Révolution, Rechtsstaat, and the Rule of Law: Historical Reflections on the Emergence of Administrative Power and Administrative Law in Europe

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The history of administrative law in Europe reflects the emergence and evolution of administrative power within the nation state over the last two and half centuries. Several broad comparative questions arise: In what ways have the various paths to droit administratif in France or Verwaltungsrecht in Germany converged or diverged from the path to administrative law in England (and later America)? Similarly, how have the German or French paths to the Rechtsstaat or the État de droit, respectively, converged or diverged from the Anglo-American path to the Rule of Law?

Providing intelligible answers to these questions is a difficult challenge. The developments under discussion are at once specifically national and, at the same time, so broad and complex as perhaps to elude effective comparison, at least in the minds of some readers. It is therefore advisable to circumscribe both the questions and the possible answers, as well as to establish chronological limits.

The particular routes to droit administratif, Verwaltungsrecht, or administrative law must be understood in light of the various processes of State-formation and the different constitutional histories of the countries concerned. Nevertheless, no State-building process mechanistically translates into a particular system of administrative law. The history of State-formation in Europe proceeded not merely according to its own specific tempos but also on a different factual level from the conceptual and legal representations of those changes. In our analysis of the conceptual and the legal, we perceive the State only in silhouette, through ideal types – the Rechtsstaat/État de droit as well as the Rule of Law – which serve as conceptual abstractions and descriptive syntheses of complex institutional orders that are imbued with important ideological implications.

This methodological caveat should caution us against jumping to conclusions. Thus, we must not assume that the use of ‘administrative’ terminology to represent State power in Germany or France compared to its relative absence in England and America (at least prior to the twentieth century) corresponds to State ‘strength’ in the former and State ‘weakness’ in the latter. There is no necessary correlation between hierarchical administrative institutions and a State’s capacity to govern a very large territory effectively (see, for example, Novak 2008).

Thus, the divergences and convergences we trace are limited to the States’ legal orders, and do not extend to the underlying history of State power per se. Our analysis only seeks to explain the way administrative law varies over time and space at the conceptual level. We do not deal with the distinct issue of the presence or absence of hierarchical bureaucratic structures along the lines of Weber’s famous model. Our aim here is simply to define the different juridical forms within which the institutional enterprises that we call States emerged historically in Europe.

A second, chronological, premise flows from the first. The conscious emergence of powers, tasks, or laws considered as ‘administrative’ is a relatively recent phenomenon, something reflected in the historical development of languages, lexicons, and concepts. In France, for example, the terms administration publique and bureaucratie did not become widely used before 1750, and droit administratif did not make its first appearance until the early years of the nineteenth century. Moreover, Verwaltungsrecht in Germany did not appear until well into the nineteenth century.

* These reflections build on Mannori and Sordi (2009); for further references and discussion, see Mannori and Sordi (2001).
Administrative law in the English-speaking world arguably did not emerge as a distinct conceptual domain until the twentieth. The development of administrative power or administrative law has its own history, which is not necessarily coterminous with history of forms of public authority. Rather, the emergence of a specifically administrative power or law is intrinsically a modern phenomenon, dating back no more than two hundred years or so.

Thus, the questions that this chapter raises only make sense for the past two centuries: for the nineteenth century, in which an identifiably administrative space, as well as corresponding understandings of administrative power and law, emerged; and for the twentieth century, in which the vast expansion of administrative personnel, responsibilities, organizations, and establishments (including, perhaps most importantly, the diffusion of public services and of social administration) became an inescapable feature of modern governance. It is precisely in this time span that the divergences and convergences between the different paths of State-formation become noticeable and measurable.

1. Révolution: the fracture line at the origin of administrative modernity in Europe

At least since the publication of Tocqueville’s 1856 masterpiece, L’Ancien Régime et la Révolution, scholars have raised questions about the continuity or discontinuity across the divide marked by 1789. In one of his most famous passages, Tocqueville himself asked whether Richelieu would have been pleased with ‘the new order of things’ emerging in the first year of the Revolution (Tocqueville 1969: 96). To what extent did the administrative inheritance of the ancien régime continue to condition institutional and legal decisions throughout the Revolutionary decade and after? Even today, the question of continuity still fascinates scholars, reflected in the rich historiography on the slow and seemingly irresistible transformation from the old normative and conceptual universe of police and Polizei that took place throughout continental Europe over the second half of the eighteenth century. It was during this period that this conceptual universe definitively lost its unitary nature, occupied instead by rigidly differentiated disciplines and distinct institutions: politics, public administration, the police force, etc.

In reflecting on the emergence of ‘administrative’ power, it would of course be senseless to search for the origins of particular public functions (say, defense of the territory, the guarantee of public safety internally, or the management of public properties). This effort would soon devolve into a regressum in infinitum toward primitive political communities, thus preventing an effective distinction between pre-modern and modern. The question we must ask ourselves is of a different sort: at what point do state functions become broadly perceived as ‘administrative’, separated from other forms of public power, like defense and public order?

To mark the emergence of administrative power as such, we have nothing comparable to the seemingly precise dates in history (for example, during the American or French Revolutions) when a ‘constituent’ power – the ‘Nation’, or the ‘people’ – purported to abrogate a constitution ancienne, proclaiming the principle of legal equality in place of centuries-old hierarchies and corporatist distinctions. We also have nothing comparable to the adoption of a new code civil that, in much of continental Europe at least, purported to displace a legal order that was so ancient and complex that it contained elements of Roman law, general and local coutûmes, royal ordonnances, municipal and corporatist statutes, as well as arrêts de règlement issued by the myriad jurisdictional powers that operated in the old order. Administrative power is deeply imbricated, rather, in concrete institutions as well as in their evolution over time; it does not live solely in a legal, conceptual or constitutional dimension. Precisely for this reason, it lends itself to substantial diversity and opens itself up to divergent paths of development.

