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# Regulating the Competence of Administrative Justice and the Public-Private Law Divide

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ABSTRACT

**Purpose**: The paper investigates the dichotomy between public and private law in terms of access to justice, especially the distribution of competences between various courts and tribunals.

**Design/Methodology/Approach**: The study employs juridical analysis of normative texts and legal comparison.

**Findings**: The continuous expansion of administrative justice calls for a more differentiated yet generalised regulation of access to justice.

**Academic Contribution to the Field**: The analysis addresses policy options regarding the distribution of competences between civil and administrative courts, as well as the potential establishment of specialised courts.

**Originality/Significance/Value**: The analysis of regulatory approaches helps legislators meet the requirements of both timeliness and effectiveness of judicial protection, as well as handle the challenges of blending public and private law instruments to create a regulation that is able to provide effective judicial protection and consistency in case-law.

*Keywords:* *access to justice, administrative justice, differentiated distribution of competences, public-private law divide, specialised courts and tribunals*

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## 1 Introduction

The division of public and private law has been a perennial topos of jurisprudence since Roman law (Barber, 2005; Kanner, 1997). Much has it been argued that this dichotomy has no real orienting and explanatory power (Har-

low, 1980) and should be regarded rather as a »genetic deficiency« (Jakab and Kirchmair, 2019). These arguments are in line with the very basic encyclopaedic definition of dichotomy, which declares the pointlessness of this technique of classification:

> Dichotomy (from the Greek dicha, "separate", and tomos, "to cut") is a technical term for a form of logical division that consists of separating a class into two subclasses, one of which has and the other does not have a particular property or attribute. On the principle of contradiction, this division is both exhaustive and exclusive; there can be no overlapping, and no member of the original species or of the subordinate classes can be omitted. This method of classification, though formally accurate, is of little value in the exact sciences, partly because at each step one of the two classes can only be negatively characterized, and is usually an artificial, heterogeneous class...[1]

This definition is undoubtedly also true for dichotomies within the legal system. Usually, we 'cut' the legal system (or part of it) in two from the point of view of one of the branches or areas of law, thus forming the opposite category with a truly negative definition. Consequently, the demarcation will always be relative and cannot be used to describe the whole legal system. Within the legal system, the boundaries are often blurred, there are many 'cross cutting' areas of law and many interactions between them so that this dichotomy is really of little value.

However, this does not necessarily mean that the dichotomy has no value at all. There are aspects that require this simplification, a schematic thinking. This is the case with the question of access to justice, at least where there is a separate administrative judiciary, which is the case in most European countries. In this system of coordinates, the public/private dichotomy implies not only that public law and civil law disputes are distinct and separate entities, but also that there is no other category and that all disputes before the courts must be able to be classified in one of these two categories.[2] It is therefore an important question how to classify a legal relationship and, in particular, whether the legislator should classify areas that could be described as hibrid and, if so, in which areas. Otherwise, the question of which court should hear a case is often left open, which can lead to a lack of judicial protection, or at least a reduction in its efficiency.

This division also implies that the two qualities or parts are equal and that there is no dependence or subordination between them. The question of (legal) public policy is thus how legal policy deals with the dichotomy: to what extent does it take into account the above-mentioned requirements. On the one hand, does it manage to strike a balance between public law and private law, and on the other hand, does it manage to clearly classify each legal relationship into one of the two parts.

1 Encyclopedia Britannica (August 6, 2019), https://www.britannica.com/science/dichotomy; accessed 30 September 2024.

2 As a further simplification, we now leave aside constitutional court procedures.

Of course, we are immediately faced with a fundamental difficulty. For what is a private law dispute and what is a public law dispute? Can the definitions be codified? Should the distinction not be left entirely to the courts? In the case of private law, it is the civil courts; in the case of public law, it is the Constitutional Court and the administrative courts, whose procedures and practice can really give substance to these concepts.

The creation of administrative justice has a decisive influence on the nature of this dichotomy. While there are quite a few countries where administrative justice has been established for centuries, there are others – especially those that experienced dictatorships after the Second World War – where this has not been the case. The presence or absence of administrative justice may explain the extent to which a balanced dichotomy can be achieved by creating a balanced situation, since in the absence of an effective and functioning administrative justice, it has often been necessary for the civil court to provide a kind of secondary legal protection in administrative disputes. And since the relationship between public law and private law is not constant, the legislator can also play a very important role at certain points. In the following, we would like to outline the main points of this dichotomy, albeit in an admittedly one-sided and generalised way, strictly from the administrative lawyer's perspective.

## 2 Methods

It is useful to compare the different techniques that have evolved in the field of the competence of administrative courts. Besides the comparative method, the analysis of legal regulations and/or case-law on questions of material competence of courts is of great use. As there do not exist sufficiently detailed statistical data on the different types of cases handled by courts, the empirical analysis of the case law is unfortunately not possible and the significant differences in the national procedural systems would also distort the comparison of empirical data to such an extent that no sound conclusions could be drawn.

