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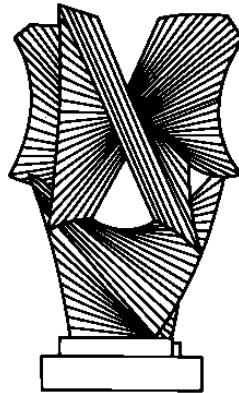
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WRITTEN CONSTITUTIONS AND THE ADMINISTRATIVE STATE: ON THE CONSTITUTIONAL CHARACTER OF ADMINISTRATIVE LAW

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7 Written constitutions and the administrative state: on the constitutional character of administrative law

Tom Ginsburg

Administrative law is the poor relation of public law; the hard-working, unglamorous cousin laboring in the shadow of constitutional law. Constitutional law, it is generally believed, resolves the great issues of state and society, while administrative law, in its best moments, merely refines those principles for dealing with the administrative state. Law students flock to constitutional law classes, of which most law schools have three or four in the curriculum. The same students enroll in administrative law with a sense of obligation, as if the subject is a chore one has to manage.

The two fields are, of course, intimately related, and share an overarching purpose of managing the relationship between state and citizen, with an emphasis on protection of the latter in democratic states. On the other hand, the fields reflect different legal sources and modalities. In some countries, they are adjudicated by entirely different courts. While constitutional law is becoming ever more comparative, with judges regularly citing each other's opinions, administrative law remains bound to the nation state.

This chapter makes three arguments. First, it argues that the conceptual division between administrative and constitutional law is quite porous, and that along many dimensions, administrative law can be considered more constitutional in character than constitutions. Second, it shows that written constitutions do relatively little to legally constrain the administrative state. Rather, their role is to establish the broader structural apparatus of governance and accountability, in which the bureaucracy is the great unspoken. This leaves administrative law as a relatively free-standing field characterized by great flexibility and endurance, features that are usually thought to be more embodied in constitutions. Third, the chapter concludes that the exercise of comparison helps to expose the limits of written constitutions, and to call for greater attention to comparative administrative law as a feature of the unwritten constitution of nation states.

1. On the constitutional character of administrative law

The conventional understanding is that the fields of constitutional and administrative law share similar purposes of protection of rights, control of agency costs, and limitation of government. The primary difference, in this view, concerns their place in the hierarchy of public law: constitutional law regulates the highest norms of the state, while administrative law governs sub-legislative action, somewhat lower in the hierarchy of sources, and hence in importance.

In contrast, I argue that along several dimensions, administrative law should be understood as more 'constitutional' than constitutional law. Consider the widely ascribed functions attributed to constitutions (Breslin 2009). Many would place the function of

constitutionalism itself or limitation of government by law, at the fore. With regard to this limiting function, it is quite obvious that administrative law overlaps a good deal with constitutional law, and has a wider scope in the sense that it touches far more behavior. The average citizen is not a dissident who is concerned with the state limiting her political speech; nor is the average citizen a criminal concerned with criminal procedure provisions in constitutions. Rather the average citizen encounters the state in myriad petty interactions, involving drivers' licenses, small business permits, social security payments, and taxes. It is here that the rubber meets the road for constitutionalism, where predictability and curbs on arbitrariness are least likely to be noticed but most likely to affect a large number of citizens. So it seems clear that administrative law is constitutionalist in orientation and arguably more important to more people than the grand issues of constitutional law.

Constitutionalism, though, is hardly the only function of constitutions. Indeed, constitutions exist in a wide variety of states that cannot be called limited in any real sense. Nor are these 'paper' constitutions to be characterized as useless (Brown 2008). Even in dictatorships, constitutions can provide accurate maps of what institutions matter. Autocrats and oligarchies need to coordinate their own internal expectations about the mechanisms of rule, and constitutions can play an important role in aligning such expectations. In some cases, constitutional rules provide useful frameworks for resolving intra-elite disputes (Barros 2002). This function of constitutions is not limitation but definition, constituting government by empowering it and establishing organizations to carry out its tasks. The administrative law analogue to this function of setting up government agencies is captured by organic statutes. These are rarely the subject of legal dispute except in terms of scope of delegation by the legislature.¹

Another set of functions widely ascribed to constitutions are symbolic or expressive. In some polities, constitutions reflect and sometimes even create a shared consciousness, and so overcome regional and ethnic divisions. In South Africa, for example, the 1996 Constitution became a symbol of participation and reconciliation, and retains popularity notwithstanding major social problems and disaffection from government. The Mexican Constitution of 1917 is widely attributed to have had great symbolic value even though it took many decades before it was effectively enforced. The symbolic or expressive function of constitutions emphasizes the particularity of constitution-making. It is *We the People* that come together, and so the constitution embodies our nation in a distinct and local way different from other polities.