The emergence of administrative power, which was closely followed by that of administrative law, unfolded over a longer time span, which undoubtedly included the Revolutionary decade and a
good portion of the Napoleonic era. However, as compared to notions of legal individualism or citizenship that emerged with the Revolution specifically, administrative power cannot separate itself as sharply from its roots under the ancien régime. Indeed, at the end of the seventeenth century, an ancien régime jurist like Jean Domat could classify public powers in a triad of justice, police, finance (Domat 1756: II, I, I, 15, p. 151), symbolizing the growing complexity of the absolute monarchy and the first significant exercises of sovereignty over corporatist society. Administrative power and law, therefore, undoubtedly have an ancient soul, deeply bound up with the capacity of political absolutism to govern.

And yet, in the legal universe of the ancien régime, the power of command generally remained firmly in the hands of ordinary judicial jurisdictions. Governance in old Europe was very much juridictionnel – that is, tied to the vast array of adjudicative bodies – even as the bureaucratic apparatus of the emergent absolute monarchies expanded. This situation eventually gave rise to a political and legal dialectic between justice and what would, by the mid 1700s, come to be defined as administration publique. This dialectical tension intensified as the old regime monarchy and corporate society progressively extended forms of social discipline through an increasingly elaborate regulatory system (Oestreich 1969). New forms of gouvernamentalité (Foucault 1994) or arts de gouverner (Senellart 1995) emerged in the eighteenth century, marked by an intense and completely new regulatory attention to the population and the territory as a whole. In particular, the use of arithmétique politique became more widespread, intended to quantify and measure activity as a necessary precondition to the development of new forms of regulatory intervention.

Thus, insofar as administration publique was concerned, the Revolution of 1789 did not so much invent as it catalyzed. It reformulated institutional and conceptual materials that had sedimented at least since of the middle of the seventeenth century. But in breaking definitively and abruptly with the old corporatist order, the French Revolution also marked a critically important fracture line. The Revolution radically overturned the organization, functions, and conceptual-legal vocabulary of the old regime. In so doing, it lacerated the old uniformity and gave rise to many of the divergences that are the object of our study.

‘The gigantic broom of the French Revolution’, as Marx called it (1973: 218) also operated with great intensity on the terrain of administration, marking an irreversible point of no return. Novelties in social and political organization – most importantly the abolition of corporate bodies and the creation of a single class of citizens – loom importantly in our analysis: As Tocqueville put it, ‘equality facilitates the exercise of power’ (1969: 98). In the place of the old corporate order, an enormous empty space emerged between the State and the individual citizen, artificially conceived as isolated. The Assemblée Constituant replaced the old institutional patchwork of gothic overlaps with an ordered, thorough, and hierarchical pyramid of districts and apparatuses, seemingly geometrical in their dimension, organization and function. The old société de sociétés (Portalis 1999: 14) disappeared for good. The State as ‘political island’ (Grossi 2006: 94) conquered the center of power once and for all, and became the exclusive artificer of the legal and institutional order.

It is precisely this ‘State island’ that would henceforth take on the tasks that had previously been distributed among a multitude of corporate bodies which, together with the prince, had comprised the old institutional order. The composite monarchy of the past, with its heavy reliance on corporatist adjudication, would make way for a machine State with its own institutional capacities, pursuing its own tasks and its own interests. Political obligation became simpler: henceforth, the institutional map encompassed only two ‘islands’, that of the State, on one hand, and that of the citizen, on the other, which occupied and shared the political space.

It is at this point that one sees the birth of ‘administration’ in a continental European sense. It contrasted with ‘justice’, proclaimed generically in article. 16 of the Declaration of Rights of Man, where a first equation of rights and powers appeared (Clavero 2007: 31). It then constructed itself
both functionally and organizationally over the course of several years. That construction, in fact, began simultaneously with the disappearance of the ancien régime, with the decree concerning the institution of primary assemblies and administrative assemblies of December 22, 1789. It continued throughout the Revolutionary and Imperial periods, by the law of August 16–24, 1790 prohibiting ordinary judicial courts from reviewing administrative acts, the first regulations attributing jurisdiction of the affaires contentieuses to the administration and, finally, the law of 28 Pluviôse, Year VIII (February 17, 1800) concerning the division of French territory and the administration. Each of these acts helped to shape the specificity and subjectivity of administration as a separate and distinct form of public power. The functional categories that today define our present way of interpreting public authority, the categories of legis latio and legis executio, also emerged, extending beyond the simple distinction between law and justice, between normative power and its jurisdictional application. The space for an administration générale de l’État thus definitively emerged, which for the first time is understood as autonomous, irreversibly replacing the substantive and institutional distinctions of the ancien régime.

Parallel to this new modality in the exercise of sovereign power which the Revolution defined as administrative, a new manner of describing and conceptualizing public power took hold, radically different from the old notions. The French Revolution went beyond a simple constitutional acknowledgement of the subjective rights of an administrative power that had existed since the formation of the modern State. This traditional nineteenth-century reading of the transformation of the Polizeistaat into the Rechtsstaat (something we take up in the next section) did not fully grasp how the exercise of sovereignty by the State led to the suppression of corporate society. In particular, this traditional reading did not adequately capture the monopolistic concentration of public tasks in the hands of the new institutional subject. ‘Administrative power’ and ‘administrative law’, that is, the new authority and its legal limitation, emerged contemporaneously. Defining in legal terms the contours of this new power became essential to the exercise of sovereignty by the nation. The shift from corporatist society to liberal society required a machine State with the effectiveness and the ‘rapidité du fluide électrique’ (Chaptal 1800). It also required the invention of new institutional and legal guarantees, first and foremost, administrative justice. Finally, it entailed a new dialectic between center and periphery, seeking legal uniformity and control, while also allowing for decentralized spaces.

