure parties has no right to define the scope of appealing proceedings. According to the art. 308 of the AdmPC the appellate court judge an administrative case in full and is not bound by the grounds and arguments set out in the appeal or objections regarding appeal.

The brief analyze of the applying of the principle of party autonomy in administrative proceedings shows that the AdmPC does not logically develop this idea. Thoughtless reproduction of the action of the principle from the suit-based ordinary proceedings could not work because of the particular nature of the public relations that are subject of the adjudication.

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[12] Шерстюк В.М. *К десятилетию АПК РФ: о предмете деятельности арбитражного суда первой инстанции по делам, возникающим из административных и иных публичных правоотношений,* 3 Вестник гражданского процесса (2012) [Sherstyuk V.M. *10 year of the ComPC: about the subject of adjudication of the public matter and administrative cases*, 3 Vestnik grazhdanskogo processa (2012)].

[13] The Act of the Plenum of the Supreme Court, 10 Feb. 2009, No. 2.

[14] The Act of the Plenum of the High Commercial Court, 18 July 2014, No. 50.

Consequently the inconsiderate use of such terms of civil procedure as claim, plaintiff, defendant, counterclaim resulted that the legislator tries to apply the institute of claim (action) in its substantive meaning to the proceedings with public nature.

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CASES COMMENTS

CASE COMMENT ON NATIONAL LEGAL SERVICES AUTHORITY V. UNION OF INDIA & OTHERS (AIR 2014 SC 1863): A RAY OF HOPE FOR THE LGBT COMMUNITY

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The lives of human beings are full of complexities, but LGBT face much more trauma compared to other people. What is necessary is to understand the sentiments of the LGBT community and also to grant them common human rights. But the world lowers its eyes and refuses a discussion over the granting of basic human rights to the LGBT community. And it is so sad to see that such discrimination exists even in the 21st century. Indian law, on the whole, only recognizes the paradigm of the binary genders of male and female, based on a person's sex assigned at birth, which permits a gender system, including the laws relating to marriage, adoption, inheritance, succession and taxation, and welfare legislation. The most pertinent question with respect to the LGBT community is whether LGBT are to be discriminated against by other human beings. Merely being different does not give others the authority to ostracize one from society. In fact, in July 2009 the Delhi High Court ruled that consensual same-sex relations between adults in private could not be criminalized. Then in a recent judgment, the Supreme Court of India expressed its concerns over the mental trauma, emotional agony and pain of the members of the transgender community: all forms of mental suffering of the LGBT community, as well as ignorance and isolation of the community, were brought to an end by the Court's decision in National Legal Services Authority v. Union of India & Others.[1]

Keywords: LGBT; human rights; identity; discrimination; judgment.

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[1] Writ Petition (Civil) No. 400 of 2012, Judgment dated 15 April 2014.

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Introduction

Gay rights are human rights,
and human rights are gay rights, once and for all.
Hillary Clinton, 2011

LGBT has become a widely accepted designation for sexual minorities and gender orientation. All members of this community are subject to similar prejudices rooted in beliefs and traditions about sexuality and gender. The LGBT community, as a social minority group, suffers from various forms of social, political, economic and cultural injustice. The lack of social recognition has an effect on the capacity of the LGBT community to fully access and enjoy their inherent rights as citizens within their own territory. They are often exposed to intolerance, discrimination, harassment and the threat of violence owing to their sexual orientation, differently from those who identify themselves as heterosexual.

