RULE OF LAW

AND

ADMINISTRATIVE JUSTICE

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I Introduction

A "global ideal and aspiration" (HILL, 6), the rule of law is a desirable good. Some authors view it as "the soul of the modern state" (Unger, 192) and others as one cog in the social fabric and legal machinery, next to values such as democracy, equality, or human rights (Lord Sales, 701). The approaches taken to the rule of law depend on our views on human nature, social life, and justice. Whether justice is taken in an abstract sense or contextualised to specific asymmetric relationships between powerholders and individuals leads to different understandings of the rule of law. Furthermore, "administrative justice" may lead us to focus on either "justice" or "administrative". If the rule of law were primarily addressed to the (wo)man in the street, it would seek to enable her to organize her life in a predictable way, protected from the government's whim. Administrative justice may then be understood as enabling accurate administrative decision making, leading to acceptable actions for its addressees. If the rule of law is mainly concerned with the ways in which governments exercise power in general, it may require that any (public or private) powerholder sees her arbitrariness restrained by law. Administrative justice may then focus on the organizational and procedural techniques by which discretion is limited, administrative decisions reviewed, and individual freedom protected. The rule of law and administrative justice can mirror each other depending on their respective focus on power (collective and organized level) or freedom (individual level). As the preference for one above the other changes over time and space, the rule of law and administrative justice have not always been congruent. In practice, their operationalisation may lead to tensions. This paper maps out how the rule of law and administrative justice are interdependent in a modern administrative state, namely a state harnessing power structures for the collective and individual good: administrative justice, as a means to ensure that the administration remains within the bounds of the law and to provide citizens with techniques to protect their legal entitlements, is one of the channels that realises the rule of law; alongside other factors, the rule of law shapes administrative justice. The local configurations resulting from their interactions are ever dynamic, although path dependent.

This chapter focuses on two aspects of the relationships between the administration and citizens (understood here as the persons at the receiving end of an administrative action): first, the administration as an organization that addresses decisions and delivers services to citizens (III); and secondly, the institutional infrastructure through which citizens seek protection from and/or the review of administrative action (IV). Analyzing these aspects allows for unpacking the ongoing debates about the rule of law, understood in a formal, procedural or substantive way (Craig 1997). Cases and the scholarship are mostly drawn from three of the main Western administrative systems (*i.e.* American, English and French) to illustrate the political and technical concerns shaping the interactions between the rule of law and administrative justice. These cases are then nuanced with insights from other jurisdictions (including the European Union) when appropriate. This comparatively informed contribution suggests that juxtaposing the rule of law and administrative justice does not provide answers but raises questions that each community needs to reflect upon. For this reason, the rule of law may be a universal question for administrative justice, but the answers are often local, which leads to new challenges (V). To explain this approach, one needs to start at the beginning, namely how the rule of law seeks to keep law and politics apart, especially in relation to administrative justice (II).

II The Rule of Law: Old Challenges for Administrative Justice

In the making of the administrative state, the interaction between the rule of law and administrative justice is often portrayed as one of tension, developing towards convergence over time (Napolitano). When upheavals came with the industrial revolution and its implications for the political order across Europe and America at the end of the 18th century, the state drastically changed its administrative and political structures. By the end of the 19th century, the tensions between individual and collective freedoms had taken a new shape, prompting Dicey to rely on the rule of law to oppose the development of administrative justice in the UK. However, the role of the state towards all sorts of social ills was, at the same time, increasing, resulting in new forms of resource allocation and disputes between the state and its citizens. In France, the Administrative Court became less tied to the executive and, by 1872, started issuing its own

judgments. Administrative justice then provided protection against the risk of arbitrariness and political interpretation of public bodies' powers. Similarly, the immense socio-economic needs triggered by the Great Depression led to major administrative transformations in the USA in the form of the New Deal Agencies. These reforms sought to provide administrative justice within and through the administrative machinery, albeit outside of the direct control of the executive. Critics argue that agencies were not provided for in the American constitution, that they threatened liberty or that they challenged democratic accountability. In short agencies threaten the rule of law (Sunstein and Vermeule, 2).

The discussions about the interaction between the rule of law and the welfare state have ebbed and flowed across the world (*e.g.* for Germany: Kingreen) and are still ongoing. The nub of the matter is how law and politics relate to each other in substantive and institutional terms. The rule of law connects the two in keeping them distinct, yet articulated. It supposes a minimum level of compliance (both from the powerholders and citizens), which requires adhesion to it. To gain this adhesion and trust from citizens (von Hayek, 75), the legitimacy of the rule(-makers) is a prerequisite. How this legitimacy is factored into the system is another matter however (for different views see Lindseth 2019 and Vermeule 2015). Here comes the discussion between the proponents of a formal conception of the rule of law and those of a substantive conception.

A formal conception of the rule of law keeps law and justice distinct. Its major feature is to ensure that the law should be such that individuals are able to plan their lives. Next to attention to the manner in which the law is promulgated (by a competent person, in a properly authorized manner), norms should be clear, predictable (sufficiently clear to guide one's conduct and to enable a person to plan her life), general, open and non-retrospective. To ensure that the norms have these features, an independent judiciary is required. Administrative discretion should thus not sap the objectives of legal rules. This conception of the rule of law focuses on rationality, reason and claims towards objectivity and predictability, leading theorists such as Hayek (75-6) to support it. Law is detached from moral or social values. Forms and legally organized procedures are followed, but no social policy or political objectives are taken into account by the rule of law to assess the law as law.