## 3 Equality of Civil and Administrative Jurisdiction Through Similar Styles in Regulation

### 3.1 Separate Codes on Administrative Court Procedures as the Source of Jurisdiction Rules

Administrative justice emerged much later in time than civil justice and for a long time only with a very restricted competence both in regard of access to justice and of decision-making powers. The civil courts for a long time thus played an important role in providing protection against the administration or the state, as a sort of secondary judicial protection. Slowly, administrative justice was established in more and more European countries, in many of them even twice, as the rise of dictatorships usually led to the abolish-

ment of administrative justice. The role of administrative justice, being "the cornerstone in the vault of the Rechtsstaat" (Thoma, 1951, p. 9) has been recognised more and more and led to a strengthening of this institution in all aspects. The requirements of effective judicial protection are a solid basis for continuous development, adding new and new aspects and thus inducing legislative action. These developments naturally affect the framework within which judicial review is granted: the organisation and the procedural regulation of administrative court procedures. So it is no wonder, that nowadays there is a strong convergence between national administrative court systems and administrative court procedural laws (Sommermann, 2019). Despite the many national specificities, there are some features that can be considered as "common denominators", partly as a result of this Europeanisation.[3] On the one hand, there is a convergence on the organisational side, which is mainly a shift towards the German model, away from both the Anglo-Saxon monistic and the French dualistic administrative court systems (Rozsnyai, 2021b). On the other hand, the trend towards Europeanisation can be seen in the codification of procedural law.

In most European countries there is a specific code or act governing administrative litigation, whether or not there are separate administrative courts. This is the case eg. for Germany, Austria, France, the Netherlands, Spain, Portugal, Greece, Norway, Sweden, Finland, Poland, Czech Republic, Slovakia, Spain and Portugal, Serbia and since 2017 in Hungary, too. It is therefore now almost an axiom[4] that administrative litigation is a sui generis category that cannot be fully governed by civil procedural rules.

However, this emancipation process is a slow one, which is also due to the fact that the development of the administration itself and its law is a "maturation process" (della Cananea, 52 Rn. 16). Many connections with civil law continue to exist. Given the later development of administrative litigation, the most used regulative approach is to regulate only the sui generis rules to avoid the unnecessary proliferation of legal norms. These separate administrative procedural codes regulate all the specific issues of court proceedings in administrative matters. As there are many procedural institutions where there are or should be no differences and are common for all courts, it is not surprising that codes of administrative court procedure often refer back to civil procedure rules (CPR). This is the case, for example, in the German Verwaltungsgerichtsordnung[5] and the Portuguese Code of Administrative Justice,[6] but there

3 However, this tendency is more global, as it is reflected by the model rules, cf. Perlingeiro and Sommermann (2014). *Euro-American Model Code of Administrative Jurisdiction: English, French, German, Italian, Portuguese and Spanish Versions*. Niterói: Editora da UFF, 2014, https://ssrn.com/abstract=2441582.

4 One of the rare European exceptions is Norway, where the monist system prevails probably because of the very low number of administrative disputes.

5 Article 173 VwGO (Verwaltungsgerichtsordnung) first sentence (applicability of the *Courts' Constitution Act* and the *Code of Civil Procedure*): *Soweit dieses Gesetz keine Bestimmungen über das Verfahren enthält, sind das Gerichtsverfassungsgesetz und die Zivilprozeßordnung einschließlich 278 Absatz 5 und 278a entsprechend anzuwenden, wenn die grundsätzlichen Unterschiede der beiden Verfahrensarten dies nicht ausschließen.*

6 Artigo 1. Codigó de Processo nos Tribunais Administrativos [Direito aplicável] *O processo nos tribunais administrativos rege-se pela presente lei, pelo Estatuto dos Tribunais Administrativos e*

is also a very close link in France between the jurisprudence of the administrative and the ordinary courts on many procedural issues. Of course, this referral has to be handled with care, as the interpretation of different norms can vary in view of the very different procedural principles underlying the two different jurisdictions. This is usually stressed in the regulations, e.g. Art. 173 VwGO or Art. 6 Hungarian CACP.

## 3.2 Regulating the Scope of Judicial Review

The existence of separate codes raises the question of the style of regulating the scope of the different court procedures. Whereas it is for everyone natural, that civil procedural rules define their scope without further ado laconically for civil law or private law disputes, this is by far not the case for administrative court procedures. This may be traced back to the originally very restricted possibility of judicial review, that was centred around the notion of administrative imperious or authoritative acts. These were regarded in quite many legal systems – mainly based on the Austrian tradition of administrative procedural law – the very tool for administrative action.

However, in Europe we experience the continuous expansion of the powers of administrative courts and with this the scope of administrative disputes. This is due, on the one hand, to the fact that the instruments of public administration are becoming increasingly differentiated, and that state action is deemed to be necessary in more and more – often completely new – fields of life and, on the other hand, to the rise of the requirement of the rule of law, according to which the most effective control over public administration can be exercised by the judiciary (Sommermann, 2019). These two conditions make it though necessary to revisit the style of regulating the scope of judicial review, the way of codifying access to court in legal regulation. Should it not be formulated through a general rule, like in civil litigation?