Democracy has played a vital role in identifying the rights of the LGBT community. It is noteworthy that gay rights have progressed farthest in the very parts of the world where democracy has been most successful, and that gay rights have struggled the most in the very places where democracy has faced difficulties in advancing or has not advanced at all.[2] Democracy also facilitates gay rights by making possible a vibrant and robust civil society that can exist only within a political framework allowing for freedom of association.[3]

Hence, the most sensible approach for the LGBT community would be to fortify existing programmes to promote democracy, civil society and the rule of law. It is due to democratization that today lesbian, bisexual, gay, transgender and 'hijra' (a Hindi word, meaning eunuch, that today is used in South Asia for a person whose sex at birth is male but who self-identifies as female or as neither of the male nor of the female sex) communities in India are asserting their right to freedom from discrimination on the basis of sexual preference. Voicing their concerns in social, legal and political contexts, they are building alliances with other peoples' struggles. This has resulted in a vibrant political movement. While their strength is gaining on one level, the movement's voices are often in conflict with each other, which has fractured the movement's collective strength. Many women's groups, lawyers and human rights activists have articulated

[2] Omar G. Encarnación, *Gay Rights: Why Democracy Matters*, 25(3) J. of Democracy (2014).

[3] *Id.*

concern and joined in solidarity to establish dialogue between movement factions to unite for sexual freedom. Together they and, most importantly, the LBGT and hijra individuals themselves work to overcome these obstacles in pursuit of a society that celebrates and protects the rights of sexual minorities.

Equality is a dynamic concept and cannot be restricted to any doctrinal limitation.[4] The battle of the LGBT community for the recognition of similar rights as other human beings is at its peak in every part of the world. A large section of the international human rights community has reacted strongly against the violence, discrimination and persecution that LGBT people openly face in the world, calling for their protection through the application of international human rights law.[5] There are also non-state actors such as NGOs that for the last three decades have incessantly raised the concerns of the LGBT community. It should be considered shameful then that today some citizens are still fighting for honour in their own countries.[6] The LGBT community is made up of people of all racial, socio-economic, religious and non-religious, and age backgrounds.[7] In India, their struggle for absolute identity in the Constitution has recently been recognized by the courts, and the Indian courts have also given prominence to the human rights concerns of the LGBT community.

Transgender Rights Case

The case under comment is *National Legal Services Authority v. Union of India & Others*[8] which was brought before the Supreme Court of India and concerned the grievances of the members of the transgender community, who sought a legal declaration of their gender identity different from the one assigned to them, male or female, at the time of their birth, and who stated that non-recognition of their gender identity violated Articles 14[9] and 21[10] of the Constitution of India.

The petitioner highlighted the traumatic experiences of the members of the transgender community and submitted that every person of that community has a legal right to decide their sex orientation and to espouse and determine their

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4 *E. P. Royappa v. State of Tamil Nadu*, AIR 1974 SC555.

5 Jayesh Needham, *After the Arab Spring: A New Opportunity for LGBT Human Rights Advocacy?* 20(87) Duke J. of Gender L. & Pol'y (2013).

6 *Assam Sanmilita Mahasangha & Others v. Union of India*, Writ Petition (Civil) No. 562/2012, Judgment dated 17 December 2014.

7 Who and what is LGBT?, available at <http://tnlr.org/wp-content/uploads/2011/04/Who-and-what-is-LGBT.english.pdf> (accessed Dec. 14, 2015).

8 Writ Petition (Civil) No. 400 of 2012, Judgment dated 15 April 2014.

9 Constitution of India, Art. 14 – "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

10 Constitution of India, Art. 21 – "No person shall be deprived of his life or personal liberty except according to procedure established by law."

identity. It was submitted that since transgender people are treated neither as male or female, nor given the status of a third gender, they are being deprived of many of the rights and privileges which other people enjoy as citizens of India. Transgender people are deprived of social and cultural participation and hence are restricted from access to education, healthcare and public places which deprives them of the constitutional guarantee of equality before the law and equal protection of the laws. Furthermore, it was also pointed out that members of the community also face discrimination with regard to candidacy for election, the right to vote, employment, obtaining licences, etc. and, in effect, are treated as outcasts and untouchables.

