ARTICLE

ADMINISTRATIVE LAW: INDEFINABLE, BUT NECESSARY AND VERY MUCH ALIVE

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ABSTRACT

This article deals with the endurance of administrative law acting as a culturally conditioned and inclusive community element. The article seeks to highlight the interplay between various factors but also the elusiveness of administrative law which shifts from rigid towards more converging norms. Administrative law is based on subjective means and objective tools that depend upon the contextual, social, cultural and political situations. It represents a social catalyst between individual preferences on one hand and the needs of communities on the other – a catalyst that in an increasingly complex society is even more needed to hold communities together. An attempt is made to show administrative law in the light of meta-legal and cultural theory because we are not yet fully aware of all psychological, emotional and other implications of this discipline of law, especially in our age of complexity.

> Administrative law is not for sissies – so you should lean back, clutch
> the sides of your chairs, and steel yourselves for a pretty dull lecture.
> – The late Antonin Scalia, Associate Justice of the Supreme Court of the United States[1]

1. INTRODUCTION

The final decades of the last century saw a rise in the interest in administrative law (AL), the largest among all disciplines of law. From the 1980s onwards, due to the influence of New Public Management (NPM),[2] AL has experienced a different approach to regulation based on liberalisation, that is deregulation, but this practice paradoxically

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1 Antonin Scalia, 'Judicial deference to administrative interpretations of law' (1989/3) Duke LJ 511 at 511.

2 Christopher Pollitt and Geert Bouckaert, *Public Management Reform: A Comparative Analysis - New Public Management, Governance, and the Neo-Weberian State* (Oxford University Press 2011); Jan-Erik Lane, *New Public Management: An Introduction* (Routledge 2002).

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has led to an increased influence on the part of the regulatory state. [3] The growth of rules (due to Vogel's *Freer Markets, More Rules*[4]) in times of economic crisis is even more rapid, but the struggle of states for a different organisation to address the economic crisis by the public administration and the common dissatisfaction with the states' results show more complexity and intensity than the regulatory goals and their means realise. However, the processes of deregulation have had the opposite effect: efforts to introduce competition have led to increased re-regulation and state interventionism and to an even larger role for AL. Although the liberal legal orders of the twentieth century were based on the protection and sanctity of property rights and the inviolability of the private sphere, these fields nonetheless required public interest rules by the state focused on community for their effectiveness and efficiency. It seems that wherever the liberal ideas of the market appear, the relatively centralised state rules are also present. The ideas of liberalism are based on human rationality and intelligence, whereas the ideas of state interference are based on the notion of the good of the community as a whole, that is, on the public interest that is or could be demolished by individual selfish or egocentric decisions. Let us call these non-intended consequences and dualism of AL as *the paradox of change*.

Europeanisation as the process through which the European Union's political and economic dynamics are becoming part of the organisational logic of national politics, and the emergence of the regulatory state as its consequence, have greatly increased the share of AL at the national and at the supra- as well as trans-national levels. This fact has blurred the boundaries between the effects of different actors in the state's performance even more than before. Although cooperation between the public administrations of the EU member states is of an informal nature due to the EU Treaties, the impact of community law and administrative cooperation is increasing. A messianic search in some European states for solutions from other member states, which were then non-critically taken from their 'natural' political and economic environment, did not produce the so-wanted results. It seems that the different organisations of public administrations can be equally administered from one centre only: in the case of the EU, the development of AL was and still is largely based on the more or less lenient[5] case law of the Court of

3 Seidman and Gilmour have coined the concept of the 'regulatory state' in their study of the American government through the transition from the positive state to the regulatory one. The positive state provides goods and services directly, while the regulatory one attempts to achieve similar goals in an indirect way, via regulation (through the guidance and control systems), the private sector and markets. See Harold Seidman and Robert Scott Gilmour, *Politics, Position, and Power: From the Positive to the Regulatory State* (Oxford University Press 1996).

4 Kent Vogel, *Freer Markets, More Rules: Regulatory Reform in Advanced Industrial Countries* (Cornell University Press 1996).

5 Usually the legal questions are left to the court of law, whereas the actual ones to the administration; there is an intermediate stage between the judiciary and the administration where the court is more (factual state) or less lenient (the legal questions) regarding the decisions of the administration; although it appears that the administration has more discretion when the factual questions are concerned, it is sometimes quite the contrary. It is precisely at this point that the administration should make every effort to show a logic that derives from the fact-finding. American authors warn that the decisions of the courts may seem somewhat surprising to foreigners: '[h]ow odd. The American courts

Justice of the EU. AL, despite its differences in states, nevertheless involves more equal and converging content due to the Court of Justice of the European Union, the Court of Human Rights, the International Court of Justice, the Appellate body of the WTO in Geneva and other decision-making forums. Let us call this interaction *the paradox of undefined boundaries*.