However one chooses to interpret the link between the ancien régime inheritance and the revolutionary novelties, the historiography unanimously acknowledges that administrative law makes its first appearance in the strategic passage out of the late eighteenth century. It then fully unfolds in the nineteenth century, which throughout the European continent becomes ‘the century of administration (Verwaltung) and the emergence of administrative law (Verwaltungsrecht)’ (Stolleis 1992: 229). Indeed, even within the common law world, one begins to see ‘the origin of an administrative law endowed with autonomy . . . in the ambit of liberal constitutionalism’ (Schiera 2009).

But it was in France, in particular, that le moment napoléonien would mark the definitive emergence of droit administratif (Bigot 2003: 108), with the birth of the contentieux administratif and the new regime of administrative acts. Justice and administration were firmly divided, separated. Juger l’administration c’est encore administrer (‘to judge the administration is still to administer’) became the basic principle of this early stage in the development of French administrative law. For the ordinary courts, judicial review of the administrative action was impossible: the ordinary judge could only adjudicate civil and penal cases. A centralized administration, endowed with its own adjudicative capacities, guided and controlled a country that Tocqueville described as an equal surface. The State stood over the society. And in that ‘State island’ which instituted and regulated the entire social fabric, administrative power became the
central axis of the government of the territory. Modernity henceforth had the unmistakable seal of administration. The epoch-making transformation of the Revolution and the Napoleonic era swept away the many old social and political elements that had become irreconcilable with the new totally equal surface in a Tocquevillean sense, giving rise in particular to a new concept of separation of powers. Montesquieu, in his classical declination of a half-century before, distinguished between ‘the executive with respect to things dependent on the law of nations’ (peace, war, diplomacy) and ‘the executive in regard to matters that depend on the civil law’, or rather civil and penal jurisdiction (Montesquieu 1914: XI, 6). But after the Revolution and Napoleonic era, a subject of a new type interposed itself between ‘the general order of the State’ and jurisdiction, baptized for the first time as administration générale de l’État. This new subject assumed the multitude of regulatory tasks that the prince and the corporate bodies of the ancien régime had previously divided between them. Administrative power and law now appeared as an irreplaceable pilaster, on the continent, of the entire liberal society: ‘une des formes de l’État nouveau du monde; nous l’appelons le système moderne qu’il faut dire’ (Tocqueville 1866: 73).

2. Rechtsstaat: the German conceptual contribution and the legal limits of administrative power

Even in countries like Prussia and Austria, which were seemingly immune from the more radical revolutionary developments taking place in France, there were pressures toward the development of administration and administrative law. Rather than abrupt revolutionary turns, however, Prussia and Austria witnessed the slow advance of reforms. As in France, these reforms began in the mid-eighteenth century and gathered momentum in the context of the Napoleonic wars. But unlike France, there were no clear constitutional ruptures, no overthrow of the existing corporate order, at least not immediately. On the level of legal language, the transformation was also less pronounced: indeed, well into the nineteenth century, the new language of administrative law continued to coexist with older conceptual vocabularies and traditions, first and foremost the eighteenth-century notion of Polizeiwissenschaft (Police science).

It is precisely over the first half of the nineteenth century that the contradistinction between civil law and common law countries became ever more pronounced on the administrative terrain. Once the idea of administration as a power of the State over society gained widespread acceptance, the European continent witnessed a profound reconsideration of the nature of political obligation, which became centered on the State–citizen relationship and the authority–freedom dialectic. A new theme emerged, that of legal guarantees for society and the individual in the face of the State’s claims to pre-eminence. The end of the Revolution indeed left a formidable administrative machine on the institutional landscape, endowed with a vast and unprecedented number of imperative powers to dispose of the properties and freedom of private parties. At the same time, administration emerged as, on the one hand, an irreplaceable support of an atomized and dispersed society suddenly deprived of its centuries-old corporative ties, but, on the other, an equally pressing danger for individual rights. In a word, nineteenth-century administration served as both condition for, and menace to, the freedom of the moderns. Everything that the Revolution left unsaid slowly acquired centrality: the need to define legal bounds and guarantees within the confines of a system of administrative ‘justice’ worthy of the name. Most importantly, it became necessary to develop means whereby liberal society could defend itself against the absolutely unprecedented concentration of powers in the State. Political freedom certainly did not exclude administrative despotism. On the contrary, as Tocqueville observed in Démocratie en Amérique (with a pinch of regret for the pluralist order displaced by the revolutionary fracture), it is precisely ‘those democratic peoples which have introduced freedom in the sphere of politics’ who also increased
'despotism in the administrative sphere' (Tocqueville 1994: 694). When he wrote these words in 1840, his real target was the French rather than the American situation. He continued that ‘all these various rights which have been successively wrested in our time from classes, corporations, and individuals have not been used to create new secondary powers on a more democratic basis, but have invariably been concentrated in the hands of the government’ (Tocqueville 1994: 680). The result was ‘a constitution [that was] republican in its head and ultra monarchial in all its parts’, which in Tocqueville’s eyes was ‘an ephemeral monstrosity’ (Tocqueville 1994: 694). Thus, administration – the irreplaceable cornerstone of the democracy of the moderns – took on extensive discretionary powers, endangering the rights of citizens.

