PUBLIC ADMINISTRATION AND RULE OF LAW: THE CONSTITUTIONAL PRINCIPLES

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PART 1
WHAT IS «THE RULE OF LAW»?

• The rule of law means that government officials and citizens are bound by and abide by the law.
THIS DEFINITION REQUIRES THAT THERE MUST BE A SYSTEM OF LAWS

• The law must be generally known and understood

• The requirements imposed by the law cannot be impossible for people to meet

• The laws must be applied equally to everyone according to their terms

• There must be mechanisms or institutions that enforce the legal rules when they are breached
DOES THIS DEFINITION INCLUDE DEMOCRACY AND HUMAN RIGHTS?

• For the United Nations: “the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency” (The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General, UN SC, UN Doc. S/2004/616 at 4)
BUT...THREE REASONS TO SAY IT DOESN’T:

• the definition, on its own terms, requires only that government officials and citizens be bound by and abide by the law. Notice that this requirement says nothing about how those laws are made—whether through democratic means or otherwise—and it says nothing about the standards that those laws must satisfy—whether measured against human rights standards or any others.

• To include democracy and human rights suggests that only liberal democracies have the rule of law.

• The third reason I do not include democracy and human rights as necessary aspects of the rule of law has to do with the powerful legitimating function the rule of law plays in modern global discourse.
THREE THEMES OF THE RULE OF LAW

• The first theme is the notion that government is limited by law
• The second theme involves the notion of formal legality
• The third theme is the classic expression: “The rule of law, not man”
A. GOVERNMENT LIMITED BY LAW

• the sovereign, the state and its officials, are limited by the law: restraining the sovereign’s awesome power has been a perennial struggle for societies as long as they have existed

• but...an ancient dilemma!
HOW CAN THE CREATOR OF LAW BE BOUND BY THE LAW?

• officials must abide by the positive laws currently in force
• when government officials wish to change the law, they are not entirely free to change it in any way they desire
B. FORMAL LEGALITY

• The nature of rules: what rules are and how they operate
• But…three limitations of formal legality:
  1. the problem of over-inclusiveness and under-inclusiveness (for example, driver’s license);
  2. it is compatible with a regime of laws with inequitable or evil content;
  3. there are many circumstances under which formal legality is not appropriate or socially beneficial
• So, sometimes, a rule of law system that strictly complies with the demands of formal legality will produce negative results
C. THE RULE OF LAW, NOT MAN.

• ‘law is reason, man is passion’: to live under the rule of law is not to be subject to the unpredictable vagaries of other individuals

• And the rule of law, it is argued, is preferable to that of any individual… Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire (Aristotle)
BUT...

• The idea of ‘the rule of law, not man’ has been forever dogged by the fact that laws are not self-interpreting or self-applying.

• The standard solution to this problem is to identify the judiciary—the legal experts—as the special guardians of the law. The judge becomes the law personified.

• For this reason, the ultimate responsibility for maintaining a rule of law system therefore rests with the judiciary.

• The standard formula for achieving this involves (1) the selection of judges based upon legal qualifications (their legal training and experience); (2) long-term appointments for judges; (3) protection against the removal of judges in retaliation for their decisions and (4) reasonable remuneration for judges, with sufficient resources to maintain a functioning court system (support staff, books, courtrooms and the like).
ALL THREE THEMES, APPROACHING FROM DIFFERENT ANGLES, WOULD CONVERGE ON THIS PROPOSITION:

• When the government exercises coercion against a citizen, it must do so in accordance with legal rules stated in advance, in a manner consistent with the dictates of formal legality. Legal rules must affirmatively authorise the government action. The government action cannot transgress any standing legal restrictions. At some point there must be recourse to an independent court dedicated to upholding the law that will make a determination of the legality of the government’s action. And the ruling of the court must be respected by government officials.
PART 2
PUBLIC ADMINISTRATION: THE CONSTITUTIONAL PRINCIPLES
WHAT IS THE PUBLIC ADMINISTRATION?

- In an objective sense, we mean the care of public interests
- In a subjective sense, we mean the apparatuses in charge of the care of these interests
• The translation of the Rule of Law in the administrative sphere
• Something changes…
PRINCIPLE OF LEGALITY

• The correspondence of the administrative activity to the provisions of the law

• Three different definitions:

1. Legality (in general): it allows to do what is not explicitly prevented by the law

2. Formal legality: the administration is allowed to act only on the basis of what is authorized

3. Substantial legality: each administrative provision must conform to the intimate inspiring ratio of the law
TRANSFORMATIONS OR DEFORMATIONS OF LEGALITY

- European Union and the multilevel constitutionalism: does a European principle of legality exist?
- And... what does “implicit powers” mean?
- Can public administration create law?
PRINCIPLE OF IMPARTIALITY

• The administration has the duty to not discriminate the position of the subjects involved from its action
IMPARTIALITY: A SPECIFICATION OF EQUALITY

• to understand the importance of the principle of impartiality, it seems interesting to refer to Article 3 of the Italian Constitution

• In particular, the content of Article 3 can be divided in two different meaning:

1. Formal equality: everyone is equal before the law without distinction of sex, race, religion and so on

2. Substantial equality: the state has the obligation to remove the obstacles generated by the differences that occur within society
PRINCIPLE OF EFFICIENCY AND EFFECTIVENESS

• The efficiency of the administrative action for the achievement of the collective interest

• A parameter of evaluation of the administration's activity

• Three meanings of efficiency: 1) Optimization of results in relation to the means available; 2) Adjustment of resources with respect to objectives; 3) Ability to pursue the set goals
PRINCIPLE OF BUDGET BALANCE

• *Fiscal compact*, European Treaty signed in 2012.
• This principle must bind the State, the public administrations and also local authorities.
BUT...WHAT DOES «BUDGET BALANCE» MEAN?

• Basically, perfect draw between entrances and public spending.
• But the Treaty requires something more. It is necessary to adopt a definition of budget balance in a dynamic sense.
SOME FOOD FOR THOUGHT

• The intergenerational equity
THE FAIR COOPERATION

• It concerns relationship between public administrations

• To achieve the most favourable result for citizens’ interests
TRANSPARENCY AND ACCOUNTABILITY

• To obtain all information regarding the administrative activity
• It is a controlling element against maladministration and corruption
• It is a fundamental requirement for the reliability and integrity of public institutions
• A standard of transparency and accountability improves the performance of public administration
THE NATURE AND IMPORTANCE OF TRANSPARENCY

• It aims to build the rule of law

• It means being: open, communicative and responsive
THE PRINCIPLE OF TRANSPARENCY IS IMPLEMENTED BY EU INSTITUTIONS

• It was introduced to European law by the Amsterdam Treaty
• Art. 41 e 42 of the Charter of fundamental Rights of the EU
• Declaration No. 17 Maastricht Treaty
IMPACT IN THE QUALITY OF ADMINISTRATIVE DECISION-MAKING PROCESS

• Accountability and transparency are key values for democratic governance

• Transparency serves as:
  1. A supportive tool to assess the level of the administrative making process
  2. It shows that the administrative practice is in line with domestic and international legal framework administrative justice
CLOSING OBSERVATIONS
AND
THE MAIN EUROPEAN GOAL
ROLE PLAY AND GROUP DISCUSSION

• Mr. Daniel was a university student. In 2005, due to an accident, he lost the use of his lower limbs. For this reason, he was initially forced to interrupt his studies. In 2007, Mr. Daniel decided to resume his studies. Therefore, he asked to the administration of his university to remove the architectural barriers present within the structure. Unfortunately, the administration told him that the available budget was not enough to carry out these works. At the most, the University was willing to offer a support assistant to Mr. Daniel.

• Please discuss the case in group: one group is required to represent Mr. Daniel and the other group is required to represent the University (so, the public administration)
THANKS FOR YOUR ATTENTION!

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