It seems that the mentioned paradoxes contradict one another: dualism between the rights of an individual and the public interest normally cause complex balancing and the non-intended consequences, whereas the undefined boundaries point towards the similar and converging contents despite states' differences. The article will try to solve this apparent contradiction with the help of the concept of endurance of AL that acts as a culturally conditioned and inclusive community element and the elusiveness of AL that is shown in the light of meta-legal and cultural theory. While the common deterministic elements within the specialisation of different areas can be the first sign of maturity, I argue in this article that AL should be placed in the space of unlimited freedom *vis-à-vis* the public interest that protects freedom but also raises dependence. This article seeks to highlight the *interplay* between various factors and the elusiveness of AL; it tries to point out its 'mystery',[6] its ambivalent changes and the above-mentioned paradoxes in which the two tendencies towards the preservation of the *status quo* (of rights) and towards the increase of obligations (to protect or enhance rights) coexist. This article will try to defend the argument that AL is placed between freedom and coercion, while its characteristics are basically that of a *human*: alive, flexible but also rigid, cohesive and exclusive, unidentifiable in definition but clearly present. This argument consists of the elements of indefinability, meta-incidence, transformations, complexity and cultural conceptions of AL.

2. THE INABILITY TO PROVIDE AN UNAMBIGUOUS DEFINITION OF ADMINISTRATIVE LAW

There are almost as many definitions of AL as there are writers who have attempted to define it, its indefinability stems from its flexibility and differences which emerge from intervention in various fields. AL is not only law and governs more than the administration. It attempts (in the national, trans-, inter-, and supranational domains) to regulate people within a particular environment, and therefore varies in time and space. Different situations preclude formulating a single definition: AL may be considered a science of the beginning or the essence and objectives of the state, when the state affects relationships between itself and individuals. Just as there are non-physical values and

defer to agencies on question of law, where courts are expert, but they conduct "in-depth" reviews of policy, where agencies are expert. They seem to have it backwards'. Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein and Adrian Vermule, *Administrative Law and Regulatory Policy* (Aspen Publishers 2006) 403.

6 The mystery of AL is understood as something that remains unexplained, as something that we understand ('tentatively') as the flexible classic relation between superior power and subordinate will.

ideas behind the specific policy and facts, so the general part of AL relates to something that is behind the actual facts, something that should be used (proportionally) equally, something that may even be a foundation of justice. This feature includes not only the principle of equality but also all the general principles that are present in most legal systems, known under different names but with a similar content (nowadays also referred to as the duty of care and/or the principle of good governance), if, in essence, they all are about the idea of good and bad life and good and bad behaviour towards other people. The right content is the one that reciprocally bounces between the state and people, between other organisations, groups and individuals. We usually attach this 'thing that is behind the material facts' to the process by which we establish them, but there is more. There should be a conception by which we also note the procedural rules.

> These two responses to the challenge of equal concern – that the distribution of resources is not the business of government, and that government's goal should be to maximize some aggregate good – have at least this virtue: they recommend policies that respect people's individual responsibility for their own lives. *But neither offers a reasonable conception of what it is to treat people with equal concern*.[7]

In an attempt to arrive at a definition I will start with an accepted conception of AL. Authors from Otto Mayer onwards have tried to define the complexity of AL mainly in one way and negatively (the administration as such an activity of the state that is neither legislation nor justice), although Mayer added to his definition that not all administration is either legislation or justice.[8] In the transition from the negative definition[9] to the

7 Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press 2011) 354–355 [author's emphasis].

8 In this part of Mayer's text, the constitutional-legal ancillary activities, such as dissolution of Parliament, setting the plebiscite, call for the general elections, are present. The functioning of the state where it exists outside of its legal system would also rank in it – in this part, he ranks international activities, management of war, cases of urgency (especially taking command in a state of emergency, etc). Mayer in conclusion defines administration as the functioning of the state for achieving its aims within the legal system outside the judiciary. Ivo Krbek, *Administrative Law FNRJ* (Book 1 JAZU 1955) 13. Waline has negatively described the administration in relation to the officials who accept acts: 'administrative function is one that is carried out by the civil servants who are neither Parliament nor the judiciary'. For the last two it is characteristic that they can contain only one of the three activities, while for the administrative activities it is typical that they include all three of them: the administration passes the general legal acts, and later executes and also supervises their implementation. Ivo Krbek, *Osnovi upravnog prava FNRJ* (JAZU 1950) 75–76.