Historical Background of Transgenders in India

The Supreme Court of India took into consideration Indian scriptures and sought to identify the status of the transgender community during ancient periods. Asian countries have centuries-old histories of the existence of gender-variant males, who in present times would be labelled 'transgender women'. India is no exception. The Kama Sutra provides vivid descriptions of the sexual life of people with a 'third nature' (*tritiya prakriti*).[11]

The historical background of the third gender identity in India signifies the position accorded to them in Hindu mythology, Vedic and Puranic literature, and the prominent role played by them in the royal courts of the Islamic world, among others. The transgender community includes *Hijras, Kothis, Aravanis, Jogappas* and *Shiv-Shakthis*, and they, as a group, have a strong historical presence in India in Hindu mythology and religious texts. The concept of *tritiya prakriti* or *napunsaka* has also been an integral part of Vedic and Puranic literature. The word *napunsaka* has been used to denote the absence of procreative capability.[12]

Ramayana

Lord Rama, in the epic poem *Ramayana*, leaving for the forest upon being banished from the kingdom for fourteen years, turns to his followers and asks all the 'men and women' to return to the city. Among his followers, the hijras alone do not feel bound by this direction and decide to stay with him. Impressed with their devotion, Rama sanctions them the power to confer blessings on people on auspicious occasions such as childbirth and marriage, and also at inaugural functions which, it is believed, set the stage for the custom of *badhai* in which hijras sing, dance and confer blessings.[13]

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[11] UNDP (United Nations Development Programme), India, A Report on "Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion" (Dec. 2010).

[12] Supra, note 1 at ¶ 12.

[13] *Id.*, at ¶ 13.

Mahabharata

Aravan, the son of Arjuna and Nagakanya in *Mahabharata*, offers to be sacrificed to the Goddess Kali to ensure the victory of the Pandavas in the Kurukshetra War. The only condition that he makes is to spend the last night of his life in matrimony. Since no woman was willing to marry one who was doomed to be killed, Krishna assumes the form of a beautiful woman called Mohini and marries him. The Hijras of Tamil Nadu consider Aravan their progenitor and call themselves Aravanis.[14]

Jain Texts

Jain texts also make a detailed reference to transgender that mentions the concept of '*psychological sex*.'

Hijras also played a prominent role in the royal courts of the Islamic world, especially in the Ottoman Empire and the Mughal rule in Medieval India. A detailed analysis of the historical background of the same finds a place in the book *With Respect to Sex: Negotiating Hijra Identity in South India* by Gayatri Reddy.[15]

Criminal Tribes Act, 1871: the Darkest Legislation

During British rule, legislation was enacted to supervise the actions of the hijras/transgender community, titled the Criminal Tribes Act, 1871, which deemed the entire community of hijras persons as innately 'criminal' and "addicted to the systematic commission of non-bailable offences". The Act provided for the registration, surveillance and control of certain criminal tribes and eunuchs, and it penalized eunuchs (who were registered) who appeared dressed or ornamented like women in a public street or place, as well as those who danced or played music in a public place. Such persons could also be arrested without warrant and sentenced to imprisonment up to two years or fined, or both. These communities and tribes were perceived to be criminal by birth, with criminality being passed on from generation to generation. In 1897, the Criminal Tribes Act of 1871 was amended, and under the provisions of the statute "a eunuch was deemed to include all members of the male sex who admit themselves, or on medical inspection clearly appear, to be impotent".[16] Under the Act, the local government was required to register the name and residence of all eunuchs residing in the area, as well as their property, who were reasonably suspected of kidnapping or castrating children, or of committing offences

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[14] *Id.*, at ¶ 14.

[15] *Id.*, at ¶ 15.

[16] UNDP (United Nations Development Programme), India, A Report on "Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion" (Dec. 2010).

under Section 377[17] of the Indian Penal Code (IPC), or of abetting the commission of any of the said offences.

Under the Act, the act of keeping a boy under sixteen years of age in the charge of a registered eunuch was made an offence punishable with imprisonment up to two years or fine, and the Act also stripped the registered eunuchs of their civil rights by prohibiting them from acting as guardians to minors, from making a gift deed or a will, and from adopting a son. The Act was repealed in August 1949.