The Recommendation on judicial review against administrative acts Rec (2004) 20 of the Council of Ministers within the Council of Europe also points in this direction.[7] According to its first principle, all administrative acts should be subject to judicial review. The recommendation uses the notion of administrative act in a much broader sense than the customary notion, as by »administrative acts« are meant on the one hand both legal acts (individual and normative ones) and physical acts of the administration taken in the exercise of public authority which may affect the rights or interests of natural or legal persons; and on the other hand the concept of an administrative act also covers situations where the public administration, although it would be obliged to initiate proceedings in a given case, refuses or fails to act. Similarily, the Code of Good Administration, the appendix to the Recommendation on good

*Fiscais e, supletivamente, pelo disposto na lei de processo civil, com as necessárias adaptações.*

7 Recommendation Rec(2004)20 of the Committee of Ministers to member states on judicial review of administrative acts. https://rm.coe.int/09000016805db3f4; accessed 30 September 2024.

administration[8] states in its Article 22(1): "Private persons shall be entitled to seek, directly or by way of exception, a judicial review of an administrative decision which directly affects their rights and interests." This Code extends its scope to all administrative relations of private persons (i.e. natural and legal persons) with public authorities. And broadly, "public authorities" shall be taken to mean: »a. any public law entity of any kind or at any level, including state, local and autonomous authorities, providing a public service or acting in the public interest; b. any private law entity exercising the prerogatives of a public authority responsible for providing a public service or acting in the public interest.«[9] Though using the more narrow notion of public authority, the substantive definition seems to consider it necessary to provide for judicial review not only in authoritative relations, but in fact in all external relations of the public administration, which encompasses the provision of public services, too.

In the "archetypes", the two dominant models of administrative justice, the competence of administrative courts is defined by a general rule. According to Art. 40 of the German Code of Administrative Procedure (Verwaltungsgerichtsordnung), the administrative courts have jurisdiction in all disputes of public law, which are not of constitutional law nature, unless a federal law expressly refers the dispute to another court. Article L-311-1 of the French Code of Administrative Court Procedure (Code de justice administrative) establishes the general competence of the administrative courts (tribunaux administratifs) in administrative proceedings, with the exception of those which, in the interests of the subject-matter of the proceedings or the proper functioning of the administration of justice, are transferred to another administrative court.[10] According to French doctrine, in very simple terms, an administrative action is an action in which the defendant is a person governed by French public law and the subject-matter of the action is the exercise of public authority or the provision of a public service (Waline, 2010, pp. 558–572). In both cases, of course, there are questions of delimitation which are largely left to the courts (Bell and Lichère, 2022, pp. 128–129).

Greek legislation, modelled originally on the French system (Gromitsaris, 2019, p. 1414), gives the administrative courts and the Council of State jurisdiction over "administrative disputes", which is interpreted in a similar way to French practice.

Spanish administrative procedural law has developed an interesting set of rules, following substantively the German example, but nevertheless still applying some enumerations for concretization. According to Article 106.1 of the Spanish Constitution, the courts are responsible for reviewing the legislative power and the legality of administrative action and their proper exercise.

8 Appendix to Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration. https://rm.coe.int/cmrec-2007-7-of-the-cm-to-ms-on-good-administration/16809f007c; accessed 30 September 2024.

9 Article 1 Code of Good Administration.

10 The practice of the Conseil d'État was affirmed by the law of 24 May 1872, which established that the Conseil d'État was to hear such cases as administrative cases.

This provision is the basis for Article 1 of the Spanish Code of Administrative Procedure, adopted in 1998, which states that the administrative courts have jurisdiction to hear actions brought against the activities of administrative bodies governed by administrative law or against general provisions below the level of law.[11] Following the German doctrine, the term "actividad" has replaced the former concept of actos administrativos, i.e. administrative acts, to broaden protection to forms outside the administrative act, like contracts, realacts or general acts, as well as the failures to act (Fuentes i Gasó, 2005, pp. 87–88).

The Hungarian legislator, inspired somewhat of the Spanish doctrine explaining the notion of actividad (Peñaranda Ramos, 2011), created a general rule around the notion of activity that combines three criteria. The subjective one is that the activity has to be subsumed to an administrative body (at least in its functional sense, ie. an entity or person performing administrative functions), the objective criteria is the action that has a legal effect, or its omission. The third criterion is the regulation of the activity by administrative law in Section 4 of the Hungarian Code of Administrative Court Procedure (CACP). This more detailed regulation has the quality of successfully bridging the dogmatic gap that exists between German and Hungarian administrative judges and preserving the flexibility and generality of the provision (Rozsnyai, 2019, pp. 9–10). While the mere term "administrative legal relationship" would not really have helped to give substance to the general rule, breaking down its essence into these three requirements can help to develop a sound jurisprudence that can help to ensure seamless and thus effective judicial protection in this respect. This does not mean that explanatory lists would not be necessary or at least of use, so the Hungarian regulation also uses them thus in a different regulatory style than does the Spanish model. Portugal also applies a regulation which, because of its very detailed nature, appears prima facie to be an enumeration, but its notions are also very general.

Although the inflexibility of the regulation of the scope by an enumeration makes it somewhat impractical, the legislator often sticks to it. The use of enumeration does not make it easier for administrative courts to decide on jurisdiction, since the definition of each category of cases is subject to uncertainties, as would be the case with a general rule. Moreover, the enumeration makes the rules very cumbersome. However, it may be regarded as a sort of path dependence. This is due to the fact that as the establishment of administrative justice always occurred later than that of civil or ordinary justice, it was initially regarded as an exceptional way of access to justice, and not as an option that would be equal to access to ordinary courts.