9 Such a gradual transition can be felt also in the work of the doyen of the former Yugoslav administrative law, the academic Krbek states: 'The administrative law is a set of legal norms that regulate the legal relations which arise in the process of the state-administrative activity, as well as all those legal acts that are carried out by the state administration bodies — in exclusion of legal provisions that fall within other legal branches. That administrative law cannot be described in a positive way, is a necessary consequence of the phenomenon, according to which also the very notion of administration can be accurately determined only negatively' (n 7) 123. The negative definition is also used today: 'The administrative law are the rules relating to the organization and functioning of the executive branch minus the rules concerning the organization and functioning of the legislation and justice and minus the rules that belong to other branches of public law, as it is the tax law and the social security law'. Sabiene Lust, 'Administrative law in Belgium' in René Seerden and Frits Stroink (eds), *Administrative Law of the European Union, its Member States and the United States* (Intersentia Uitgevers 2002) 6.

present ones, AL has been defined according to different starting points: in relation to the control of the state power which ensures that the competences of the state remain under the jurisdiction of the state, that is within the statutory limits in protecting citizens from abuse[10] (the function of control), in relation to the competences of the state bodies (the main purpose is the protection of individual rights[11] of the public members:[12] the protective-controlling function), in compliance with the rules that have to be effectively implemented to achieve objectives (with a simultaneous determination of the complaint mechanisms against the state's decisions:[13] the effective function), in ensuring the accountability of the state through promotion of participation by stakeholders and citizens (the legitimacy function), in relation to the competences of the court (in relation to cases which courts take into consideration:[14] the natural function), the concretisation of the Constitution[15] (a characteristic of the German administrative law), in relation to the type of democratic society and political theory in which nations live[16] (the democratic-political function), in relations between the public and the private in which the public part constitutes and defines AL[17] (the public law function), in relation to the scope of its public-autonomous object, distinct from private law[18] (the autonomous-authoritative function), et cetera. In view of the complexity of public areas, primarily the organisational and procedural aspects can be applied: AL consists of a set of rules that relate to the overall organisation in the Constitution, to the implementation of the state bodies[19] and to cases where in administrative matters public authorities decide about rights, obligations and/or the legal interest of persons or groups. This definition, too, is inadequate. After all, what is an administrative matter? At which point is the

10 William Wade and Christopher Forsyth, *Administrative Law* (9th ed Oxford University Press 2004) 4–5.

11 Seerden and Stroink (n 9) 'Administrative law in the Netherlands' 145.

12 Philip Harter, 'Administrative law in the United States' in Seerden and Stroink (n 9) 307.

13 Brian Jones and Katharine Thompson, 'Administrative law in the United Kingdom' in Seerden and Stroink (n 9) 199–200.

14 Jean-Bernard Auby, 'Administrative law in France' in Seerden and Stroink (n 9) 60. 'The essence of the administrative law is based on the legal doctrines that on the basis of an unwritten law set the general legal standards for the conduct of public authorities' Wade and Forsyth (n 10) 6. Similarly, see Peter Craig, *Administrative Law* (Sweet & Maxwell 2003) 3: 'Natural justice and judicial review are the legal bases that establish administrative law'

15 The administrative law concretises the constitutional law ('Verwaltungsrecht als konkretisiertes Verfassungsrecht', according to Fritz Werner in 'Deutsches Verwaltungsblatt' (1959) 527. 'Administrative law is part of constitutional law which reveals what tangible and enforceable limits can be placed on administrative action' in Stanley A. De Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books 1994) 577.

16 Craig (n 14) 3.

17 René Chapus, *Droit Administratif General* (Montchrestien 1996) 1.

18 Guy Braibant, *Administrativno pravo Francuske* (JP Službeni list SRJ Beograd 2002) 17.

19 From the administrative law, the so-called acts of government are excluded already at the constitutional level because the 'administrative acts are not those decisions which are made by holders of the legislative and judicial branches of power in executing their constitutional powers, and those acts which are made by the bearers of the executive branch, based on their political discretion granted under the constitutional and statutory powers' (art 3 of the Administrative Disputes Act, Official Journal of the RS n 105/06).

legal, legitimate, sufficient interest recognised? The definition does not enhance the protective, controlling, natural and legitimation functions – so, we are once again at the start of our discussion.