So constitutions limit government, establish institutions, and serve as important symbols for the polity. The mode by which constitutions carry out these functions is familiar. Constitutions work through entrenchment, providing an enduring set of foundational rules, structuring and facilitating normal politics in a particularistic way that reflects local values.

Administrative law accomplishes some but not all of these functions, and does so in a less grand manner. Very little writing on administrative law discusses the symbolic dimensions of articulation of state-society relations. Organic statutes for particular agencies are not always entrenched, and the major instruments governing administrative

¹ For a broader perspective on coordination in administrative law, see Ahdieh (forthcoming).

procedure and adjudication are typically statutory in character, in principle amendable as conditions change.

My first argument is that administrative law is often a better reflection of the local and that it is administrative law which provides for more endurance in many polities. Only at a symbolic level, then, can constitutions claim distinct functions that administrative law does not accomplish: only constitutions can be said to constitute the nation or bind the people together through common understandings. But this symbolism is in turn based on an illusion and a misunderstanding of the crucial constitutional characteristics of endurance and localism. Constitutions serve as important symbols because people believe they do things that they do not. Administrative law systems, in turn, are more localized and more enduring, and hence worthy of greater attention in trying to understand the effective legal regulation of government.

1.1. Localism: constitutions converge more than do administrative law systems

The classic image of constitution-making is of a discrete group of citizens coming together to empower a government. This social contract imagery is temporally and geographically bounded. We the People produce the constitution as a distinctive reflection of our local values. But this imagery is wrong on several scores. First, international actors increasingly have a stake in constitution-making and take substantive positions in the drafting process (Lollini and Palermo 2009). Second, and somewhat related, constitutions have converged in substance over time. A substantial body of research has demonstrated that provisions of national constitutions have come to reflect a kind of script of national modernism in which the local is subordinate to global norms (Go 2003, Boli 1987, Boli-Bennett and Meyer 1978, 1980). The basic forms of governance, too, seem to divide into fairly predictable variants.

Why might this be the case? Because constitutions are the highest legal norms of a state, they have expressive elements, and these are often addressed *outside* the nation state at an international community. Constitutions are signals of modernity and sovereignty, designed not only to empower a government but to secure recognition of that act on the international plane. The result is that there has been a significant amount of constitutional convergence.

Consider menus of human rights, for example. Constitutional collections of rights have tended to converge over time, particularly following the passage of the major international human rights instruments (Elkins and Ginsburg 2009). The international covenants and regional charters of rights serve as menus for constitution-makers, and so it is hardly surprising that constitutions have become more similar to each other over time. There are many possible explanations for this phenomenon. Convergence may in part result from mimicry, in which countries need to signal their modernity and so adopt institutions most reflective of the international. It might alternatively reflect collective learning, as countries learn from each other and from international institutions about the quality of different institutional configurations. Whatever the explanation, the result is that constitutions can no longer be viewed, if they ever could, as exclusively local affairs.

Contrast the situation in administrative law. Surveying global developments, the overarching impression must be one of continued stickiness of national institutional configurations. Taking four major jurisdictions, France, Germany, the US and the

UK, it is clear that great institutional and ideational divergence remains. France retains its tradition of oversight by expert administrators in the Conseil d'Etat, with the *droit administratif* considered a separate and autonomous body of law (Brown and Bell 1998). Germany too retains specialized administrative courts, but unlike the French tradition centers its practice around an administrative procedure code that embodies the principles to be overseen by judges. In scope, too, the traditions differ in that tort liability and government contract law, however, are seen to be outside the realm of German administrative law.² While it can also include general policy directions, German administrative law focuses more on individual rights-type issues than on public participation in rule-making, which is where much of the action is in American administrative law.