Understandably, much of nineteenth-century legal development, at least in the realm of administration, focused on checking powers, functions and offices. Drastic amputations of responsibilities and functions were felt necessary; new balances between center and periphery were understood to be needed to temper the unbearable administrative centralism; and substantial restitutions to the social sphere were urged, mostly in vain, in order to escape the providential crutches of the State. Calls for decentralization were recurrent in liberal European society from the 1830s onward. There was a palpable desire to re-establish relationships between society, territory, and public power that were less artificial and mechanical than in the Napoleonic era, and therefore more solid and profound. Concerns were less about the lack of democratic control than about the administration’s seeming separateness from society, most importantly from the influence of local notables. Adding to the atmosphere of liberal anxiety was the rise of the ‘social question’ – the increasing tensions between the working classes and the bourgeoisie in a period of industrialization and urbanization – which made itself felt both in the revolutions of 1848, and then later in the Paris Commune of 1871, posing a challenge to the precarious liberal hegemony.

The inexorable development of administrative power, as well as its magmatic character due to its very recent emergence, captured the attention of jurists and politicians. Old representations of power were set aside; new typological models emerged. Most importantly, continental jurists developed the idea of the Rechtsstaat (Stolleis 1982), a new theoretical lemma which originated in German doctrine but rapidly found equivalent expressions in other continental European legal languages (Stato di diritto, État de droit, Estado de derecho). This typological model sought to reconcile the new ‘laws of freedom’ (Kant 1991: 129) with the eclipse of the judicial regimes of the old order and the full deployment of State sovereignty via administrative power that emerged in the Revolutionary and Napoleonic eras. In German legal culture, from Kant to Mohl, from Stahl to Gerber, from Bähr to Gneist (see Stolleis 1992) – indeed, in continental legal culture as a whole – the Rechtsstaat expressed both the new demand for guarantees as well as the acknowledgment of the irrevocable transformations since the end of the eighteenth century. The goal was to circumscribe the enormous power that executive administrations had conquered with the French Revolution and the Napoleonic era.

The notion of Rechtsstaat sought to reconcile the ‘freedom of the State’ with that of the citizen; it attempted to make the primacy of the administration compatible with the respect for individual guarantees. It reflected the broadly accepted idea that power and freedom developed symbiotically. The Rechtsstaat was thus never understood as a spontaneous, natural order, pre-existent to power. The legal order that this notion sought to describe was very much a State order. And the principal guarantee of rights it contemplated would be through positive law, most importantly legislation. The challenge of limiting power was hardly new, but the Rechtsstaat implied new methods of mediating between power and freedom, and thus new techniques of limiting authority. The guarantees invoked in the early nineteenth century were very different from the guarantees typical of the old order. Gone were the intrinsic inequality and historical particularism of old-regime rights, pre-existing the State. Henceforth, rights would cohabit with a sovereignty personified by the centrality of legislation. Indeed, rights were understood to have no existence without recognition by
the legislative power, and legislation becomes the principal guarantee of rights. Hence the increasing importance of the principle of legality in Verwaltungsrecht: from this moment onward, the prerequisite for every manifestation of authority was the legal source.

The problem of administrative legality was one that the Revolution left substantially open. It was also one that the Napoleonic construction considerably aggravated, particularly with its assertion of the general immunity of administration from judicial control. Definitively separated from justice, administrative power achieved an overall authority and institutional centrality to such an extent that many began to see it as the very ‘essence of the State’ (see Ranelletti 1912: 279 and the bitter objections of Kelsen 1968a: 2, 1647). Administration’s claims to freedom and autonomy were subject to few legal checks, resistant to all possibility of codification, or to the control of the ordinary courts. Even in French legal culture, which defined administration as exécution des lois (implying, in some sense, a degree of subordination to the legislator), leading commentators stressed the active, vital, and autonomous qualities of administrative power (see, for example, Macarel 1848: 11). As the direct interpreter of the general interest, Vivien argued that ‘administration needs air and space; liberty is its lifeblood’ (1852: I, 122).

It was therefore the task of nineteenth-century legal doctrine to conceptualize administration both as a power and as a field needing legal bounds. Administrative legality came to be understood as an essential guarantee of freedom. As numerous commentators reiterated in different national contexts over the course of the nineteenth century, from Barthold Georg Niebuhr to Rudolf von Gneist to Silvio Spaventa, up to the American Woodrow Wilson: ‘liberty depends incomparably more upon administration than upon constitution’ (Wilson 1887: 211). This was a significant affirmation. On the one hand, it pointed to the fact that, in Europe at least, constitutional review of legislation was still a distant goal. On the other hand, it suggested that it was in the administrative context, where the construction of power was strongest and most incisive, that the provision of efficient rights guarantees was perceived as the most urgent task. The legal control of administrative action, by increasingly court-like administrative tribunals, became the banner of the century: in the administrative universe, power and freedom did indeed advance hand in hand.

It was precisely in this search for a kind of judicial review of administrative action that the ideal of the Rechtsstaat acted as a force for institutional modernization. Administrative justice stood as a guarantee of legality, as a mechanism to ensure the administration’s conformity to the law. But because administrative action was immune from the control of the ordinary courts, administrative justice would not, strictly speaking, entail ‘judicial review’. Rather, the continental interpretation of the separation of powers required the establishment of a new, specifically ‘administrative’ judge, one who was often organically attached to the executive (as with the French Conseil d’Etat), or at least separate from the ordinary courts.

In sum, we can say that the continental model of the Rechtsstaat entailed three fundamental elements: the supremacy of the legislative power; the existence of a strong administrative power; the existence of a special judge for administrative matters. On the level of the concrete enunciation of public functions, the course taken by continental Europe therefore presents several conspicuous particularities. We can attempt to measure them with respect to the English evolution, conscious of the fact that distinguishing between civil law countries and common law countries does not exclude important convergences, especially on the level of typological models, where the effects of the shared individualist universe are stronger. There is no doubt that, beneath the marked national individualities, the diverse declensions of liberal constitutionalism reveal important common matrices.