2.1. In the direction of the functional definition of AL to the duty of care

It seems that the definition of AL (which depends on the desirability of the individual and collective values) cannot be put in any kind of frame: it is based on the contextual, social, historical and political situations and represents a social catalyst between individual preferences and individual rights on the one hand and the needs of communities, and public interests on the other hand. AL is the means by which a regulator maintains direction through active observation of the surrounding area(s) and making the necessary adjustments. Any attempt to define AL apparently always omits one or more of its aspects.

To do justice to this statement I will once again make an attempt at defining AL. For example, for Jennings 'the administrative law is the law relating to the administrative authorities'.[20] This definition is too broad, it is like trying to capture the miscellany of experience of a sea-crossing by saying that mariners are sailing across the sea. Kenneth Culp Davis defines it as 'concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action'.[21] Although this definition omits all informal and potential options of behaviour, it could be on the right track if we upgrade it. Griffith and Street consider that the main object of AL is the operation and control of the administrative authorities, so it must deal with the following three aspects: 'What are the limits of those powers? What sort of power does the administration exercise? What are the ways in which the administrative is kept within those limits'?[22] This definition can be improved by adding the following two aspects: What are the procedures that must be followed by administrative authorities? What are the remedies available to a person affected by the administration? But, can the limits of power, a power *per se*, or its exercise on the affected person be properly defined? In my opinion the most satisfactory definition, in view of all states' material and procedural differences, can only be descriptive *functional and potential.* The above-mentioned definitions demonstrate that as the state and its political, economic and cultural web evolves it does persistently create new opportunities for new goods and services that fit functionally into the existing web. This updated web starts its own future in ways that we cannot predict. Once that happens, yet other new, unforeseeable, functional elements may fit into the still new niches that the existing good, used for a new purpose, affords. Thus, it is clear that even for existing goods and services we cannot

20 Sir Ivor Jennings, *The Law and the Constitution* (University of London Press 1967) 194.

21 Kenneth C. Davis and Richard J. Pierce, *Administrative Law Treatise* (Little, Brown 2002) 1–2.

22 John Aneurin, Grey Griffith and Harry Street, *Principles of Administrative Law* (Pitman 1973) 4.

predict all the uses to which they might be put or which new chances and problems they might create.

If we continue on this path on which we pay attention to every detail, we see that not only legal procedures and remedies are available, but also other ways by which the work of public authorities can be affected or can affect others. Some of the evidence can be seen in Switzerland and Singapore with the best quality of public institutions within different legal systems.[23] Harlow and Rawlings indicate all theories where AL is seen as an instrument for the control of power and protection of individual liberty (with the emphasis on the courts rather than on government) as the 'red light' theory: '[w]hile red light theory looks to the model of the balanced constitution and favours strong judicial control of executive power, green light theory sees in administrative law a vehicle for political progress and welcomes the "administrative state" … green light theory prefers democratic or political forms of accountability'.[24] The green light theory is close to life itself because it points also to other factors that affect efficiency, governance and human understanding of wide and intertwined effects which cause changes in AL.

Even this wider view (and our definition of AL with it) combined with the green light theory shows nothing else but a human factor, about which Hamilton in 1788 stated that the 'executive branch needs energy for a good governance'.[25] This 'energetic commitment', two centuries after the cited statement, is still located within the executive branch, in the public administration, in *the duty of care*. Public officials are so far the ones who largely implement AL.[26] Aristotle's *homo politicus* is today Simon's *homo administrativus, adaptivus*, and even more and more *expertus*.[27] Not only in the public administration's context, but also wherever a person is, she or he can contribute with

23 In 2010, Switzerland and Singapore were among the most competitive countries in the world. They have a different constitutional arrangement, but nevertheless they have the best public institutions in the world. The result shows that what matters is not just the law but also the commitment, values, energy and personal contribution, no matter in what environment or circumstances states operate. See World Economic Forum *The Global Competitiveness Report 2010–2011* (Word Economic Forum 2010) at 14.

24 Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press 2009) 31 and 39.

25 Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws. A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government. Alexander Hamilton, *The Federalist No. 70, The Executive Department Further Considered* (18 March 1788) <http://avalon.law.yale.edu/18th_century/fed70.aspY> accessed 19 June 2011.

26 The civil servants are those who represent the public administration and whose main deterministic element is the public authority. The origins of administrative law were related to the public employees law at least in the Anglo-Saxon area: the administrative agency is directly related to employees (as agents): 'As the word "agency" suggests, the "authorities" that are the subject matter of administrative law are the agents – officers, boards, commissions and the like – established by some principal to carry out that person's or body's purposes' see Jerry L. Mashaw, Richard A. Merrill and Peter M. Shane, *Administrative Law* (Thomson West 2003) 12.