Ill Treatment of the Transgender Community: Judicial Precedent

In *Queen Empress v. Khairati*[18] a transgender person was arrested and prosecuted under Section 377 IPC on the suspicion that he was a "habitual sodomite". He was later acquitted on appeal. This case demonstrated that Section 377, though associated with specific sexual acts, highlighted certain identities, including hijras, and was used as an instrument of harassment and physical abuse against hijras and transgender people.

International and Regional Conventions

The Supreme Court of India seriously deliberated over international conventions[19] and reports while deciding the matter over the rights of the transgender community and it exhaustively referred to various articles contained in the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966, the International Covenant on Civil and Political Rights, 1966 as well as on the Yogyakarta Principles. International forums and U.N. bodies have also recognized the gender identity of transgender people and referred to the Yogyakarta Principles,[20] and have pointed out that those principles have been recognized by

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[17] Indian Penal Code: § 377 – "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine**.**

*Explanation***.** Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section**."**

[18] (1884) ILR 6 All 204.

[19] Constitution of India, Art. 253 – "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body." See also Art. 51 of the Constitution of India.

[20] A distinguished group of human rights experts drafted, developed, discussed and reformed the principles during a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November 2006. The Introduction to the Yogyakarta Principles (Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity) begins:

various countries around the world. The Supreme Court also made reference to a number of statutes giving recognition to transsexual persons in other countries.

The United Nations has been instrumental in advocating the protection and promotion of rights of sexual minorities, including transgender people. Article 6 of the Universal Declaration of Human Rights, 1948 and Article 16 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) recognize that every human being has the inherent right to live and that this right shall be protected by law and that no one shall be arbitrarily denied that right. Everyone shall have a right to recognition everywhere as a person before the law. Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation, and that everyone has the right to the protection of the law against such interference or attacks.[21]

The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, took up a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and sexual identity so as to bring greater clarity and coherence to the human rights obligations of states.

U.N. bodies, regional human rights bodies, national courts, government commissions and commissions for human rights, the Council of Europe, etc. have endorsed the Yogyakarta Principles and consider them an important tool for identifying the obligations of states to respect, protect and fulfil the human rights of all persons, regardless of their gender identity. Moreover, the United Nations Committee on Economic, Social and Cultural Rights in its Report of 2009 speaks of gender orientation and gender identity.[22]

Observations by the Supreme Court of India

The Supreme Court admitted that transgender people, as a whole, face multiple forms of oppression in India. Discrimination is so widespread and pronounced, especially in the fields of healthcare, employment and education, that it results in social exclusion. The Court held that Article 21 was incorporated to safeguard those rights and that a constitutional Court cannot be a mute spectator when those rights are violated, but is expected to safeguard those rights, as it takes the pulse and comprehends the feelings of that community, though a minority, especially when their rights have gained universal recognition and acceptance.[23]

"All human beings are born free and equal in dignity and rights. All human rights are universal, interdependent, indivisible and interrelated. Sexual orientation and gender identity are integral to every person's dignity and humanity and must not be the basis for discrimination or abuse."

21 Supra, note 1 at ¶ 21.

22 *Id.,* at ¶ 24.

23 *Id.,* at ¶ 49.

Opinion on Article 14 of the Constitution and Transgender Rights

Article 14 of the Constitution of India declares that the state shall not deny to 'any person' equality before the law or the equal protection of the laws within the territory of India. Article 14 does not restrict the word 'person' and its application only to male or female. Hijras/transgender people who are neither male nor female fall within the meaning of 'person' and, hence, are entitled to legal protection of the laws in all areas of state activity, including employment, healthcare and education as well as to equal civil and citizenship rights, as enjoyed by any other citizen of the country.[24] Non-recognition of the identity of hijras/transgender people results in their facing severe discrimination in all spheres of society including access to public spaces like restaurants, cinemas, shops, malls, etc. Furthermore, access to public toilets is also a serious problem they often face: since there are no separate toilet facilities for hijras/transgender people, they have to use male toilets where they are prone to sexual assault and harassment. Discrimination based on sexual orientation or gender identity, therefore, impairs equality before the law and equal protection of the laws and violates Article 14 of the Constitution of India.[25]