Under a substantive conception of the rule of law, a connection is established between the law and its social or political content. Next to the features associated with the formal conception of the rule of law, the proponents of the substantive rule of law add criteria to protect specific moral or social goods, such as democracy, justice, fairness and the respect of political and economic rights (Bingham). The Venice Commission explicitly adopts such a substantive conception of the rule of law in its checklist for the rule of law (*Checklist,* para 18). Despite this endorsement, the substantive conception of the rule of law lacks precision: which human rights are protected? What is their content in the field of administrative action and justice?

Administrative justice and the rule of law have developed complex relationships based on instrumental considerations. The rule of law has historically been seen as a *"political construction of modern capitalism, particularly through the agency of the state*" (Lindseth 2005). In that sense, administrative justice can be seen as a by-product of the welfare state, the way that Western societies developed to mitigate the externalities of capitalism and make it socially and politically sustainable. So presented, it may seem a pragmatic compromise that the content of the rule of law and administrative justice standards converge, that a liberal concept (of the rule of law) and a social technique (of delivering social goods to all) come to support each other.

There are limits to this abstract approach, however. It is difficult to objectively assess the exact content of the rule of law. The limits encountered by indicators and checklists in measuring the rule of law are but one illustration of the challenges to reaching a consensus on what "rule of law" and "administrative justice" mean (Ginsburg 2011; Versteeg and Ginsburg 2017). Furthermore, attention to "odd details" (Frankenberg, 573-74; Frankfurter; Bell 2020, 6-8) reveals a more sophisticated story: path dependency, political preferences and social demands may also pull the rule of law and administrative justice apart. Indeed the challenge is to make sense of the rule of law and administrative justice within the complex constitutional, political and social settings in which they are embedded, namely the constitutional underpinning and democratic layout of a polity, its political culture; the distribution of powers between the legislature and the

executive and its operationalization through administrative justice; the wider social context and how it frames the distinction between what is law (and thus has to be complied with by citizens) and what is not law (but can be social norms). The social context conveys specific techniques, procedures and practices that contribute to administrative justice (such as civil society litigating strategically or providing an interface between welfare agencies and vulnerable citizens). This context is shaped by the compromises adopted following the social upheavals in Europe and America in the early 20th century. Over the last fifty years globalization has upset these compromises; adaptations and reforms are only incremental and domesticated to an extent.

The rule of law and administrative justice may converge to a degree, but tensions remain. First, the proponents of a formal rule of law may still doubt the compatibility of the rule of law and a welfare state (Tamanaha, 4-5). If they are to push further towards deregulation however, some legal framing is needed to avoid unrest with all of its dangers for the formal rule of law. It is difficult to square the circle to organize an administrative justice system by taking into account that administration needs both to be empowered and constrained, and that the rule of law can do both (*cfr.* Fisher and Shapiro, 9-16). Secondly, the rule of law puts a strong emphasis on (administrative) judges, with the risk that they take decisions outside of their mandate and expertise. Thirdly, the rule of law may become too demanding for administrative justice to be taken seriously by the main significant players. Hence, pragmatism may be needed. Finally, seemingly neutral factors of convergence, such as new communication technologies or global crises such as the Covid-19 pandemic, may lead to critical junctures by stirring deeper changes across administrative systems, and leading to differentiation and adaptation to local circumstances. If alignment emerges at times thanks to a dynamic interpretation of both the rule of law and administrative justice, contested areas, uncertainties, and ambiguity are also recurring.

III Administrative Capability and Justice

A major concern of the administrative justice idea is to make administrative decision-making acceptable for the addressees (Mashaw 1983, 213). The solutions to do so are constantly adapted (Vermeule 2017, 2465). In particular, administration and jurisdiction can be difficult to delineate as they are on a continuum. Over time, the productive tension between the rule of law and administrative justice have contributed to deepening each other. To illustrate this tension, three operational levels of the rule of law are discussed: the framing of administrative organizations themselves (III.1), the professional expectations of public employees (III.2), and the rationality of administrative processes and activities (III.3). If the rule of law has brought techniques of administrative justice within administrations, the process is ongoing, fragmented, and open to variations.

III.1 The rule of law: A requirement for administrative organizations

The administrative state is far from monolithic, functionally, organically, and territorially. Functionally, the missions of the administration vary from implementing the democratic will of the legislature at the day-to-day level; to delivering services efficiently; to securing the basic conditions for collective political, social, and economic life. Organically, the administration may deliver its missions itself, contract them out to private (profit and non-profit) entities, or externalize them to independent agencies or private bodies (*e.g.* bodies issuing professional qualifications or providing care). The overall pattern may be that of a hierarchy, silos or networks where competition, cooperation and specialization can be more or less intense. This diversity in the administrative state should caution us about the possible interfaces between the rule of law and administrative justice. A formal conception of the rule of law draws attention to the risk of unpredictable and contradictory laws adopted by a multipolar administration and even more to the possible anarchy among the administrative justice systems embedded in such an administration. Territorially, the administrative state may be organized along centralized, decentralized, federal, or devolved logics. This territorial distribution may embed a form of administrative justice in redistributing resources across state components. For instance, local governments provide public functions and manage public money closer to the immediate needs of citizens than major central funding programmes. Local administrative justice may respond to local specificities in ways that are foreign to central administrative justice, begging questions about the terms of formal equality before the law across the state territory. Local government may use the

courts to challenge central legislation. Such a disagreement among the state components may weaken the consistency linked to the formal rule of law, and yet it is also a means to ensure the respect of legality as well as the substantive rule of law.