The tendency to prefer enumerations is especially remarkable in countries where there was an early first codification of general administrative procedural law. This is even more the case if administrative justice was abolished for a shorter or longer period and the public-private division was therefore non-existent in the judiciary. This is typically – but not exclusively – the case in

11 https://www.boe.es/eli/es/l/1998/07/13/29 accessed 30 September 2024.

many Central European countries of the former Austro-Hungarian Monarchy (Potěšil et al., 2021). These countries, together with other former post-Soviet states, are still in a transition phase from the regulation of administrative disputes as a special civil procedure, a common feature of socialist civil procedural law. Thus, in many European countries, in addition to or instead of a general rule, we find lists of competences or only rules of access to justice against administrative acts in the narrow sense, however, formulated in a general manner to appear as a general rule – this was the case in Hungary until 2018, too.

Adhering to the previously mentioned first group, in Austria, the competence of administrative courts is traditionally regulated by enumeration. The administrative courts of first instance rule on complaints under Article 130 of the Federal Constitution[12] in the following cases:

1. unlawfulness of the decision of the administrative authority
2. unlawfulness of the exercise of direct authority to use command and coercive powers
3. breach of the obligation to take a decision by an administrative authority (failure to act)
4. instructions under Article 81a(4) of the Constitution (instructions to schools from the professional management side).

The Constitution also empowers the legislature of the Länder to confer by law additional powers of decision on administrative courts in the following cases:

1. complaints against the unlawfulness of the conduct of public authorities in the implementation of laws
2. complaints against the unlawfulness of the conduct of the contracting authority in public procurement cases
3. disputes relating to the civil service of public servants.

In Liechtenstein, a country very much connected to Austria, the enumeration is a bit broader, where "[A] final measure (administrative act) issued by the government, its president, special committees established in place of the government or other officials, and all other decisions (administrative orders) and decisions which may be challenged under Chapter Two or Chapter Three, shall be subject to administrative complaint as a remedy before an administrative court, unless a separate remedy exists."[13]

The mere juxtaposition of the two types of regulation speaks in favour of regulation by means of a general clause. One of its great advantages is its flexibility, which allows it to follow the development of administrative law. In this way, legal protection against the administration can be truly effective, since

12 Federal Constitution Act, BGBl. Nr. 1/1930; the quoted paragraphs have been amended by the Verwaltungsgerichtsbarkeitnovelle 2012, adopted by the Austrian legislature on 30 May 2012.

13 Gesetz über die allgemeine Landesverwaltungspflege v. 21. April 1922, [B. Die Verwaltungsbeschwerde (Rekurs)], 90.

judicial control can be exercised over all administrative legal instruments. In deciding what constitutes an administrative dispute, the judiciary can rely on the results of administrative jurisprudence. We have to admit that these lists are becoming more and more general, which can be seen as a sign of an approach that may soon lead to a recodification of the rule on the scope of administrative litigation in these countries. A good example of this "merging" is Portugal, whose solution is somewhat between the two models, as mentioned above.

## 4 Differentiated Allocation of Competences within the Administrative Judiciary

The general rule is only one element of the system of competence regulation, it is equally important to ensure an appropriate distribution of cases at first instance between the different levels of court, i.e. the use of differentiated division of jurisdiction, and even the creation of separate special courts can be an option to grant effective protection in a timely manner.

### 4.1 Allocation of First Instance Competences on Higher or Highest Courts

Differentiated allocation of material competences is a well-established practice in civil and criminal matters. In administrative litigation, for a number of reasons, it was only towards the end of the 20th century that the legislature began to apply this technique to administrative proceedings. One reason for this delay is the explosive development of administrative law in recent decades, as mentioned above. Another reason is that the organisational framework for administrative justice in general developed much later than that of ordinary courts.

In France, the administrative tribunals have general jurisdiction to hear administrative cases, but there are cases in which the Conseil d'État retained jurisdiction at first instance in 1953. This list has since been both extended and reduced. It includes, on the one hand, cases relating to changes of name and the adjudication of electoral disputes. It has full jurisdiction to hear cases challenging the decisions of the regulatory authorities, cases relating to decrees of the President of the Republic, normative decisions, circulars and memoranda of principle issued by ministers and other central administrative bodies, and cases relating to the selection and disciplinary matters of government officials (Broyelle, 2022, p. 31).

The Spanish Code of Civil Procedure of 1998 also differentiates the jurisdiction of the administrative courts. As there are several higher courts, jurisdiction is also divided between them. The Administrative Chamber of the Supreme Court of Justice rules in the first and last instance on appeals against decisions and measures relating to the Council of Ministers and Government Deputies, the Council of the Supreme Court, the Senate, the Constitutional Court, the Court of Auditors, the staff, administration and management of

the Office of the Parliamentary Commissioner. It also rules on certain actions relating to the electoral process and on appeals against decisions and actions of the Central Electoral Board. The Audiencia Nacional rules at first instance in the following cases: review of decisions and acts of ministers and secretaries of state in general and certain acts of public office (creation and termination of legal status); disputes concerning agreements between public bodies; review of tax decisions of the Minister of Economy and the Central Tax Court; decisions and acts of the Anti-Terrorism Commission. The Administrative Senate of the Supreme Court rules on certain decisions of municipalities and autonomous communities and their general regulations; decisions and measures of executive bodies of legislative bodies and autonomous institutions, such as the Court of Audit and the Office of the Parliamentary Commissioner, concerning personnel, administration and management; decisions of regional and local administrative courts terminating the enforcement of law; decisions of the Central Tax Tribunal in the review of decisions on the transfer of taxes; in disputes relating to local and regional electoral procedures, in disputes relating to agreements between authorities at the level of the Autonomous Communities, and in decisions and measures of central public administration bodies below ministerial level relating to personnel, administration and management; in the review of decisions and measures of the competition authorities of the Autonomous Communities. They also have jurisdiction in certain public procurement cases (associations of autonomous communities and municipalities) and in appeals against decisions of regional administrative courts on administrative contracts.

