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NOTES ON ADMINISTRATIVE LAW: FRENCH AND ENGLISH EXPERIENCE

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Introduction

Administrative law is the branch of the law governing the relationship between the individual and the executive branch of the government when the latter acts in its administrative capacity. The theme discussed in the following pages is administrative litigation and not general administrative law dealing with relations between agencies of the administration. The notes will deal with judicial review of administrative action. This paper is limited to a comparative exposition of the manner in which judicial review is treated in England and France. The purpose is to assist the reader (and in particular law students) to acquire knowledge of foreign systems.

1. Administrative Law - the French experience

1.1- Scope

France is today governed under the Constitution of the Fifth Republic of 1958. The Constitution has established a parliamentary regime and meanwhile adopts a separation between executive and legislative powers. The Constitution gives the executive competence to regulate many areas by decree. The respective powers of the executive and the legislative are controlled by the Constitutional Council which is the organ empowered in France to ensure respect for the Constitution. The ordinary courts are not involved in this function. In the course of its decisions, the Council consistently upholds constitutional principles and focuses on the protection of the fundamental rights and liberties. This has enabled the Council to become the partner of administrative courts whose activity has often relied on the decisions of the Council.

The state employs thousands of persons, owing to the fact that it not only conducts public administration but also owns a great deal of property and administers social welfare. Independent agencies have also been created to regulate certain policies and conduct various activities related to the regulation of monopolies, broadcasting, consumer protection, elections etc. The most notable control of the administration is provided by the administrative courts.

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France has a separate hierarchy of administrative courts of general jurisdiction. These are not administrative tribunals designed to deal with specific government functions but are courts of general competence. These courts of general jurisdiction are always competent to deal even with those special cases handled by special tribunals. The few administrative tribunals that exist outside this system have been created only in very specialized areas such as social security administration. Like in many other countries conciliation procedures as well as the Ombudsman (*Mediateur*) also exist.

The administrative courts have three levels of courts at the head of which is found the "*Conseil d'Etat*". The administrative courts were created as a separate hierarchy of courts in order to stop the ordinary courts from interfering with the executive. In the political history of France there were events when courts played a negative role by going against reforms initiated by the executive.

The citizen complaining against the administration was given the right to lodge a complaint with the *Conseil d'Etat* which was part of the executive. In the course of the 19thC, the Council assumed full independence from the administration in rendering judicial decisions. The judicial function became the most important role of the Council. Subordinate courts were also created to deal with complaints ranging from taxation to torts and state social and economic regulations and they adjudicated tens of thousands of cases every year.

A complaint by an individual will normally state the facts and the legal grounds in which the complaint is based as well as the particular relief sought, such as – a pecuniary claim or the annulment of an administrative decision. The court takes steps to examine the case by consulting both parties, and the judgment is given in public. The decisions are enforced without any constraint because it is a tradition to obey the decision. Complaints are brought to the administrative courts when they involve a public service conducted while the administration acts in the course of satisfying public need. The scope of the public services that might evoke administrative complaints is wide and it can include sporting federations. However, such special regimes can be excluded by statute.

1.2- Role of Ordinary Courts in Complaints against Administrative Agencies

In acts undertaken by the state that are analogous to activities of private persons, private law usually applies and redress is sought in the civil law courts. The ordinary courts also have a longstanding exclusive jurisdiction in the protection of personal liberties such as the ones protected by criminal law, criminal procedural law, property law and other laws. Property rights that arise in the context of expropriation, for example, fall under the jurisdiction of ordinary

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courts. Moreover, cases such as liability for accidents caused by motor vehicles or accidents at work are reserved to the civil courts.

1.3- Grounds of review

The general principle under which review is made is based on the principle of administrative legality. The meaning of this principle has been largely influenced by the case law of the administrative courts. This is an area of French law that is based on case law rather than on code law as would be typical of a civil law country. Basically, legality involves the exercise of administrative power under the empowering legislation, observance of rules of procedural fairness and adherence to general principles of law. As stated above, the administrative courts have relied on a category called general principles of law to define the extent of legality. This has permitted the courts to review an administrative decision on any ground which they consider proper for the protection of the individual. They can be compared to the English rule that courts have an inherent power to ensure that the rule of law is respected.

In a civil law country like France, this power of the courts is more restricted but in the area of administrative law the courts have managed to have a wider power. These general principles have their basis in general constitutional provisions (liberty, equality) or general private law and procedural law (e.g. right to a hearing).

The principles have been applied to a number of different cases on such grounds as the right to freedom of movement. For example, an administrative decision forbidding camping at a certain site was considered illegal because it violates freedom of movement. Other examples include the annulment of a decision forbidding the entry into France of family members of immigrant workers (which is regarded as violation of the right to normal family life), or the right of a political refugee against deportation to his country of origin.