3. Rule of Law: the Anglo-American variant in the law of administration
At first glance, the English path diverged sharply from the continental route, whether measured by the abrupt changes engendered by the French Revolution, or the slow progression of reforms in the Austrian-German context. Rather, the English process of constitutional modernization was much older, the process of displacing corporative pluralism in favor of a more individualist order was slower and arguably less painful, and the primacy of Parliament was more deeply rooted and undisputed. The construction of a modern public authority thus proceeded in parallel rather than in conflict with the expansion of political participation, which conserved and transformed, but did not deny, the old pluralism of freedoms. The pre-eminent vocation of the State could thus still be to mediate between divergent interests rather than express unitary values. ‘Justice’ associated with the common law courts, rather than absolutist ‘administration’, arguably remained central.

For its part, ‘the importance given to institutional continuity within the common law habit of thinking’ was essential to the ‘Whig fundamentalism’ that was by far the prevailing interpretation of English constitutionalism, in turn expressed in the ‘high degree of cohesion within the governing class’ (Loughlin 2009: 156, 163). As a consequence, England rejected fracture lines that were taking shape in continental history. The peculiarities of the English State, on one hand, combined with a very resistant way of thinking, on the other, represented an insurmountable barrier to the development of an administrative apparatus on the continental model. The old and traditional judicial model for the exercise of public power did not lend itself to radical transformation; moreover, there was no similar lexical revolution in England as occurred on the continent with the end of the eighteenth century.

And yet, in England too, the nineteenth century saw an administrative space progressively take root, prompted by the demands and problems that exploded with the Industrial Revolution. This space emerged gradually, in perhaps a confused and disorderly manner, in response to specific and concrete problems posed by a rapid urbanization, the emergence of the social question, and the need to regulate the socio-economic relations that broke sharply with the past (reflected on the constitutional level in the increasingly more insistent pressures to extend suffrage). Case-by-case, through a process of learning by experience, an administrative apparatus developed, which focused variously on the regulation of work, railways, health, public education, and poor relief. Thus, in England too, ‘administration’ – even if not understood in a continental sense – began to flank the traditional judicial apparatus. ‘The great body of such changes were natural answers to concrete day-to-day problems, pressed eventually to the surface by the sheer exigencies of the case’ (MacDonagh 1958: 65). Built either by statute or regulatory authority shifted to the executive (‘delegated legislation’), England saw the creation of a broader network of administrative authorities having executive prerogatives and discretionary powers.

The appearance of a functionally driven and unplanned administrative centralization, with the institution of the first boards and central departments, as well as the birth of administrative forms of adjudication beyond the purview of the common law courts, increasingly displaced Parliament as the hinge between the central and local government, and complicated the traditional judicial model of exercise of public power. Nevertheless, these developments did not impose an epochal change in the State organization or the adoption of new legal categories comparable to the French administration publique or to the Staatsgewalt of the German tradition. Instead, they were generally regarded as exceptional, inserted among the consolidated principles of common law governance. Even local government in England, though heavily influenced since the early Victorian Age by the profound functional transformations affecting both State and society more generally, conserved features of strong continuity with the previous territorial constitution. England gradually grafted administrative novelties onto the fabric of common law, updating but not altering the furrow of tradition and the relative conceptual universe.

Most importantly, England did not establish a specifically ‘administrative’ judge whose constitutional function would be to defend administrative prerogatives. It was thus unnecessary to
alter the traditional way of thinking, which regarded the common law courts as the pre-eminent defenders of the ‘Rule of Law’, to which all litigants, including the executive, must submit. Indeed, in nineteenth-century England, the very idea of the Rule of Law emerged in legal scholarship explicitly to delimit administrative powers analogous to those of the continent. In this, the idea of the Rule of Law Ironically shared much with the Rechtsstaat: both sought to reconcile State sovereignty with the need for legal guarantees of individual rights, and both acknowledged a general presumption of freedom, as well as the primacy of individual property. Indeed, both the Rechtsstaat and the Rule of Law acknowledged the primacy of legislation: in the first case, as the expression of the sovereignty of the State, and in the second as the expression of ‘Parliamentary Sovereignty’ – ‘the sovereign and uncontrollable authority’ of Parliament, as Blackstone had long before put it (Blackstone 1884: 159). Finally, both reflected considerable prudence toward what appeared a dangerous democratic drift, certainly in terms of the generalization of political rights, but also in terms of social rights, whose development remained far in the future.

Strong divergences remained, however. The continental concept of Rechtsstaat referred to a State that stood above society, instituting and rationalizing the social sphere, privileging the legislative over customary law, entrusting absolute centrality to codification. The Rechtsstaat was also a markedly administrative State, as we have seen, manifesting this axiom in continental legal science: ‘one can conceive of a despot who governs without laws and without judges, but a State without an administration would be anarchy’ (Jellinek 1914: 612). On the continent, the centrality of administration translated into the idea that the administrative sphere expressed the very essence and continuity of the State’s sovereignty. It did so on the level of organization, by means of centralized administrative control of the periphery. It did so on the level of law, through the regime of the acte administratif and justice administrative, which prevailed in the face of contrary claims of common law and judicial authority exercised by the ordinary courts.

The Rule of Law in England, by contrast, confirmed itself as a purely and typically judicial regime in which the omnipotence of Parliament, though formally acknowledged, needed to compromise with the substantial intangibility of the ‘common law of the land’, in which the execution of the law and respect for common law rights was still essentially the duty of the jurisdictional function. As a consequence, an administrative sphere distinct from the legislative and the judicial powers, one capable of affecting the rights of citizens, encountered a number of legal-conceptual obstacles in its struggle to emerge. It was no coincidence that only in the English milieu did the common law courts succeed in monopolizing (at least well into the twentieth century) the forms of judicial defense before public power, preserving the unity of jurisdiction. On the organizational level, the greater weight of local government, with its separate functionaries, duties, and financial autonomy, along with a persistent non-bureaucratic ideal of self-government, drastically marked the limits of the dimensions and activity of the central administration and impeded the bureaucratization of the civil service. This explains why, from John Stuart Mill to Walter Bagehot, nineteenth-century commentators classified the English system as a non-bureaucratic order, viewing bureaucracy as a typically continental creature.