Functionally and organically, independent agencies are often seen as a major feature of the administrative state. New Deal agencies in the USA and exported abroad exhibit extensive discretion in their missions. The legislative schemes under which agencies operate are often complicated or provide broad delegations to the administration (Wagner, 158-203). In the early 1980s, Mashaw (1981) suggested that the rule of law was mostly at the core of moral judgments where administrators decided on the capacity and deservedness of claimants in regard to the granting of disability benefits. Furthermore, the fact that each agency is regulated by its own statutory framework with no common blueprint may also complexify the accessibility of their regulatory action for citizens. However, some administrative systems have adopted statutory frameworks to improve this accessibility and the overall accountability of these agencies, albeit with different emphases (*e.g.* downsizing agencies in the UK, preventing conflicts of interest in France, or organizing coherent administrative structures in Flanders). Different countries have adapted independent and regulatory agencies according to their administrative priorities and constitutional requirements. For instance, concerns for the rule of law in administrative justice seem to have been obscured by trends such as managerialism, consumerism and market logic when it comes to agencies in England (Adler 2006). By contrast, French judges have imposed constitutional and administrative requirements on agencies, such as limited technical powers, institutional separation between the prosecuting section and the adjudicating section or impartiality, hence operationalizing the rule of law in the ways in which these agencies work.

These developments in the administrative state point towards a variety of possible interactions between administrative justice and the rule of law, which are illustrated here with two examples. First, the administrative state may go hand-in-hand with contracting out public missions; in that case, predictability may require setting targets and indicators in the contractual frameworks to facilitate monitoring and enforcement and thus a formal rule of law; and the stability of relationships may also be embedded in these agreements for the same reason. However, such a quantitative approach sets aside the qualitative side of delivering public services, such as the need to adapt public services to changing circumstances or side-lining users from the delivery of public services with little space to voice their preferences, and hence overriding their dignity. In this way the operationalization of the rule of law through administrative contracts weakens administrative justice, both in its substantive and procedural components. Secondly, the administrative state has to manage scarce resources, such as public contracts, subventions, licences etc. The rule of law may require formal processes to ensure equality and fairness in their allocation. To take the example of procurement in Europe, sophisticated regulations apply to ensure access to these contracts, curb corruption and facilitate the internal market. The rule of law cuts across the whole life of these public contracts: at the level of contractual awards (Sajó 2019b, 372); at the level of monitoring the contractual performance, even when enforcing horizontal objectives (such as compliance with tax, labour and environmental legislation) remains dubious; or at the level of the remedies open to disappointed bidders, and by ensuring that these remedies offer an efficient judicial protection (for a long struggle: Stelkens 2021). Yet the story of European procurement is one of successive loopholes, where administrative justice components are weak due to the high level of technicality of the rules, as research into legal challenges against procurement in local authorities in England and Wales in this area suggests (Cahill and Clear).

III.2 The rule of law: Integrity of public employees

The rule of law depends crucially on how the officials manning the administrative machinery act in accordance with the law (Heath, 257). As public employees do not always conform with the law, to an extent the rule of law remains an ideal (Endicott). Administrative systems differ in the professional requirements they set for their staff, and their cognitive approach to cases (and hence legal consciousness) varies. Administrative justice may contribute to operationalizing the rule of law, either in terms of the legal professionalisation of bureaucrats or in shaping how bureaucrats are made to comply with the law.

Bureaucrats' professionalisation can be seen from two perspectives. First, it relates to reducing arbitrariness in regard to access to and progress in the administration. The rule of law can be closely intertwined with the development of judicial control over the appointment, promotion, and discipline of public employees

(Mercier, 119), curbing political favouritism and hierarchical discretion. Administrative justice may be one of the channels to achieve this. French administrative judges developed a strategy to discipline civil servants in the interwar period (Weidenfeld, 191-92). Secondly, public employees develop day-to-day routines and cognitive mindsets to make sense of their work, thanks to their general education or specialized training (*e.g.* in procurement). Here tensions may arise between those mindsets that are framed to comply with legal requirements and to provide legal interpretation of authorities (Varuhas 2020) and those shaped by meeting auditing targets.

Administrative justice can also develop to further the rule of law and bureaucrats' compliance with the law, especially by setting standards of administrative action and personal behaviour. In terms of standards of administrative action, administrative justice can assess compliance with the law against errors, misunderstandings, or power abuse in regard to the ways in which civil servants exercise their powers. When administrative justice strengthens bureaucrats' compliance with the law thanks to accountability and the enforcement of personal liability, it supports the rule of law. Here, convergence has appeared over time between the rule of law and administrative justice, as special privileges once granted to civil servants in administrative systems such as France have receded. In terms of standards of personal behaviour, such as the duties civil servants owe to the state and their employers, obligations of impartiality, objectivity, integrity and honesty may exist (*e.g.* UK *Constitutional Reform and Governance Act* 2010, section 7 (4)). In addition, criminal offences can be provided in cases of corruption (*e.g. Bribery Act 2010* [England]; article 432-12 and 432-14 criminal code [France]). However, administrative justice contributes only modestly here with little, if any, litigation surfacing in courts in England for instance. If there are disciplinary proceedings, they occur behind closed doors, begging questions about compliance with formal rule of law requirements.

III.3 The rule of law: Reason(ing) in administrative decision-making

The belief that (wo)men are able to act upon reason is core to both the rule of law and administrative justice. Reason allows (wo)men to think about their longer-term self-interest and to direct their behaviour according to social and legal norms, so as to plan their lives. When Mashaw (1983, 213) investigated the rule of law in American welfare benefits agencies in the 1980s, he found out that it had collapsed: the administration was producing its own internal law, and there was a lack of publicity and external control among other features of the rule of law. Soft law had replaced hard law to the detriment of administrative justice. Reason could no longer find its way in the administrative meanders. Bringing court-like procedures within the administration, and hence embedding a form of administrative justice in the active administration becomes a rule of law requirement, both from an instrumental and a dignitary perspective. They bridge rule of law requirements and administrative justice.

