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Carelli, D., Peters, B. (2025). Administrative Law and Bureaucratic Autonomy in a Comparative European Perspective. The Civil Service in Europe: A Research Companion: 547-564.
http://dx.doi.org/10.4324/9781003458333-33

N.B. When citing this work, cite the original published paper.

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28 Administrative Law and Bureaucratic Autonomy in a Comparative European Perspective

Daniel Carelli and B. Guy Peters

I. Introduction

The study of administrative law has in most countries become separated from the study of public administration in political science, as well as within public administration itself as a discipline. Administrative law is assumed to be just something for lawyers, and to be of little relevance for understanding how public bureaucracies function as part of the political systems within which they are embedded. Although we come from the perspective of political science, what we are interested in when studying the bureaucracy, or the civil service, or any other synonymous term, is the interaction between politics, bureaucracy, and the citizen involvement. This, as far as we understand it, actually corresponds well with the study of administrative law. Our chapter will therefore be an attempt to integrate the political study of administration with the legal one, and thereby contribute to understanding European civil services.

We also come to this chapter with an interest in the historical and ideational backgrounds of contemporary administrative systems. We assume that those contemporary bureaucracies have been influenced by administrative traditions.[1] While every administrative system is *sui generis*, we will be arguing that there are four underlying administrative traditions in Western Europe. These traditions have also influenced administration in other parts of the world, such as the United States, Canada, the Antipodes, India,[2] and many countries in Africa.

The basic argument of the chapter is that administrative traditions manifest themselves in administrative law, as well as in the organisational structures and the behaviours of individual administrators. The field of administrative traditions has developed into a branch of a larger so-called historical turn in political science,[3] based upon the perhaps obvious idea that that history is important for understanding many underlying motivations in the current public sector. In the specific case of administrative traditions, the argument is that the observed patterns of structure and performance of contemporary public administration are shaped, at least in part, by the history of these organisations. Further, there are several broad "families" of administrative systems that have many aspects of their administrative systems in common.

1 Peters (2022).
2 Baribanti (1966).
3 Tilly (2006).

DOI: 10.4324/9781003458333-33
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Indeed, administrative law provides an extremely useful window into how administrative systems function because it contains clear statements of principle about how fundamental issues in administering law should be dealt with. And given that all administrative law systems must deal with the same questions, such as rule-making and adjudication, administrative law provides directly comparable "data".[4] Administrative law may also make some more fundamental statements about governing, given that it defines how the State will deal with its citizens, and how the political and the administrative components of governing will interact.

We are attempting to demonstrate the utility of looking at an aspect of administration that many public administration scholars would consider arcane. We believe that although administrative law is embedded in the broader legal system and its approach to law,[5] there are still political and managerial elements that help define the way in which administrative law functions, and its impact on the delivery of public services. Administrative law is about administration, and therefore it is shaped by the perceived needs of political systems to make and implement laws, and thereby to govern.[6] Administrative law constrains public management, but it also defines opportunities for public officials to exercise their legitimate authority.

In addition, the bureaucratic organisation and its inherent roles and functions in the political system is bound to both transformation and persistence. For instance, the COVID-19 pandemic forced bureaucrats to manage an unusually large-scale issue – one which strengthened or nuanced relationships among bureaucrats, politicians, and citizens. At the same time, constitutional and administrative law serves the public with predictable bureaucratic action, which is essential to the legality principle and democratic governance. Thus, the study of administrative law in the perspective of tradition illuminates the dichotomy between institutional change and the stability and of good governance more broadly.

The final general point we want to emphasise about administrative law and its connection to administrative traditions is the utility of this approach for comparison.[7] First, as noted earlier, administrative law must deal with very similar questions in all countries, and the answers to those questions tend to be less ambiguous than they are for many other aspects of governing.[8] The use of traditions as a focus for the comparison is useful because it forces us to identify some general patterns within "families of nations"[9] rather than having to confront dozens of individual cases and to treat each as *sui generis*. There are differences within the traditions,[10] but those are generally outweighed by the similarities.

II. Bureaucratic Autonomy and Administrative Law

We will illustrate our argument for the importance of administrative law in comparative public administration by focusing on the concept of bureaucratic autonomy. The fundamental question in studying bureaucratic autonomy is to what extent are organisations

4 Bertelli and Cece (2020).
5 See Damaška (1986).
6 de Burca and Scott (2006).
7 Peters (2022); Rose-Ackerman et al. (2017).
8 Less ambiguous, but not totally unambiguous. At times ambiguity can be useful as when governments cannot condone some activities but may not want to criminalise them because of the difficulties of enforcement.
9 Castles (1993).
10 Heyen (1989); Sager et al. (2018).

within the public bureaucracy, and individual civil servants within those organisations, capable of making their own decisions and exercising their own discretion?[11] Public law attempts to define the goals of public action and to place legal constraints on the behaviour of administrators. The autonomy exercised by civil servants is always "bounded autonomy", with the bounds coming from law as well as political constraints. Inevitably, however, there is discretion available to the administrative actors involved.[12] The question is how much discretion, and who can use it?