Even in the late nineteenth century, when the gap between the continental administrative regime and the persistent English judicial regime closed considerably, Dicey ‘emphasized, not the state, but the “ordinary law” applied by the “ordinary law courts”’ as the cornerstone of the English system (Allison 1996: 72). Dicey expressly grounded his understanding of the English constitution in what he discerned as the three founding principles of the Rule of Law: first, ‘the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power’, which excludes ‘the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government’; second, the ‘universal subjection of all classes to one law administered by the ordinary courts’; and finally, the preservation of ‘the rights of individuals’ via the negation of any droit administratif in England (Dicey 1959: part 2, chapters 4 and 12). The historian F.W. Maitland
was considerably more cognizant than Dicey of the increasingly administrative character of Victorian governance (Maitland 1908: 505); nevertheless, he too reaffirmed the English divergence from the path of the Rechtsstaat, which depended primarily on the absence of a process of bureaucratization comparable to that on the continent. According to Maitland, in England ‘we have no practical experience of a Polizeistaat or Beamtenstaat’ (1987: XLIII). Continental jurists, by contrast, unvaryingly conjugated the Rechtsstaat with the existence of a system of separate administrative judges, now recognized as the cornerstone of the administrative regime. In the most famous handbook of administrative law of Wilhelmine Germany, Otto Mayer could thus identify the Rechtsstaat precisely with the State of ‘a well-ordered administrative law’ (Mayer 1924, vol. 1, 58).

And yet, in England, too, by the end of the nineteenth century, the progress toward an ‘administrative law’ worthy of the name was a reality that observers found increasingly hard to ignore as a consequence of intense functional pressures on the State. As Woodrow Wilson put it in 1887, in terms that applied equally well to the English case: ‘the functions of government are becoming every day more complex and difficult; they are also vastly multiplying in number’ (Wilson 1887: 200). England, like its common law confrère across the Atlantic, was quickly filling the ‘hole in the U.S. Constitution’ where administration might have been (Mashaw 2006: 1266), as a consequence of nearly a century of institutional and regulatory experimentalism. Like Wilson, Maitland also saw that ‘year by year the subordinate government of England was becoming more and more important’ (Maitland 1908: 501). To use Dicey’s chronology, England had passed from Benthamism or individualism to the age of collectivism. The powers of the government had grown, administrative organization had become more complex, and a stricter discipline of the civil service was needed.

4. Rechtsstaat and the Rule of law faced with State Interventionism

Therefore, at the beginning of the twentieth century, the previously distinct and different traditions of Rechtsstaat and the Rule of law seemed to finally converge onto common and shared paths. This is acknowledged by Frank Goodnow, an American legal scholar with a particularly strong German imprint, the voice of a pure, continental juridical culture. Goodnow was probably the first person in the Western countries to be able, in 1893, to describe a common juridical world based on the universality of administrative law. Surelly he was the first to write a textbook of Comparative administrative law. A textbook with a very eloquent subtitle: An analysis of the administrative systems national and local of the United States, England, France and Germany. His unwavering opinion is also very eloquent and it represents an absolutely opposite point of view to that of Dicey: “the general failure in England and the United States to recognize an administrative law is really due, not to the non-existence in these countries of this branch of the law but rather to the well-known failure of English law writers to classify the law” (Goodnow 1893: 6-7).

But had administrative law already managed to secure an unquestionably global dimension by the end of the nineteenth century? Had it succeeded in reuniting legal language and institutions, previously marked by an unmistakeably national character?

If the position expressed by Dicey in 1885 and its peremptory denial of the existence in England of anything that could be compared with administrative law was largely based on an erroneous representation of the reality of the situation in England, Goodnow’s position was no less so. In the pages of Comparative administrative law we witness a mechanical transplant of the German 19th-century theory of law and State to the common law world. Concepts, notions and definitions were imported directly from Germany and France. This is particularly evident with reference to three basic conceptual topics, alien to the Anglo-American mentality: the idea that Administration represents the very essence of the State; the sharp distinction (a real conceptual divide) between
public and private law and between administrative powers and judicial powers; and finally, the inherent public law nature of administrative law.

“The Government” - wrote Goodnow using Otto Mayer’s identical, contemporaneous terminology - “represents the sovereign power of the land. Through its administrative authorities, it demands of the persons in its obedience, the sacrifice of their property, and curtails their freedom of action” (Goodnow 1893: 10).

Dicey’s negationist interpretation was as false as Goodnow’s idea of a natural convergence towards administrative law in continental Europe and the Anglo-American countries. On the one hand, the noble lie of the Rule of law; on the other hand, the noble lie of the universality of the German Rechtsstaat, in its typical declination based on the primacy of public administration. In other words, the idea that the Rule of law would not permit the existence of a droit administratif was undoubtedly an ideological one, but so was the theory of convergence toward a common administrative system under the German theory of law and State. The rapid failure of the project of an important follower of Goodnow, Ernst Freund, to introduce the German model of Rechtsstaat into the United States, demonstrated the significant limits that were still hindering the globalisation process of administrative law at that time. “Despite Freund’s best efforts, however, the Rechtsstaat was one European import that never established itself on American soil” (Ernst 2014: 8).

