

NOTES ON ADMINISTRATIVE LAW: THE AMERICAN EXPERIENCE

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Background

The United States Constitution is an offspring of the western tradition of liberalism and republicanism. While liberalism is concerned with freedom, republicanism is concerned with the right of the citizen to participate in government.

Many constitutions provide for a list of fundamental rights of citizens. Some also state that laws which are inconsistent with these rights can be nullified by the courts. One such constitution is the US Constitution. Types of constitutions vary world-wide but one relevant distinction is between parliamentary and presidential constitutions. In the latter, the president and the legislature are chosen differently. In the former, however, the executive emanates from the legislature. The US is a presidential system, and the separation of powers doctrine which is enshrined in the Constitution insures that power does not fall into the hands of a single leader or power group.

The principle of *separation of powers* is adversely affected if law making, executive and adjudicative functions are granted to a single government agency. However the law puts limits to the exercise of these powers. It is up to the court to determine the proper determination of the separation of powers principle at the level of the agency. Although it is not possible to abolish the administrative agency for the sake of maintaining the traditional separation of powers principle, it is possible to designate (within the agency) separation of functions between those who lodge a complaint and those who judge.

The US does not have courts specializing in administrative law disputes. Ordinary courts have jurisdiction to deal with these cases. This choice is based on the American idea of the separation of powers which does not accept the administrative court to be part of the executive.

The US Constitution is supreme in relation to any other law. Because of these reasons, arguments based on the Constitution are typical of administrative law litigation in the US. The Federal system considers the states as independent units having defined relationships with the federal government. Many disputes

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start at level of the state. But according to the supremacy clause of the US Constitution state law is subordinate to federal law.

The US has a written constitution and several amendments called the Bill of Rights. The Constitution is supreme in relation to any other law and the US Supreme Court insures the respect of the constitution. Any government agency cannot thus act contrary to it even if it is accorded such power by legislation.

Reliance on the Constitution for the setting aside of agency action is exercised sparingly because conservative theorists argue that such action should be based on a specific constitutional text. Other theorists have argued that in the interest of protecting individual liberties, evolving social values should permit the courts to exercise the power of giving full meaning to the Constitution.

Historical development of American Administrative Law

Administrative law in the United States has its origins in the common law courts of England during which officers of the crown were to deal with claims related to damage liability. The damage remedy became insufficient, in the 17th Century, and new writs such as *mandamus*, *prohibition*, *certiorari* were used. The judiciary assumed this role as a result of political development during the glorious revolution of 1688. Later, the expansion of administrative activities led to the adoption of legislation to rationalize the system. In the US, this resulted in the Federal Administrative Procedure Act of 1946. It has been amended to include provisions that meetings of certain agencies be open to the public and providing for stricter procedural rules in decision making. The Act also lays down the availability, timing, and scope of judicial review.

Comparison between the English and American systems of administrative law

Institutional, historical and cultural differences exist between the two. The English system is based more on formal reasoning while the US law is based more on reasons related to substantive results.

England has a centralized political system while in the US federalism and the theory of separation of powers have resulted in a diffuse governmental power. The American judiciary has the power to rule over the constitutionality of statute while this is not possible in England. Any court decision in England can be replaced by a parliamentary statute. American legislatures are less effective than their English counterparts which give the American courts greater capacity to innovate in what are considered socially desirable ends. In England, the courts consider their duty to be to decide disputes in accordance with a statute or previous case law.

Obtaining judicial review

The Courts to whom petitions for judicial review are brought have their authority in a law which designates a particular court to review certain decisions of an agency. The courts can also assume jurisdiction under their general judicial power. The Administrative Procedure Act provides that generally a statutory basis should be found to seek review.

The following are examples of statutory grounds of review.

1. Agency regulation of owners of public utilities are required to conform to statutory requirements on selection of parties who could enter them, the rates they can charge, the prevention of concentration of a service in a few hands. Statute may require that utilities be safe and provide competent service and make them available to a wider public. Members of the public may be given power under the statute to give their opinion on the adequacy of such services.
2. The regulation of the professions have controlled entry into the profession, control of practice and discipline of misconduct in the interest of the protection of the public. Any deviation from the statute can be a ground for seeking review of the administrative action.
3. Other statutes involve labor relations, consumer protection, licenses for radio and TV production, food and drug legislation and land use control.

All these activities will involve questions of administrative law such as what procedures must be followed before granting a license to operate a service and what form of hearing will be required for a disciplinary decision.

Timing of request for review

In the interest of maintaining the balance in the respective spheres of the administration and the court, rules have evolved determining the time for requesting review. Judicial review can commence only after a final administrative action and the exhaustion of internal remedies. This has the purpose of preventing interruptions of administrative actions. Review must not be requested before the maturity of the case. It is analogous to the rule against interlocutory appeals in civil cases.

Ripeness of a request for judicial review means the prevention of a judicial decision until an administrative decision has reached the enforcement stage and waiting for finality will not cause hardship to the parties. The practical impact and not the abstract formulation of an administrative decision is required for seeking judicial review.

Scope of judicial review

Modern government is given a great variety of administrative duties and broad powers of law-making and adjudication. Administrative agencies have different functions but can be summarized as regulation of private conduct and the provision of goods and service. They exist at every level of government, national or local. They may use standardized procedures or special procedures required by a specific statute. They may employ formal or informal procedure. Broad general principles are employed by the courts in reviewing agency decisions in the areas of fact and law and procedure. General principles on standing, exhaustion of administrative remedies and maturity of the subject matter are basic requirements of judicial review.

Knowledge of the substantive area with which the agency is dealing and knowledge of the agency itself in terms of its place in the government structure are necessary in the practice of judicial review. Principles of judicial review cannot be understood outside the particular nature of the agency. Those who deal with administrative law often become specialized in one area of administration. A case law approach is necessary in order to understand particular solutions. Administrative regulation of monopoly power in the interest of price and profit regulation, the need to control excessive profit, the need to control environmental pollution, all will raise administrative law problems but the solutions will not be the same. They must correspond to the nature of the activity of the administrative agency.

The dividing line between the power of the agency and the power of the courts is not easy to see, but generally the courts must defer to the agency for the application of a statute. The acts of the agency are limited by requirements of reasonableness, transparency, and procedure. It will be for the court to determine whether these legal requirements have been complied with.

The court's role will include questions as to whether the agency acted within the scope of its authority and whether the legal requirements that permit the action have been fulfilled. The actual administrative decision must not be arbitrary. Considerations of the relevant factors by the agency are also important. The court may return a case to the agency for further detailed treatment. The agency must state valid and consistent reasons for its decisions. Departure from prior decision must be explained by the agency. These are the criteria by which the courts control the activities of the administrative agencies although the courts are also obliged from acting arbitrarily and the exercise of the judicial function is to resolve disputes according to law.

The Federal Administrative Procedure Act (APA) describes the general scope of administrative review. Section 706 of the Act provides that the court the power to:

- Compel agency action which is not taken;
- Hold unlawful and set aside agency action which is:
 - a) arbitrary, capricious,
 - b) contrary to the Constitution,
 - c) in excess of statutory power,
 - d) made without procedure required by law,
 - e) unsupported by substantial evidence,
 - f) unwarranted by the facts.

These provisions can apply to an agency's conclusions of facts or conclusions of law. They are also used to review the proper exercise of discretion by an agency.

