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Administrative law

Baudouin Dupret

1. General Overview

Administrative law did not become a category of legal history until the French created a specific body with jurisdiction over relationships between citizens and their administration, on the one hand, and between and among different administrative departments, on the other. Although administrative organs, in a functional meaning, existed in Islamic countries before the transformations they went through during the nineteenth century, their organization, activities and relations were never conceived, in an organic and analytic way, as a specific and distinct part of the law.

Administrative law follows the primordial distinction in the civil law family between public law and private law. Its goal is to create mechanisms within the executive branch of the state for curbing arbitrary acts and abuses of power. Administrative law may therefore be defined as that part of public law which governs public administration in the performance of its activities.

Inspired by the principle of the division of powers, administrative law distinguishes between the legislature, the executive, and the judiciary. The executive branch, in order to carry out its mandate to execute the law and administer the state, organizes itself and promulgates by-laws and decrees. Administrative law is the organizational and functional law of the administration. These include the organization of public administration (the body of rules relating to the organization of administrative agencies and their classification into central and decentralized regional agencies, administrative and professional organs), the regulation of administrative activities (functioning of public utilities and protection of public

interest), the many legal and material acts performed by the administration, the legal system that governs civil servants and public funds, and administrative liability for its mistakes that caused harm to individuals.

2. Egypt as a paradigm

In the 19th century, the Ottoman empire was the first Middle Eastern state to introduce administrative law. It is the Egyptian experience in this field, however, that has proven to be the most influential in the Arab world and beyond. It worked as a paradigm for many countries and its main body, the Council of State, continues to provide the template of administrative adjudication in many Muslim and Arab countries. A close and detailed examination of Egyptian administrative law will expose the main principles of this legal field and the manner in which it functions in the region.

In Egypt, the 1971 Constitution distributes power between central and decentralized authorities. The central authority is composed of the President of the Republic and the Prime Minister, who supervises the work of other Ministers and their deputies. The Cabinet's duties include issuing and supervising the implementation of administrative and executive decisions in accordance with all laws and decrees; supervising the implementation of laws; maintaining state security; and protecting the rights of citizens and interests of the state. The administration is decentralized, i.e., it is divided into local authorities (governorates, cities and villages) and public authorities. The Constitution and the Law of 1979 concerning local administration regulate administrative activities, that is, administrative police (regulation of individuals' activities with a view to maintaining public safety, health, peace, and morals) and public utilities (administration charged with the satisfaction of the public needs of citizens). Different laws, such as the Law of 1961, amended in 1963, regulate public organizations.

The main rules relating to administrative decisions are based on precedents established by the administrative judiciary, although legislative texts often touch on the determination of competent authorities and the different types of administrative decisions. Administrative contracts are largely regulated by constitutional and legislative rules, such as the Law of 1947 regulating the obligations of public authorities and the Law of 1998 relating to auctions and tenders. Although administrative liability is regulated by precedent, Article 57 of the Constitution requires the state to award fair compensation to any person subjected to prejudice by the state, while administrative judges apply general rules of responsibility established in the Civil Code.

Administrative law also regulates public offices. The Constitution and the Law of 1978 concerning civil servants are the main texts governing this domain. Private state property is subject to the provisions governing the property of private individuals and entities, whereas public state property is subject to special rules (e.g., Constitution, Civil Code, Law of 1984 concerning irrigation and drainage).

Administrative law has several distinctive features and principles. Its rules are not codified in a single text. It is thus essentially a judge-made law that is flexible and evolving. Administrative courts have the freedom to devise appropriate solutions for dealing with the case at hand. For this reason, civil law countries have created special courts to deal with administrative matters. Arab countries and Turkey have such a dual judicial system in which administrative courts adjudicate in administrative disputes and follow specific rules.

The first attempts to create administrative courts in Egypt date to the reign of Muhammad ‘Alî (1805-1848), when newly created administrative bodies progressively acquired judicial mandates. Following the establishment of Mixed and National Courts, the Egyptian legislature adopted a single judicial system in which ordinary courts were vested with

competence to review administrative disputes, in addition to their ordinary jurisdiction.