The courts have also expanded the general principles of law to be observed by the administration (in economic matters) such as the right of an administrative employee to receive the minimum wage granted to private employees. This power of the court could include a revision of an administrative decision on the existence of a public interest sufficient to permit expropriation or the existence of an environment impact assessment before any investment permit is granted.

Equality of employment in the public service as well as equal access to the public service to all (e.g., radio, TV) and the equality to benefit from government grants have all been applied as general principles of law. France has a highly developed case law dealing with all forms of inequality which the administration engages in and which the courts have been correcting under their power of judicial review.

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A case in point is the right to an impartial decision whereby French courts uphold a similar principle embodied in English law that there should be no bias in reaching an administrative decision. Under the same title of general principles of law, the administration in France has been ordered often to be impartial in its process of decision making. Similarly, the right to a hearing is also recognized like in English law.

1.4- Categories of review

Violations of general principles of law or administrative decisions that are *ultra-vires* (i.e. performed in contravention of the scope of authority of an administrative body) are subject to judicial review. Procedural failure can also be a ground of judicial review. For example, non-observance of prior publication of a slum clearance order involves a procedural error (*vice de forme*). Infringement of the right to a fair hearing falls under this category.

The actual content of an administrative act is also reviewed under what is known as "*violation de la loi*" (violation of the law) which is related to the application of the particular statute in conformity with the purpose for which it was enacted. A disciplinary action not prescribed by the law would be an example, or a refusal to grant a trade license when the law says it should be granted would be subject to judicial review.

When there has been an abuse of power (*detournement de pouvoir*) that administrative power is considered to have been exercised for purposes outside the empowering legislation. This is a great power of the courts because it will permit them to use what they consider is the necessary purpose of the legislation in question. Traffic regulations issued not to regulate traffic but instead for the convenience of an official would be considered abusive.

1.5- Types of remedies

The remedies available under judicial review are the following:

a) *Annulment of an administrative decision*: This is a remedy that annuls an administrative decision on grounds of illegality (*recours en annulation*), on grounds of being *ultra-vires* (*excès de pouvoir*) or being in violation of basic principles of law (*principes généraux du droit*).

b) Declaration of the rights of persons called full jurisdiction (*pleine jurisdiction)* in areas such as elections, taxes as well as contractual or extra-contractual liability.

c) Giving interpretations of administrative law in the course of civil litigation.

d) Punishment of administrative crimes e.g. abuse of public property such as roads, ports.

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Most decisions deal with the first two claims and a special body of law has evolved. The two principles guiding the courts are the *principles of legality* meaning administrative decisions must be guided by the rule of law and the *principle of responsibility* (or liability) which means the administration must pay damages to an individual who is harmed by an administrative decision.

In the case of *responsibility* (liability) the rules governing the liability of the administration are different from the rules of liability enunciated by the civil law in matters among individuals. French law thus involves separate administrative torts and administrative contracts, specially created to accommodate the rights of the state and the rights of the individual and handled by the administrative courts, not the civil courts. The administrative torts arise in the course of operation of a public service and apply fault and no fault criteria peculiar to the administration. Administrative contracts are also governed by special administrative rules and are adjudicated by the special administrative courts. A contract falls under this category if it deals with the provision of a public service and contains clauses which are not found in ordinary contracts. Such cases are considered as regulatory rather than purely contractual and they are, in effect, subjected to special rules entitling the administration to a greater degree of protection such as the power to a unilateral termination of a contract.

2. Administrative Law - the English experience

2.1-Scope

Under English Law government activities can be controlled through many means. The control by the courts is the area of concern of administrative law. Judicial review has helped in developing the concepts that control government action. Judicial review involves an array of diverse administrative decisions such as refusing a trading license, refusing entry to a foreigner into the country, the refusal of a building permit etc. These judicial review decisions are public law decisions as opposed to private law decisions because the review is done on the basis of rules which have evolved to deal with the public law function of the administration. The court acts to annul an administrative decision on the grounds of its illegality, not on grounds of rightness or wrongness of the decision. A typical example of an illegal decision is for the administration to act beyond the powers given to it by statute.

In England focus is given to the public law/private law distinction. Public law regulates the relations between individuals and government agencies and between government agencies. Private law regulates the relations of private persons. The distinction is necessary because it has been felt necessary to subject the government to a special regime of laws which can either give it greater freedom or restrain this freedom. In private law the role of the courts is essentially only to apply the law. Some government activities (contracts and

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torts) are of course also regulated by the private law regime. The public law nature of the activity does not depend solely on whether it is being exercised by a public authority but also on whether it was being exercised in the interest of a public function.

