ALL ROADS LEAD TO ROME: THE INTERNATIONAL CONVERGENCE OF PRINCIPLES OF ADMINISTRATIVE JUSTICE

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Abstract

This paper aims to highlight the continuation of the process of convergence that Mario Chiti has identified in his work, subject of course to different ways of applying or implementing those principles. In addressing this topic, the article starts by discussing the growth of English administrative law, then proceeds to European administrative law, followed by reference to international developments which have not yet been discussed (this is the 'new frontier' under the theme in this session). The development of administrative law is based upon the fundamental requirements of the rule of law. This is because the central purpose of the rule of law is to shift arbitrary decision-making to accountability.

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1. Introduction

I feel privileged to be among this distinguished group of administrative lawyers meeting here in Rome today, united in the important common enterprise of public law. United too in the celebration of our colleague, Professor Mario Chiti, both for his immense contribution to European administrative law but also through his extraordinary efforts over the years in bringing together academics, practitioners and judges from across Europe to share experience and learn from one another, as we are today.

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I have known Mario since he came to London in 1978 to research on the subject of regional government at the London School of Economics. I attended his talk one evening on a subject that was little considered in the UK at that time (but which has since become of major importance as we have devolved powers to Scotland, Wales and Northern Ireland and cities such as London). A year or two later, when he was teaching in Pisa, Mario invited me to join a small group studying the latest edition of a major English work on the judicial review of administrative action by Professor Stanley de Smith. Even then, Mario was considering to what extent there might be common principles between England and Italy at a time when scholars in both in Europe and in the England were of the consistent view that our systems were wholly different.

There followed seminars in comparative public law arranged by Mario after he moved to Florence, and he invariably contributed brilliantly to seminars in London where his participation was eagerly sought. In recent years I have been so pleased to have collaborated with Mario again, on a very successful exchange between the Bingham Centre for the Rule of Law, which I now direct, together with the United Kingdom Supreme Court and the Italian Consiglio di Stato, which Mario has been advising.

In addressing my topic today I shall start by discussing the growth of English administrative law, then proceed to European administrative law (which has been well-covered today), followed by reference to international developments which have not yet been discussed (this is the 'new frontier' under the theme in this session). The reference in my title to all roads leading to Rome indicates the continuation of the process of convergence that Mario has identified in his work, subject of course to different ways of applying or implementing those principles which Carol Harlow has warned about.

2. The growth of English administrative law

In England, for the most part of the twentieth century it was rare for individuals to be able successfully to challenge state power. This was because when laws conferred upon officials discretionary power (to act generally in the public interest, or as

they 'saw fit'), that power tended to be interpreted literally by the courts as being entirely in the subjective judgment of the decision-maker and not open to judicial control. From about the mid-sixties however, shortly before Mario first came to England, some judges began insisting that statutes should be interpreted purposefully (teleologically) and subject to implied requirements that the affected person should receive a fair hearing before his rights and interests were affected. The courts also sought to ensure that power not be exercised arbitrarily (the ground of review of 'unreasonableness', or 'irrationality', a ground later supplemented by the European- influenced ground of 'proportionality'). Lord Denning, who was mentioned earlier today, was perhaps the first judge, together with Lord Reid, who expanded administrative law in this way, followed by such as Lord Woolf, Lord Bingham, Lord Steyn and others. The basic "grounds" of review of official decisions were eventually described succinctly under three heads: "legality", "procedural fairness" and "rationality".

What prompted this almost sudden change of approach to discretionary power? Was it just a personal view of justice on the part of certain judges? No. There was already a constitutional source which provided a solid foundation upon which to base their decisions, namely, the principle of the rule of law. When Dicey wrote his seminal work on the constitution in the late 19th century, he identified two principles which guided the 'English' Constitution (as he called it), even despite the fact that the constitution was not codified. The first principle was the sovereignty of parliament, which gives supremacy to government elected by the people. The second principle was the rule of law.

Now we do not accept all that Dicey says these days, but it should be acknowledged that his genius was to appreciate that even a sovereign parliament should be constrained by the rule of law. And if Parliament chooses to override the rule of law, it must do so clearly and unambiguously. However, Dicey overplayed his hand by claiming that parliament should never confer discretionary power upon public officials, for in his view this would inevitably lead to the arbitrary exercise of that power. He was greatly criticised for that by Professor Jennings and others, an onslaught which was so effective that it almost silenced the notion of the rule of law forever. Jennings and others rightly observed that discretion is necessary in any modern society and accused

Dicey of implicitly seeking to preserve a free market economy. However, if we accept, as we now do, that discretionary power is necessary, yet that it must be controlled, the rule of law can be brought back to life as a constraining principle which tempers the excesses of an all-powerful parliament and state.

I shall return to the rule of law shortly, but in the meantime let me just outline, for this is often not clear, that the rule of law contains just four simple components. One of the reasons why it is often misunderstood is that each of the four components seeks to achieve different objectives, and do different work.

The first component is legality, which requires that everyone is subject to the law and not the arbitrary exercise of power. The second component is certainty. Law must be accessible and not changed without fair warning. The third is equality. Law must be applied equally to everyone. And the fourth requires access to justice and rights. It is this fourth component that permits challenge of decisions - challenge by means, where required, of a fair hearing before an independent judiciary. Such a challenge also permits rights to be asserted (some of which are contained within the rule of law itself, such as the right to equal treatment and freedom from arbitrary arrest or detention).

We see now the link between those components of the rule of law and the grounds as they then developed of judicial review, which permitted challenge to decisions which were infected with illegality, uncertainty, the lack of a fair hearing or the kind of arbitrariness contained in decisions which offend rationality or equality.

Incidentally, it is sometimes said, by scholars and others who should know better, that the rule of law is a 'thin' concept, of procedural significance only, and can therefore accommodate unjust laws such as slavery or the cruel commands of the Party. Under that version of the rule of law it could be said to prevail in countries such as China where the law may well be certain, and often equally applied. The Chinese system is better described, however, as 'rule *by* law', as there is no way that individuals may challenge the law, or its implementation, or assert a number of rights with any real chance of success.

3. European administrative law and the wider Europe

Moving now to Europe other than the United Kingdom: The development of common principles has been well-covered here today and some of the pioneers in this exercise, in addition to Mario Chiti, have been mentioned. One other should be mentioned too: Roger Errera, a member of the French Conseil d'Etat, who came to the UK twice during the 1980s and shared the 'Continental' approach to principles of administrative justice with us, to great effect. He also lectured widely in the countries such as Hungary after the fall of the Soviet Union. I should also declare that I was a member of a group led by Guy Braibant, also a member of the Conseil d'Etat, who has also rightly been mentioned today, which travelled, in the early eighties, to countries of the then Soviet Union, in order to test whether their principles of public law and those of Western Europe were similar. As much as I admired Guy Braibant, I remained sceptical of his hypothesis that the systems were not dissimilar. For while the judiciary were simply not independent in those countries, whenever public interest was pleaded by officials, judges were simply not able to contradict that plea. After the fall of the Soviet Union things changed, and mention should be made here of the work of the body formed by the Council of Europe known as the Venice Commission, which assisted with the constitutions and 'institutions of democracy and the rule of law' of the former Soviet Union countries. Significantly, one of their main tasks was to develop an independent judiciary (as well as prosecution service). It should also be noted that the leadership of the Venice Commission was in the hands of some very able Italian lawyers, notably its President, the late Antonio La Pergola, its Secretary (now President) Gianni Buquicchio, and its Italian member, Professor Sergio Bartoli.

4. International developments

I turn now to the international adoption of principles of administrative law: The first question to ask here is: Can there be such principles? Earlier this week the President of Hungary, in the context of a different issue -migration into Europe - accused the President of Germany of "moral imperialism". To the extent that administrative law principles are based on the rule of law, which I

argue they are, to what extent is the rule of law a principle of universal application? Is it a Western construct, only applicable in developed countries and not suitable for societies in transition?

The answer to those questions may be gleaned from a paper on the rule of law produced by the Venice Commission in 2011. I happened to chair the committee leading up to that paper and I can tell you that it took 5 years to reach agreement on its content. This was because there was initially much doubt as to whether the different cultural features of concepts such as *Rechstsstaat*, *l'Etat de Droit* and others could claim any common ground. In the end however there was unanimous acceptance, among the 47 members of the Commission, that the rule of law was both a common concept and a practical one (the paper ends with a 'checklist' of rule of law requirements).

The Venice Commission document lists a number of requirements of the rule of law along the lines I have mentioned above, namely, legality, certainty, no arbitrariness, equality, access to human rights and justice before independent and impartial courts. The elements of administrative law are deep within these requirements, which insist on challenge to arbitrary or discretionary decisions in accordance with settled principles. The Venice Commission were greatly assisted in their report by a recently published book on the rule of law by Lord Tom Bingham (who I have mentioned already as one of the British pioneers of administrative law and after whom is named the Bingham Centre for the Rule of Law, which I have the honour to direct). Bingham lists 8 "ingredients" of the rule of law, a number of which also provide for the opportunity to challenge official decisions that were infected by lack of good faith, fairness, were outside the purpose for which the power was conferred, and which exceeded the limits of those powers or were unreasonable.

Let me now turn to a further development, namely, the constitutionalisation of justice, as set out in recent constitutions, and beginning in South Africa under the leadership of the Mandela government in the mid-1990s. Section 33 of The South African constitution of 1996 proclaims a constitutional right to "just administrative action", under which everyone has the right to administrative action that is "lawful, reasonable and procedurally fair" including the right on request to reasons for decisions and access to government information. That African innovation was

soon replicated elsewhere in Africa, such as in Malawi, where it was called the right to "administrative justice", defined a little more extensively this time as including actions which are lawful and procedurally fair but substituting the requirement of "reasonableness " with action that is "justifiable in relation to reasons given with [a person's] rights, freedoms, legitimate expectations or interests". In Kenya the right was to "fair administrative action", defined as action which is "expeditious, efficient, lawful, reasonable and procedurally fair". Further afield in the Commonwealth, in the Maldives, the right, as in Kenya, is to "fair administrative action", defined as action that is "lawful, procedurally fair and expeditious". And in the Cayman Islands, there is now a constitutional right to "lawful administrative action", requiring the decisions of all public officials to be "lawful, rational, proportionate and procedurally fair".

We often see such rule of law measures as exports from the West to developing countries but note that in these cases out of Africa came a right to "good administration" that was adopted under Title V of the European Union's Charter of Fundamental Rights. Article 41 of the Charter is somewhat differently phrased to the Commonwealth rights, proclaiming perhaps more narrowly "the right [...] to be heard before any measure which would affect him or her adversely is taken", the right of every person to access to his or her file, and the obligation to give reasons for decisions.

5. Conclusion

I hope to have shown that the development of administrative law is based upon the fundamental requirements of the rule of law. This is because the central purpose of the rule of law is to shift arbitrary decision-making to accountability. And its central mechanism to achieve that (apart from its moral force) is the opportunity to challenge decisions which offend a person's rights - private rights and fundamental human rights (the latter including the fundamental right to administrative justice which have so recently been constitutionalised in the countries I have mentioned). In this sense the rule of law should not only be seen, as it has sometimes been rightly portrayed, as an instrument of economic growth and investment (encouraged by stable, predictable laws and mechanisms of legal accountability). It

should also be seen to be an instrument of empowerment, in the sense that the opportunity to assert rights and challenge wrongdoing should be equally available to all, and not only to the privileged few and the powerful.

Let me conclude by quoting the final page of Tom Bingham's book on the rule of law, on which I could not hope to improve:

"In the Hall of the Nine in the Palazzo Pubblico in Siena is Ambrogio Lorenzetti's depiction of the *Allegory of Good Government*. Justice, as always, is personified as a woman, gesturing towards the scales of justice, held by the personification of Wisdom. At her feet is Virtue, also a woman. A judge sits in the centre, surrounded by figures including Peace. The *Allegory* is flanked by two other paintings, illustrating the *Effects of Good Government* and the *Effects of Bad Government*. In the first, well-to-do merchants ply their trade, the populace dance in the streets and in the countryside well-tended fields yield a plentiful harvest. The second (badly damaged) is a scene of violence, disease and decay. What makes the difference between Good and Bad Government?

I would answer [writes Bingham] predictably: The rule of law. The concept of the rule of law is not fixed for all time. Some countries do not subscribe to it fully, and some subscribe only in name, if that. Even those who do subscribe to it find it difficult to apply all its precepts quite all the time. But in a world divided by differences of nationality, race, colour, religion and wealth it is one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to approach to a universal secular religion. It remains an ideal, but an ideal worth striving for, in the interests of good government and peace, at home and in the world at large."