According to the Portuguese Administrative and Fiscal Courts Act, the Administrative Litigation Section of the Supreme Administrative Court has jurisdiction in the following cases: administrative acts or omissions of certain persons and bodies: the President of the Republic, Parliament and its Speaker, the Government, the Prime Minister, the Constitutional Court and its President, the Supreme Administrative Court and its President, the Court of Auditors and its President, the Supreme Military Court and its President, the National Defence Council, the Public Prosecutor, the Supreme Council of the Public Prosecutor's Office. The Supreme Administrative Court also has jurisdiction over electoral disputes, as well as over the interim measures required in such disputes and the measures necessary for the execution of its rulings.[14]

The Greek Code of Administrative Procedure divides jurisdiction between three levels of administrative courts. The courts of appeal have jurisdiction at first instance, for example in disputes concerning administrative contracts, municipal elections, administrative fines imposed by certain central administrative bodies exceeding a certain sum. (Gromitsaris, 2019, p. 1413) The Council of State acts at first and last instance in relation to so-called implementing acts of administrative bodies and in certain civil service disputes according to the Constitution.[15]

14 Estatuto dos Tribunais Administrativos e Fiscais, Art. 4-5.
15 http://www.aca-europe.eu/colloquia/1998/greece.pdf;, accessed 30 September 2024.

Under the Polish legislation, the Higher Administrative Court has first and last instance jurisdiction in certain cases. These are competence disputes between different municipal bodies and between municipalities and central administrative bodies. This is coupled with disciplinary proceedings against administrative judges, objections to the delay in proceedings and certain other disciplinary cases. The Czech Supreme Administrative Court also has jurisdiction at first instance, such as in electoral proceedings and proceedings relating to political parties.[16]

The German system has also been known for its differentiated division of powers since the 1990s. Thus, the Higher Administrative Courts of the Länder have first instance jurisdiction to hear administrative disputes relating to major technical investments (construction and operation of nuclear power plants, waste disposal, high-voltage power lines, railway lines, federal waterway and road networks). The Federal Administrative Court is the court of first and last instance in non-constitutional public law disputes between federal and Land authorities and between the Länder; in disputes concerning the provision of federal information; in proceedings concerning decisions of the Federal Insurance Supervisory Authority; and in disputes concerning road and public airport investments in some Länder. In recent years, other first instance competences have been added (Mann, 2023, p. 88).

In the Netherlands, there are also cases before a higher administrative court in a single instance. The Raad van State has jurisdiction in land-use planning and environmental proceedings, the Social Security Court of Appeal in relation to special pension benefits and compensation for war victims, and the Administrative Court of Trade and Industry in reviewing decisions of regulatory authorities.[17]

In Finland, appeals against decisions of certain authorities can be brought directly to the Supreme Administrative Court: these are the Government and the Ministries, the Åland authorities, the ecclesiastical authorities. There are also special statutory cases (taxation, social security, agricultural law, aliens law) in which this court also has exclusive jurisdiction, irrespective of the body responsible.

## 4.2 Specialised Administrative Tribunals

It should not be overlooked that there is a certain organisational differentiation within administrative justice, too. In many places, financial adjudication, which is generally regarded as a branch of administrative adjudication, has been established at the same time as – if not before – administrative adjudication, and the two areas of law were already separated in the 19th century (Stipta, 2006). In Germany, for example, there is a separate administrative fiscal justice system, with the Finanzgerichte at the level of the Länder, and the

16 http://www.aca-europe.eu/en/eurtour/i/countries/czech/czech_en.pdf, accessed 30 September 2024.

17 https://www.aca-europe.eu/en/eurtour/i/countries/netherlands/netherlands_en.pdf, p. 5, accessed 30 September 2024.

Bundesfinanzhof at the federal level, responsible for the judicial review of all administrative cases relating to taxes and other duties. In Portugal, there are separate administrative and finance courts of first instance, with separate finance colleges operating alongside the administrative colleges in the higher courts. In the Netherlands, the courts of first instance also hear administrative tax cases, but at the second level there have been tax colleges in the courts of appeal since 2005. Austria also has on one instance a separate financial federal court, the Bundesfinanzgericht.

To overcome the dichotomy, there are even such special judicial forums that hear both administrative and civil disputes. For example, in many cases separate social courts are set up to hear social cases, where this separate court, in addition to social security cases, decides on other issues in the field of social law. Such social courts operate at two levels in Germany and at one level in the Netherlands. In addition, Finland has a Social Insurance Court (Vacuutusoiekus), which is the court of first instance in social security cases (Kulla, 2019, p. 1214). Similarly, Norway has a separate National Pensions Court which acts at first instance.