When did this ideological contraposition, typical of 19th-century juridical culture, end? We can cite Dicey’s famous essay published in 1915, in Law Quarterly Review with its unequivocal title: The development of administrative law. A more effective convergence between the two different mentalities emerged for the first time in Interwar Western Europe. In that period, faced with State Interventionism and the development of Welfare State legal scholars were finally pushed and encouraged to update their traditional juridical way of thinking.

The Weimar Constitution of 1919 epitomizes this shift of mentality. Social rights and “life of the economy” became part of the constitutional framework. Social and economic democracy complicated the catalogue of civil rights. Public interest invested private law with a growing focus on production and economic organization. New juridical sectors acquired a new disciplinary autonomy such as the public law of economy, taxation law and labour law. However, the problem was not exclusively a German one. On the contrary, the same shift from Liberal State to Welfare State was seen throughout Europe after World War I. The State’s entrance into the economy is a generalized phenomenon in the Western world, caused by the pull of the war economy and the problems of its reconversion; by the technological revolution; by the push of the social conflict rekindled by the Russian Revolution; and by the financial instability that would explode with the world crisis of 1929. The liberal strategy of devolving the regulation of the economy to society is replaced by the State-regulated economy.

In the French Third Republic, legal scholars - from Maurice Hauriou to Léon Duguit - have been able to record the great transformation of sovereignty already underway in the last decade of the 19th century. Before the First World War, in French juridical culture, la puissance publique - “the sovereign power of the land through administrative authorities”, in Goodnow’s words - was already flanked by another form of public activity, whose principal function became that of “giving satisfaction to the mass of elementary needs” (Duguit 1913: XVII). The French École du service public was the first to describe the unprecedented level of social and co-operative activity and the new dimension of service provision. Léon Duguit in particular, according to the sociological inquiry of Emile Durkheim, developed a frame of general theory capable of depicting the strong growth of public tasks.

Duguit was not alone in Interwar Western Europe. Hans Kelsen, the founder of the School of Vienna and one of the founding fathers of Austrian Constitution in 1920, starting from a different theoretical basis, perfectly interpreted the transformations underway, discovering the State of direct
administration and distributive justice: “the State that goes into action” (Kelsen 1968b). In the German legal culture, on the specific administrative terrain, we have to wait for the appearance of some young legal scholars, grown up in the School of Carl Schmitt: Ernst Forsthoff and Ernst Rudolf Huber. They developed a public law of the State economy and an administrative law of the public services during the Thirties, between the Weimar Republic and the Nazi regime.

In England, too, the spirit of the time is exactly the same. The end of laissez faire is published by John Maynard Keynes in 1926. Only one year before, in A grammar of Politics, Harold Laski defined the State as a “public service corporation” whose activity unfolds toward the realization of a new economic and social democracy (Laski 1925). Laski – as it is well known - was a follower of Duguit’s thought and the translator in English - in 1919 - of his masterpiece, Law in the modern State.

Already in October 1927, in the introduction to the first edition of Justice and administrative law, William Robson was able to conclude on the basis of a specific juridical approach in the following way:

“There can be no doubt that the rise of Administrative Law is mainly due to the vast extension in the work of government which has taken place in England during the past few decades, and to the rapid increase in power of the executive which has accompanied that extension. The traditional Court system, in which isolated individuals contest disputed rights of property or person, has been superseded by an entirely new type of judicial process so far as concerns controversies arising in connection with the new social services undertaken by the State” (Robson 1928: XXX).

The different traditions of Rechtsstaat and Rule of law thus started to converge in Europe for the first time; and they converged toward the depiction of a new Social Service State. From the continental legal scholars to the interdisciplinary English group at the London School of Economics (from Beveridge to Laski, from Robson to Jennings) the administrative law marked out new boundaries between authority and individual rights, “furthering a policy of social improvement” (Robson 1928: 438). The way to comparison was finally opened, notwithstanding “the lurid journalism” (Frankfurter 1930: 157) of Lord Hewart and his infamous 1929 diatribe, The New Despotism. Despite the persistent Dicey-based rhetoric therefore, even in England “the State either through the central departments or the local authorities has ‘gone into business’” (Robson 1928: 443).

Also in the United States, in the same years, the functions of the government were growing, driven by the needs of the second industrial revolution and the social question. In fact a Modern Regulatory State was developing, able to accommodate The demands of modern society upon Government and the growing “interplay of economic enterprise and government” (Frankfurter 1930: 1-2). Thus, even in America “those simple days” (Frankfurter 1930: 19) seem far off now, symptoms of a nineteenth century world marked by elementary needs and limited public functions. Anticipated by the late nineteenth century creation of the first Agencies system, Roosevelt’s New Deal with its political target of “Freedom from Want” seems to follow an identical path to that of the European countries. The “administrative oversight” of “public utilities” and “interstate public services” (Frankfurter 1930: 83-85) grew to the point where it was considered that even across the Atlantic because of the increasing subjection of private enterprise to “the fostering guardianship of the State”, the “laissez faire comes to an end” (Landis 1938: 83, 8).

Even in a constitutional system like the American one which, in its classic eighteenth century form, using the Montesquieu distinction, left no space for a “fourth branch of Government”, “the rise of administrative process” could now appear – at least to a jurist very close to Roosevelt’s project like James Landis - “by all odds the most significant development in legal history in the last century” (Landis 1940: 1078).

Since the beginning of the nineteenth century, “the American administrative constitution has been a continuous experiment in institutional design that has sought to conciliate administrative efficacy
with multiple conceptions of democracy and the rule of law” (Mashaw 2012: 312). The United States, therefore, joined the mainstream and saw, between the two world wars, a sudden acceleration with a huge growth in the government administration, “part of a worldwide process” (Ernst 2014: 89). With “the growth of Administrative Power”, “the difference between Anglo-American and French and Continental Law diminishes” (Frank 1923: 15-16).