Opinion on Articles 15 and 16 of the Constitution and Transgender Rights

Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. In the Constitution lawmakers gave emphasis to the fundamental right against sex discrimination so as to prevent direct or indirect acts by some people to treat other people differently, for the reason of their not being in conformity with stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. Discrimination based on 'sex' under Articles 15 and 16, therefore, includes discrimination on the basis of gender identity. The meaning of 'sex' in Articles 15 and 16 is not just limited to biological sex as male or female, but is intended to include people who consider themselves to be neither male nor female.[26]

Opinion on Article 19(1)(A) of the Constitution and Transgender Rights

Article 19(1)(a) of the Constitution of India declares that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression

[24] *Id.*, at ¶ 54.

[25] *Id.*, at ¶ 55.

[26] *Id.*, at ¶ 59.

of one's self-identified gender. Self-identified gender can be expressed through dress, words, actions or behaviour or any other form. No restriction can be placed on one's personal appearance or choice of manner of dressing, subject to the restrictions contained in Article 19(2)[27] of the Constitution. A transgender person's personality could be expressed by that person's behaviour and presentation. The state cannot prohibit, restrict or interfere with that person's expression of such personality, which reflects that person's own inherent personality. The Supreme Court therefore, held that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community[28] under Article 19(1)(a) of the Constitution of India and the state is bound to protect and recognize those rights.[29]

Opinion on Article 21 of the Constitution and Transgender Rights

It was noted by the Supreme Court that Article 21 is the heart and soul of the Indian Constitution. This article is also known as the Seminal Clause, because the right to life is one of the basic fundamental rights, and not even the state has the authority to violate or take away that right. It also protects the dignity of human life, one's personal autonomy and one's right to privacy. Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender constitutes the core of one's sense of being and is an integral part of a person's identity. The legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under the Constitution of India.[30]

Sex/Gender Determination on the Basis of the 'Psychological Test' and Not the 'Biological Test'

The Supreme Court observed that Articles 14, 15, 16, 19 and 21 "do not exclude Hijras/Transgenders from its ambit, but Indian law on the whole recognize[s] the paradigm of binary genders of male and female, based on one's biological sex."[31]

The Court, then taking a bold step, succinctly stated that they could not accept the Corbett principle of the 'biological test'; rather, the Court preferred to follow the

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[27] Constitution of India, Art. 19(2) – "Nothing in sub-clause *(a)* of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."

[28] The Supreme Court of India relied upon a number of U.S. judgments (*City of Chicago v. Wilson et al.*, 75 III.2d 525(1978) and *Doe v. Yunits et al.*, 2000 WL33162199).

[29] *Id.,* at ¶ 66.

[30] *Id.,* at ¶¶ 67, 68.

[31] *Id.*, at ¶ 75.

psyche of the person in determining sex and gender and prefer[red] the 'Psychological Test' instead of [the] 'Biological Test'. Binary notion of gender reflects in the Indian Penal Code, for example, Section[s] 8, 10, etc. and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislation … [such as the National Rural Employment Guarantee Act] …, 2005 … Non-recognition of the identity of Hijras/Transgenders in the various legislations denies them equal protection of law and they face wide-spread discrimination.[32]

Jurisprudential Approach on Transgender Rights

In *National Legal Services Authority v. Union of India & Others*, Justice Sikri, signifying the organic character of the Constitution of India, brought forward the jurisprudence on the theory of justice to human existence. He explained the rights of transgender people after summarizing the understanding of various philosophers. As per paragraph 127 of the judgment:

Aristotle opined that treating all equal things equal and all unequal things unequal amounts to justice. Kant was of the view that at the basis of all conceptions of justice, no matter which culture or religion has inspired them, lies the golden rule that you should treat others as you would want everybody to treat everybody else, including yourself. When Locke conceived of individual liberties, the individuals he had in mind were independently rich males. Similarly, Kant thought of economically self-sufficient males as the only possible citizens of a liberal democratic state. These theories may not be relevant in today's context as it is perceived that the bias of their perspective is all too obvious to us. In post-traditional liberal democratic theories of justice, the background assumption is that humans have equal value and should, therefore, be treated as equal, as well as by equal laws. This can be described as 'Reflective Equilibrium'. The method of Reflective Equilibrium was first introduced by Nelson Goodman in 'Fact, Fiction and Forecast' (1955). However, it is John Rawls who elaborated this method of Reflective Equilibrium by introducing the conception of 'Justice as Fairness'.