In addition to social and tax matters, cases of economic administration have recently been stretching the boundaries of administrative adjudication in many cases. The rise of the regulatory authorities has not only reorganised administrative organisation law but has also had a strong impact on administrative procedural law in the broader sense. In the UK, a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy has been set up whose function is to hear and decide cases involving competition or economic regulatory issues.[18] In the Netherlands, the Administrative Court for Trade and Industry is responsible for economic-administrative matters, from where there is a narrow range of recourse to the Hoghe Raad, which has cassation powers. Spain also has a separate central administrative-economic tribunal, whose decisions can be appealed to the Audencia Nacional. In Sweden, appeals against decisions of the Patent Office in patent, trademark, copyright, design and business name cases, and the similar plant-type protection cases of the Agricultural Council can be brought before the Patent Court (Patentbesvärsrätten). This court is on the same level as the courts of first instance and its decisions can be appealed to the Högsta Förvaltningsdomstolen. In Finland, administrative cases in the fields of trade, competition and public procurement are heard by the Markkinaoikeus (Market Court), from which a differentiated appeal is possible: usually the Supreme Administrative Court of Finland (Korkein hallinto-oikeus, KOH) acts as second instance, except in commercial cases, where the Regional Administrative Courts act (Kulla, 2019, p. 1212). In Finland, there are also tribunals for agricultural subsidies, patent and trademark cases, whose decisions can also be appealed to the KOH.

There is also a current "trend towards autonomy" in the area of asylum cases, which takes different shapes. In France, a separate asylum court (Cour

18 Competition Appeals Tribunal, www.catribunal.org.uk, accessed 30 September 2024.

Nationale du Droit de l'Asyle)[19] has been set up under the Conseil d'État. Exclusive territorial or material competences are also used instead of setting up fully separate special courts. In Sweden for example, since 2006, there are separate Migration Courts (Migrationsdomstolen). They are responsible for reviewing decisions taken by the Swedish Immigration Service. They are attached to a separate appeal court (Migrationsöverdomstolen) in Stockholm, from which appeals can only be lodged to the Högsta förvaltningsdomstolen in exceptional cases (Wenander, 2019, p. 1182). In the Netherlands, immigration and asylum matters fall within the exclusive competence of the Council of State.

There is also a counterdevelopment, i.e. the merging of different special courts into general administrative courts. Austria is in a special position in this regard. Until 2014, there was a separate Asylgerichtshof (Asylum Court) in Austria whose decisions could only be reviewed by the Constitutional Court. However, the great reform, by which Austria set up first instance administrative courts led to its abolishment. Similarily, there are tendencies of reintegrating some tribunals to the administrative regional courts in Finland (Kulla, 2019, p. 1214).

## 5 Public Policy Choices and the Public-Private Divide

With the increasing amalgamation of public and private law in the legal systems throughout Europe, there are of course more and more areas where the classification of certain disputes can be both administrative and civil, or where because of the »privatisation« of public law or the »publicisation« of private law, the qualification is not that evident. In the case of a general clause, the question of conflicts of jurisdiction between ordinary and administrative courts may therefore arise quite often. As the development of administrative law inevitably shifts the dividing line drawn by case law and theory, conflicts of jurisdiction will arise even in countries with a long tradition of administrative jurisdiction, let alone those with recently established administrative courts. In French practice, for example, the Tribunal des conflits[20] is not without work even after such a long time. This is also due to the fact that the concept of public service has lost some of its explanatory power in the context of developments in recent decades (Waline, 2010, pp. 539–572). Unfortunately, this question has to be left aside for the moment to focus on what regulation can do to avoid conflicts of competence and uncertainties of access.

There are, of course, different ways of dealing with these issues, which may lead to diametrically opposed decisions, as many factors – both legal and paralegal – influence these decisions. We can divide the possible solutions into two groups: those that aim to create synergies and combine public and private law expertise, and others where there is more of a separation of the two

19 www.cnda.fr; accessed 30 September 2024.

20 The Tribunal des conflits is a parity tribunal chaired by the Minister of Justice http://www.tribunal-des-conflits.fr/; accessed 30 September 2024.

spheres. Latter obviously requires much less regulatory effort, so "combinatorial" solutions are quite rare.

### 5.1 Cutting the Gordian Knot by Policy Decisions – Separation

As it was mentioned, legislators often add to the general rule lists of matters in order to orientate judges. These enumerations can both have a positive or a negative direction. The negative lists contain matters excluded from the jurisdiction of administrative tribunals. Such cases may be those which the legislator expressly refers to the jurisdiction of the civil, criminal or social courts, even if they relate to the functioning of the public administration. Another category is made up of cases that could fall under the jurisdiction of both administrative and ordinary courts. There might also be a category for cases excluded from judicial control altogether, such as e. g. political questions.