2.2-Grounds of review

A case that involves judicial review arises when the applicant alleges that a particular administrative decision has caused some prejudice to her/him. The decision can be challenged where the administration did not have the authority to make the decision, or the decision was not consistent with the law, or where the proper procedure was not followed. The action is available because the administration is considered as having powers limited by law and that the courts are legitimate interpreters of the extent of the powers granted to the administration as a matter of constitutional division of powers. The nature of the dispute usually determines how much the court will be willing to interfere to correct a decision and there are very few general principles. The court usually restricts itself to a policy principle that is considered as part of the legislation. The course taken by the court will depend largely on the clarity of the controversial legislation. English courts apply (as far as possible) the intention of the legislator in contrast with the French administrative courts which in the name of general principles of law have widened the scope of judicial review.

2.3-Categories of review

The grounds of review are based on abuse of discretionary power. It is referred to as the *ultra- vires* rule and contains the following categories.

a) Errors related to the substance of the decision: *Errors of fact and Errors of law*

The administration has to determine the facts before making the decision. For example there might be the need to determine whether a person is single or married so that a particular statute can apply to him/her. In this exercise the administration may commit an error of fact by assuming the existence of facts that are not actually present or not taking account of a fact which actually exists. Decisions around facts are usually particular to specific cases and the courts deal with this type of problem on a case by case basis.

An authority which is given with some discretion is expected to be practiced properly or the decision will be declared invalid. Inappropriate usage of discretionary authority is graver than mere mistake in the interpretation of the law. It would include decisions made without proper evidence (e.g. in town planning). This falls under the general category of illegal use of power.

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There will also be an error of law based on the courts' interpretation of the best manner of achieving the policy of the law. The concern is to prevent the administration from unnecessarily extending the powers given to it by law. The courts have traditionally assumed the responsibility to have the last word in stating what the law is in a particular case. The courts control decisions which are made outside the limits set by legislation. This can mean exceeding or abusing the powers given to the authority as in cases of either stepping outside the reasonable limits of power or basing a decision on irrelevant considerations.

The power given must also be exercised by the person authorized by law. Unauthorized delegation is considered illegal. The power of the public authority to issue directives and standards are limited although they are made in the interest of clarity. This is called rule making as opposed to adjudication. But these forms of self regulation must not limit the entitlements of the individual under the parent legislation.

The authority is also not allowed to fetter the power given to it by legislation, e.g. adopting a rule that certain applications will be refused instead of examining each application. Failure to give reasons or to maintain proportionality between the action taken and the purposes of the statute can also serve as a ground of review.

b) Errors related to the process and purpose of decision making

In addition to the result of an administrative decision, the process used in reaching the decision may also be subject to judicial review. In this regard the concern usually pertains to the differential treatment of persons who are entitled to equal treatment. Error related to the decision making process may also result from the failure to take into consideration proper distinction between different cases. The result in both situations contravenes the policy of the legislation under consideration and will lead to its annulment.

The purpose of the authority in exercising its powers may also be a ground for review. Power is usually conferred for a certain purpose and cannot be used for other purposes. For example, a grant of permit or licence cannot be denied merely because a given administrative authority had/has been involved in previous or pending litigation with the permit seeker.

c) Errors related to procedure

Certain statutes may impose procedures before a decision is made. These rules of procedure are called rules of natural justice and are divided into *rules against bias* and *rules for fair hearing*. Bias means deciding a case in which the decision maker has an interest in the matter. Fair hearing requires that a person affected by a decision should be given the opportunity to present her/his side of

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the story. The nature of the case will determine how much hearing will be required.

2.4-Types of Remedies

a) The first group of remedies which have been operational for a long period are:
   - *Certiorari* (annulling an illegal decision);
   - *Prohibition* (ordering that some act not be done by the administration); or
   - *Mandamus* (ordering that something be performed by the administration).

b) The second group of remedies were originally used in the private law context but have gradually been adopted in administrative law. This category of remedies consists of:
   - *Declaration* in which the court limits itself to declaring the law on a particular subject;
   - *Injunction*, by way of a temporary relief until final decision is rendered;
   - *Entitlement to damages through an award of* compensation for harm caused to the complainant.

The court that hears administrative dispute litigation is the Queen's Bench division (high court). It has supervisory jurisdiction in contrast to its powers to hear all other disputes called original jurisdiction. Appeals to the high court are possible from the decisions of administrative entities. There will be a right of appeal to the ordinary courts of appeal i.e. the *Privy Council* or the *House of Lords*. So there is no separate hierarchy of administrative courts as in France.

It is to be noted that the principles that resolve administrative law disputes are public law remedies and cannot be regarded as private law remedies. Remedies that are of a purely public law nature cannot be exercised in the context of pure private relationships which give greater power to courts. ■

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