In his 'Theory of Justice' Rawls has proposed a model of just institutions for democratic societies. Herein he draws on certain pre-theoretical elementary moral beliefs ('considered judgments'), which he assumes most members of democratic societies would accept. … [Justice as fairness …] tries to draw solely upon basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretations. Justice as fairness is a political conception in part because it starts from within a certain political tradition.

Based on this preliminary understanding of just institutions in a democratic society, Rawls aims at a set of universalistic rules with the help of which the justice of present formal and informal institutions can be assessed. The ensuing conception

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[32] *Id.*, at ¶ 75.

of justice is called 'justice as fairness'. When we combine Rawls's notion of Justice as Fairness with the notions of Distributive Justice, to which Noble Laureate Prof. Amartya Sen has also subscribed, we get jurisprudential basis for doing justice to the Vulnerable Groups which definitely include TGs. Once it is accepted that the TGs are also part of vulnerable groups and marginalized section of the society.

The Court further stated that they are only bringing them within the fold of aforesaid rights recognized in respect of other classes falling in the marginalized group. This is the minimum riposte in an attempt to assuage the insult and injury suffered by them so far as to pave [the] way for fast[-]tracking the realization of their human rights.

Conclusion

The exclusion of LGBT people from full participation in society with equal opportunity and dignity is an important human rights issue.[33] The Yogyakarta Principles can be said to be the Magna Carta for the modern LGBT community, providing the new wave of freedom of gender identity.

India follows a democratic model of governance. The Indian courts have recognized democracy as the basic structure underpinning the Constitution of India.[34] This democracy facilitates that gay rights are to provide gay people with the most socially tolerant environment in which to live their sexuality openly and honestly. In *National Legal Services Authority v. Union of India & Others*, India became one of the first nations to legally identify the rights of the LGBT community and accept them as a third gender. The whole world widely acclaimed the humanistic approach taken by the Supreme Court of India. The Court granted third gender status to transgender citizens, noting that "*recognition of transgenders as a third gender is not a social or medical issue but a human rights issue*", thereby granting rights to those who identify themselves as neither male nor female.

There is no denying the fact that such an inception is a welcome step forward for the LGBT community in India – but this judicial pronouncement has also been applauded by the United Nations, and soon it will set its benchmark in identifying the rights of the LGBT community in all nations. After sixty-seven years of independence of the Republic of India the fifteenth of April 2014 is now marked down as the red-letter day for the LGBT community. This long-awaited judgment on the human rights of the transgender community has made a respectable statement in identifying transgender as a third gender, not only in India, but in the whole world.

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[33] M.V. Lee Badgett, Sheila Nezhad, Keez Waaldijk and Yana van der Meulen Rodgers, The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies (The William Institute, November 2014).

[34] *Keshavananda Bharti v. State of Kerala*, AIR 1973 SC 1461.

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BOOK REVIEW NOTES

RUSSIAN BUSINESS LAW[1]

EKATERINA TYAGAY,

Kutafin Moscow State Law University (Moscow, Russia)

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It's been 25 years since Russia has become one of the stakeholders of the world economy and a key member of international business community. Yet when it comes to the modern Russian Business Law, not much has been said, and even less has been written.

Professors Evgeny Gubin and Alexander Molotnikov, together with other authors, performed an impressive research project with the goals of uncovering, systemizing and outlining the essentials of the Russian Business Law. Their work took a lot of professional courage and enthusiasm which finally led to a long-awaited result: a fundamental and at the same time easy-to-read textbook that represents Russian commercial, business and legal basics to the global English-speaking audience.