As an example of enumerations in regulation, section 3 of the Spanish Code of Administrative Procedure lists the cases that cannot be brought before the administrative courts. Similarly, there is a list of cases excluded from the jurisdiction of the Portuguese administrative courts. These are acts carried out in the exercise of political and legislative functions, acts carried out in the course of law enforcement, and the administrative courts have no jurisdiction to hear actions for liability for errors of law by courts belonging to other branches of the judiciary, nor to review decisions of the judicial administration, nor to hear disputes concerning employment contracts concluded by public bodies which do not establish a public service relationship. Neither military disciplinary matters, nor disputes over jurisdiction between the courts and the administration or between administrative bodies, nor direct or indirect appeals against the fiscal legislation of certain historical territories fall within the jurisdiction of the administrative courts. The Hungarian regulation also uses this technique and lists types of administrative acts that would not be contestable before a court even in the absence of such a regulation, so it is rather a "safety play" of the legislator. These are disputes relating to political issues, intra-administrative relations and so-called ancillary administrative acts. Of course, special laws can override these exceptions by expressly granting access to the courts, as is the case with public service disputes arising in the context of intra-administrative relations, or with some administrative procedural decisions in the context of administrative proceedings (e.g. decisions on procedural fines or the suspension of a procedure).

The positive lists are usually of greater importance in the public-private divide as they clarify whether certain activities should be recognised as administrative ones. This can be particularly useful in areas where the nature of disputes, their subsumption under administrative law, civil law or labour law is disputed. Such an often mentioned categorys are the disputes connected to civil service. It is common practice in Europe that disputes (including related compensation claims) between public employers and civil servants are subject to administrative judicial review. This is the case in Germany, Austria, France, Spain, Portugal, Greece, the Netherlands, Finland and Spain. They do

not belong into the competence of administrative courts in Sweden and Poland, and this was the case in Hungary until recently. In the monist countries (e.g. Norway) this question does, of course, not arise.

There are more complicated areas where a simple list of case types is not really helpful. Here, either procedural definitions can guide judges, or additional substantive legislation is needed. Thus, one regulatory strategy may be to provide definitions that can be used to clarify the nature of disputes and the type of access granted. This method of regulation is sometimes used within or alongside enumerations. Such a field are e.g. administrative contracts, where in many countries, uncertainties reign the field. Those disputes over public law contracts which are defined as administrative ones, are decided by administrative courts in many countries of Europe. This is the case in Germany, France, the Netherlands, Finland, Spain, Portugal and Greece. This also means, that in most countries contracts are regarded as civil law instruments, as long as there is no special rule on them. So e.g. in Sweden the civil courts have competence for administrative contracts except for disputes relating to procedures prior to the conclusion of public contracts. The policy nature of this decision is maybe best illustrated by public procurement contracts and contracts on state subsidies where the qualification of contracts is quite diverse (Gönczi & Hoffman, 2023). Here we already see the second type of regulation, namely the use of special rules on access to court in sectoral legislation, in German "Sonderzuweisungen", whereby the legislator explicitly allocates disputes to either civil or administrative courts without going into dogmatic questions (Schröder, 2024, pp. 101–108).

As a third way, there are also interesting techniques to "convert" a dispute over an administrative contract into a contestation action, so that these qualification issues do not arise. This is for example the case in the Czech Republic by providing an inner-administrative remedy in the case of disputes over contracts. Subsequently, the decision deciding on the remedy will be susceptible for judicial review. This technique – also applied in connection to silence of administration with the negative fiction, eg. in France (Deguergue, 2015) – is both able to set aside the problems resulting from an enumerative scope of administrative justice and the qualification problems of contracts.

In Hungary, the code of administrative court procedure sets up a dual system using both the first and the second regulatory technique. One pillar is the formal definition given in the CACP that defines agreements on public tasks between Hungarian administrative organs as administrative contracts. The other pillar is a "renvoi" to special legislation: the definition adds that further administrative contracts are those that are qualified as such in legislation. Thus, this rule is conferring a public policy choice of court on the sectoral legislator. This is very much the effect of the very strong private law dominance which clings to the view that contracts can only be of civil law nature (Kisfaludi, 2018, p. 801).

## 5.2 Cutting the Gordian Knot by Policy Decisions – Combining Administrative and Civil Law

Besides the separation and the clinging to the dichotomy, there are more sophisticated, »combinatorial« solutions, as eg. the already mentioned specialised courts set up for both civil and administrative matters. As the merging of public and private law is maybe the most intensive in market regulation, this seems to be a solution at hand in certain fields of economic administration, eg. in competition law or in commercial law. Not seldom, not only civil law and public law are combined to such solutions, but also other non-legal expertise. Besides economics, environmental protection seems to be such a field where courts have hard times to deal with scientific evidence. Environmental courts have been set up e.g. in Finland and Sweden, where legal and non-legal expertise are both constituting elements. These courts belong in Sweden to the ordinary justice, but they proceed in both administative and civil law disputes connected to the environment, as well as rural space and planning (Wenander, 2019, p. 1182). Patent tribunals were transformed and merged into the ordinary court system, as well (Wenander, 2019, p. 1186).

It can also be a policy decision to combine administrative and civil procedures and create "combinatorial" solutions. Such a case constitute eg. in Hungary the protection-of-possession proceedings that can be initialised in connection with questions of fact within a year before local government officals in an administrative procedure, and only if this procedure is not bringing relief or is not possible, should the claimant turn to a civil court. The same model is applied in Hungary to remedies in public procurement procedures.