Bureaucratic autonomy is important for understanding how bureaucracies function, but this concept is both under-conceptualised and often misunderstood in the mainstream literature in public administration. At the most basic level, autonomy can be understood by the definition offered by Martino Maggetti,[13] namely that it refers to the ability to translate one's own preferences (those of the bureaucrat) into authoritative actions, without external constraints. A significant proportion of the scholarly literature, inspired by game theoretic assumptions, has thus investigated how bureaucracies are autonomous to politicians.[14] Some research has also investigated the extent to which organisations, and especially street-level bureaucrats,[15] are independent from stakeholder and citizens.[16]

The results of these analyses largely show that knowledge asymmetries and moral hazard between bureaucrats and politicians will lead to suboptimal equilibria of political control, and consequently to oversized budgets and "shirking" bureaucrats.[17] That is, public bureaucrats may be able to use the resources at their control to advance their own and their organisation's interest rather than the public interest. These results are based on the assumption that bureaucrats and their leaders in organisations are primarily self-interested, with self-interest being defined in terms of the expansion of the organisation, the size of budgets, and leisure for the individual civil servant.

However, such a perspective presupposes an unorthodox principal-agent relationship, which is not necessarily always the actual case. It further assumes that a narrow, economic conception of self-interest is sufficient to understand bureaucratic behaviour. Bureaucracies are also driven by other forces than budget maximisation, such as trust, professional norms, loyalty, and public-sector motivation, and they are not necessarily in perpetual opposition to the political level.[18]

The principal-agent framework is certainly important for the micro-analysis of rationales for bureaucrats and politicians but is limited in explaining all forms and degrees of autonomy. Autonomy is not a dichotomous concept. There are degrees of autonomy, and these vary across time, as well as across policy areas, and forms of governance. They may also differ by level within the bureaucratic institution. The institution as a whole may be tightly controlled by political actors, but organisations within the institution may be

11 See Carpenter (2002); Peters (2022).
12 Evans and Hupe (2020).
13 Maggetti (2007).
14 Moe (1990); Calvert et al. (1989).
15 The lowest echelon of the public administration, in direct contact with citizens. See Lipsky (1980).
16 Brodkin (2011).
17 Brehm and Gates (1997); Moe (1984); Whitford (2002); Niskanen (1975).
18 Pierre and Peters (2017); Carpenter and Krause (2015); Sobol (2016); Brehm and Gates (2015); Perry and Hondeghem (2008).

able to exercise substantial autonomy, in part because there is such a focus on the overall institution.[19]

Several different forms and sources of autonomy can be gathered from the literature. The most basic form of autonomy is the mission or description found in formalised steering documents. Formal instructions to government agencies, yearly budget allocations, and constitutional rights to steer bureaucratic activity are all used, however, to reduce autonomy. Although mission statements coming from political organisations are important, we need to remember that in the New Public Management (NPM) world of administration, organisations may construct their own mission statements[20] and use those statements as a means of gaining greater autonomy.

In addition, countries have established control mechanisms due to path-dependent administrative traditions. The Napoleonic and German traditions have relatively strong traditions to control bureaucratic activity by law, while the Anglo-American and Scandinavian models strive for more autonomy, largely through the use of managerial controls.[21] The "environmental-institutional" context thus shapes the basic function of the bureaucracy in formalised and institutionalised practices.[22]

Thirdly, informal autonomy is the outcome of imperfect formal control at the political level. The scarcity of resources will complicate the task of politicians to monitor all day-to-day activities in the bureaucracy, and bureaucracies might acquire knowledge that they do not necessarily need to report to their parent ministry.[23] However, bounded rationality, changing external circumstances, and knowledge asymmetries between the ministry and agency will make autonomy not only the result of deliberate design.[24]

This informal and largely unplanned version of autonomy appears most clearly in the American administrative system. Although there are numerous controls from both the executive and legislative branches built into the system, agencies are often able to play off the two political branches against one another and carve out a sphere of autonomy.[25] Further, the connections of stakeholders with the public sector come primarily through the agencies rather than the departmental level, giving the agencies more opportunities to gain freedom from political controls. This pattern may be less relevant for European countries, but the formal autonomy of agencies in many countries may be magnified through informal means such as information hoarding.