However, significant differences remain between the American and the European path. Above all, “the struggle for administrative legitimacy” (Kessler 2016: 718) is far from resolved. The great conflict which saw the New Deal against the Supreme Court, presided for more than a decade (1930-1941) by Chief Justice Charles Evan Hughes, surpassed the political and economic struggles of the time. It was rooted in the eighteenth century constitutional framework and the objective difficulty of the quest to “normalize American Administrative Government” (Kessler 2016: 718) within a consolidated balance of powers that seemed to exclude a truly administrative function. It expresses a system of judicial review firmly entrusted to courts of general jurisdiction. It is based on property rights and economic rights, conceived by the seventh and eighteenth century Law of Nature, that in Europe are progressively losing ground to the affirmation of social rights and the principle of the indivisibility of rights. In spite of the significant progress in Social Security in the Roosevelt years, “the United States remained a residual provider of welfare, preserving insurance-based benefits for particular groups deemed to be deserving and failed to develop major state service” (Oxford Handbook of the Welfare State 2010, 7).

The history of American administrative law can certainly be described, convincingly, as the “occasional tilt” between “progressive” and “libertarian administrative law” (Sunstein-Vermeule 2015: 473), a frequently recurring theme, in particular on the front of ideological representation in the twentieth century and up to today: opposing forces which nevertheless found in the 1946 Administrative Procedure Act (APA) - “the only general charter for judicial review of administrative action” (Vermeule 2009: 1107; Sunstein-Vermeule 2015: 464) – a decisive point of compromise and equilibrium. After the war, with Truman’s Fair Deal, a solid reconciliation, starting in 1937, (Ernst 2014: 67), finally becomes possible between the culture of the lawyers, deeply rooted in common law and still loyal in its underlying principles to the version of Dicey’s rule of law, and the new managerial culture of administrators of the New Deal.

It is difficult, nevertheless, to think of anything similar on the European continent. The American ‘Tocqueville’s nightmare’ is taking on in Europe the appearance of a reassuring Etat providence, a Welfare State, an Etat gestionnaire which is willing to take charge of an increasing number of social needs, widely accepted and increasingly present in the daily lives of European citizens. The common spirit of the time, for the whole Western universe, does not translate immediately into a set of institutions fully in tune with one another.

The question of legal guarantees for administrative actions, on the continent, is a nineteenth century issue which underwent a phase of gradual adjustment between the two world wars, but without great changes, even in the German and Italian totalitarian system or in Vichy France. Judicial review was on the contrary at precisely this time central to the American path, due both to the definition of its scope of application and the content and intensity of the control over the activities of the Agencies. Becoming, precisely because of this function, the main motor of a by now well consolidated administrative law. In Europe the issues of the administrative organization are instead becoming absolutely central, in parallel with an administrative structure that is developing a multi-organized structure, hosting within it, alongside authorities which exercise the traditional puissance publique and bodies which carry out the new tasks of service public, also a significant number of public enterprises, which although belonging to the öffentliche Hand (public Hand) perform exclusively commercial activities.
This is a further element of difference compared to the American path. The second industrial revolution in Europe was possible only due to direct State intervention in the economy. The state takes action and intervenes directly, as an economic player, in the market equilibrium. Even the services of economic interest are (or soon become) public services. The term ‘public’ should be interpreted not only in the sense that they must serve a general pool of users, as a universal service, but also because it refers to services performed by the State (or in any case by the public administration or by private enterprise under government concessions). Similar examples of public interventionism will soon involve the banking and insurance sectors and even quite a few manufacturing sectors, especially in the field of heavy industry.

The State that made inroads on the continent between Nineteenth and Twentieth Century is at the same time an *Etat Providence* and an entrepreneurial State. Only in the last four decades, the European diffusion of the American experience and regulatory lexicon (from New Public management to the independent regulatory agencies, from competition law to consumer law) has introduced new forms of legal transplant and new elements of convergence, along a stream that flows in one direction only. That direction is now the opposite of that seen a century before when a true forerunner such as Frank Goodnow dedicated his book to the study of comparative administrative law.

**Conclusion**

The English and continental paths to the development of a law of administration reflect different starting points, development paths and conceptions of legitimate governance that can be traced at least to the end of the eighteenth century. Only with at the beginning of the twentieth century does the vocabulary start to become uniform, starting with the widespread – no longer reversible or in doubt – of the term ‘administrative law’. The content instead, again during the period between the two World Wars, continues to reflect the different starting points and the varying constitutional and government architectures and national experiences. The equilibrium between public and private, in particular, is very different on the two sides of the Atlantic.

In this sense, Dicey’s famous 1915 essay on the emergence of administrative law in England was correct: “a body of administrative law resembling in spirit, though certainly by no means identical with the administrative law (droit administratif) … of France” could no longer be denied in England (1915, 148) (emphasis added), or in the United States. It is only over the last several decades that we have witnessed, in the circulation of models of public authority, an increasing effort to reconcile continental and common law traditions. In this process, the functional and political demands of increased global trade have played a significant role. *Droit administratif* has narrowed its radius of application, while also rediscovering judicial and procedural outlooks of a seemingly more Anglo-American character. In place of administration grounded in the idea of *service public*, one sees increased privatization and regulation. On the other hand, Anglo-American administrative law has increasingly distanced itself from its common law underpinnings, focusing instead on the prerogatives of general regulatory power in the face of social change. Globalization and the persistent economic crisis have further focused the attention of jurists on the still extremely fragmentary answers to global economic, political, and regulatory problems. Today, all administrative traditions face the same challenge: to offer global answers to problems of the public regulation of markets and society that now often transcend the borders of nation-states in which the particular traditions of administrative law developed.
References:


