



## Encyclopedic Dictionary of Public Administration

The reference for understanding government action

### ADMINISTRATIVE LAW

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Administrative law is a sub-category of the legal discipline that refers to a set of principles and rules of law applying to public administration and its organizations, as well as to actions taken in the context of relations among the various components of the public administration or between public administration and citizens. Administrative law is a branch of public law; which should be distinguished from constitutional law, although, to some degree, it becomes its concrete embodiment. Administrative law is thus national in nature (as opposed to international) and is confined to the territory defining a state. It plays out at every subnational level, following the jurisdictions of its various components (education law, municipal law, social law, public health law, etc.). Administrative law is associated with general principles that apply to government authorities in general, but it also develops itself in specialized fields involving particular mechanisms and rules (environmental law, immigration law, tax law, etc.).

According to some, the origins of administrative law can be traced back to Roman law, when rules were developed to codify subjection to law and establish the exercise of public authority. Administrative law can also be viewed as evolving in tandem with the mechanisms of canon law or as emerging from feudal law when the power of medieval towns grew (Truchet, 2008).

However, administrative law did not really start to expand and take on its present-day contours until the advent of the administrative state in the 18th century, when bureaucracies began to implement policies, particularly in Great Britain and France (Weber, 1995). Administrative law allowed the administrative state to self-limit its own powers while those of absolute monarchies were eroding. The administrative state gained increasing importance from the early 19th century and continued to grow throughout the 20th century with the development of the social state, whose ramifications affected every aspect of community life. Administrative law thus focuses mainly on the general dimensions and limits of the administrative power exercised by the state. Theoretically, therefore, administrative law does not touch upon parliamentary activity.

The world's two major legal traditions, civil law (*droit civil*) and common law (Glenn, 2007), have each imbued the concept of administrative law with a particular character. The French conception, which is central to the civil law tradition, is based on a fundamental distinction between public law and private law. Public law, and therefore administrative law, is structured around rules that are not necessarily comparable to those of private law (see the seminal decision by the *Tribunal des conflits* in the 1873 Blanco case, considered to have marked the coming of age of French administrative law). Public lawsuits must be brought before a judge specialized in

## ADMINISTRATIVE LAW

administrative law, regardless of the level of the proceedings, right up to the highest court of appeal (the *Conseil d'État*). French administrative law is based on principles surrounding the notion of public authority, whereby the government is accorded the privilege of acting unilaterally as long as its actions are motivated by the promotion of public interest through the provision of public services, in accordance with the law. The civil law tradition, in forms that are sometimes quite different from the original French version, has spread to most countries in continental Europe and beyond, reaching the former colonies of some of these countries. Despite such variations, the workings of public authority in the civil law tradition basically reflect the concept of *État de droit* (rule of law) (Chevalier, 1992; Barilari, 2000).

In contrast, the British conception of administrative law, strongly influenced by 19th-century jurist A. V. Dicey, who was wary of the state's administrative activity, differs from the French conception in that administrative cases are not considered to require special courts or rules. The state's administrative bodies are subject to the principles of the common law and to regular courts of law, whose role in controlling the state's administrative activity is thus strengthened (or even constitutionalized, as in Canada). The British conception of administrative law, which is also represented in the Commonwealth countries, can be summed up as corresponding to the notion of the *rule of law*. This means that no person or entity is above the law; both government authorities and ordinary citizens are subject to the same laws, except for explicit legal exceptions. Some jurisdictions, such as Quebec and South Africa, are located at the crossroads of both systems, since, through an accident of history, one of the two major legal traditions was succeeded by the other.

Regardless of the family of law to which it is attached, administrative law is generally studied according to two fundamental and complementary approaches. In the first approach, the focus is on the organization of a state and its organs, while in the second, the focus is on the mechanisms regulating administrative activity in order to ensure the rights of litigants and to prevent abuse of power on the part of the state.

The principles of administrative law cannot normally determine the substantive content of "good" law or what it should be. In democracies, this role is reserved for Parliament, in keeping with the principle of parliamentary sovereignty. Administrative law therefore focuses on the structures of public administration, processes to be respected in decision making, procedures for taking action, and mechanisms available to litigants demanding that the public administration exercise its power in accordance to law. Authors differ as to the primary goal of administrative law. For some, the major goal is to combat arbitrary power in the workings of the state by ensuring that government machinery is subject to the rule of law (Endicott, 2006, p. 9). For others, the foremost goal is to provide the government with the tools required for its smooth functioning or to demand accountability from public organizations in decision-making processes, while also seeing that citizens are able to participate in these processes (Craig, 2008).

From a strictly formal and procedural point of view, administrative law – supported by seemingly clear, elegant distinctions, which sometimes turn out to be sophistic when it comes to actual application (for example, the *ultra vires* principle or the distinction between an appeal and a judicial review in the common law tradition) – touches on fundamental issues concerning the role of the state, the exercise of public authority and the control of government activity in democratic societies. Administrative law has recently been the locus of fierce struggles between the judiciary and the legislative or executive branches of government, sometimes explained theoretically as a democratic dialogue between the legislature and the courts (Roach, 2001). The application of the

## ADMINISTRATIVE LAW

principles of judicial review has led to what is known as judicial activism (as opposed to judicial restraint). This situation has in turn led to the elaboration of a complex theory dealing with the standard of review. In the 20th century, for example, courts of justice used their power of review to curb the development of administrative tribunals and the social state (Lambert, 1921). However, the principles underlying the rule of law are not always well served when courts of justice interfere too actively in the decisions of a public administration (Endicott, 2006, p.19), as has been pointed out by a number of authors.

The fact that several nations, including Canada, have adopted a charter of rights has also changed the relation between administrative law and constitutional law, as well as the relation between the various authorities that support government action. A charter of rights inevitably reinforces the notion of self-limitation on the part of public authorities. As a result, parliamentary sovereignty is directly affected, and collective rights are frequently placed in opposition to individual rights.

The increase in international free trade agreements and the creation of international administrative law (such as European Union law) have meant that administrative law is now implemented on a much broader, international scale. When nations are subject to international administrative law, their own constitutional and administrative laws are affected by supranational judicial principles, thus bringing into play some new, fundamental issues (Auby and de la Rochère, 2007; Raimbault and Bioy, 2006). While administrative law was not supposed to be involved with the role of parliament, according to the dominant theories elaborated in the 20th century, it is now, as a result of globalization, provided with mechanisms that enable it to interfere with and control democracy, as well as to bypass the rule of law of nations (Mockle, 2002).

Today, as in the past, administrative law frequently affects the definition of public policies, despite the fact that, theoretically, it is resolutely uninvolved in this sphere and should be limited to simply ensuring compliance with the rule of law as determined by the legislator. By its very nature, administrative law must “negotiate” the perilously narrow dividing line between the political and the legal.

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## ADMINISTRATIVE LAW

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