Fourthly, the civil service consists of individuals, and the full staff is both heterogeneous and employed at several different levels of hierarchy and responsibility. In consequence, the degree of autonomy, as well as autonomy from *whom*, is dependent on such conditions. There is some tendency to talk about "The Bureaucracy" as a single thing, while it is in fact a highly differentiated and variable structure, even within a single country.[26] The variations within a single public sector are perhaps even greater when differences across countries are considered.

19 Likewise, if a large number of controls are placed on the organisations, then the institution as a whole may enjoy greater freedom.
20 Goodsell (2013).
21 Peters (2022); Pollitt and Bouckaert (2004).
22 Maggetti and Verhoest (2014), p. 248; Yesilkagit and Van Thiel (2008).
23 Maggetti (2007); Majone (1997).
24 Bach and Ruffing (2013), p. 716.
25 Parker and Parker (2018).
26 See Seidman and Gilmour (1986).

1. Sources of Autonomy

Several other forms and sources of autonomy are important for understanding the full power of the concept of autonomy in the light of how public administration functions. We cannot do full justice to each of these explanations, but should mention them to round out the discussion.[27] Briefly stated, these explanations include, among other things, organisational autonomy, meaning that specific organisations of the public sector are designed to have less political control and thus more autonomy than others, and that whole organisations cannot be steered and controlled easily by their political masters.[28] This autonomy is most apparent for regulatory organisations, such as those regulating industries, public utilities, the environment, and so on, that are designed to be able to make choices based more on professional criteria than on political considerations.

In addition to organisational autonomy, the form and degree of autonomy is assumed to vary considerably across policy areas. The degree of complexity of a policy issue will require more expertise in policymaking, which is primarily found in the public bureaucracy rather than in political structures. Therefore, autonomy and complexity should correlate.[29] Likewise, the political saliency creates more ministerial control and thus less bureaucratic autonomy.[30] This political saliency may be especially important for agencies that may usually be thought to be at odds with the politics of the minister. Right-wing governments may attempt to exert more control over environmental agencies, while the left may be expected to attempt to control defence more tightly.

Time is also important for explaining bureaucratic autonomy. Short-termism in politics is related to saliency;[31] politicians will delegate tasks and significant autonomy when a policy issue requires long-term goals or has a strong need for specific expertise.[32] Democratic governments tend to have great difficulties in processing long-term problems – democratic myopia – and therefore relatively autonomous bureaucratic organisations may be better suited for dealing with long-term issues than are political organisations.[33]

Delegating decisions to agencies with substantial autonomy may also be a means of blame avoidance,[34] although despite their best efforts blame may still attach to the political leaders.[35] Even when policies are made and implemented by autonomous agencies or public corporations, the public will still look at the political leaders in office at the time and assign blame to those politicians.

Furthermore, two fundamental sources of the creation – and most probably the sustaining of – bureaucratic autonomy refer to reputation and trust. First, by ensuring a good provision of public service over a significant period of time, politicians face fewer incentives to monitor and control every minute action within its operative area. Such a good reputation also advances the relationship between clients and bureaucrats and can boost its operative autonomy. Therefore, time and good service provision can improve

27 See Maggetti and Verhoest (2014).
28 Verhoest et al. (2004).
29 Bawn (1995); Gailmard and Patty (2007); Callander (2008).
30 Pollitt et al. (2004); Page (2012).
31 Garrì (2010).
32 Verhoest et al. (2010).
33 MacKenzie (2020); MacAskill (2022).
34 Hood (2013).
35 Monetary policy decisions are delegated to central banks, but presidents and prime ministers still tend to bear the blame for inflation and unemployment.

informal relationships and fundamentally shape the latitude and forms for administrative action. Bad reputation will, on the contrary, complicate such administrative autonomy and instead lead to more informal control than what is formally designed in the legal framework.[36]

Second, a "united" bureaucracy with strong interpersonal trust will allow more independence at lower levels in the bureaucratic hierarchy, just as trust between senior managers and ministry staff can facilitate budgetary processes. Trust between specialised agencies within the public sector can also be favourable in instances where issues require cross-sectoral policymaking. Trust-based cross-sectoral horizontal coordination can be fruitful for exchanging information and indeed influencing agendas. The total expertise in such bureaucratic networks can bring comparable advantages to decision-makers, and therefore influence their space for manoeuvre partly based on such high levels of collective knowledge.