Different proposals were made to create a specific administrative jurisdiction, but it was only after the Montreux Convention (1937) that a proposal to create a full-fledged Council of State was initiated. In 1946 the Egyptian Council of State was established, on the model of the French *Conseil d'Etat*. Unlike the latter, which belongs to the executive branch of the state, the *Majlis al-dawla* is part of the judiciary.

In 1949 'Abd al-Razzâq al-Sanhûrî (1895-1971) became the Council of State's second president. By 1952, the first year of the Free Officers' revolution, the Council of State had become a strong and respected institution. In 1954, however, following a confrontation between the regime and its constitutionalist opposition, Sanhûrî resigned from office after being physically attacked. In the following years the Council of State kept a low profile. No major changes occurred until 1972, when the Council of State regained influence. Not until 1984 did it recover full control over its affairs and become an independent judicial body.

Article 172 of the 1971 Constitution stipulates that the Council of State is an independent judicial authority competent in administrative and disciplinary matters. Pursuant to Law 47 of 1972, the Council of State's courts are competent to review disputes specified by the law, including disputes involving employees and individuals, disputes over administrative contracts, and all disputes defined by the Council's own rulings as administrative disputes.

The Egyptian Council of State is composed of three sections: judicial, advisory, and legislative. The judicial section, which includes all administrative jurisdictions, deals with (1) administrative litigation; and (2) disciplinary litigation. It is divided into three jurisdictional levels: administrative courts (*mahâkim idâriyya*), created in 1954, and disciplinary courts (*mahâkim ta'dibiyya*), created in 1958; a Court of Administrative Justice (*mahkamat al-qadâ' al-idârî*), created in 1946; and a Supreme Administrative Court (*mahkamat al-idâriyya al-*

'ulyâ), created in 1955. The disciplinary courts are divided into two levels according to the rank (low or high) of the civil servant referred to the court. The disciplinary section of the Supreme Administrative Court hears appeals against decisions by both categories of disciplinary courts.

As courts of first instance, administrative courts are competent to consider appeals placed before it by public servants against administrative decisions concerning them, while the Court of Administrative Justice is the competent first degree jurisdiction for all other administrative litigations. The latter court also hears appeals against decisions taken by the Administrative Courts. The Supreme Administrative Court examines appeals against rulings of the Court of Administrative Justice sitting as judge of first degree. The control exercised by the Supreme Administrative Court (similar to that exercised by the Court of Cassation in civil and criminal matters), is limited to issues of law and does not include points of fact, except as prescribed by a clear legislative provision. The quorum for the Supreme Administrative Court is five judges and for the other jurisdictions three. The judicial section of the Council of State also includes a body of state commissioners (*hay'at mufawwadîn al-dawla*), created in 1955, composed of magistrates charged with the task of conducting a preliminary investigation of cases submitted to the various jurisdictions. The different functions of the magistrates (courts, body of state commissioners) are permutable.

The legislative section of the Council of State, created in 1969, is charged with reviewing governmental draft laws and by-laws, and presidential orders, prior to their promulgation. However, the absence of review by the legislative section does not undermine the legal validity of these texts.

The advisory section (*qism al-fatâwâ*) of the Council of State is competent to issue a legal opinion to the different state administrations (including ministries, public administration,

public institutions and public sector companies). It has three levels: (1) Advisory Departments, each of which specializes in a specific ministry and its agencies; (2) three Committees of the Department Presidents that discuss issues sent by the Advisory Departments and review public concessions, monopolies, and draft contracts exceeding 50 000 £E to which the government is a party; (3) the General Assembly of the Legislative and Advisory Sections, which includes the presidents of the Advisory Departments, the presidents of the Committees and the president and members of the legislative section. Presiding over the advisory section is the first vice-president of the Council of State. It is competent to issue an opinion on questions submitted to it by the Committees, the legislative section, the President of the Council of State, Ministers, the President of the People's Assembly or the President of the Republic. Recourse to the opinion of the advisory section is not obligatory. Although its opinions are not binding, they are frequently requested and generally followed, largely so as not to risk having the text declared null and void by the judicial section. When disputes pit one public administration against another, recourse to the advisory section is obligatory and its decisions are binding.