The rule of law is operationalized through a combination of (court-like) institutions and procedures, such as hearings by impartial actors, independent judges, the right to be legally represented, to be present at the trial, to present evidence, to make arguments about its bearing on the case, and to confront witnesses, restrictions on how the government can gather evidence, the right to reasons that properly attend to the evidence and arguments, and a right to appeal to a higher body. In short, administrative decision-making mimics internally what is excepted from a third party judge: this internalization for the sake of the rule of law to an extent embeds administrative justice in the administration.

Legal systems include more or less formal procedures in administrative decision-making. Sometimes, this happens through principles of good administration (Addink, 75-90). When these principles are not binding, questions arise as to their compliance with the formal rule of law due to their weak predictability for individuals. Yet, they may lower the risk of arbitrariness. In 1977, the Council of Europe sought to foster cooperation among its Member States in the field of administrative matters, believing that a broad consensus existed on "*the fundamental principles which should guide the administrative procedures*" (Resolution (77) 31). It codified five principles: the right to be heard, access to information, assistance and representation, statement of reasons, and indication of remedies. This soft law has since, slowly but surely, found echoes, in Western European states, such as France and Belgium, as well as in the case law of the ECtHR (Stelkens and Andrijauskaite). Procedural requirements are well rooted in England and well received in common law jurisdictions such as Australia (Napolitano, 432). Elsewhere, the administrative decision-making has been

codified or put in legislation (Auby 2016), such as the model of the American Administrative Procedure Act. In that sense, these procedural requirements are linked to the rule of law and a "*good governance*" agenda.

Administrative procedures can be understood as the epitome of the formal rule of law, with little substantive addition (Verkuil). They may be seen as techniques for the administration to gather relevant information and make the correct decisions. Beyond this instrumental side to the administration's benefit, procedures may also be framed in terms of individual rights (Poole, 167-68). They convey respect for individual dignity: individuals have an opportunity to make their case (*i.e.* an exchange between the two sides). Procedures offer a discursive space where arguments and reasons can help clarify the truth and appropriate choices. Hence, this procedural dimension of the rule of law sees individuals as "*capable of explaining themselves*" (Waldron, 15-16), which is a cornerstone for any substantive administrative justice. The administration has to explain how it arrives at its decision, on the basis of which sets of facts and legal norms, taking into account all of the relevant (and only the relevant) circumstances. This translates into the duty to give reasons. An arbitrary government is one whose actions depart from the reason of the law. An administration that justifies its decisions may make mistakes but is less inclined to arbitrariness. Overall, the rule of law enables citizens and the administration to act rationally. Administrative justice within the administration consolidates this even further.

IV DESIGNING ADMINISTRATIVE JUSTICE

Among state institutions, courts play the most significant role in securing the rule of law (*UNISON v Lord Chancellor*). There is no fast answer however about how the rule of law should be operationalized across the institutions delivering administrative justice, *i.e.* the bodies adjudicating litigation of an administrative nature. The rule of law can have systemic, principled, or concrete questions as well as answers for administrative justice. From a historical perspective, convergence can be observed to a degree although the differences across jurisdictions remain significant. Each of the apparently technical points that riddle administrative justice calls on us to "*recognize how, upon closer examination, they are sites of contestation and negotiation over the more fundamental complications and complexities*" (Lindseth 2019, 185). These discussions touch upon the relationships between administration and sovereignty with varying emphasis on the individual (subjective) or collective (objective) dimension of administrative justice. This section discusses the institutional, process-oriented and outcome-oriented dimensions of the relationships between the rule of law and administrative justice.

IV.1 The rule of law: Institutional expression in administrative justice

When organized externally from the administration, administrative justice pursues different objectives: next to the effective running of the administration (Bell 2001, 153), it may seek to guarantee the rule of law and hence, express organic, functional, and organizational interactions with the rule of law.

Organically, the rule of law supposes two conditions for the administrative judiciary: independence and impartiality. Their implementation usually deals with questions such as the skills required from judges, their appointment (by independent bodies or their peers), salaries, terms of appointment, and professional incompatibilities, and the regulation of conflicts of interest or non-removability. Administrative judges need to be free from political interference when deciding a case. They are not all located in similar ways in relation to the administration, however. European countries know different formats: English judges have moved away from the legislature and the administration institutionally since the UK Supreme Court was set up (*Constitutional Reform Act* 2005) and tribunals were reorganized (*Tribunals, Courts and Enforcement Act* 2007); French administrative justice is primarily delivered through a dedicated pyramid of courts with the administrative judge at the top of the pyramid also advising the executive. The formal rule of law finds expression in how (far) judges differ in administrative and civil litigation and the extent to which the administrative and the judging functions are supposed to be kept distinct from each other. The ECtHR developed an objective interpretation of judicial impartiality, which led to reforms in countries, such as Luxembourg and the Netherlands, based on a French model of administrative justice, and to convergence towards objective impartiality. However, subjective impartiality remains on the radar, for instance when

administrative judges are looking to join a prospective job with an administration party to a litigation that they have to decide on (*Société des Mines de Sacilor Lormines v France*).

Functionally, administrative judges are entrusted with different missions: some, like the German one, mainly protect the subjective rights of aggrieved individuals (subjective control); others, like the French one, protect the respect of the law for its own sake (objective control) and only marginally, as if it were an afterthought, subjective rights. Some systems, like the Belgian one, exhibit both types of control (Mast *et al,* para 562-63). Other systems, like the English one, struggle to accept such a plurality (Bell 2020, 8-9, 12-14). This, in turn, is connected with the respective role of the judge and the parties during an administrative dispute, and the ways in which the asymmetry of information, skills and powers are addressed systemically. Little, if ever, discussed in scholarship, these technical differences remain deep in practice. They also play a crucial role in identifying the law applicable to any administrative dispute, and hence in operationalizing the rule of law in administrative justice.