Lastly, there is a difference among issues that become slow and fast-burning crises and those that occur in "everyday politics".[37] When confronted with issues of the burning sort, governments will usually be at the front seat, even though the current COVID-19 pandemic tells us that the autonomy-control dichotomy in public management played out rather differently across administrative traditions.[38] The role of bureaucracies in crises may also vary across time, with political leaders intervening initially but then finding that managing a long-term crisis, and not resolving it, may make them appear incompetent

2. Autonomy from Whom?

As we consider administrative autonomy we should consider the autonomy of bureaucratic organisations from their nominal political masters, the public, and from the regular courts. These three dimensions of autonomy will not necessarily vary together, and may very likely change in exactly opposite directions. As the administrative agencies are given great latitude to make independent decisions without as much control of politicians, they may find themselves more subject to scrutiny by citizens (and by the media). This last point, however, presupposes an informed public, both regarding political rights and knowledge concerning the specific issue or question. Therefore, legal knowledge and transparency measures are likely to be important for the tension between autonomy and control when the political dependence is low.

Furthermore, we are not necessarily talking about autonomy from the general public, and the involvement of the general media. The most important aspects of control, or attempted control, over agencies may be through the stakeholders of the policies being implemented. The clients of the programs have demands for services, and have ideas about how to make the programme work better. The opportunities for stakeholders to exercise more control are being expanded through the institutionalisation of collaboration in policymaking and implementation.[39] The danger, not just for bureaucratic autonomy but also for the general public, is that the "public interest" becomes defined narrowly as the interest of those stakeholders.

36 Carpenter (2002).
37 Seabrooke and Tsingou (2019).
38 Toshkov et al. (2022).
39 Peters et al. (2022).

III. Dimensions of Administrative Law With Administrative Traditions

As we discuss these several administrative traditions later, one question stands out perhaps more than others. If this is administrative law, which is dominant – law or administration? For example, somewhat paradoxically the French administrative system is generally understood to be legalistic, but administrative law is influenced by administrators, trained very much like administrators in other *grand corps* of the State.[40] In contrast, American administrative law and courts, operating in a system that is usually deemed managerial,[41] are actually dominated more by legal concerns, and by the ever-present possibility of administrative actions being appealed into the regular court system.[42] Similar patterns are found in Sweden, where the public administration enjoys high levels of autonomy and managerial values, but where administrative law to a very large extent structures those values. The relative strength of law and management is crucial in defining administrative traditions, but the relationship of those two variables is also complex and nuanced.

This difference in the importance of law and management also raises the question of how administrative adjudication is practised. In some systems, administrative law judges are located within the same agencies whose decisions they are examining. This can be especially important in the social services organisations where thousands, if not millions, of cases must be adjudicated each year. While administrative law judges may be well-trained to apply the law fairly, their affiliation with the organisation may create the appearance of bias, even if there is no such bias.

As we compare the administrative law systems within four major administrative traditions, there are several key points of comparison. While we acknowledge that administrative law contains even more variation than can be captured through these variables, we believe the variables identified here are essential for understanding variations in bureaucratic autonomy. Also, although we are using these variables to characterise whole traditions, they can also be important for explaining differences among countries within traditions. We will now turn to introduce these variables.

1. Basic Legal System

The first variable refers to the basic *legal system* within which administrative law functions.[43] Common and civil law systems operate by fundamentally different logics and will likely influence the way in which administrative law shapes bureaucratic autonomy. For example, the codification of civil law may allow less space for autonomous action by bureaucracies than does common law. In addition, we argue that studying the evolution of the legal system will help us understand the basic function of the specific legal system.[44] The form of administrative law is also in itself a point of comparison. For example, even in common law countries the administrative law may be codified, and shaped by a single procedural statute. Other issues include what are the main characteristics of the law, and how does it manage

40 Bell and Lichere (2022), pp. 85–86.

41 That said, another characterisation of the policymaking system is “adversarial legalism” Kagan (2001).

42 See Mashaw (2012). For example, the recent ruling by the Supreme Court, limiting the rule-making power of the Environmental Protection Agency (*West Virginia et al., v. Environmental Protection Agency et al.*) may alter significantly the capacity of agencies to act autonomously in writing new regulations.

43 Head (2011).

44 Duve (2017).

secondary legislation? Is administrative law extensive or narrow in its style and substance? To what extent does it delegate tasks and procedures to public authorities? What are the rights of individuals within this body of law?

2. *Rule-making*

The second point of comparison regards rule-making processes in the context of administrative law. *Rule-making power* refers to the capacity of public authorities to amend, repeal, or create administrative regulations. These regulations are also referred to as secondary legislation. A common explanation for why the political government would grant, through law, public authorities extensive rule-making powers is that the bureaucracy has a relative advantage in expertise on technically or socially complex issues. The rule-making power is either formal or informal, where the former implies formal judicial hearing for public consultation over proposed rules. These hearings may utilise rules of evidence and sworn testimony when making their decisions.