27 Crowther-Heyck Hunter and Herbert Simon, *The Bounds of Reason in Modern America* (JHU Press 2005).

her or his knowledge and will to the greater good since 'legitimate democracy and effective governance in the twenty-first century require collaboration. This is the core idea of *Wiki Government* ... connecting the power of many to the work of the few in government'[28] and can be spotted already in the democratic experimentalism of Dorf and Sabel,[29] where they name the system of collaboration as 'learning by monitoring',[30] which is also contained in articles 37 and 72 of the French Constitution.

Recent developments in the field of AL show an 'increasingly blurred boundary between state and society [and] between justice and administration'.[31] It seems that AL could be more 'constitutional' than the Constitutions themselves: it rather adapts to the youngest forms of democracy than to the older constitutional frames and 'it touches far more behaviour'.[32] Because AL is the non-living means by which states achieve their public goals, it is obvious that the only living 'component' in it is the person. If in dealing with the definition of AL we encounter the human factor, we connect with it all the people who work within and outside the public administration. An expert is the one who under control or even without it [*sic*] chooses between small decisions and transforms them into bigger ones, whatever his or her position may be. The Crichel Down's affair[33] is often described as the beginning of modern English administrative law because it revealed the inadequacies of ministerial responsibility, where the fundamental defect was (and still mainly is) in the officials' mental processes:

> But the peculiar virtue of the civil service has been its objectivity and the feeling it has created that its decisions are based on accurate information, intelligent interpretation and a responsible attitude of mind. The criticism has hitherto been that administration has been too formalised and

28 Beth Simone Noveck, *Wiki Government: How Technology Can Make Government Better, Democracy Stronger, and Citizens More Powerful* (Brookings Institution Press 2009) xiv and 14.

29 Michael Dorf and Charles Sabel, 'A constitution of democratic experimentalism' (1998) Columbia LR 267–473.

30 The model requires linked systems of local and inter-local or federal pooling of information, each applying in its sphere the principles of benchmarking, simultaneous engineering, and error correction, so that actors scrutinise their initial understandings of problems and feasible solutions. These principles enable the actors to learn from one another's successes and failures while reducing the vulnerability created by the decentralised search for solutions. The system in which citizens in each locale participate directly in determining and assessing the utility of the services local governments provide, given the possibility of comparing the performance of their jurisdictions to the performance of similar settings, we call *directly deliberative polyarchy* (id 287–288).

31 Susan Rose-Ackerman and Peter L. Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2010) 1.

32 The average citizen is not a dissident who is concerned with the state limiting her political speech; nor is the average citizen a criminal concerned with criminal procedure provisions in constitutions. Rather the average citizen encounters the state in myriad petty interactions, involving drivers' licenses, small business permits, social security payments, and taxes. It is here that the rubber meets the road for constitutionalism, where predictability and curbs on arbitrariness are least likely to be noticed but most likely to affect a large number of citizens. So it seems clear that administrative law is constitutionalist in orientation and arguably more important to more people than the grand issues of constitutional law. Tom Ginsburg, 'Written constitutions and the administrative state: on the constitutional character of administrative law' in Rose-Ackerman and Lindseth (n 30–31) 118.

33 JAG Griffith, 'The Crichel Down Affair' (1955) 18 The Modern LR 557–570.

> that the careful exclusion of personal considerations in the making of decisions has resulted in over-caution, 'red tape' and a certain inhumanity.[34]

Griffith concludes that the civil service must 'find its own solution' and/or be left to put its own house in order, 'to ensure that objectivity and intellectual integrity become not only common but, so far as is humanly possible, universal habits of mind'.[35] It seems that habit and/or the nature of mind are the main defining elements that change content and hence the definition of AL according to the context in which it is used. In today's incapacity of public administrations to deal with all the world's problems, AL cannot be left only to them. A personal, 'positive attitude' stance exceeds all definitions and understands them only as fragments of an unfinished mosaic. AL is what most humans think it is; if we could know enough about the forming of decisions in our mind, we could also formulate a more objective definition of AL. But, is this necessary? Does AL not work despite the absence of an all-encompassing definition? Is it not true that we cannot completely define a human, but we still, despite this inability, live our lives? The search for the definition on the other hand has contributed to the finding that AL not only depends on the public administration, but also on the spheres of social life in which many different stakeholders affect its content. Its efficiency lies not only in the public administration, in the same way as righteousness/justice lies not only in the courts. Our search for the definition has led us to the descriptive, functional and potential definition that uses duty of care as its *sine qua non*.

