A state based on the rule of law implies the capacity of citizens to submit administrative actions to judicial control.

All European countries have now accepted this fundamental idea, which has resulted in a reinforcement of the role of the courts in controlling the administration throughout Europe.

Even if this development is based on different traditions, an increasingly solid framework of common principles is emerging.

The general reinforcement of judicial control over the administration raises both issues and problems. The solutions are often similar and reinforce the process of constructing a European model of relations between the administration and the courts.

A) Foundations of Judicial Control of the Administration

1) Two Objectives of Judicial Control of the Administration

Europe has historically been divided between two conceptions of control of the administration by the courts:

- a “subjective” conception: courts are responsible for establishing the subjective rights of individuals who have been wronged by the administration. This is the idea of Rechtschutz: developed especially in Germanic countries and in Central Europe, the role of the courts is to ensure the judicial protection of individuals against the administration.

- an “objective” conception: the courts control the administration’s respect for legality. The subject of appeal is the objective legality and the regular legal functioning of the administration. This idea of judicial control of administrative actions follows the French tradition (including Belgium, Portugal, Greece, etc.)

In the context of objective legality, the administration’s obligations and constraints are first defined in order to then deduce the rights of individuals. Focusing on subjective rights, the

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1 To cite a Portuguese jurist, Maria da Gloria Dias Garcia: “Administrative justice is not limited to the guarantee of citizens’ rights. Its justification also lies in the necessity to defend the public interest and to guarantee a balance between individual rights and the general interest.”
starting point is the citizen, and the definition of his rights, so as to deduce the consequences imposed on the administration².

These two conceptions result in different rules of admissibility (locus standi), rules of procedure and scope of control³. However, nowadays there is an ever increasing sensitivity to the complementary nature of these two approaches, and the most evolved judicial systems attempt to combine them.

2) **Position of Judicial Control in the Administrative Process**

Administrative justice has been placed within one of two judicial systems, depending on the historical context:

- administrative justice as a branch of the general judicial system: Administrative courts are above all courts, with all of the corresponding characteristics (independence, impartiality, adversarial procedure, legal expertise, decision-making based on law). This approach emphasizes the organic and functional separation between administrative actions and judicial control. This dimension of administrative justice has been rigorously upheld by the precedent set by article 6 of the European Convention on Human Rights.

- administrative justice as a phase in the decision-making process of the administration and as an instrument for justifying administrative actions: according to a famous phrase, “judging the administration is still part of the process of administrating”. The objective sought is the best administrative decision. Administrative procedure determines criteria and behaviour, and the judicial procedure is the extension of this procedure. In the event that the administrative decision is annulled, a new administrative procedure generally follows, with a view to correcting the error pointed out by the court. No complete separation exists therefore between the administrative phase and the judicial phase: the two combined produce “right decisions”.

3) **Philosophy of Law: Two Systems**

Across Europe two tendencies can be seen in the system of judicial control of the administration:

- “substantialist” tendency: The role of the judge is to find the “right solution” corresponding to a “legal truth” and to guarantee its application. This approach concentrates control on the content of the contested decision. If the decision conforms to the right solution, it must prevail, even if it is impaired by procedural flaws⁴.

- “procedural” tendency: As neither the judge nor the administration really knows the right solution, it is necessary to simply verify that the decision taken was “fair”; in other words, that it

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² A third approach could perhaps be set apart, which characterizes English law: the starting point is the judge, with his rules of procedure, powers and constraints, thereby defining the rules of a fair process where each party has a chance.

³ In particular, under the “subjective” conception, the claimant must be able to invoke a subjective right that has been wronged. Respect for this right is itself subject to control by the court. This control will be complete, however. In the objective system, simply being able to justify a legitimate interest suffices to claim the violation of a rule that does not affect a subjective right. However, the control will be less thorough.

⁴ This tendency is perceived especially in Germany.
was made following an equitable procedure that permitted each party to voice his opinion. This could be referred to as “procedural truth”\(^5\).

B) Tendencies in the Development of Judicial Control of the Administration

1) Extension of the Concept of Legality

In its original conception, the principle of legality signified respect of the administration (as a branch of the executive) for the law (passed by parliament). The concept of legality, in its different national conceptions (rule of law – Gesetzesvorbehalt), was therefore limited to the compliance of the executive authority with the legislative framework. This conception revealed long ago its limitations, especially when the same political majority controls executive actions and holds legislative power.

Nowadays, in most European countries, the principle of legality has a much larger scope. It signifies not only the administration’s respect for the directions given by the legislator but also its observation of the constitutional framework and respect for international (especially European) norms. In this context, the administrative judge is not only the guarantor of the administration’s respect for legislative rules but also the judge of the legislator’s respect for constitutional rules and of the compliance of national norms with EU law and international law.

It is therefore not uncommon for an administrative judge of a European state to sanction the administration for having faithfully applied a law that is itself contrary to European law\(^6\). This “paradigmatic change” is no longer really contested, but its scope has not yet been totally integrated into a number of national judicial systems of control of the administration.

In a larger framework, the control of legality also signifies control of a set of superior principles. Administrative judges have often set down general principles of administrative actions that are frequently given supra-legislative value: the principles of impartiality, non-discrimination, proportionality, legitimate expectation (i.e. respect for the justifiable expectations of individuals), etc.\(^7\). At the same time, administrative courts have developed legal instruments that oblige the administration to respect its own rules, norms, and instructions.

The respect for the legality of administrative activity ensured by the judge is therefore not limited to respect for legislative acts alone but now includes conformity with a complex hierarchy of norms and a set of fundamental values.

2) Europeanisation of Judicial Control of the Administration

Previously, judicial control of the administration constituted one of the legal sectors that was the most affected by national political history and the least sensitive to trends in comparative law.

Today, this sector has also become an “open sector” for several reasons:

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\(^5\) This approach is typical of the United Kingdom.

\(^6\) This applies equally to the administrative judge with regard to respect for the European Convention on Human Rights.

\(^7\) These principles are discussed below.
- International economic exchanges require – for the security of investments and trade – that the behaviour of public decision-making bodies be subject to effective means of redress through appeal. If the decisions of administrative authorities do not respect a minimum standard of legality, predictability and accountability, no state whatsoever can hope to attract external entrepreneurs, who want to be given sufficient legal guarantees.

- The body of European law has taken an important role:

  - The jurisprudence of the European Court of Human Rights has assumed a very important role in the definition of minimum standards for the judicial control of the administration (resulting from a wide interpretation of article 6 of the European Convention on Human Rights with regard to penal matters and civil and political rights, the application of article 13 on the right to effective remedy, and the application of the principle of proportionality in the control of limitations on liberties, etc.). The Convention and the jurisprudence interpreting it are – as a general rule⁸ – applied directly by national jurisdictions.

  - The jurisprudence of the European Court of Justice has also had a positive influence on the rapprochement of national traditions of judicial control. It has a direct influence on EU Member States, and an indirect influence on candidate countries. Admittedly, national administrative and judicial bodies serve as instruments in the application of EU law in accordance with their own procedures. This procedural autonomy is nevertheless limited by two factors: effective implementation of EU law and equivalent conditions of implementation. EU jurisprudence, in taking its inspiration from national laws, has borrowed certain concepts or principles of national laws and applied them on the EU level (principle of legitimate expectation, etc.). Several contentious techniques applied by the Court of Justice (legal notion of liability, control of discretionary power, etc.) result from a synthesis of different national traditions. In addition, there are some extraordinary cases of alignment of internal law with solutions adopted by EU law.

  - Various European institutions – Council of Europe, OECD (SIGMA), etc. – have played a role on the “doctrinal” level. These institutions develop recommendations and at times special conventions, and diffuse numerous information documents or studies, defining “good practices”, common standards, recommended techniques, etc.⁹

Nowadays, it is no longer rare for a national jurisdiction of a European state, when examining a delicate case, to refer to the law or the jurisprudence of other European states.

- The process of exchange and influence between European countries has played a particularly important role in the reorganisation of the countries in Central and Eastern Europe following the political changes at the end of the 1980s. To adapt their legislation and construct a system of judicial control of the administration adapted to the current conception of a state based on the rule of law, these countries have borrowed considerably from the laws and doctrines of other European countries, thereby reinforcing the process of intra-European rapprochement concerning the legal framework for judicial control of the administration.

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⁸ Sometimes with specific special clauses, as in the United Kingdom, where a special law has been adopted

⁹ Numerous European professional institutions of magistrates have been set up and serve as a framework for exchanges, studies, training and comparison: European Association of Supreme Administrative Jurisdictions, European Union of Associations of Magistrates, European Academy of Magistrates of Trier (Germany), etc.
Emergence of a Set of Major Principles of European Administrative Law

Beyond the special rules of implementation at national level, judicial control of the administration in Europe has set down a number of major principles that convey in concrete terms the notion of a state based on the rule of law. These principles constitute basic references for all European administrative law.

a) Pre-eminence of the rule of superior rank
This principle requires that each rule or decision applied by the administration must be compatible with the rules of a superior value. In the event of its incompatibility with these superior rules, the administrative authority must not apply it, and jurisdictions must sanction it. The application of this principle, by recognizing the most important rules, guarantees their stability and protection with regard to political changes.

b) Subordination of individual decisions to general rules
This principle guarantees the predictability and absence of arbitrary power in administrative actions, as well as the conformity of its actions with defined and known objectives. This does not exclude, however, adaptation for special cases.

The general rules guiding individual administrative actions must be fixed by parliament whenever they concern rights and liberties.

c) Idea of legal security constitutes a special example of the preceding principle
This idea results in the ban on applying rules or decisions retroactively other than in the case of necessity in the general interest, as declared by the legislator.

d) Principle of legitimate expectation
An extension of judicial security, this principle requires the administration to respect its commitments or promises, but also takes into account the justifiable expectations\(^\text{10}\) that the administration has given to the general public or to individuals. The consequence of this rule is that the administration must in principle follow its own instructions.

Another result is the principle of the respect of acquired rights and situations established under legitimate conditions.

e) Principle of equality
This principle must in fact be understood as a rule of non-discrimination for unjustifiable reasons, but also as an obligation for special treatment in cases where necessary in order to guarantee genuine equality.

The different treatment of similar situations therefore constitutes discrimination, but also the equal treatment of different situations. The administration must avoid arbitrary power and unjustified differences in the exercise of its power of assessment.

f) Principle of impartiality
Impartiality constitutes an extension of the principle of equality. However, it also signifies that public authorities must show themselves to be neutral with regard to special interests and only seek to serve the public interest.

\(^{10}\) UK case law refers to “legitimate expectation”.

g) **Principle of proportionality**
This principle constitutes the legal translation of the idea of equity and appropriateness:

- Public measures must be likely to ensure that the expected result will be obtained. An obviously inappropriate measure taken to reach the desired goal cannot be legal.

- A weighing of advantages and disadvantages of the measure must be carried out. A measure that would have serious disadvantages and reduced advantages cannot be justified. The idea of weighing\(^\text{11}\) the consequences of a project is central to all planning law\(^\text{12}\).

- The administration must seek to minimize the infringements of individual interests that its action could entail. Unnecessary infringements must be avoided. In particular, in the case of police measures, it is necessary to give priority to actions that permit the attainment of the objective and are the least strict for the individuals concerned.

h) **Principle of accountability / liability**
The administration is accountable for its actions and liable for the prejudicial consequences they could have. It is therefore obliged to compensate the victims of a prejudicial action if this prejudice:

- results from the faulty behaviour of the administration;
- results from a violation of a rule of law; or
- adversely affects an individual or a small group of persons, whereas the prejudicial action profits the general interest.

The principle of public liability is therefore a consequence of the principle of the equality of citizens in the face of public power.

4) **Increasingly Demanding Rules of Administrative Procedure**

The rules of administrative procedure constitute a guarantee of quality and legality in administration decision-making, which gives judicial procedure a subsidiary function, thus reducing the congestion of tribunals. These rules also facilitate the intervention of judicial control, rendering it \textit{a posteriori} more effective. It could therefore be said that there is no advanced or effective judicial control if it is not based on rules of administrative procedure that frame and orient administrative activity in a precise and strict way.

An increasing number of European countries have elaborated laws of administrative procedure. These rules constitute the framework of conduct of the public administration and a charter of confidence between public authorities and citizens. The quality of these texts is an essential factor in ensuring the quality of administrative actions, since they make increasing demands on the administration while at the same time preserving the administration's flexibility and rapidity.

In spite of their diverse sources of inspiration, the following common rules can be mentioned:

- **Rule of complete investigation**: Before taking a decision, the administration must be sure to gather all of the pertinent elements of fact and assessment.

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\(^{11}\) \textit{Abwägung} in German

\(^{12}\) On the judicial level, this idea is applied in its negative aspect: courts sanction the absence of any weighing process or an obvious disequilibrium in the balance between advantages and disadvantages of an action.
This rule can be interpreted as the obligation to carry out impact assessment in the various fields before certain decisions are taken.

- **Respect for the adversarial nature of the procedure and for the right of a fair hearing:** Draft decisions that could infringe on the interests of an individual must be brought to the attention of the interested parties – except for special reasons – so that they can make their observations known.

- **Formal reasons for decisions:** Other than for justified exceptions, the administration must explain the reasons for taking a particular decision.

- **Rule of transparency:** Following the preceding principle, the administration must disseminate appropriate information on the decisions it will take or has taken and ensure public access to administrative documents that are not covered by legitimate secrecy.

- **Principles of consultation and co-operation:** To enhance the understanding and acceptance of its actions, the administration must, insofar as possible, announce – and obtain public opinion on – important projects. If any observations or reservations concerning such a project arise, the administration must take these into account in an appropriate way.

- **Rule of self-control:** The administrative authority must carry out a thorough examination of the complaints it has received and correct any behaviour or decision that, proves to be irregular.

C) **Different Options in the Organisation of Control of the Administration by the Courts**

1) **Institutional Choices:** between an administrative jurisdiction that is autonomous and one that is integrated into the judicial system.

Traditionally, states that have set up a specialised administrative jurisdiction have been placed in opposition to those having maintained control of the administration through the competency of common courts.

Developments over the past 20 years have shown that this opposition did not necessarily correspond to an essential difference. In several respects the difference is subtle: there are in fact two conceptions of specialised administrative jurisdiction:

- Specialisation of certain courts within the judicial system in the judicial control of the administration; these courts nevertheless remain subject to the same statutes and principles as the rest of the judicial system. This conception is therefore of a simple functional jurisdiction.

- Creation of an administrative jurisdiction that is fundamentally different in nature and organisation from judicial jurisdiction.

It is increasingly rare – even in countries maintaining the unity of jurisdiction – not to have, in one form or another, specialised judges responsible for administrative litigation (specialised chambers

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13 This information and consultation process can be carried out by an independent authority, e.g. by an inspector or commissioner.
in common law courts, special administrative appeals commissions with judicial functions\textsuperscript{14}, or other types of bodies specialised in administrative litigations).

The need for the specialisation of judges in certain fields of public law has been recognised nearly everywhere in the face of public law that is increasingly detailed and complex. The practical details of this specialisation may vary from country to country. The solution of specialised chambers within ordinary jurisdictions is developing more and more (Netherlands, countries of Eastern Europe, Spain, etc.). It should be noted, however, that the existence of a separate administrative jurisdiction remains the best means of promoting the development of a jurisprudence that is specifically adapted to control of the administration.

However, in countries where these separate administrative jurisdictions exist, a process of rapprochement with ordinary jurisdictions has developed. These courts are expected to provide the same guarantees of impartiality and independence: administrative judges must be authentic judges and not civil servants examining more or less formal administrative complaints.

Finally, in no country have all of the litigations concerning the public administration been brought before specialised jurisdictions. Most often the economic or patrimonial activities of the administration come under ordinary jurisdictions. The definition of public law litigations is just as varied. In particular, depending on the country, measures relating to social assistance or social security come under either administrative litigation or private litigation. In recent years, the civil service has sometimes been transferred from administrative jurisdictions to either civil or labour jurisdictions.

In summary, the necessity of having judges specialised in the control of the administration is becoming more and more apparent, but they must remain real judges.

It is this quality of genuine jurisdiction that must be emphasized today.

An independent and impartial court, according to the criteria of the European Court of Human Rights, signifies:

- "objective" impartiality: The administration must have no means of exerting influence on administrative judges; individuals and the administration must be on completely equal terms;
- "subjective" impartiality: Even if the administration in effect exerts no influence on judges, any appearance of a lack of neutrality constitutes in itself an infringement of impartiality.

This concerns in particular the role in some countries of members of administrative courts having the misleading title of government commissary\textsuperscript{15} and relations between consultative and contentious activities of administrative jurisdictions\textsuperscript{16}.

Moreover, to guarantee the independence of administrative judges, special precautions must be taken concerning their nomination, promotion, or any possible disciplinary sanctions they may be

\textsuperscript{14} For example, in the United Kingdom, which for a long time had been against the idea of autonomous administrative law, there are a large number of “administrative tribunals”, quasi-judiciary commissions responsible for settling administrative litigations, and now also an “administrative court” within the High Court.

\textsuperscript{15} Kresse case, 7 June 2001, European Court of Human Rights

\textsuperscript{16} Procola case, 28 September 1995, European Court of Human Rights
subject to. In numerous European states, special bodies, independent of executive power, have been created to assume responsibility for taking these kinds of decisions. These “Superior Councils of Administrative Jurisdiction” are usually composed of judges, members of parliament, representatives of supreme jurisdictions and of the Ministry of Justice, and specially qualified persons (such as academics).

2) Paving the Way for Judicial Remedies: Wide or Narrow Conditions of Admissibility

Besides the rules of admissibility of secondary importance (delays for appeal, types of remedies, required assistance of a lawyer, exhaustion of preliminary administrative appeals, etc.), the different European systems of judicial control of the administration can be distinguished in terms of the requirements concerning the capacity to take action (standing).

- Some countries limit the right of appeal solely to those individuals who are directly affected by the challenged decision or for whom the contested public action infringes a personal right protected by law;

- Other countries allow all individuals having a legitimate interest to take action against an administrative decision, as this interest can at times be very faint. It can be legal or purely factual, economic or only moral, etc.

The latter approach is rather clearly gaining ground. A restrictive conception of the right of appeal increases the duty of control of admissibility by the courts, without reducing considerably the number of appeals. It does reduce considerably the possibility of appeal by groups representing collective interests (associations for the protection of the environment, unions, etc.), which constitute precious allies for the effective control of certain decisions.

In practice, in terms of quantity, most appeals are made by individuals who have been directly wronged. However, appeals submitted by individuals who cannot put forward a personal right infringed (in particular appeals by associations) are often those which most help to improve the scope of judicial control of the administration and best promote the development of case law.

3) Extent of Control: Actions and Behaviour of the Administration that can be Submitted to the Courts

The simple establishment of a system of judicial control of administrative action does not suffice. The system must also effectively cover the scope of activity of the administration and not include any significant gaps.

Even if all European states have a system of judicial control of the administration, many have maintained “no-control zones”, which must be reduced. In fact, if a state based on the rule of law is to be promoted, it is not acceptable that in certain sectors the state can violate its own law with impunity. Depending on the field, the law can undoubtedly be more or less demanding and the judge’s control more or less complete, but respect for the law must be ensured, and the right of appeal before a court must exist for all public actions.

17 Germanic states and countries of Central Europe

18 States influenced by French law
Developments in recent years have made it possible in most European countries to reinforce the extent of judicial control in the following areas:

- **“Government Acts”**: Some administrative decisions have remained excluded from judicial control because of their “political” content or because they concern the most important public powers of the state. This reason for exclusion of judicial control is increasingly being challenged\(^{19}\) once these decisions have an impact on legal situations.

- **“Internal Measures of Order”**: As opposed to government acts, in some countries certain decisions on the internal management of the administration do not come under the courts as they are judged to be too unimportant. However, once these decisions have an effect on a third party, they must be subject to judicial control. This concerns in particular decisions concerning prisoners or military personnel.

- **Regulatory measures or statutory instruments**: These kinds of administrative actions rather frequently undergo specific appeals processes, but it would be incoherent to exclude them from judicial control when these actions serve as a basis for individual decisions, which in turn are subject to judicial control.

- **Contractual actions, in particular public tenders**: In some national systems, on the pretext that these actions come under private law and interest only the parties to the contract, they have often been excluded from judicial control, even in states that aim to place the administration completely under the law\(^{20}\). Thanks to EU law, these actions have been incorporated in a system of judicial control, whether they be litigations related to the conclusion or to the implementation of contractual actions.

\(^{19}\) See, for example, the Spanish law of 1 July 1998.

\(^{20}\) This was the case until recently for public tenders carried out by the German administration.

4) **Intensity of Control: Judicial Control of the Power of Assessment accorded to the Administration** (the issue of “discretionary power”)

Apart from the cases where the law sets out in detail the conditions of administrative activity (“bound competence”), the law often leaves the administration a more or less wide margin of opportunity. In all judicial systems this constitutes a complex issue of knowing the extent of control by the courts over the use of this power to exercise discretion. It is a delicate issue, as it requires the combination of two contradictory concerns:

- reinforcing control over the use of this power, which can be a source of arbitrary action;
- maintaining the scope of manoeuvrability that the law intended to grant the administration so as to ensure sufficient flexibility.

To respond to this difficulty, the diverse judicial systems have developed varied but similar arguments.

First of all, in each administrative situation it is necessary to define the limits of discretionary power. A legal analysis reveals that discretion does not involve an interpretation of the law but only an assessment of the facts. Even if the law uses “indeterminate legal concepts”, such as “public security” or “immorality”, it is up to the judge to verify if the interpretation given to these
concepts by the administration is correct; the interpretation of legal concepts is a question of legality and not of opportunity.

- Moreover, the exercise of discretion has to be analysed as an assessment power; this power is set in the framework of a number of general principles that limit its scope of application: the principles of equality, proportionality, legitimate expectation, etc.

- Second, the evaluation of facts corresponding to the exercise of discretion must respect certain rules: the administrative authority must be sure to gather all pertinent facts and to disregard any that are irrelevant. These facts must be brought to the attention of the parties concerned, who can then discuss them (giving the reasons for the decision envisaged, fair hearing procedure). Finally, the different factual elements of assessment must be weighed, with a view to respecting their relative importance, as fixed by law.

- The administration must also be sure to take into consideration the objectives and proper purposes set by the authority that has granted it the power of assessment. This power is to be used only to reach the goals for which it has been established and no other; otherwise it would constitute a “misuse of power”.

- The administration must also make a real and complete use of its power of assessment. It cannot maintain a position of principle or a priori without examining the particular circumstances of each case. It would be committing an illegal action if it restricted its discretion or refused to exercise the power of assessment with which it has been entrusted.

- Finally, if while respecting the above rules the administration is in a position to make an assessment of the facts, it is up to the judge to correct this assessment if it appears to be obviously excessive or unreasonable – in other words, if there is an “obvious error of assessment”.

These rules concerning the exercise of discretion, which are shared by most European administrative jurisdictions, are more or less strictly applied, depending on the circumstances and the country. They allow for a rigorous control of the administration without depriving it of the authority and scope of action it requires. The development of case law in this area aims to provide an improved framework and to limit the scope of assessment by the administration without suppressing this power.

5) Rules of Judicial Procedure

The methods of examination of remedies or appeals presented to the administrative judge are based on certain common general principles, but also reflect divergent traditions:

- Common principles: These principles guarantee: the equality of the parties in having the possibility of advancing their respective arguments; the adversarial nature of the procedure (by which all parties must be informed of all elements under debate and in particular the arguments of the adversary); the possibility of responding to any objections that the court may raise without consultation; and the neutrality of the jurisdiction in handling the case.

21 The European Court mentions the idea of “égalité des armes”.
Divergent traditions: The role of the judge in handling the case is understood in various ways. In some countries, the judge is asked to take an active part in seeking the truth. He must direct the debates, seek possible irregularities that may affect the action in question or, on the contrary, seek arguments for justifying the validity of the action (this kind of procedure is sometimes called “inquisitorial” or procedure under the direction of the court).

Another conception consists of considering the judge as only a passive arbitrator, who listens to the arguments of the parties without taking an active part in the search for pertinent elements (procedure referred to as adversarial, leaving the parties to determine the conduct of the procedure).

Each of these methods has its advantages and disadvantages. The inquisitorial procedure is very demanding on the judge and risks making him appear as lacking impartiality. The adversarial procedure results in the trial being won by the most skilful party and not necessarily by the one who is in the right. Such a procedure places the judge in a situation where he is incapable of pointing out the irregularity that he alone has noticed. An active intervention of the judge may be necessary to counterbalance the inequality between the public administration and a private claimant.

D) Problems Encountered in the Judicial Control of the Administration

1) Increase in the Number of Appeals

A common problem in most European countries is linked to the congestion of jurisdictions, due to the more rapid growth in the number of cases than the increase in the number of judges.

As a result, there are excessive delays in decisions and at times a temptation to reduce the time and attention given to disputes. This situation could therefore compromise the quality of administrative justice.

In nearly all countries, one litigation that constitutes a really catastrophic development is the litigation of foreigners. In Germany, the litigation of asylum seekers became so extensive that it nearly destroyed administrative justice. Still today, it represents close to half of the cases brought in the first instance before administrative courts in that country. However, there are difficult situations in the litigation of residence authorisations for foreigners in many other countries as well.

There are numerous, even systematic, appeals in other areas – for example, concerning large regional and urban development projects. Construction rights are also the subject of many litigations. The same is true of the right to administrative decisions concerning social assistance. However, in many sectors of law, the percentage of appeals in relation to the decisions taken by the administration is not really abnormal, but the number of decisions taken by the administration is so high (cf. in the fiscal area) that even a small increase in the proportion of disputes represents a large number of appeals and can destabilise jurisdictions.

Administrative justice then finds itself in a kind of contradiction:

- On the one hand, efforts are made to develop the efficacity and exhaustive nature of judicial protection, as well as the accessibility of justice, with the obvious result of increased attractiveness of administrative justice.
- On the other hand, complaints about the excess number of appeals constitute the normal consequence of this increased attractiveness, and it would be preferable if appeals to the courts were further limited.

Several solutions to this problem are envisaged:

- The attempt to develop “filtering” mechanisms, such as:
  
  + Setting up, prior to judicial remedies, obligatory preliminary administrative appeals: if these appeals examined by authorities within the administration\(^{22}\) are well organised and offer real guarantees, they can help to avoid a large number of judicial claims;
  
  + Setting up an obligation to appeal through the intermediary of a lawyer, at least for certain types of litigations: the lawyer can discourage his client from undertaking an appeal that is bound to fail; moreover, his intervention increases the cost of the procedure, which can have a dissuasive effect;
  
  + Creating a financial filter by increasing the legal costs; in certain cases, mechanisms of fines for abusive appeals have been set up;
  
  + Putting in place simplified judicial procedures for the refusal of claims that are obviously inadmissible or unfounded;
  
  + Reinforcing conditions of admissibility of claims so as to limit their number; in particular, conditions for appeals to higher jurisdictions have been made more strict in several countries (exclusion of appeal for certain subjects, reinforced requirements concerning the conditions of motivation for appeals, obligation of a lawyer for an appeal, etc.)\(^{23}\);
  
  + Subordinating the right to begin an appeals procedure to obtaining “leave” from the relevant jurisdiction\(^{24}\).

- On another level, the search for alternatives to the judicial procedure: diverse steps are possible in this context:
  
  + Developing the protective and participatory nature of the preliminary administrative procedure: hopefully, if consultation has been carried out at this stage, there will be fewer judicial appeals. It is a fact that if the administrative procedure requires respect for the principle of fairness, obliges the administration to give reasons for its position, and establishes a relationship of confidence with citizens, the number of appeals is smaller\(^{25}\);
  
  + Proposing other types of claims that are external to the administration which, in certain cases, are better adapted (e.g. Ombudsman);
  
  + Developing “mediation” techniques: mediation seeks to reconcile the parties, whereas a court declares which party is legally in the right. With mediation, an attempt is made to reach an amiable arrangement based on compromise. This can give reasonable

\(^{22}\) For example, the hierarchical appeal or the appeal organised before an appeals commission within the administration

\(^{23}\) This development is noted especially in France and Germany.

\(^{24}\) This system exists in the United Kingdom for the submission of a case to the High Court and in France for abolition appeals.

\(^{25}\) However, these rules of procedure have their own cost: they make administrative work more complex and sometimes slower. They require human resources and qualified personnel. Finally, the complexity of the rules of procedure can in itself constitute a source of contention.
satisfaction to both parties, which is especially important when they must continue their collaboration after the end of the litigation.

- Another response to the influx of claims consists of rationalising their treatment by using modern management methods (and especially informatics), carrying out sorting operations or grouping of similar cases, improving documentation systems, and even developing support programmes for decision-making and drafting of decisions. Finally, in the specialisation of judges, putting at their disposal auxiliaries or assistants can relieve them of part of their workload. In many countries, the “productivity” of courts has thus been considerably strengthened.

- Finally, as decision delays tend to lengthen, another measure consists of developing ways of provisionally resolving litigations, in other words through urgent procedures. Following an accelerated and summary procedure, a provisional decision allows for interim relief, which makes it easier to wait until the court makes a definitive decision.

All of the above measures remain partly ineffective in view of the increasing demand for justice. In the end, all countries are obliged to reinforce their staff of administrative judges and to develop their judicial system.

It should be noted, however, that – other than exceptional cases, such as the litigation of foreigners – the number of appeals (and consequently the cost of administrative justice) remains low compared to the total cost of the administrative apparatus\(^{26}\). However, the number of appeals in itself can also entail an increased complexity of administrative actions.

2) Judicial Control as a Factor in the Complexity and Inefficiency of Public Activity

Another difficulty lies in the success of judicial control of the administration in Europe. The multiplication of appeals – and therefore the multiplication of abolitions of administrative actions – results in this judicial control being increasingly seen, especially in the political sphere, as a factor in the over-regulation of administrative activity related to “legislative and regulatory inflation” (in other words, the multiplication of laws and regulations and the increasing complexity of rules of procedure). These rules require more and more complicated steps to be taken before a decision can be made (impact assessment, principle of precaution, preliminary consultation, publicity of documents, etc.).

In other words, judicial control contributes to weighing down administrative activity, enclosing it in complicated rules, submitting it to principles that are more and more difficult to respect or to combine correctly without committing some illegality. The rules imposed by administrative procedure are often justified, but the penalty for not observing them by the judicial abolition of the decision in question often seems too heavy. Adding rigid control to severe rules provokes a disequilibrium that multiplies the sources of irregularity: the occurrence of a significant number of abolitions defers one of the essential aims of judicial control – legal security.

The result is a critical reaction, even at times a dispute with regard to judicial control of the administration, in particular at the political level, especially when courts quash important projects in which an executive authority has extensively invested. Democratic legitimacy and even

\(^{26}\) According to statistical calculations, French administrative justice costs less than the running costs of the Paris Opera!
economic efficiency or financial necessity are then presented as being compromised by judicial control that is too rigid in terms of formal legality.

In some countries, it has been pointed out that appeal possibilities go too far and that control is too intensive. It would be necessary to “loosen the stranglehold of dispute” in order to let the administrative apparatus become once again effective and competitive.

However, in the end no country has seriously questioned judicial control. In any event, this would have been in contradiction with the demand for increased control, already mentioned above.

How then can the risk of excessive judicialisation be reduced without limiting control? How can the effects of judicial control of the administration be adjusted?

In several countries the thinking is heading towards solutions other than the restriction of appeal possibilities or reduction in the power of judges. This reflection – together with a number of developments – is ongoing.

These developments lead paradoxically not to reducing the role of the courts but to expanding it even further. In fact, in many judicial systems the first step has been the realisation that the abolition of an administrative action is often in itself both insufficient and excessive:

- It is insufficient as it creates a legal void that is then difficult to fill. The judge can help to overcome this void by indicating to the administration the path to follow and the laws to be respected, and then by ordering the actions to be taken.

Thus in several countries the powers of declaration and injunction have been developed for the benefit of administrative courts. These powers permit them to go beyond the act of abolition of illegal decisions and to re-establish administrative legality by indicating to the administration how to draw the consequences of an abolition.

- Another tendency aims to permit the judge to correct on his own the established irregularity. Following this logic, administrative courts have developed procedures aimed not only at establishing legal irregularities concerning administrative actions but also at rectifying the situation as much as possible instead of purely and simply annulling the actions. Several techniques have been developed for this purpose:

  - The judge can accept or even invoke a substitution of reasons or legal basis for an action that includes an irregularity in this respect. In other words, in the course of the procedure he accepts the modification of the factual or legal elements forming the basis of the decision under attack.
  
  - He can decide or order the correction of certain procedural errors, for example by setting up complementary legal measures of instruction that could compensate for the established irregularities.

27 In Switzerland, after the abolition by a court in Zurich of the decision to construct a stadium that was to serve for a world football match, following an appeal by an association for protection of the environment, a proposal was made to reduce the rights of appeal to administrative justice.

28 In Germany, the argument of a reduction in competitiveness and economic attractiveness of the country resulting from judicial control became very popular in the 1990s.
- The judge can be called on to intervene even before the decision is definitively adopted to correct an ongoing procedure if there is a doubt about its regularity⑨.

Finally, another method consists of adjusting the effects over time of an abolition (this concerns especially regulatory actions). Instead of proceeding with a total abolition, the abolition is pronounced for the future — and even on a conditional basis if within the prescribed time limit the administration does not take any corrective action⑩.

This development has obviously also met with criticism⑪: that it changes the role of the courts and puts into question the principle of separation of executive and judicial authorities⑫. It can also have very positive consequences, however, by moderating the effects of control.

It should be noted, moreover, that any administrative action, if it raises grievances for some individuals, also creates advantages for others. The administrative process is not only a litigation between one individual and the administration but also between the individual who has been wronged by the action and the individual who is its beneficiary. By correcting an administrative action instead of annulling it, the judge therefore does not place himself in the service of the administration against the citizens, but carries out more completely his role, which is to take all interests into consideration in the most balanced way possible.

Approval should therefore be given to this tendency to find the solution to the sometimes excessive consequences of judicial control in the search for ways of refining its exercise and its consequences rather than in the reduction of this control. In this area as in others, our complex societies cannot solve their problems with an unrealistic return to greater simplicity of administrative activity and therefore to lesser judicial control. On the contrary, an increase in judicial technicality is needed to master and overcome the negative effects of a type of control, which is still too general and marked by simplistic solutions⑬.

Translated from French
Sigma, Paris, February 2005

⑨ This kind of urgent procedure exists in France in the area of public procurement and is called “référencé précontractuel”.
⑩ Such techniques are applied by the EU judge, the German constitutional judge, and more recently by the French State Council (Conseil d’État).
⑪ In Germany, a slogan has developed that administrative courts must not become “repair workshops” for administrative actions.
⑫ For this reason these tendencies are often seen as shocking: they make the judge step down from Olympus, and they eliminate the boundaries between the administrative phase and the judicial phase.
⑬ For example, the “all or nothing” alternative: abolition or dismissal.