Informal rule-making lacks the court-like trappings of formal rule-making but may still have formalised procedures.[45] The most important variations in informal rule-making are in the extent to which the public is aware of, and involved in, the process of rule-making. Furthermore, increasingly collaborative forms of rule-making demand that stakeholders participate in the process, and use this as a means of marshalling the expertise that is held by those stakeholders when making regulations. Means of informal rule-making may also differ in the extent to which other institutions within the public sector are willing to defer to the expertise of the public administrators involved, or want to impose other checks on the autonomy of the agencies.

In all these cases of rule-making, the actions of the administrative actors are bound by law. They cannot make rules without some specific piece of primary legislation that empowers them to do so. Further, the courts may decide later if the administrators' interpretation of their latitude in making rules was appropriate. Again, it is important to understand bureaucratic autonomy as operating within boundaries.

3. *Judicial Review*

Judicial review is a third central concept for understanding differences among patterns of administrative law. This term refers to the process of judicial scrutiny of administrative action, as well as the scrutiny exercised by higher courts over the decisions of lower courts. Some mechanism of courts having powers to invalidate administrative rules or actions is an essential component for checks and balances in the separation of powers. This is especially important for administrative decisions in democracies, given the unelected nature of the bureaucracy.[46]

Nevertheless, this fundamental feature is manifested differently in different administrative traditions. Most notable perhaps is the dichotomy between *ex ante* versus *ex post* judicial review. The former signifies legal reviews by a reviewing agency that is independent from the agency currently making a specific regulation, and where the review process precedes the adoption of the new regulation. *Ex post* review, on the other hand, implies

45 Custos (2006).

46 The judiciary is also unelected, but tends to have greater legitimacy among citizens than does the bureaucracy.

review after the new regulation is adopted.[47] We believe these distinctions provide different "spaces for manoeuvre" for public agencies, and hence are important for the degrees and forms of bureaucratic autonomy.

In addition to judicial review per se, there may be other reviews of secondary legislation that impose controls over the autonomy of the bureaucracy. An increasing number of countries utilise regulatory reviews based on cost-benefit analysis, or other modes of economic analysis.[48] These reviews are often more connected to the political priorities of political leaders, but they still constitute an *ex ante* check on the decision-making of agencies, and hence a check on their autonomy.

4. Liability

The issue of liability is related to the issue of judicial review of administrative actions. The exercise of public power by the public bureaucracy and its officials must be correct, professional, and lawful. It is therefore essential for the administrative law to describe the ways and the extent to which liability can affect the organisation or the individual bureaucrat. Wrongful conduct by individuals can inter alia be punished by disciplinary or financial liability,[49] which we believe shape bureaucratic autonomy in distinct ways.

Both judicial review and liability are related to an important underlying theme in the discussion of bureaucratic autonomy, namely the accountability of the public bureaucracy. Being shielded from electoral accountability, the bureaucracy must be held accountable through other means. There are numerous forms of political accountability, such as the budget process and direct political controls, that limit autonomy, but the courts (and more often the threat of going to court) provide a major means of ensuring that the bureaucracy does not exercise excessive autonomy.

5. Administrative Courts

The fifth and final dimension to be considered here is the nature of administrative courts. In addition to general courts, many States have specialised administrative courts to impose judicial review over public authorities. These can be specialised in issues related to, e.g. taxation, labour, or environmental licenses, or they can be more generally responsible for reviewing administrative behaviour. The specialised courts provide some significant advantages for governing, albeit also with some challenges.[50] A number of differences in powers are found among administrative courts, and these differences define to some extent the power of the bureaucracy *vis-à-vis* both political controllers and against the public.

We should also differentiate true administrative courts from adjudication that takes place within the agencies themselves. The latter forms of "trying cases" may involve civil servants playing specific roles rather than formal judges. The civil servants may or may not have specialised judicial training, and the formality of these proceedings, e.g. rules of evidence, may differ markedly. The adjudication within the administration itself is largely confined to Anglo-American countries, with the others requiring more judicial independence.

47 Asimow et al. (2020).
48 Livermore (2014).
49 Chaba (2020).
50 Psygkas (2017).

One important difference among courts is their ability to command the exercise of ministerial duties, or those duties for which there is intended to be no discretion. In some cases, the courts are confined to judging actions already taken, rather than having the power to make an agency perform a mandatory act. That power to compel obviously lessens the autonomy of agencies, given that inaction (shirking) can be a very powerful weapon for a bureaucracy.[51]

In addition to the points about administrative courts, we should ask how autonomous they are in relation to the general courts. Is there a clear line of appeal out of the administrative courts to the regular court system, or are any appeals confined within the administrative courts? In addition, are the civil servants in these administrative courts trained separately from other civil servants, or are they merely regular civil servants who have responsibilities as adjudicators?

