

SOVIET
ADMINISTRATIVE
LAW:
THEORY AND POLICY

edited by
GEORGE GINSBURGS

SOVIET ADMINISTRATIVE LAW: THEORY AND POLICY

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LIST OF ABBREVIATIONS

ACCTU	All-Union Central Council of Trade Unions
ACEC	All-Russian Central Executive Committee
ACP(b)	All-Union Communist Party (of the Bolsheviks)
<i>AJIL</i>	<i>American Journal of International Law</i>
<i>BNA</i>	<i>Biulleten' Normativnykh Aktov</i>
<i>BSE</i>	<i>Bol'shaia Sovetskaia Entsiklopedia</i>
<i>BVS SSSR</i>	<i>Biulleten' Verkhovnogo Suda SSSR</i>
CCP	Chinese Communist Party
<i>CDSP</i>	<i>Current Digest of Soviet Press</i>
CEC	Central Executive Committee
CM	Council of Ministers
CMEA	Council for Mutual Economic Aid (COMECON)
CPC	Council of People's Commissars
CPSU	Communist Party of the Soviet Union
<i>Izvestiia</i>	<i>Izvestiia Sovetov Narodnykh Deputatov</i>
<i>Komsomol</i>	<i>Kommunisticheskii Soiuz Molodezhi</i> (Communist Youth League)
<i>Lit.Gaz.</i>	<i>Literaturnaia Gazeta</i>
PRC	People's Republic of China
PSS	Presidium of the Supreme Soviet
<i>Rev.Soc.Law</i>	<i>Review of Socialist Law</i>
<i>SGiP</i>	<i>Sovetskoe Gosudarstvo i Pravo</i>
<i>SLG</i>	<i>Soviet Law and Government</i>
<i>Sots.Zak.</i>	<i>Sotsialisticheskaia Zakonnost'</i>
<i>Sov.Iust.</i>	<i>Sovetskaia Iustitsiia</i>
<i>Sov.Nar.Dep.</i>	<i>Sovety Narodnykh Deputatov</i>
<i>SP RSFSR</i>	<i>Sobranie Postanovlenii Pravitel'stva RSFSR</i> (Official Gazette of the RSFSR Government)
<i>SP SSSR</i>	<i>Sobranie Postanovlenii Pravitel'stva SSSR</i> (Official Gazette of the USSR Government)
<i>SSD</i>	<i>Soviet Statutes and Decisions</i>
<i>SU RSFSR</i>	<i>Sobranie Uzakonenii i Rasporiazhenii Rabochego i Krest'ianskogo Pravitel'stva RSFSR</i> (Collected Laws and Decrees of the Workers' and Peasants' Government of the RSFSR)

<i>Svod Zak. SZ SSSR</i>	<i>Svod Zakonov Sobranie Zakonov i Rasporiazhenii SSSR</i> (Collection of Laws and Decrees of the USSR)
<i>Ved.RSFSR</i>	<i>Vedomosti Verkhovnogo Soveta RSFSR</i> (Official Gazette of the RSFSR Supreme Soviet)
<i>Ved.SSSR</i>	<i>Vedemosti Verkhovnogo Soveta SSSR</i> (Official Gazette of the USSR Supreme Soviet)
<i>VMU</i>	<i>Vestnik Moskovskogo Universiteta. Seriia 11: Pravo</i>
<i>VIIuN</i>	<i>Vsesoiuznyi Institut Iuridicheskikh Nauk</i> (All-Union Insti- tute of Legal Studies)
<i>VluZI</i>	<i>Vsesoiuznyi Iuridicheskii Zaochnyi Institut</i> (All-Union Insti- tute of Extramural Legal Studies)
<i>VNIISZ</i>	<i>Vsesoiuznyi Nauchno-Issledovatel'skii Institut Sovetskogo Zakonodatel'stva</i> (All-Union Scientific Research Institute of Soviet Legislation)

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FOREWORD

As luck would have it, we have been spared the traditional burden of those inducted to serve as editors of conference volumes to produce an introductory piece by the fortuitous fact that the essay authored by Professor Arena neatly fits the bill. We have thus been freed to add a few supplementary thoughts to his excellent discussion of the enduring themes in the general canon of administrative law and practice with reference to a mix of features peculiar to the Soviet scene.