The combination of criminal and civil court procedure could serve as a model for combining administrative and civil adjudication, too. One such example is the so-called adhesive procedure developed in Hungary in criminal court proceedings. It wests criminal courts – besides the criminal competences – with the power to award monetary compensation on the basis of civil law if the court sees the question fit for a decision based on the claim of the victim. This is only a possibility for the court, not an obligation. If it decides on the claim, the timeliness of awarding compensation will more likely be granted than by an additional sequential civil procedure. What makes this solution complicated is that in the private law part of the judgment, the same remedies must be available as against a similar decision of a civil court. It would depend on the will of both the claimant and the judge whether such a decision could be taken in the procedure. Another way of combining administrative and civil court procedures is the Austrian way of regulating state liability claims (see infra), or for example the so-called unified action in Hungarian procurement law that has been a way of cutting the Gordian knot in regard of some contestation actions against public procurement contracts, where the administrative court could decide both on administrative and private law questions in connection with such contracts.

### 5.3 State Liability as a Longstanding Problem Field of the Public-Private Dichotomy in the Light of the Requirement of Effective Judicial Protection

State liability cases constitute a field, where the allocation of disputes is very much dependent on policy decisions. There are two main models used in Europe. In the model based on the German concept, damage caused in the exercise of public authority is understood as a special form of tort liability (Nagy, 2010, p. 182). The German model is followed e. g. in Hungary, Sweden, Finland and Poland. In the French administrative court model, the question of damage caused by administrative action falls generally within the competence of the administrative court following the Blanco judgment.[21] This is the case in France, the Netherlands, Greece, Spain and Portugal. In this model, deciding on a claim for damages upon a contestation action is possible.

By comparing the two models, the sequential nature of the two procedures is a great disadvantage in the German model. In the light of the requirement of timeliness, the necessity of having first an administrative court procedure to decide on the illegality of administrative action, and afterwards a second court procedure before the ordinary court to grant compensation, the solution hardly complies with the requirements of neither Art 6 European Convention of Human Rights nor with Art 47 of the Charter of Fundamental Rights of the EU. With the broadening of the scope of judicial review, the positive feature of the German model, namely that state liability (and privacy) actions can provide for a sort of secondary or substitute judicial legal protection in areas where no legal protection is provided for by an administrative court (Hoffman, 2024), fades quickly away. In fact, one of the advantages of the monist system lies in this, as these two issues can often be decided in one action. Moreover, in some cases, the award of damages can also remedy the illegality of the administrative act. But this is even more true for the fully dualist (French) model of the "procedure en plein contentieux". The functions of administrative liability beyond reparation and prevention (control, sanctioning, protection of interests) can even more effectively be exercised by administrative courts. They also contribute to a clearer doctrine of administrative liability.

An intermediary solution between the German and the French model is the combination of the civil and the administrative court procedure, to be found e.g. in Austrian procedural law: here, the ordinary court in tort cases must, before deciding on the question of the illegality, seek the opinion of the administrative court on the illegality of the administrative action (Leskovar, 2011). Such solutions bring a lot of synergy into the system.

## 6 Conclusions

As administrative justice keeps evolving, the questions of jurisdiction and competence keep being raised and the regulation of these issues needs con-

21 The judgment, which is considered one of the foundational decisions of French administrative justice, was handed down by the Tribunal des conflits on 8 February 1873.

stant development. The requirements of effective judicial protection, both from the aspect of a seamless protection and from timeliness need efficient regulations which are more and more sophisticated.

The broadening of administrative justice necessitates a general regulation of the scope of judicial review. This general clause can be accompanied with positive and negative lists to help the development of a sound case-law and the right balance between administrative and public justice, as well as to avoid conflicts of competence.

An actual phenomenon is the proliferation of possibilities to get legal protection. However, if there are too many ways of granting judicial protection, that can threaten the effectivity of judicial protection. Due to the confluence of public law and private law, there are more and more areas of the legal system where access to court is granted both by civil and by administrative law. The mixing of private and public law elements has led to hybrid formations, which need careful consideration when addressing the questions of the scopes of the two procedural codes, as well as when codifying definitions and rules on judicial protection. For example, the issue of various environmental emissions as nuisances of the enjoyment of property[22] or the private use of public space (Rozsnyai, 2021a) can be disputed both by administrative and civil claims. The possibility of parallel legal procedures is not a problem in itself however, it can threaten the effectiveness of judicial protection if these parallel possibilities are not sufficiently coordinated.[23] The legislator should thus coordinate them with particular care, since the unity of the law can significantly be jeopardised by the possibility of parallel enforcement.

We cannot end without acknowledging that, even in terms of the judiciary, there are areas where thinking in dichotomies is not only of little value, but actually harmful, especially when it results in providing parallel possibilities of judicial protection before both administrative and civil courts without the careful coordination of these procedures. The legislator needs to address these "entanglements". Rather than parallel routes, it is necessary to consider which court is better placed to hear a particular issue and take the necessary policy decisions. Developing combinatory solutions, where both administrative and civil justice and expertise can play a part, are often a more adequate solution to the hybrid legal institutions that are being developed, than clinging to the outdated dichotomy of civil and administrative law. Indeed, it is even possible, ad absurdum, that the civil court will act according to administrative rules and the administrative court according to civil procedural rules. For this reason, the right way forward is to formulate the right delimitation questions and to make appropriate use of synergies, both in civil and administrative court proceedings.

22 See e.g. the report of the Fundamental Commissioner of Hungary, AJB-1492/2018.

23 ECJ, C-132/21 BE v NAIH (Nemzeti Adatvédelmi és Információszabadság Hatóság), 12 January 2023, ECLI:EU:C:2023:2.

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