IV. Empirical Illustrations

We are focusing on four major traditions that exist within the consolidated democracies of Europe, North America, and the Antipodes. These four traditions do contain some internal variance, but we argue that there are some common attributes that define the way public administration is practised in these countries and that has persisted over a significant period of time. There are also hybrids among these four basic traditions, but given space constraints we will focus only on the four more or less "pure" types. Finally, we are aware that there are other traditions in the rest of the world, but for this book in particular will concentrate on the European cases, and examples from the remainder of the world that are directly derivative from the four traditions we discuss here.

1. The Napoleonic Tradition

The Napoleonic tradition is perhaps the clearest of the four traditions.[52] Although it did have closely related antecedents,[53] the model for administration was developed during the reign of Napoleon Bonaparte in France and then adopted by other countries in Southern Europe.[54] Unlike the other traditions discussed here, the Napoleonic tradition was developed more or less purposefully, and therefore is somewhat more integrated than the others.

The Napoleonic tradition was developed in order to manage a centralised, powerful State. Public administrators were to be central actors in governing France, and were trained to have the skills necessary for managing a developmental State. Much of that training was in law, but it increasingly came to include management and other aspects of contemporary governance. In this model of governing, control was to be centralised in Paris, and public administrators (the *prefets*) were to exercise control over the remainder of the territory. Likewise, other administrative corps were to regulate inside government, especially the

51 Brehm and Gates (1997).

52 Ongaro (2010).

53 Dreyfus (2013).

54 This model was also transplanted to former colonies in Africa, and adopted by some countries in Latin America. It also influenced other countries within Europe that are not strictly operating within that tradition. See also *The Civil Service in France: The Evolution and Permanence of the Career System* by D. Capitant in this volume.

finances of the public sector. Public administration, like the remainder of public life, was to be governed by codified law.

While the administrative tradition was associated with a strong, centralised State, it also provided for controls over the exercise of that power. Some of these controls are *ex ante*, such as the review of legislation and administrative regulations by the *Conseil d' Etat*. In addition, administrative law provided checks on the powers of individual administrators that included personal liability in some instances. Further, as the State in France has continued to change there has been greater decentralisation, with intermediate levels of government and even the communes having more self-government.[55]

These characteristics of the French State are mirrored, although always with local variations in the other countries using this tradition. All the countries in this tradition tend to have highly legalistic administration, and to have a powerful, entrenched public bureaucracy. Perhaps the greatest difference to the centralised French model has been the more extreme decentralisation in Spain and to some extent Italy. Likewise, the political histories of these other Napoleonic States have led to a closer connection between politics and administration, and perhaps therefore less dominance of administrative law, than in France. But the fundamental institutions and approaches of the Napoleonic system show through.

2. *The German Tradition*

The German administrative tradition is perhaps most recognisable from its strong reliance on the concept of *Rechtsstaat*.[56] It refers to a set of fundamental legal principles – more administrative than constitutional in nature – that regulates the action in the bureaucracy and protects against the executive power.

More generally, the emergence of the German State administration occurred in several stages from the Middle Ages and onwards. Especially in the aftermath of the Thirty Years' War, there was a strong general desire for stability and order, which led to the development of more formalised systems of law enforcement. This, combined with more general societal developments, spurred a gradual formation over the following century into the *Policeyrech*, which laid a foundation for an unrestricted lordly administrative authority (*ius eminens*). The introduction of exclusive legal protection against territorial lords provided the basic separation of public and private law in German legal culture.[57]

Many of the autonomous States within the German Confederation in the 19th century, e.g. Rhine, Prussia, and Bavaria, installed a Napoleonic bureaucratic structure of centralisation through departments and respective ministers, as well as a system of prefects and specialised agencies for welfare activities and provincial government. However, a decentralised self-administration remained intact in Germany despite strong administrative influences from France. Germany developed as a "total" concept in juxtaposition to this federal structure, inter alia in the Imperial Constitution (*Paulskirchenverfassung*) of 1849, which, although it never realised in its full form, laid the foundation for several centralised administrative courts in the various States.