Professor Arena is quite correct in pointing out the extent to which the science of administrative law has dwelled in the past on the question of how to safeguard the *de cujus* from the effects of administrative acts where the latter appeared to infringe on the individual's rights either by virtue of a bid to establish principles incompatible with the prescriptions of superior normative media or application of the designated rules in individual cases in an allegedly improper manner. Equally justified is his expression of dismay at the systematic failure of the Soviet regime to address itself to this vital issue throughout much of the USSR's history. The topic is no longer being ignored — at least on a theoretical plane — but, as Soviet critics remind us, the recent statute which was supposed to procure local citizenry viable relief from administrative “deviance” through the instrumentality of judicial review is fatally flawed and flunks the test. The problem thus remains unsolved and, what is perhaps even worse, where once the picture was clear because the Soviet leadership had not cared to pretend otherwise, today it is thoroughly muddled due to the advertising of a sham remedy which works to divert attention from the need to press for a suitable treatment by claiming that one is already available.

Absent basic experience in the classical art of personal defense against the negative manifestations of administrative power, it comes as no surprise that Soviet political culture has still not stepped up to the second level noted in Professor Arena's analysis calling for affirmative policing of administrative performance in order to secure equal access to the civic resources and a fair share of the social services which the modern state is now expected to operate for the benefit of the community. If the Soviet citizen had not acquired the psychology of challenging the legitimacy of administrative conduct where it adversely affected his interests primarily because the institutional channels for staging the match were never provided for public use, whence would he draw the motivation to beard the administrative apparatus in seeking to obtain positive recognition of his qualitative entitlements? A sense of irony per-

vades the picture. Indeed, official pronouncements have always accented that immanent to the doctrine of socialism was the proposition that its constituency would enjoy a truly "good life" upon arrival to the promised land, except to let the hierarchy determine the contents of the entire package and each allotment and leave the recipients with no option than to accept docilely their respective quota.

The notion itself that the "socialist" state is duty bound to satisfy the normal appetites of its "stockholders" is deeply embedded in the popular ethos and fosters the image of a relationship between the authorities and the individual rooted in the principle of reciprocal fealty, albeit ignoring the possibility of disagreement over the terms of the partnership and neglecting to define a sound method for settling potential disputes. To compound the surreal flavor of the situation, in no other contemporary polity is the individual as dependent on the state for supplying his daily fare as in the Soviet Union. Without the kind of adequate alternatives which the private party can tap in a *laissez-faire* milieu to earn a livelihood and meet routine exigencies, the Soviet citizen is totally at the mercy of the state's distributive procedures with no occasion to compel a reevaluation of the decisions which dictate his lot.

Elsewhere, the shift in the state's role from minimal governance to broad sustenance has triggered a concomitant move from parrying administrative intrusion to claiming a specific stake in the administrative trust-fund. In the Soviet setting, the dramatic expansion of administrative control over human affairs has not entailed the same kind of readjustment either in folk mores or organizational routine up to this point, although we do receive signals of innovative thinking that may indicate that changes are in the offing. In particular, the revival and growth of concern among the more enlightened Soviet spokesmen about the meaning of "civil justice" or "equity" suggests disillusionment with the old positivist approach to the grading of personal status which marked the home record over the preceding stretch. If, in fact, universal criteria might be invoked to pass judgment on how the regime fulfills its mission of showering the country with the blessings of "socialism", the idea of permitting the individual to appeal to these "transcendental" standards to contest the propriety of administrative actions which afflicted him may eventually also gain validation. When that occurs, getting to tell the administration to cease and desist will represent one weapon in the citizen's arsenal; perhaps more important than will be his ability to demand that the administration reconsider the treatment it has afforded him with an eye to upping the ante.