In the UK, administrative law has long labored under Dicey's suspicion of the very concept (Lindseth 2005, Williams 1994). Dicey saw virtue in control by the common law courts rather than a distinctive set of institutions, but as the modern state expanded, it became clear that the sheer volume of appeals would overwhelm the traditionally small English judiciary. The result was the creation of independent 'tribunals', distinct from the common law courts, to hear appeals from initial decisions by administrators. These are specific and specialized, tied to individual bureaucracies such as the Health Service, Immigration, and Social Welfare bureaucracies, although recent reforms under the Tribunals, Courts and Enforcement Act 2007 promise to consolidate the structure (Carnworth 2009). The tribunals have a statutory obligation to deliver independent justice, and they rely on notions of 'natural justice' in developing constraints on administrative discretion and procedure. In the United States, in contrast, the Administrative Procedures Act focuses a good deal of its energy on the practice of rule-making, and it is here that the largest battles in the administrative state are conducted.

To be sure, there has been some convergence across jurisdictions in the norms of administrative law. Most major systems involve questions of balancing, proportionality and procedural transparency. One can generalize that in all four jurisdictions one can describe administrative law as largely judge-made (counting the Conseil d'Etat as a judicial organ), in which courts apply a set of open-ended standards to myriad factual situations. But each system remains its own distinctive animal. Furthermore, there is little of the trans-national judicial borrowing that has drawn such attention in comparative constitutional interpretation.

One of the reasons that administrative law may have converged less than constitutional law is the lack of agreement over the scope of the field. Constitutions, for nearly all modern states today, are defined in relation to (even if not exclusively bounded by) authoritative texts called constitutions. There is less conceptual agreement on the boundaries of administrative law: while all the administrative law schemes rely heavily on a notion of internal and external boundaries of the system, the precise lines differ (for example, with regard to where government contracts fall), as does the precise mix of tort liability, judicial remedies and other mechanisms of control. Administrative procedure calibrates the rigidity of the boundaries and reflects different conceptions of public and private. For example, continental and Japanese systems draw on a strong conceptual

² The scope of government liability is in fact less extensive in Germany than in France. In Germany, it is covered by principles of negligence, whereas in France, no-fault liability for regulations is allowed (Singh 2001:257).

distinction between public and private law. In the United States, the public-private distinction is less rigid, with private law regularly utilized to accomplish regulatory ends, and hence the proper boundaries of administrative law as a field may be somewhat more open. The relative mix of natural law principles and positivistic focus on proper delegations also varies across systems.

Institutional structures differ, too, with distinctive administrative courts in France and Germany, while the Anglo-American systems rely on the generalized notion of the rule of law to subject the state to ordinary courts, on an equal footing as citizens. The systems also exhibit divergence on the extent to which administrative law has been developed primarily through case-by-case judicial decision-making or through legislative exercises in codification; though again it must be said that judicial development has played a prominent role nearly everywhere.

In short, there may be less convergence in administrative law than in constitutional law, where judges regularly look to decisions of other courts, and constitutional drafters draw on foreign models. Forces against convergence in administrative law include institutional inertia, entrenched political interests, path dependencies, and cultural preferences that render some solutions unattractive in particular polities. Many scholars have argued that public law should see less convergence than corporate or private law because it reflects values rather than interests, and hence is less likely to be shaped by short-term economic factors. Professor Schwarze (2004, see also Lindseth 2005), for example, catalogues the traditional arguments that administrative law expresses 'national particularities' and therefore is relatively impermeable to change.

Administrative law concerns the control of regulatory institutions, and regulatory institutions are difficult to establish. Once established, they are even harder to get rid of. An alternative to eliminating agencies is to seek to exercise greater control over them, and administrative law becomes a natural solution. It is perhaps no surprise that all industrialized countries have developed extensive bodies of administrative law in the past century. But administrative procedures, like primary regulatory rules, also have the quality of establishing their own communities around them. The much-criticized Administrative Procedures Act in the United States has never been changed despite numerous proposals to that effect. Nor is it likely that specialized administrative courts can be disbanded without a major constitutional revolution. While we have seen the establishment of *new* administrative courts and specialized benches (that is, in Korea, with similar proposals currently circulating in Japan), it is rare to see an administrative court merged into the ordinary court system. Indeed, in the French case, the Conseil Constitutionnel has even held that one has the right to recourse to an administrative judge. In short, then, inertia can make switching costs of change prohibitive and the disbanding of institutions difficult. Thus we see substantial divergence in the *structures* of administrative law. A corollary of this continued divergence is that administrative law systems reflect localism more than constitutional law, which is now embedded in open and vigorous transnational dialogues about particular issues (Jackson 2009).