3. Other countries

While Egyptian law may serve as a template for the study of administrative law in Arab and Islamic countries, the experience of each country was unique, as indicated in the following sketch..

The Ottoman empire borrowed aspects of French administrative law. Its collapse in 1918 and the establishment of the French mandate in Lebanon (1920-1946) led the mandatory authority to establish a system of administrative law that drew heavily on the French model. This system was expanded after Lebanon became a democratic republic in 1926. In Lebanon, adjudication in administrative matters is performed by the Council of State (*majlis al-shûrâ*),

which functions on the basis of precedent. The Constitutional Council and Council of State have clashed on several occasions, with the latter claiming competence in constitutional matters explicitly assigned to the jurisdiction of the former. A law passed in 2000 created regional administrative courts, alongside the Council of State, which serve as an appellate and a cassation court of the administrative courts' decisions. In certain cases, the Council of State settles at first and last instance.

In Syria, litigations over administrative contracts are adjudicated by the Council of State, which is also competent to annul administrative by-laws violating the law. The commercial activities of the State are normally dealt with by ordinary courts. The Syrian Council of State is composed of courts of administrative jurisdiction and a High Administrative Court that functions as an appellate court. The Court of Conflict adjudicates conflicts between civil and administrative courts.

In 1994, Morocco created administrative courts with jurisdiction over conflicts involving administrative decisions, administrative contracts, and damages caused by the acts or activities of juristic public persons. In Algeria, the judicial system includes both civil courts and administrative courts. In 1998, a Court of Conflicts was established to arbitrate conflicts over competence between the two orders of jurisdiction. Tunisia reorganized its Administrative Court in 1996, when a new law assigned judicial and consultative competence to the Administrative Court. It has first instance and appellate divisions.

In 1996, the President of the Republic of Yemen issued a resolution establishing Public Property Courts that function as courts of first instance in cases involving, *inter alia*, public property, religious endowments, economic crimes, and crimes connected with a public office or a public servant. In Oman, a Basic Law, promulgated in 1996, paved the way for the creation of a judicial system competent in administrative matters. An Administrative Court

was created in 1999. In Saudi Arabia, the Board of Grievances was created in 1955 to hear claims against ministries and public agencies. In 1982, the Board was reorganized and it now functions as a judicial body with jurisdiction over the treatment of persons and companies dealing with the government.

In 1994, Libya issued a law that regulates provisions relating to the formation, performance and termination of administrative contracts. Such matters are supervised by a special People's Committee. Disputes over administrative contracts fall within the jurisdiction of Libyan courts, unless otherwise stipulated by an arbitration clause. In 1995, Sudan promulgated a Public Service Act that regulates the functioning of the public sector. The Act created a Chamber of Grievances of Public Service Employees with competence in grievances against provisions governing public service and in disciplinary matters.

In Turkey administrative cases are heard by administrative courts and the Council of State, except for decisions issued by the President of the Republic, the High Council of Armed Forces, the High Council of Judges and Public Prosecutors, the Martial Law Commander, and the Regional Governor of the State of Emergency. The Constitution provides that "all acts and actions of the Administration shall be subject to judicial review." The law organizing administrative courts recognizes the right of any person whose interests have been infringed by an administrative act to petition against the administration. An amendment to this law, which attempted to limit its scope, was declared unconstitutional by the Constitutional Court.

Article 174 of the Iranian Constitution provides that the National Inspection Department is competent with regard to the proper conduct of affairs and the correct implementation of laws by the administrative organs of the government, under the supervision of the judiciary. In 1996, a new law provided that the Department's reports relating to government regulations,

resolutions, circulars, and directives must be sent to the Court of Administrative Justice for examination and judgment.

In Pakistan, there are no administrative courts, although several offices have been created to control the work of the administration. In 1999, for example, the National Accountability Bureau Ordinance created an accountability court responsible for fighting corruption. In 2001, the Supreme Court declared some of the Ordinance's provisions unconstitutional, while maintaining its core elements.

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