Next, bear in mind that when Professor Arena discusses the matter of arming individuals with the means to keep the crew of administrative agencies in check he is targeting the issue of singular instances of "miscarriage". Because

the Soviet Union relies on administrative regulations probably more than any other country in the world, such slippage would already be serious enough under ordinary circumstances given that the chances of lapse tend to increase in proportion to the density of the traffic. What compounds the difficulty in the present case is the special style of Soviet statecraft in which the administrative repertory displays two distinctive modes. First, we have the pervasive phenomenon where legislative language is, to cite Soviet commentators, literally “strangled” by administrative encrustations which end up radically distorting the pitch of the original message so that the latter is, to all intents and purposes, lost in the shuffle. To be sure, the administrative edicts do not pretend to do anything else than concretize, fine-tune and elaborate prior legislative fiat and presume to derive their mandate from that source. Ultimately, though, the ancillary instructions succeed in totally displacing the primary postulates through a suite of incremental exegeses, constant contentions to the contrary notwithstanding.

Far less subtle is the companion drill which betrays a common tendency by administrative offices to draft their own in-house directives — often in plain disregard of and at variance with the thrust of the applicable statutory injunctions — and follow their own version in spite of its manifest incompatibility with a set of superior norms and the consequent nullity *ex tunc* of the subordinate rules as a generic premise. When faced with a chronicle of usurpation of “law-making” power by the administrative branch, worrying about what sanctions will avail against isolated instances of administrative transgression and how effectively they manage to contain the damage strikes the outside observer as a trifle academic. In sum, we are talking here about a problem tantamount to a categorical difference, not merely a quantitative divergence, and the featured specimens hence simply do not share the same logical baggage.

How administrative law emerges ahead in the pecking order in specific areas of operation with the covert consent or tacit acquiescence of the ruling elite is amply documented in this portfolio of studies, both those tackling general themes and select topics. A newer track shows the people running the system acting more boldly in condoning the wholesale substitution of administrative regulations for legislative prescriptions. The fledgling experiment involves transnational arrangements whereby norms improvised in the company of one or more foreign partners enter Soviet home premises in the guise of legal enclaves carved out of the expanse of Soviet domestic jurisdiction. Such pockets of hybrid law constitute an outgrowth of the accelerated process of rapprochement currently pursued within the “socialist” clan and attest to the consistent Soviet preference for promoting legal uniformity within its regional setting through the channels of treaty “codification” instead of the route of synchronization of the municipal scripts by members of the cast. A

significant drawback of this scenario is that not only does it open extra avenues for administrative writ to score fresh inroads into the legislative domain, but the unity of the domestic administrative fabric is thus also disrupted and reduced to an assemblage of different textured patches. If jurisprudential coherence is a desideratum, the current trend in the Soviet administrative environment leans in the opposite direction.

On the other hand, the comparativists in our midst remind us of how much more advanced the legal culture of many of the Soviet Union's associates looks when contrasted with the Soviet record and the pattern holds for the administrative law *métier* as well. From that perspective, the infusion of an alien legal ingredient into the Soviet alloy may result in a net improvement of the local product and compensate somewhat for the trauma of the quilt effect noted above.

Will Gorbachev's slate of reforms alter the picture which springs from these pages? The question is easier asked than answered. Odds are that some changes will indeed take place. Much of the public outcry today swirls around the crushing weight of the bureaucratic machine, its ubiquitous presence in the individual's calendar, its wanton treatment of personal rights and entitlements, its predilection for stifling human initiative, its resistance to progress, and so on. The indictment is lengthy, the charges are serious and the voltage of popular criticism of past bureaucratic performance is high. Official spokesmen now promise a fundamental overhaul of the existing structure and the manner in which the apparatus handles its assignment. Some institutional constraints have already been devised and, undoubtedly, further bids to curb the bloated power of the civil service *incubus* can be expected — if the current momentum does not falter. It is a great deal harder to predict what practical impact these efforts will have on Soviet civic practices owing to the capital difficulty of getting legislative pronouncements translated into observed standards of behavior. Even if other social services are mobilized to patrol the administrative turf with a view to keeping its denizens honest, time will be required for the idea of exercising such surveillance with commensurate vigor to seep into and shape popular consciousness and graduate to the rank of a communal imperative. While an overnight quantum leap here is a far-fetched proposition, cautious optimism over the medium stretch does not smack of a fling at Russian roulette and may be recommended as a plausible estimate of future fare on the local scene.