1.2. Endurance: administrative law institutions endure, while constitutions do not

Constitutions are defined by entrenchment, and their authors and audiences presuppose that they provide a set of relatively enduring norms. To be sure, constitutions are subject

to amendment procedures, but these are assumed to be exercised relatively infrequently and only for issues of sufficient importance. Constitutions are higher law and hence to be protected against frequent change. Indeed, the very notion of constitutionalism presupposes a certain level of endurance.

Yet written constitutions do not endure in most countries (Elkins et al. 2009). Even among industrial democracies, France (with its 11 constitutions since 1791) is more typical than the United States, with its venerable 220-year old document. In Western Europe, the region of the world where constitutions are most enduring, the average document will last only about 30 years, and the figure for countries in other parts of the world is much lower. Constitutional change is sometimes associated with drastic changes in the character of the regime, in the design of political institutions, and the mechanisms of ensuring political accountability.

Contrast administrative law institutions. The venerable Conseil d'Etat has survived episodic swings between monarchy and republic, presidentialism and parliamentarism, dictatorship and democracy. It has maintained a relatively autonomous system of monitoring bureaucratic behavior and ensuring legality in administration. (Indeed, one might argue that the formal constitution matters less in the French tradition *precisely because* the autonomous state endures.) Nor is France alone. The Swedish ombudsman institution dates to 1809 and has survived major transformations of the political structure. And distinct administrative courts in the German tradition have been enduring.³ The Soviet procuracy survived myriad constitutional changes, and indeed has retained its role of general supervision in some post-soviet constitutions notwithstanding complete regime transformation. When one moves beyond Western Europe, constitutions become more ephemeral but administrative law structures may be relatively stable. Thailand, with its 18 constitutions since 1932, may be an extreme case, but bureaucratic autonomy centered around a Council of State has been an enduring feature.⁴ Similarly, the institution of *amparo* in Latin America has enjoyed widespread and continuous usage, notwithstanding constitutional instability (Brewer-Carias 2008).

Institutional structures are distinct from legal norms. The norms of administrative law *do* change with developments in technology, with ideas about rights, and with the emergence of communities of accountability, all of which may reflect changes embodied in constitutional texts. Nevertheless, this discussion suggests that administrative law structures are relatively enduring, in many cases more so than constitutional regimes. Indeed, endurance at the administrative level may ameliorate the negative effects of instability at the constitutional level: whatever the machinations over political institutions, citizens may enjoy relative predictability in relations with the state bureaucracy.

³ Japan did change its structure of administrative law with the 1946 Constitution, shifting away from the German tradition of distinct administrative courts toward the American model of unified jurisdiction. Some attribute Japanese judges' reluctance to challenge administrative action to the institutional residue associated with this shift – ordinary judges do not have confidence in their ability to second guess administration (Haley 1991).

⁴ The 1997 Constitution corresponded with the introduction of an administrative court that did have important ramifications for Thai administrative law. But this was the exception that proved the rule (Leyland 2008).

1.3. Symbolism: the inferiority of administrative law systems

To summarize the argument so far, administrative law is enduring and it retains a local quality even in an era of globalization. Constitutional law, in contrast, is increasingly transnational as well as, too frequently, transitional. One might then view administrative law regimes as better embodying constitutional values than constitutions themselves.