The book consists of 10 chapters and covers the following topics: business legislation (Chapter 1); business association forms (Chapter 2); core business contracts (Chapter 3); bankruptcy (Chapter 4); securities regulation (Chapter 5); banking regulation (Chapter 6); regulation of natural resources (Chapter 7); competition (Chapter 8); investment regulation (Chapter 9); litigation, arbitration and other means of legal protection (Chapter 10).

The aforementioned areas go far beyond 'the essentials' of the Russian business law – a glimpse at the table of contents reveals modesty with which the authors have chosen a name to their book. For example, banking regulation, regulation of natural resources, contracts, litigation and arbitration are usually considered as independent and very

[1] Reviewed book: Russian Business Law: the essentials (E.P. Gubin, A.E. Molotnikov eds, Moscow, STARTUP 2016).

complex fields of study and are barely covered within a traditional course of Business Law taught in Russian law schools. In spite of all the challenges, the editors succeeded in forming a strong team of authors who managed to put together all principal questions related to Russian Business Law and even covered some specific areas.

The introductory note is an important part of the book where historical, social and conceptual background of Russian business and Russian business law is precisely explained. This text gives a short but meaningful comment on entrepreneurship revival, economic environment, Business Law evolution, entrepreneurship as a legal concept and Business Law principles in modern Russia.

Each chapter provides the reader with a consistent analysis of a corresponding theme, highlighting not only theoretical basics, but also a wide range of illustrative cases which can be hardly overestimated when, for example, liability issues are considered. Acting judicial practice is most broadly presented with respect to business transactions and other legal matters related to natural resources; each section of Chapter 7 includes a relevant overview of judicial practice.

One of the main challenges for businessmen and entrepreneurs planning to start their own business in Russia is picking an appropriate business association form, which can be a harder problem than one might imagine. Chapter 2 of the reviewed book gives a quick tour through all possible forms – starting from defining entrepreneurial activities and moving forward to an individual entrepreneurship and legal entities. The latter are classified into profit (corporate and state/municipal) and non-profit (corporate/unitary) organizations and observed in general terms of their establishment, reorganization and liquidation.

The managing bodies of legal entities are specified in a separate section together with authorized officers, branches and representations. This covers corporate basics and gives a simple key to structuring and managing business in accordance with Russian legislation (including responsibility questions).

Technical yet important steps related to preparation, submission and receipt of all documents necessary to the registering body are outlined in Section 3 of the Second Chapter.

Contracts that are traditionally considered by the Russian Civil Law as a basis of creating (primarily business) obligations are defined, grouped and categorized in the book by different criteria such as the aim and commonness of use. Contracts for state and municipal needs are specified separately from other types. A special section (Section 5 of the Third Chapter) is reserved for one of the most essential questions to any party of business transactions – liability for the non-performance of contractual obligations.

The Post-Soviet evolution of economic relations resulted in a vast market development, and many efficient financial instruments were integrated into the Russian legal system. In particular, securities and financial derivatives came into widespread acceptance, and today the Russian securities market turned into one of the largest and most recognized platforms for international business transactions. Chapter 5 of the reviewed book is dedicated to securities regulation and contains

detailed comments on regulations of the activities of securities market-makers (issuers, investors, professional securities market-makers, the organizer of trading and clearing organizations – just to name a few). The securities regulation block also includes provisions on the disclosure of information pertaining to the securities market in Section 5 of the Fifth Chapter and a special liability section.

One of the most substantial areas of the Russian Business Law – the Competition Law – is summarized in Chapter 8 of the book. This part sums up major areas of focus of the Russian Competition Law (prohibition of monopolistic behavior and unfair competition, prohibition of anticompetitive actions of state authorities and agencies, control over economic concentration, and the Federal Antimonopoly Service jurisdiction). In addition to the aforementioned chapter, there is an extra section – "Important Considerations for Foreign Investors" with special reference to merger control filings and rules on potentially anticompetitive agreements.