The principles of *Rechtsstaat*, for instance the "lawfulness of the administration" (*Gesetzmäßigkeit der Verwaltung*), underscore the supremacy of the law and its restrictions

55 Schmidt (1990).

56 See *The Civil Service in Germany: A Service Based on Mutual Loyalty* by C.D. Classen in this volume.

57 Bogdandy and Huber (2017).

on administrative action that may violate individual freedom. It serves as a core control mechanism within the administration. Administrative law (*Verwaltungsrecht*) and the German Administrative Act (*Verwaltungsakt*) emerged in this context, partly in correspondence to the French *act administratif*. These two administrative acts share some similarities in their basic role to regulate the actions of government authorities and thus protect the rights of individuals, but are also highly different in terms of, among other things, the formal requirements for making decisions. The German Administrative Act is also subject to review by administrative courts. In addition, it is different, however, as it underlines *forms* and *substances* of administrative action.[58]

The scope of the present contribution does not allow for a detailed exposition of the German public administration,[59] but two features that deserve mention are the hierarchically structured direct administration (*unmittelbare Staatsverwaltung*), which possesses the formal power of responsible authorities to inter alia maintain public infrastructure or more broadly provide social welfare services, and the indirect administration (*mittelbare Staatsverwaltung*), which refers to the delegation of powers to other (regional or local) entities.[60] Related to these, the bureaucracy has lost much rule-making authority compared to many other EU Member States during the 20th century, and there exists today a comprehensive *ex post* judicial control over administrative action. Furthermore, the proportionality of administrative legal action is always subject to judicial review. Albeit not explicitly stated in the constitution, it is determined by three aspects: suitability, necessity, and balance.[61]

Judges were long clustered together with the wider notion of the public bureaucracy and recruited in a similar manner. Administrative courts were therefore not directly part of the judicial system but rather the administrative. Such a distinction persisted until the 1960 statute *Verwaltungsgerichtsordnung* was enacted to make the administrative court system independent from the administration,[62] which blurred the lines between civil law and public law, but also shaped opportunities and obstacles for administrative autonomy in the wider civil service.

3. The Scandinavian Tradition

The codified, civil law tradition in which Sweden is embedded is most explicitly described in the constitution (*Grundlag*), in which the Instrument of Government (*Regeringsformen*) steers the basic configuration of the bureaucracy.[63] It stresses, most fundamentally, the equality of law, and that public officials shall not make decisions without regulated authority. In addition, it underlines values of objectivity, impartiality, independence, and human rights.[64]

Judicial review over administrative action followed the procedure of the general courts before 1971. Procedural rules for administrative regulations were heterogenous across

58 Becker (2017); Nolte (1994).
59 See Kuhlmann et al. (2021) for a thorough account.
60 Sommermann (2021), p. 24.
61 Sommermann (2021), p. 21.
62 Künnecke (2007), p. 36.
63 See *The Civil Service in Sweden: Duality and Non-specific Status of Civil Servants* by P. Herzfeld-Olsson and E. Sjödin in this volume.
64 Herlitz (1964); Marcusson (2018); Kumlien (2019).

substantive areas, and citizens could send complaints against administrative decisions through an internal appeal in the public bureaucracy. After 1971, however, a homogenous procedural code (*Förvaltningsprocesslagen*) for the public courts and a general law for public agencies (*Förvaltningslagen*) were enacted.

The administrative courts, which exist on three levels (*Länsrätter, Kammarrätter*, and *Regeringsrätten*), have an extensive jurisdiction to review both the legality and suitability of administrative actions, which makes them somewhat of an outlier in a European comparative perspective. The tradition of merging the administrative courts as part of the administration rather than the court system provides hints into this peculiarity.[65]

There exists no sharp legal distinction between personal liability for civil servants and for other employees in the Swedish system. All are responsible for their actions according to penal law, even if this responsibility is restricted to cases about the exercise of public power, and there are also special disciplinary punishments for State employees.[66]

A definable feature of the Swedish, and more broadly the Scandinavian, administrative tradition is its strong emphasis on openness and transparency. The Administrative Procedures Act from 1986 (first enacted in 1971), guarantees and protects correct and efficient handling of administrative matters. It is rather concise, but shall be applied by all public agencies, with certain exemptions, and by the courts.

Regarding openness, the Freedom of Press Act (*Tryckfrihetsordningen*) from 1766 – which provides citizens with extensive rights to monitor the public bureaucracy, and installed the Parliamentary Ombudsman (*Justitieombudsmannen*) – fundamentally constituted a rather controlled bureaucracy. Paradoxically, the Swedish bureaucracy is often described as possessing exceptional degrees of autonomy. For instance, Chapter 11, Section 7, of the constitution states that the public agency's exercise of public power is made independently according to laws and ordinances. The combination of bureaucratic control and autonomy constitutes a rather unique arrangement and is often subject to controversy in matters of responsibility.[67]

4. *The Anglo-American Tradition*

The last of the traditions we will discuss is the most distinct from the others, and has perhaps the greatest internal variance. Unlike the others, the civil servant has long been considered to be a manager or an implementor, rather than a lawyer, and relatively few civil servants have formal legal training. This lack of a legal emphasis is in part a function of working in a common law system without fully codified law. Law is not irrelevant by any means, but the principal duties of the civil servant are to get things done, with those "things" being defined by their political masters as well as by the law.