One distinct feature of national constitutions, however, is their ability to bind the polity together through symbolic expression. Not all constitutions effectively play this role, but it is an aspiration of many. In contrast, administrative law is rarely ascribed symbolic resonance. Few are willing to die for the principle that expert regulators ought to hold a public hearing before deciding how many parts per million of a pollutant can be released by a smokestack, or that an individual has a right to pre-deprivation hearing regarding loss of social security eligibility. Here, then, we expose what is truly distinctive about constitutional law, and the one sense in which constitutions can be said to be more constitutional than administrative law regimes. Constitutions *express* ideas about the polity, and do so largely on an international stage. We the People are signifying that we are *not* those other people, and so adopt statements of our distinct national character embodied in constitutional institutions. And because the statements are directed, to some degree, outside the state, they require a common language to be understood. Convergence in constitutional vocabulary in some sense facilitates the distinct communicative quality of written constitutions.

Perhaps it is too much to say that administrative law systems lack symbolic value. Some scholars have talked about the communicative and legitimating virtues of administrative process. But one would be hard-pressed to argue that the degree of symbolic importance attached to administrative law systems approaches that of constitutions. Written constitutions embody moments of great struggle and high stakes, and hence mark the great junctures of national history.

2. Written constitutions and the administrative state

This part of the chapter examines the constitutional treatment of administrative law. In general, written constitutions tend to say relatively little about the administrative state, though the establishment of a government structure is a core function of constitutions. While the rules governing selection and activities of executives and parliaments are described in great detail, the sub-political institutions of government are not consistently or thoroughly regulated. Written constitutions tend to focus on providing chains of accountability and democratic legitimacy for the decisions of administrators, rather than detailed rules regulating the administration. In other words, constitutions tend to regulate administration structurally rather than legally.

A search of several hundred contemporary and constitutional texts reveals that only a handful mention the bureaucracy at all, and often use bureaucracy as an epithet.⁵ In terms of legal constraint on the state, general due process-type considerations may apply particularly to administrative agencies.⁶ But provisions such as South Africa's Article

⁵ For example, the Constitution of Vietnam (1992), Art. 112 (power of government to 'fight against bureaucracy' in state administration). The sample is from the Comparative Constitutions Project, www.comparativeconstitutionsproject.org.

⁶ For example, the Constitution of Dominican Republic (1966), Art. 8.2.j (no sentence without

33, constitutionalizing rights to 'lawful, reasonable and procedurally fair' administrative action and a right to receive reasons for adverse actions, are truly exceptional.⁷ General due process requirements, which are found more broadly (roughly 10% of national constitutions) are on their face frequently restricted to criminal proceedings, and hence may not automatically facilitate judicial oversight of administration.

What one does see is that written constitutions reflect developments in the technology of governance. Thus, the creation of the independent regulatory agency is reflected in constitutional texts: the US Constitution of 1789 of course does not mention any independent agencies (it barely mentions 'departments'), while the average constitution drafted in the 1990s mentions more than three such bodies. And certain administrative law institutions, like the ombudsman or human rights commissions, have become more popular: roughly 20% of constitutions currently in force provide for an ombudsman, for example. A smaller number, less than 10%, provide for a counter corruption commission. Historically, the regulatory body most relevant to checking the administrative state is a council or court of audit, and these institutions are relatively frequently observed: nearly 20% of all constitutional texts coded to date in our project (700 total) include some agency designed to supervise accounts or audit.⁸

Another way in which constitutions may affect the administrative state is through the establishment of a public service commission or other device to guarantee meritocratic employment practices. In many societies, state jobs are highly desirable and so the temptation to utilize them as a form of patronage is great. A pre-commitment to meritocracy is a constitutional function. As early as 1824, Brazil's Constitution felt the need to say that 'all individuals are equal to occupy public offices; talent and virtues will determine if a person can occupy a public office'.⁹ The Republic of China went so far as to establish an entire branch of government, the Examination Yuan, just to administer state exams. This body still functions on Taiwan today, and as a formal matter has equal status with the Legislative and Executive branches of government. Its head is equivalent to the Premier. The Republic of China also established a 'Control' branch of government, set up to audit and fight corruption. Though these innovations have not been borrowed elsewhere, their motivation is widespread.

Finally, constitutions engage with administrative law through the designation of administrative court systems. These are found in countries from Mexico to Mongolia, though they are not always constitutionalized (only about 2% of cases in our sample include them). Even the French Constitution makes only incremental reference to the Conseil d'Etat, which is not properly speaking a creature of the political constitution.