3. ADMINISTRATIVE LAW AND ITS META-INCIDENCE

Despite our inability to provide a perfect definition of AL, it is clear at least that it forms a part of our lives at almost every turn, and that it does not depend solely on the (in) actions of the core public administration. If we all care, we can do a lot of good things. And this also holds true for AL. I will now turn to this care for the common good in AL, which at the same time is also present outside of it. If this were not so, we could never change it for the good of the people. But we are changing it every day with our practices. I will address the superiority of the 'meta-AL (a prefix from Greek meaning 'beyond') or 'modified' AL that shows its superiority above the formal AL. The public interest, a good society, is located *outside the formal law*[36] because it is reformatted in it again and again; the specifics of AL are in its movement between the public and the private, between the constitutional and non-constitutional principles, open and closed concepts, more or less specific standards, determined and undetermined terms, between

34 id 570.

35 ibid.

36 Compare with Laski's statement in 'Introduction' in Leon Duguit's, *Law in the Modern State* (George Allen & Unwin Ltd. 1921) 20: 'The rule of law is, clearly, independent of the state, and, indeed, anterior to it; for it is the principle on which the life of society – far vaster in extent than the state – depends'.

the bounded performance and discretion, between a more or less restrained judicial review, between *lex certa* and *non certa*, between efficiency and legality, even between legality and morality.[37] Works from antiquity already point out the interplay between the private and the public life, both are united in the question about what is good for the society and an individual in it and what is not. The *Magna Carta Libertatum*, the *Habeas Corpus Act* and similar Acts have tried to strike a balance between the good for the society and the limitation of power, between utilitarianism and deontological ethics. Dworkin considers this balance as the unification of ethics and morality that is as in Kant's principle: '[a] person can achieve the dignity and self-respect that are indispensable to a successful life only if he shows respect for humanity itself in all its forms'.[38] Law cannot be regarded as an object which stands for itself; it is made or at least is found as such by people and in a large part depends on them. Only if regarded as a subjective means that offers appropriate paths to objective results as the duty of care,[39] can the law be established as the common representative of deontological ethics and their utilitarian aspect? As such AL can also gain its credibility and legitimacy for interference in people's lives.

3.1. A subjective-meta side of AL in 'dare to act'

Kant emphasises that no disposition to obey the law forms a part of its definition: 'the will is the capacity for desire considered not so much in relation to action [as the capacity for choice is] but rather in relation to the ground determining choice to action'.[40] This incentive to act, which *per se* is duty, is a *virtue*: '[l]aw represents an action that is to be done as objectively necessary, that is, which makes the action a duty; and second, an incentive, which connects a ground for determining choice to this action subjectively with the representation of the law. Hence, the second element is this: that the law makes duty the incentive'.[41] A meta-incidence of AL is about all the things that are good for the society and all the acts that not only are the formal objective duties, but also the subjective informal virtues that give their factual content to the duties. The 'meta-AL' can mean simply: 'care for and treat other people with respect'.

For the state apparatus we therefore can say plainly that it should operate 'independently, impartially and equally'. But if this concept in theory is easy to follow,

37 The Universal Declaration of Human Rights: 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society' (at 29 para 2).

38 Dworkin (n 7) 19.

39 Goodnow explains simply that 'it is the duty of the government to further direct the welfare, both physical and intellectual, of its citizens'. Frank J. Goodnow, *Comparative Administrative Law* (G. P. Putnam's Sons 1893) 3. But before we could have the intellectual welfare of citizens it should be present in persons who further direct this welfare towards citizens.

40 Mary Gregor (trs), 'Introduction, translation and notes' in Immanuel Kant, *The Metaphysics of Morals* (CUP 1991) 42.

41 id 46.

in practice it represents more serious obstacles because independency, impartiality and equality can gain a different context in life. In the legal field, at least for the apparently clear, predictable and reliable abstract rules, the indeterminate legal concepts (due to the impossibility of complete determination and required flexibility) and discretion, which are inseparable elements of AL, also come into play. 'As in adopting of rules and as in other activities are discretion and order in the constant stress; in it could someone find an engine that drives the processes of public law'.[42] This delicate spirit (*esprit de finesse*) or vital force (*élan vital*) that delineates social life and the rules in obligatory 'factition'[43] of law, resists tangible rules and principles, and it could be somewhere between feeling and reasoning:

> Those who are accustomed to judge by feeling do not understand the process of reasoning, for they would understand at first sight, and are not used to seek for principles. And others, on the contrary, who are accustomed to reason from principles, do not at all understand matters of feeling, seeking principles, and being unable to see at a glance.[44]