Another important subject fully covered by the book is bankruptcy. Bankruptcy is a condition which, even when there is a distant probability of this event occurring under the complex and strict norms of the Russian legislation, prevents many potential entrepreneurs from starting a business in the current economic situation.

"The Russian Business Law: the Essentials" clarifies definitions, sets criteria and focuses on the main features of bankruptcy, illustrates the basic characteristics of a debtor's, s creditor's and an arbitration receiver's legal status, and in particular details and describes each stage of bankruptcy procedures (such as filing of bankruptcy, preventive procedures, receivership, financial rehabilitation, external administration, winding up and voluntary settlement).

Moreover, the book provides insight into the latest legislative amendments regarding the peculiarities of bankruptcy of specific types of debtors – not only certain types of legal entities (e.g. credit organizations, natural monopoly entities, strategic enterprises, insurance companies), but also natural persons and individual entrepreneurs whose legal status as one of the parties in bankruptcy proceedings has only recently gained sufficient legislative formalization.[2]

Businessmen and entrepreneurs who – owing to the reviewed book – become aware of bankruptcy rules and precautionary norms relevant thereto, should without further doubts consider wide investment opportunities existing today in Russia. One of the most interesting parts of the book for perspective investors is Chapter 9 which describes investment regulation and consists of eight practice-oriented sections covering legislative framework, foreign investment guarantees and restrictions (including selected restrictions other than those set forth by the Strategic Investment Law)[3], special contract

[2] Федеральный закон «О несостоятельности (банкротстве)» [Federal Law No. 127-FZ "On the Insolvency (Bankruptcy)"], dated Oct. 26, 2002 (with amendments and supplements introduced by the law dated June 29, 2015).

[3] Федеральный закон № 57-ФЗ «О порядке осуществления иностранных инвестиций в хозяйственные общества, имеющие стратегическое значение для обеспечения обороны страны и безопасности государства» [Federal Law No. 57-FZ "On the procedure for Foreign Investments into the Business Entities of Strategic Significance for Ensuring National Defense and State Security" dated Apr. 29, 2008].

treatment, investment funds, preferential treatment, a list of strategic industries and a special note on subsoil areas of federal significance.

Russia is famous for remarkable natural resources and these resources make our country very attractive to businessmen who are interested in the natural resources industry. Thus it is absolutely logical and reasonable from all practical perspectives to pay serious attention (as the authors did in Chapter 7 of the reviewed book) to legal matters such as:

- regulation of subsoil use (including but not limited to the right of ownership of the subsoil, classification of subsoil, licensing, transition and termination of subsoil use rights, production sharing agreement, rational use and protection of the subsoil, etc.);
- regulation of the gas industry (including description of the Unified Gas Supply System, gas markets (tariffs and prices), gas transportation, gas supplies, connection to the gas distributing networks, etc.);
- regulation of oil sector (revealing principles of access to oil pipelines and trunk pipelines, defining main activities of oil refineries, clearing up the rules of sale of oil products);
- regulation of the electric power industry (with focus on the Unified Energy System of Russia, the Unified National Electricity Grid, the Unified Monitoring Control, the wholesale energy market, retail markets of electric energy, access to the electric networks and services on electric energy transfer).

Last but not least, it is important to mention that the authors draw the reader's attention not only to the timeless traditional basics of the Russian business law, but also to a number of specific issues that appear to be on the front burner, such as the current situation in the Russian Banking Sector and the impact of sanctions thereon. Chapter 6 of the book covers these matters along with a general description of the Russian banking sector and analyses of the legal and regulatory framework.

The book gives detailed explanation to both substantive law and procedural law matters without mixing them up. The final part of the book (Chapter 10) is solely dedicated to litigation, arbitration and other means of the legal protection. The forms and methods of such protection are classified and divided into two main types – judicial (arbitration courts, courts of general jurisdiction, the Constitutional Court of the Russian Federation) and non-judicial (complaint/demanding procedure, arbitral tribunal proceeding, international commercial arbitration, notarial procedure).

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