George Ginsburgs

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Gianmaria Ajani

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INTRODUCTION: SOME REMARKS ON ADMINISTRATIVE LAW AND ADMINISTRATIVE JUSTICE

Gregorio Arena

A "Definition" of Administrative Law

The very tight relationship between a country's public administration and its constitutional setting is, I believe, quite obvious. Less obvious, by contrast, is the direction of the relationship itself whereby the whole legal system is influenced, in one way or another, by the values to which the administration aspires.¹

It can be said, therefore, that public administration is one of the main factors in determining the phenomenon which was described several years ago by an Italian scholar as the "material Constitution" of a country: that is, the ensemble of forces, relationships, situations which operate beyond and beside the principles and the norms enunciated in the "formal Constitution" in its written embodiment.²

The detailed analysis of the Soviet administrative system, so carefully performed during this international conference, is therefore extremely useful and meaningful for a better understanding not only of Soviet administration, but of the Soviet legal and constitutional system as a whole.

In fact, if I had to state what strikes me most, as an outsider to the Soviet legal system, in this conference, I would certainly single out a topic which I believe is implicitly present in all the papers. This topic, or rather this unifying theme, can be synthesized in the following question: how is the use of administrative power controlled in the Soviet system?

Of course, the question itself is not new at all, having been asked in all the Western countries for almost two centuries, that is, ever since the birth of the modern "administrative" state with its bureaucratic system. And the importance of the problem is indeed such that one could actually define administra-

1. U. Allegretti, "Pubblica amministrazione e ordinamento democratico", *Foro Italiano* 1984 V, 205.

2. C. Mortati, *La Costituzione in senso materiale*, Milan 1940.

tive law as a set of rules and procedures designed to limit and control the use of administrative power.

This “definition” presupposes, of course, that one is looking at public administration, as the Italian philosopher Bobbio would say, “*ex parte populi*” and not “*ex parte principis*”.³ There is in fact no doubt that from the point of view of the rulers, that is of those who are able to “use” administrative power, controls on such use are seen as a hindrance, rather than as something positive; from their point of view, the problem is not control or democracy in administration, but rather efficiency, seen mainly as responsiveness to decisions coming from the top.

Here, too, if one opts instead to look at the efficiency issue “*ex parte populi*”, one could say that efficiency consists above all in making administration responsive to the inputs and requests emanating from the citizens; that is why I believe that democracy and efficiency in administrative action are not inconsistent but, rather, mutually self-reinforcing.

So we come back once again to the “hidden” topic of this conference, namely, the problem of control of the use of administrative power in the Soviet Union; and it should be clear, at this point, that the question is not being asked “*ex parte Gorbachev*”, even though, from his point of view, there certainly are (as for any politician) major problems of control and direction of the bureaucratic apparatus.

Practically all the papers presented during this conference have to do, in one way or another, with the problem of how the people of the Soviet Union can defend themselves from an unchecked use of administrative power; in a planned economy system, this problem is perhaps even more relevant than in Western countries owing to the pervasiveness and omnipotence of administration in socialist countries.

To cite but a few examples of how the conference treats this problem, one could begin with Beerman, whose paper shows the historical roots of present conditions, underlining the damage done to the spirit of peasants by the uncontrolled exercise of administrative power. Then follows Barry, who traces a fascinating (and, for an Italian scholar, almost unbelievable) picture of a country lacking until recently a system of judicial control of administrative acts. Hazard shows the propaganda component in the literature on administrative law, and this is particularly meaningful when one takes into account the role of the administrative lawyer at the heart of the legal system. One should remember, though, that propaganda and control do not go well together.

Bettini, on the other hand, shows something strange for an Italian lawyer:

3. N. Bobbio, “La democrazia e il potere invisibile”, in *Il futuro della democrazia*, Turin 1984, 95.