AL is firstly between the meanings of value and desire, and secondly between the factual means and causal effects; the greater the inability of knowing about the effects according to the reasoned or desired end the more *skill* comes in place of learned behaviour: 'a real heuristic principle of the causal interpretation of activity and values are with the setting of a purpose outside the law'.[45] Because we cannot fully know all the causes and effects of the cognitive functioning of individuals (it is a reminder of Popper's theory of demarcation according to which 'it is logically impossible to conclusively verify a universal proposition by reference to experience'[46]), the entire legal hermeneutics is reduced to the understanding of *the common sense* thinking and to an ability of subjugation of empirical facts under normative rules in a way that they result in a *reasonable interpretation*. In fact, more of the human capacity to analyse and synthesise than of the legal science could be present; it could be more about training (acting) than learning. In AL, it is (as in other branches of law) about the common sense and desire which are applied[47] to the society as a whole. Matching the content of the public interest to those who design it within the state apparatus and to the people forms the core of legitimacy. We should not give up if results are not always perfect and are

42 Peter Strauss, 'The rulemaking continuum' (1992) 41 Duke LJ 1463 at 1463.

43 'Factition' is a strange and vague concept of which it is clear only that it derives from the word fact. It means that law has discovered facts in their identity and has submitted to them and their design and stopped to imagine that it can tamper with or change them. Nature and society are expressing themselves in here directly, while the law reserved for itself an unobtrusive editing right. See P Grossi, *Pravna Evropa* (sn 2007) 26.

44 Blaise Pascal, *Misli* (Mohorjeva družba 1982) 35.

45 Niklas Luhman, *Teorija sistema, svrhovitost i racionalnost* (Globus 1981) 82.

46 Stephen Thornton, 'Karl Popper' in Edward Zalta (ed), *Stanford Encyclopedia of Philosophy* <http://plato.stanford.edu/archives/sum2009/entries/popper> accessed 14 September 2011.

47 Remember just one of the golden rule's versions: 'Do not do unto others what you do not want others do unto you'.

different from those of our 'neighbour'. If Dostoevsky's unhappy family is unhappy in its own way, the same stands for AL: effective and efficient means (in theory) are all alike (the general legal principles, discretion, administrative procedure, impartiality, accountability, transparency et cetera), but the ineffective and inefficient ones are (in practice) different in their own way.

It is the *mental* skills, which most people have, that forbid us to be hidden behind the complex formulas and forms of action – it is fundamentally about the simple ideas which are based on combining forces for the collective overcoming of otherwise individually insurmountable problems. Instead of Kantian *sapere aude*, in AL we should put *audeant facere* ('dare to act') after the 'duty of care', although we sometimes cannot foresee all causes and effects. This is *prima facie* discomforting, but there are enough comforting elements that this can be done. Axelrod's evolutionary path to solutions is similar to this statement ('it is possible to know of the singular causal relation without knowing the law or the relevant descriptions [of that relation]'[48]); we do not need to know of all the circumstances that have caused the final results and we do not give up hope only for this reason. In this way the simple heuristics within the bounded rationality is also confirmed, where people score better results from those who have more knowledge within the recognition heuristics (a recognised object has a higher value than a not recognised) and *take the best* heuristics (an object with the positive cue value has a higher value based on this criterion).[49] Today's life offers not only a monochromatic image of cognitive idealism, but an increasing complexity of relationships and influences: '[t]hese processes [globalisation and the European process of legal integration] have brought about an ever-increasing interconnected world with migration of people and ideas across various kinds of borders … people have transformed into 'skilful negotiators' in the pluralistic webs of overlapping legal systems without clear hierarchies or coherence between them'.[50] Only a responsible and careful review of all the circumstances and facts can give us an approximate insight into a specific area, although it may be better (but not fully) known only to those who are within its frame. With more awareness of the absence of a single location of power, the future can be built on the idea according to which a large part of AL is not based only on legality, but also on the behaviour of the official in the public administration and that of the individual in society.

The theory of public administration is focused also on human character (on the scope of the disclosure of irregularities ['whistleblowing' according to Miethe, Hunt, Hesch[51]]), on administrative behaviour ('Simon' referred to above) on the bureaucracy

48 David Davidson, 'Mental events' in William Lycan andJesse J. Printz (eds), *Mind and Cognition* (Wiley-Blackwell 2008) 64.

49 Peter Gigerenzer and ABC Research Group, *Simple Heuristics That Make Us Smart* (OUP 1999).

50 Jaakko Husa, 'The method is dead, long live the methods! European polynomia and pluralist methodology' (2011) 5 Legisprudence 249 at 258.