Grounds of review

1. Administrative agencies are obliged to rely on facts whenever they make a decision. Otherwise the law which is regulating a certain behavior would be applied despite the absence of facts which warrant its applications. Therefore judicial review of the facts on which the agency relied is a legitimate concern of judicial review. According to the Federal Administrative Procedure Act (APA), there must be substantial evidence of the facts to reach a particular decision. In relation with the requirement that a decision should have a basis in fact, the APA also empowers courts to set aside agency action which is arbitrary, capricious, or an abuse of the discretion given to the agency. This means that the decision of the agency must have a basis in reason. The technical capacity of the courts must of course be equal to that of the agency for the court to evaluate such judgment. In this role they may need the advice of technical assistants to help them to appreciate the nature of the action which is in dispute.
 2. On the other hand, it is generally true that courts decide questions of law without taking into consideration the position of the agency. The decision will be based on the meaning of a piece of legislation and the courts are the final authority on the meaning of the law. The court's adjudicatory methods are also more fair than that of the administrative expert or policy maker. The APA thus states that one of the functions of the court is to decide questions of law. Where the agency has been given law making powers by law, the court's role will be to provide a reasonable interpretation.
 3. A statute may also give an administrative agency powers of rule making which are necessary for its mission. How these powers will be exercised is also a concern of administrative law. Rule of law constraints will be imposed. Elements of this power of rule-making will include requirements of consistency over time and across similar cases, reasoned judgment and neutrality of the decision maker and possibility of hearing.
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Examples of judicial review cases

Speech

The first amendment which forbids the legislature from making laws limiting the freedom of speech was intended to protect political freedom, but has been also used to protect all forms of speech. Legal provisions on defamation as well as use of speech in the commercial context such as in publishing contracts were given narrow meaning enlarging the protection given to free speech.

Unreasonable search

The provisions of the fourth amendment against unreasonable searches and seizures although largely applicable to the criminal law have been also applied to the administrative process. This has been the case with inspection of premises by government agents and the requirement of submission of documents by private persons. Courts have assimilated these inspections to searches under the Constitution and made them subject to the issuance of a warrant. The requirements of information from private persons are also subject to standards relating to privacy.

Self-incrimination

In the process of administrative decision making, a person is not obliged to submit information that is self –incriminating. It applies to written as well as oral information.

Procedural due process

The provisions of the fifth and the fourteenth amendments provide that no person may be deprived of life, liberty or property without due process of law and these are the source of fair procedure in administrative processes. Originally applicable to courts, it has become applicable to the administration in the course of the 20th century. All administrative regulatory activities such as public employment, licensing are not allowed to deprive the rights of citizens without due process of law. The procedures required have been mainly supplied by the the legislator and courts. It is to be noted that the courts usually supplement the procedure where it is inadequately provided by the legislator.

The type of procedure required has been enacted in the Administrative Procedure Act of 1946 which provided rules applicable to different circumstances. The procedure will vary with the case but discussion with an agency official, the delivery of a clear and final decision, the provision of an appeal procedure within the agency, the right to present evidence and the right to assistance of counsel have usually been considered important. It is as if the requirements of the criminal procedure have become part of administrative procedure. The actual procedural requirements are generally provided by statute. The 1946 APA is the statute that has put in statutory form the procedures which

have found general acceptance. It prescribes internal agency rules and the manner of seeking judicial review. Other judicial rules of procedure contain rules on the role of the courts.

Substantive due process

It is generally true that statute and administrative regulations impose economic loss on some sections of society or grant economic benefit to others. This happens in granting professional licenses, imposing control of pollution or restrictions on the use of property. All these measures will require the adequate compensation of the person affected by the measures. Some statutes provide for analytic requirements in the promulgation of rules. The statutes of individual agencies also provide for special procedural requirement. The interpretation to particular statutes given by the US Supreme Court also serves as an important source for understanding administrative law. Certain types of legislation were not permitted because they had a negative impact on the liberties of the citizen, for example the liberty to contract freely. At some time in the history of administrative law, social and economic progress promoted by legislation was opposed by some judges contrary to general economic and political developments. However, the modern trend of courts is to impose constraints only on legislation which is lags behind social and economic development.

Contractual and tort claims

The liability of a government agency for tort is based on tort claims at the place where the harm has occurred. In general, government tort law is not as pervasive as private tort law with many administrative law limitations on types of injury. Contract law is also subject to distinct laws on government procurement. Standard contract terms are prevalent containing clauses promoting some public policy such as minimum wages and simpler methods of variation of contracts as well as greater protection of private persons. —■

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