Institutional and personal expertise in administrative justice fosters key features of the rule of law, such as generality, autonomy, predictability, and clarity. Administrative justice can be specialized as the court deals with administrative litigation covering broad fields such as environment, planning, or welfare. It can be specialized because specific judicial committees are dedicated to expert questions related to housing, special needs in education, language in administrative matters, immigration, etc. Lay and/or professional judges may develop different patterns and attitudes within administrative justice or may be in a different position in regard to the administrative bodies whose decisions they review: they may be former members of the administration and know well how the procedures are designed, they may have a secretariat and a budget that is paid by the administration or by the sector they regulate, they may have more or less time and dedicated space to hold their hearings, etc. The formal rule of law fosters solutions where forms and procedures are followed, but little consideration is given to the outcome of these procedures.

Organizationally, the rule of law highlights the dynamics of competition or mutual support between the parts of the administrative justice system (including alternatives such as tribunals and ombudsmen). The procedural relationship between an ombudsman and a judge can be organized formally, but practical questions may arise. The approach taken by the respective institutions makes a difference in operationalizing the rule of law. For instance, the ombudsman may recommend the administration to take a decision that does not comply with the law to correct previous maladministration. Different systems accept this variously. For instance, the French ombudsman does not take this strategy except in exceptional circumstances and for cases with limited side effects, such as accepting that a time limit may have to be moved because of managerial issues that occurred in an administrative procedure. These organizational developments in administrative justice may be linked to a substantive conception of the rule of law, in some cases pursuing purposes other than upholding legality (*e.g.* good administration). This may weaken the rule of law as confusion arises about the principles underpinning administrative actions. Finally, a substantive conception of the rule of law may call for looking for a blending between different institutional arrangements for administrative justice (Bell 2019). This may suggest practical solutions but reinforces a paradox with the formal rule of law: the legal frameworks may be open, general, and transparent, as required by the formal conception of the rule of law, but the complexity of navigating procedures may defeat the very purpose of widening access to some form of administrative justice due to the lack of transparency of the system as a whole.

IV.2 The rule of law: Process-oriented operationalization in judicial review

Judicial review is the device that epitomises the rule of law in administrative justice (*Wightman v Secretary of State for Exiting the European Union*). The starting point of the rule of law is to set requirements for access to courts (*e.g.* standing, costs or time limits). However, operational questions (the scope, intensity, grounds of review, and types of redress provided to the claimants) need to be answered in relation to the rule of law. Here, the strictures between the different understandings of the rule of law and administrative justice can be stark among judges (*e.g.* Varuhas 2020, 588-89). The rule of law may provide as many questions as answers in administrative litigation in an institutional, formal, and substantive way.

In an institutional sense, courts use the rule of law to protect their own role as the guardian of individual freedoms. Examples can be found in the case law of the CJEU (*e.g.* AG Bobek, C-826/18, [105]), the ECtHR, and the Belgian constitutional court (*e.g.* case 46/2019, [B.4.3]-[B.5.6]), to name just a few. This objective appears especially in relation to access to administrative justice. Access to justice spans many hurdles such as financial (*UNISON v Lord Chancellor*), temporal or intellectual access, and finding one's way in the labyrinth of remedies or procedural challenges. Access to administrative justice can be made more challenging than access to civil justice as the asymmetry between the parties may be sharper. Furthermore, users of administrative justice are particularly vulnerable in relation to public bodies: for instance, they may not speak the official language used in courts (*e.g.* in asylum and immigration cases or in the case of linguistic minorities), they may not share the same assumptions about social life, they may depend financially on public support or they may not even know that they have a right to challenge a decision and how to do so.

Access to administrative justice provides a good illustration of the different approaches to the rule of law in an institutional sense and its high degree of contestability, yet principled importance. The UK Supreme Court sought to protect citizens' right to access to courts and to limit legal costs (*UNISON v Lord Chancellor*). Faced with the hypothetical case that the government or the legislature might want to abolish judicial review, "[t]*he rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise*" (*AXA v The Lord Advocate* [51] [per Lord Hope]). This illustrates how the rule of law and access to justice are mutually supportive. It also illustrates the interactions and possible tensions between the rule of law and parliamentary sovereignty in drawing the attention to different interpretations of the judicial role. Are judges collaborating with Parliament in ensuring that the executive does not exceed its powers? (Bogg) Are judges balancing parliamentary sovereignty and the rule of law, and giving primacy to the latter in extreme cases, when administrative power risks being insulated from any judicial control?

In a formal sense, judges use the rule of law to identify the primacy of judicial power in certain circumstances, and to delimitate the powers of other institutional actors, and their scope and limits. For instance, judges are tasked with judging public bodies for their (in)action – and not the other way round: the executive cannot set aside a judgment because it disagrees with it (*Evans v Attorney General*). Conversely, courts also define the limits of their own jurisdiction. They limit their control to the legal aspects of administrative decisions. They accept that non-legal factors (*e.g.* political, expertise, social, economic factors, etc.) inform the administrative decision-making process. The formal version of the rule of law defines the role of administrative judges as the gatekeepers of the forms of the law, not its political content. Judges are equipped in their missions accordingly: they interpret and apply grounds for review (such as illegality [*e.g. Lumba v Home Department*], error etc.) to maintain a formal rule of law. Courts are expected to be deferential towards the executive, and mainly keep an eye to ensure that individual freedom is protected from abuse of powers. The control over how the administration decides on social rights and financial expenses is not included in the mandates of administrative justice (King). The rule of law helps to allocate roles between judges and the administration when decisions are highly complex (*eg R v Secretary of State for Health, ex parte Eastside Cheese Co*). Here decisions by independent agencies are particularly testing for the rule of law. For instance, the American "Chevron" doctrine brings deference in relation to expert knowledge from independent agencies, with the underlying idea that political control is more appropriate than judicial control. Opinions are divided about the implications for the rule of law, some arguing that this means a "collapse of the rule of law" (Mashaw 2005, 498), and others that *"[d]one properly [judicial review of how an agency interprets its statutory framework] contributes to meaningful accountability by fostering active administrative competence*" (Fisher and Shapiro, 219). Similar discussions have arisen in Europe, with questions regarding European agencies' powers (Simoncini) or the appropriate review of UK regulatory agencies (Psygkas).

In a substantive sense, judges use the rule of law not only to limit administrative powers, but also to protect citizens' entitlements. Courts calibrate their control over how far to intervene in the use of their powers by administrative bodies. In this way, the content of rights is directly impacted by judicial scrutiny. One of the best examples of this approach is that used through the control of proportionality of administrative action. Administrative justice may become a means to enforce the political and economic rights that individuals have, and even to recognize such rights. Administrative litigation may be an opportunity for judges to better characterise the legal relationship arising between citizens and the administration (see discussion between Varuhas 2018 and Craig 2019): a right, a need, an interest, or a freedom? The legislative scheme or relevant

case law may provide a technical answer. In these cases, the rule of law mandates the judge to apply it. Problems arise when the judge cannot find a technical answer. The judge may then look for an argumentative or persuasive frame such as a substantive conception of the rule of law that is closely intertwined with values such as democracy, justice, or good administration (Marique). This approach can lead to heightened control being exercised by the courts over administrative discretion. This approach would be justified by the fact that judges should assume

> that the legislature intends its delegates to act in accordance with fundamental values. At one level, the principle is procedural in nature, since it does not tell officials what result to reach, but, rather, that relevant values have to be demonstrably taken into account or given weight in deciding on the result. But the principle does have substantive effects since it will necessarily limit the range of results open to the official to those, she can show to be consistent with the values, given the particular context (Dyzenhaus *et al*, 29).

All of this leads to a paradox: a substantive conception of the rule of law may transform judges into alternative rule-makers, who decide upon policy and the social choices that legislatures need to make, while not having the same legitimacy to do so. This weakens the democratic rationale behind the substantive rule of law. However, a part of the rule of law relates to the institutional and procedural systems within which judges make the choices they do. They do not act in a void, but as a third party that has heard the various reasoned positions offered on the specifics of a dispute (Waldron). In a rule of law system, constraints frame their discretion and ensure that the implications of their decision for the plans of the parties are presented to them.

IV.3 Outcome of the rule of law: Effective judicial protection

Effective judicial protection has become the touchstone for the rule of law in Europe, thanks especially to the interplay between article 6 of the European Convention on Human Rights, article 47 of the European Charter of fundamental rights and the domestic judicial, constitutional, and administrative traditions. With varying degrees of concrete realization (Gentile *et al*), it has (re)shaped domestic and European administrative justice. In addition to including the institutional and practical operationalization of the rule of law discussed above, effective judicial protection goes beyond a rule of law as it draws the attention to the concrete outcome of administrative justice for the claimant, for instance in terms of the speed of the process and of the change in her (administrative) situation.

The rule of law provides a framework to identify the power of the administrative judge to control administrative action. Four main means of redress are available. First, the direct quashing of an illegal administrative decision restores legal consistency and the formal rule of law. Secondly, a collateral/indirect challenge against an illegal administrative decision can lead to tensions between legal certainty and formal legality (Eliantonio and Dragos). Thirdly, judges may issue an injunction to the public body. Under a formal rule of law, one would expect the administration to comply with the judicial decision or use the procedural means legally established to challenge it, but would not refuse to comply with it. The administration may also wish to negotiate with citizens about its implementation, contributing to citizens' ability to pursue their lives according to plan. Fourthly, administrative liability is at the core of administrative justice in continental systems (*e.g.* institutionally in France since the *Blanco* case, and substantively in Belgium since the *Flandria* case), with some systems expanding administrative liability to protect vulnerable citizens, for instance through extensive no-fault liability (Oliphant, 875-76). Public torts in common law systems such as England are patchy however (Cornford). The solutions adopted for each of these four options need to be taken as a whole to provide a realistic assessment of the rule of law in a given administrative justice system. It would not be realistic to assert that one size fits all, even though improvement and adjustment may be desirable.

The rule of law comes into action in particular in administrative litigation to decide when and how to end an administrative dispute, and what needs to be done with illegal administrative action: are there cases when the rule of law would require the judge to maintain illegality? What level of illegal decisions can be accepted without weakening the idea of the rule of law? A certain conception of justice is at the core of deciding this question. If a citizen has relied in good faith on an illegal decision to organize her life, should she be deprived of her expectations? Can facts and behavior trump formal law and, if so, when? Each

administrative system balances differently objective legality and the subjective protection of citizens. Different interpretations of the rule of law justify different technical solutions in the case of a breach of legitimate (procedural or substantive) expectations, the withdrawal of administrative decisions, and the effects of judicial decisions in the time as well as transitory periods.

A formal conception of the rule of law may result in expecting the legislator to undertake an inventory of the most recurring procedural problems to suggest solutions aimed at maintaining consistency between the law and its practice. Yet, in systems such as France and England, judicial solutions have been found. In France, only some procedural defects lead to quashing (*Danthony*). This approach has been justified by the need for the administrative judge to maintain legal certainty, a feature of the formal rule of law (*KPMG*). This paradox is justified by the over-complexification of administrative decision-making and the need for expediency. In England, the judge may ignore a technical breach of the law if the breach would not have made a substantial difference in the outcome of the decision (*Criminal Justice and Courts Act 2015* section 84 (1) and (2); *Senior Courts Act* 1981 section 31(2A)). The judge can set it aside where there are reasons of exceptional public interest.

V THE RULE OF LAW: NEW CHALLENGES FOR ADMINISTRATIVE JUSTICE

The development of the administrative state has long been intertwined with the interactions between the rule of law and administrative justice in France, the UK and the USA. A renewed need for national and international, material, political and economic security calls for revisiting this development and the associated interactions with the rule of law and administrative justice, not only in the USA and Europe, but also globally.

V.1 Testing times for the rule of law: Administering repression

In the administrative state of the 21st century, the rule of law is playing new roles by reshaping the borders between criminal and administrative justice. Indeed, the administrative infrastructure supporting criminal justice (such as prison) is subject to increasingly complex regulation (because of prison privatization, expectations of minimal service in prisons and increased internal regulation of prison discipline). In addition, the rule of law calls for two developments. On the one hand, it requires an effective implementation of the law (Barber, 85). This need for enforcement leads to administrative techniques being tested with patchy review mechanisms. For instance, petty matters that once fell outside a systematic enforcement of the law (*e.g.* parking-related offences in France) are increasingly caught by legal techniques aimed at securing legal compliance outside criminal law. On the other hand, matters of life and death or political freedoms have been brought outside the procedural guarantees of ordinary criminal justice to be dealt with by administrative justice and its lesser guarantees. States of exception and surveillance operations – either in the aftermath of 9/11 or during the Covid-19 pandemic – illustrate this trend. In particular, restrictions to going out at night or to going to specific locations (*e.g.* football stadiums) have become pervasive. Public and private spaces are also policed, with the closure of places of worship and limits to the freedom of protest, for instance.

Administrative justice is thus understood as a means to organize procedures when individual freedoms are limited to secure a degree of public order. This contrasts with the role that administrative justice plays when it is used in relation to welfare benefits. The rule of law in administrative justice is no longer about realizing a degree of substantive equality through implementing socio-economic rights but, rather, is related to giving priority to the security of the community. If social control is displaced in favour of administrative control, administrative justice seems to become a proxy for criminal justice.

On the rise in all sorts of administrative fields, from taxation to competition to welfare benefits (Adler 2016), administrative sanctions illustrate these tensions between administrative justice and the rule of law. They are now often aligned with criminal sanctions in some respects, if not all. Administrative and criminal sanctions can be combined, if there is a general scheme behind this combination (*Nodet v France*). Yet, the ECtHR calibrates the legality requirement depending on the gravity of the sanction (Andrijauskaite) and judicial control may differ between criminal and administrative sanctions. A criminal judge normally has

full jurisdiction over sanctions, while an administrative judge may only have a narrower jurisdiction, which is limited for instance to quashing but not modalizing sanctions (*Sigma Radio Television Ltd v Cyprus*). Administrative sanctions reshape the rule of law towards more efficiency and more systematic law enforcement of legal obligations.

These developments in the administrative state point towards tensions between the rule of law and administrative justice as the different spheres of administrative justice (the welfare state, high security, and low policing) are arguably not of the same kind. The rule of law needs to be included in these processes of administrative justice. However, these developments call for attention regarding the modalities under which the rule of law and administrative justice converge to support each other. Each technique needs to be analyzed in its own specific context to allow for an informed assessment of such convergence. However, the scholarship has expressed doubt that administrative justice is best equipped to protect citizens' freedom against sustained administrative repression (in the USA: Ackerman; in France; Hennette Vauchez). Administrative justice may be a second-best solution, in cases when criminal justice guarantees are not available. However, the observer may reflect on these interactions: are they a positive development in regard to limiting administrative power or one that should be a source of concern for individual freedoms? In which direction are the rule of law and administrative justice converging?

V.2 Administrative justice beyond the local: A global rule of law?

The fear of administrative arbitrariness is not limited to national state powerholders: the administrative state leaves ample room for foreign transnational public or private powerholders to exercise power through treaty-making, international and regional organizations, or self-regulation. They may have a bearing on citizens' lives and the predictability for the future. Two questions deserve further attention in this respect: firstly, can a global rule of law apply in a universal fashion, shaping the basic requirements for administrative justice across multiple jurisdictions? And secondly, how do the rule of law and administrative justice interact with each other at a global level?

The discussions about an international rule of law are lively and include proponents of the universality of the rule of law (Etherton, 479), sceptics (Burgess; Rajkovic) and realists/pragmatists (McCorquodale). If the rule of law is a successful hermeneutic device at the domestic level, why could it not have its place in global constitutionalism understood as an interpretative exercise undertaken by the academic and legal community (Peters)? Yet, administrative justice is about actual ways to address the concrete problems that citizens face due to administrative action taken upon them. Administrative justice requires a particularization of abstract constitutional principles including the rule of law. The rule of law can be understood in different ways, either as a legal principle or as an interpretative device.

First, as an interpretative device, the rule of law is not universal, although it can be said to be a "universal good" as any society will be better off if power is not used to oppress (some classes of) citizens (Tamahana, 137-38). Sociology of law insists on a better understanding of the interplay between law and non-law (Krygier *et al*), and between an official understanding by legal experts and a living one by citizens (Hertogh). Comparative lawyers question the ability to transplant a fundamentally Western concept elsewhere (Bussani). Even moving from the international level to a regional level, such as the theoretically closer legal community, founded on shared values, including the rule of law that the European Union is, assessing the actual level of convergence in administrative justice *sensu lato* calls for more nuances, especially in the light of developments in Eastern Europe (Marique and Slautsky).