But the designation of an administrative jurisdiction can have very important consequences on the ground. In some transitioning democracies, it is the administrative courts rather than the higher profile constitutional court that have actually served to constrain the state. Two examples here are Indonesia (Bedner 2001) and Thailand (Leyland 2008).

procedure established by law); Constitution of Ireland 1937, Art. 38 (no person shall be tried on any criminal charge save in due course of law).

⁷ See also Draft Constitution of Kenya (1999), Art 70.

⁸ For details, see www.constitutionmaking.org and www.comparativeconstitutionsproject.org or contact author.

⁹ Art. 179.14.

In each case, a constitutional court created as part of a transition to democracy was set up alongside a new or recently created administrative court. In each case, the constitutional court was called on to adjudicate high-profile political issues that led to a political backlash against the court. In contrast, the administrative law systems worked at a lower level of government and served to provide, for the first time in many areas, genuine legality in administration. This is an example of how a lower-profile administrative court may have more impact in furthering constitutionalist values than a higher-profile constitutional court.

In short, written constitutions are short on detail about legal control of administration. Administrative action is regulated through structural provisions on the design of government and accountability chains, through the creation of specialized monitors such as ombudsmen and administrative courts, and through provisions requiring merit-based selection of agents. To understand the functioning of administrative law in various countries, written constitutions turn out not to be very helpful, notwithstanding the constitutional character of many of the norms and purposes of administrative law.

3. Administrative law systems as an element of the uncodified constitution

In recent years, scholars have renewed their attention to the so-called unwritten constitution (Grey 1978, Ackerman 2007, Young 2008, Tribe 2008). It has, of course, long been recognized that, in any constitutional system, the language of constitutional text is modified and interpreted by political actors and courts. In the United States, judges of the Supreme Court have filled in the details of the vague 18th century document to make it suitable for modern life, notwithstanding the lack of explicit textual basis for constitutional review. More broadly, extraconstitutional mechanisms of constitutional change have in some sense involved or relied on unwritten constitutional conventions (Ackerman 1993, Munro 1928, Tiedeman 1890).

Constitutional functions are also performed by written texts beyond the constitution itself. Some statutes have been considered to be 'super-statutes' that are practically entrenched, even if not formally so (Eskridge and Ferejohn 2005). Although the writers on super-statutes focus on particular regulatory instruments, such as the Sherman Antitrust Act and the Civil Rights Act of 1964, procedural laws surely fit into the category in the sense of meeting criteria of *de facto* entrenchment and substantive reach. Administrative procedures laws are meta-regulations, designed to govern the way in which substantive regulations are generated and operate. It seems difficult to exclude the US Administrative Procedures Act, for example, from the scope of the 'constitution outside the constitution'. Perhaps, then, the analysis here suggests the need to keep our eyes wide in looking for legal instruments that embody constitutionalism.

The core critique of the uncodified constitution is, unsurprisingly, rooted in the lack of a rule of recognition. Without a clear rule that helps to identify particular norms as constitutional or not-constitutional, the boundaries of the category become fuzzy. But the discussion at the outset of this chapter seems potentially helpful for articulating constitutional boundary criteria. Constitutions, we have seen, focus on regulating interactions between the state and the people, and are at least imagined to be relatively enduring. In considering what norms outside the constitution might be considered uncodified constitutional norms, it seems clear that those rules that are relatively enduring, and purport to regulate the relationship between the state and society, should be within the definition.

What are the normative consequences of treating administrative law systems as essentially constitutional in character? First, such constitutional realism helps us to focus on those areas where constitutionalist values are most frequently encountered, even if not always the matters of the highest stakes. Routine matters like drivers' licenses and building permits make a difference to more people than the high principles of constitutional text, even if they do not always carry great symbolic weight. Second, this focus on the micro-level interactions of citizen and state draws needed attention away from the constitutional courts, heretofore considered central actors in upholding the rule of law. Constitutional courts, by the very nature of their exclusive and high jurisdiction, frequently become embroiled in high profile politics that can undermine rather than enhance their ability to constrain the state. Administrative courts may in such circumstances be more important on a number of levels. Finally, such an approach helps to highlight the importance of the discipline of comparative administrative law. While the field is still nascent, the various contributions in this volume help to draw out the rich array of possibilities for the discipline.

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