The political and administrative systems of influenced by the Anglo-American tradition also tend to be more decentralised than in the other systems. Some parts of these countries – Scotland in the United Kingdom and Quebec in Canada for example – using different legal systems for at least some parts of their jurisprudence. There are also more concerted attempts to separate politics and administration in these systems, with limited movement

65 Ahlbäck Öberg and Wockelberg (2015).
66 Ehn (2015).
67 Hall (2015).

Table 28.1 Legal variables in four administrative traditions.

Variables	*Napoleonic*	*German*	*Scandinavian*	*Anglo-American*
Basic legal system	Civil	Civil	Mixed	Common
Rule-making	Significant, Formal and Informal	Limited, formal	Extensive, Informal	Extensive, Formal and Informal
Review of actions	Ex Ante	Ex Post	Ex Post	Ex Post
Personal liability	Yes	No	No	No

between civil service and political careers, and, except for the United States, having a limited number of patronage appointments in government.

In terms of administrative law, there are marked differences among the countries, with the United States being distinctive in having a comprehensive law governing secondary legislation and administrative adjudication – the Administrative Procedures Act of 1946. The United Kingdom and other countries have a more diffuse set of rules governing procedures, and have not codified administrative law to the extent of the United States. Further, the long presence of judicial review has meant that administrative law cases in the United States are appealed into the regular court system more often than in other Anglo-based systems. These appeals can occur if there is substantive constitutional question involved, such as the denial of due process.

As well as the bulk of administrative law cases that are heard in the agencies, there are specialised courts in many of these countries dealing with matters such as taxation, labour law, and international trade.[68] In addition, the United Kingdom has developed an administrative court to handle a variety of technical matters in administrative law, although there are relatively few appeals of individual citizens. In addition, cases in which a government agency or administrator is alleged to be operating *ultra vires*, or unfairly, are appealed within the regular court system.

We can summarise the differences in administrative law among these four traditions by using the variables in administrative law mentioned previously. Table 28.1 shows the variables and the values they take on within those four sets of countries. As already mentioned, there may be internal differences within a tradition, especially the Anglo-American tradition. Still, this table provides a useful means of demonstrating the differences between the manner in which civil services are controlled by administrative law, and can use discretion within the legal frameworks.

V. Conclusion

As well as being a discussion of the utility of administrative law as a means of comparing administrative systems, this chapter is also something of a research agenda. We have asserted the importance of administrative law for bureaucratic autonomy, and given some examples of how that relationship functions in four settings. There is still, however, a great deal to be done to explicate the linkages among these variables, and to detail the characteristics of national legal systems that produce particular types of bureaucratic patterns. But we believe that we have brought administrative law back directly into the study of

68 Ford (2017).

comparative public administration, and have shown that this is not some arcane study for lawyers, but a central component of the functioning of the public sector.

While the empirical illustrations only briefly introduce the four legal-administrative 'traditions' and how it relates to administrative autonomy, they do demonstrate that distinct legal arrangements, strengthened through path-dependent mechanisms, continue to fundamentally influence bureaucratic behaviour. Also, as argued in the introduction, we maintain that the legal sources of autonomy comprise only one aspect of the concept; informal factors such as trust and reputation can create significant latitude for action for the bureaucratic organisation as a whole or the individual bureaucrat, and thus be integrated in the study of administrative autonomy and bureaucratic politics.

Moreover, administrative autonomy is expected to result in various consequences. For instance, while each country's distinct sources, forms, and degrees of autonomy are interesting for bureaucratic politics per se, the very composition of different administrative solutions in transnational collaborative settings yields intriguing questions of contemporary governance. If path dependency and legal traditions continue to influence behaviour, how does that stand in relation to such developments? One obvious example is the growing function of domestic bureaucrats to partake in networked forms of governance in the EU,[69] a development that still requires a great deal of substantiation from scholars of public administration, law, and political science.

For administrative law to be an avenue for comparison that will be able to bear the fruit that we believe is possible, we and other scholars will have to do several things. The first is to engage in a more extensive dialogue with administrative lawyers. This discussion should be useful for both sets of participants. In addition, we may have to provide more precise measures of some of the attributes of administrative law that we have discussed. These need not be suitable for full-fledged quantitative analysis, but should enable us to make more precise statements about the degree to which individual cases are exemplars of a particular tradition.

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69 Mastenbroek and Sindbjerg Martinsen (2018).

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