Secondly, if we believe that the rule of law is a legal requirement, we need to pay attention to capacity-building programmes and their impact on administrative justice systems (Bussani, footnote 4). One may then believe that the rule of law does not relate to the content of the law but its mode of generation and implementation. The conditions of individual and social prosperity under the rule of law are supposed to be universal (Raz 2019, 2): stability, predictability and intelligibility of the law are needed in all cases, across different societies, because people need them to plan their lives. In turn, this allows for worldwide cultural and economic exchanges. However, even under this approach, there is "considerable room" for flexibility and adaptability in the practical implementation of the rule of law (*Ibid,* 12). When unpacking this "considerable room", one may be led to believe that differences prevail over universality. The Council of

Europe has adopted this relativism (although its member states share a commitment to similar international obligations and the ECtHR case law has had some homogenization effect on administrative justice). The Venice Commission warns its readers:

> While the main components or "ingredients" of the Rule of Law are constant, the specific manner in which they are realised may differ from one country to another depending on the local context; in particular on the constitutional order and traditions of the country concerned. This context may also determine the relative weight of each of the components (*Checklist,* para 34, footnote omitted).

In short, context matters (Cotterrell, 712): contested concepts taken out of their historical, social, political, and legal (constitutional and administrative) context, such as the rule of law and administrative justice, need to be re-contextualised within different epistemic communities, social groups, and administrative structures. The "odd details" cannot be trivialised, due to the risk of being naïve about the resources required to reform administrative justice alongside rule of law principles (Frankenberg, 573-74). Complex interactions between the need for innovation and tradition mould the actual ways in which the rule of law and administrative justice are implemented and influence each other (Marique and Slautsky).

The second aspect of a global rule of law moves from the state level to looking at transnational problems beyond the remit of the individual state system. In the first instance, this leads to questions about the international law system with its organizations, including their system of administering justice, for instance with respect to their employees or members (Craig 2015, 603-22). Discussions about a global administrative law, wherein the rule of law is strongly connected to individual rights, emerged in the 2000s (Kingsbury *et al*). Yet, the actual development of this legal field has been limited, maybe due to the absence of a "global administrative justice system", even though eminent scholarship laments this fact (Cassese). Moreover, the uncertainty about the ways in which various international tribunals interact with each other without a clear source of authority has been identified as a threat to the formal rule of law (Atanasova). Secondly, the emergence of an unwieldy set of norms outside the domestic legal system leads to challenges for the citizens and domestic administrative justice. Here the rule of law could be useful both in its formal and substantive understanding. For instance, one can query what is law and non-law when faced with international instruments, binding and non-binding, and the many decisions (recommendation, report, guidance) taken in peer-review fora (such as the implementation review mechanism of the UN Convention Against Corruption, the Compliance committee to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters or its task force on access to justice). Which rights and obligations can be imposed on citizens? How can citizens rely on these instruments in administrative litigation or when dealing with their national administration? What happens if citizens have been misled by these instruments and have planned their lives accordingly in good faith? Do they have a course of legal action against the source of their *bona fide* error? Which (national?) administrative justice process can answer these questions? Answering this leads to the core challenge of international law: what is the democratic legitimacy of international law to impose obligations or to create rights for citizens? Here is the beginning of a different story.

V.3 The way forward

Keeping broad views on both the rule of law and administrative justice unveils their respective limits and leads to healthy discussions in democratic pluralistic societies. In this respect, a deeper understanding of the evolving interactions between the rule of law and administrative justice requires combining empirical, socio-legal and comparative analysis (Sajó 2019a). In doing so, micro-case studies could probe the pragmatic and idealist assumptions underlying the rule of law or test the emotional, behavioural, and institutional roots of the rule of law in administrative justice. A conceptual framework might then lead to rethinking the binarity between a formal and a substantive rule of law with respect to administrative justice. Overall, paying more attention to three issues could contribute to this framing.

The first issue touches upon the credibility of the rule of law, which depends on the law being complied with spontaneously to a degree. Administrative justice supports this in singling out administrative errors and incentivizing administrations to comply with the law. How could more systematic lessons be learned from this process? Could the rule of law and administrative justice be harnessed to produce administrative

innovation, such as embedding a feedback loop connecting administrative justice and the administration? Could this ensure a collective dimension to administrative justice that would benefit the whole fabric of citizens and administrative users?

The second issue touches upon the new ways in which domestic administrations are called on to work together to address administrative cross-border problems. This leads us to ponder the possible development of transnational administrative justice in Europe, across common law jurisdictions, or within international agreements (*e.g.* related to climate change, free trade or labour). Could administrative justice be designed in such a way as to secure the rule of law in cross-border situations where the risk of loopholes is especially high?

The third relates to the interactions between the constitution and administration based on a better understanding of how administrative matters are decided on the ground, including the current changes resulting from the digitalisation of decision-making. A constitution is not only political or legal: it is also economic, social, and administrative. The open-endedness of the rule of law may conflict with the binarity underlying the digitalization of administrative decision making. Above all, administrative justice calls for more attention to be paid to equality as a constitutional principle and as one of the main stakes behind administrative digitalisation. It also points to one of the limits of the rule of law, namely that the rule of law assumes that power is only vested in the administration, whereas inequality is also affected by families, work places and the market (Unger, 179). Social and economic shifts expose the tensions between these sites of power. Where is administrative justice supposed to come in exactly and how (far)? The separation between the administration and justice has been reshaped over time and space to ensure that individual freedom is not dependent on administrative discretion, thanks to the law's mediation. Yet, to do so, judges need to "*find a shared authoritative set of shared understandings and values upon which to base [their] interpretation of the law*" (*Ibid*, 180). Will the rule of law in the 21st century offer such a consensus and a shared understanding for administrative justice to thrive in the years ahead?

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