51 Terry Miethe, *Whistleblowing at Work: Tough Choices in Exposing Fraud, Waste, and Abuse on the Job* (Westview Press 1991); Geoffrey Hunt, *Whistleblowing in the Social Services: Public Accountability & Professional Practice* (Hodder Arnold 1998); Joel D. Hesch, *Whistleblowing: A Guide to Government Reward Programs* (Goshen Press 2009).

at its actual operations ('Street level bureaucracy' according to Lipsky[52]), on public choice and budget maximisation (Stigler, Peltzman, Niskanen[53]), on the servant-leader ('servant leadership' according to Greenleaf[54]), whereas AL still is centred mainly on the institutions of public authority, on the protection of individual rights and the interpretation of judgments, although these means and goals have their predispositions in the public servants' minds. The theory of public administration also points out the moral or egotistic side of public officials, whereas AL theory provides only a formal, more or less traditional view on rights and obligations. Before and after the explanation of a decision there must be a responsible, ethical public administration and an ethical individual. Before an ethical state there must be ethical officials, who should go through training and education that should provide them with the required knowledge enabling them to decide what she or he knows what she or he wants, can or should do. Notwithstanding the fact that there may be no formal rules, we must not overlook the actual influence of informal rules, practices and informal groups. Functioning by an internal, informal system that ensures the efficient flow of energy and its expansion in desired directions is the basic trick of politicians and public servants that can be seen in soft law and everyday practice. These people are the ones who are behind the transfer of powers and who influence the citizen's behaviour. According to this view the statement that 'values and their changes are in proportion to the growth of power of the value setter'[55] has become very relevant. The setter places legal concepts as exceptions, even if they would not be counted as law (*iuris apices non sunt iura*), while she or he must tolerate the factition of (administrative) law, otherwise she or he lands in legolatry (worshipping just the words of law [letter of the law]), regardless of the factitional state that should be placed in law.

With the increasing interconnectedness of relations, it is all the more difficult to answer the question of who or in whose name a person is explaining, while it is more clear what she or he is explaining: the benefits of AL should be in the public interest, to the benefit of the people as a whole according to a *specific* time and space, that is *context* [author's emphasis]. The content of the public interest is on the shoulders of various stakeholders and we still do not know them sufficiently (their reasoning, conclusions, interpretations, reflection, and/or judicious power). The people's psychological limitations when they draft a law, when they deliberate or make decisions were never in fact (to a sufficient level) studied or included in AL. In the future officials

52 Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service* (Russell Sage 2010).

53 George A. Stigler, 'The theory of economic regulation' (1971) 2 Bell Journal of Economics at 3; Sam Peltzman, 'Toward a more general theory of regulation' (1976) 19 Journal of Law and Economics at 211; William A. Niskanen, *Bureaucracy and Representative Government* (Transaction Publishers 1971).

54 Robert K. Greenleaf, *The Servant as Leader* (Greenleaf Center 2015).

55 Friedrich Neitzsche, *Volja do moči* (Slovenska Matica 1991) 16. After him, this conclusion has also been confirmed by other authors, for example Noam Chomsky, *Understanding Power: The Indispensible Chomsky* (New Press 2002); Paolo Grossi, *Pravna Evropa* (The New Press 2007).

in public administrations ought to have more expertise in problem-solving, decision-making, communication, human behaviour, and social relationships. Public officials should be more aware of these limitations, and should have the help of people trained in psychology. The science of human mental functioning, behaviour and nomotechnics[56] should focus more on the different form of rules (experimental rules, diagram rules, a Henry VIII clause, a sunset clause, et cetera) on a relevant psychological basis.

3.2. An objective-meta side to AL

In the above subparagraph the real subjective predispositions for AL that promote a 'duty of care' and a 'dare to act' were discussed. These predispositions have to be put in an objective context if we are to grasp their practice in full. In the absence of the formally established AL, societies do not aid themselves by (market) competition, but by informal rules and forms and their modifications that enable competition. This is the same trick that is used when we have no rules for some present problems. In peace time the unwritten law in the form of general legal principles that serve for the interpretation of law and for filling the gaps in the law,[57] and informal clubs (G7, G8, G20, the Basel Committee on Banking Supervision et cetera) are used instead of (absent) AL, whereas in a state of war and/or emergency there is the institution of emergency situations in which the rights of individuals come after the context of social necessity. There is thus obviously some form of law that precedes the formal one.

If law as the concept of what is right is located wherever societies emerge, it seems that it is outside the formal law: it could even be somehow paradoxically said that an informal, internal system of operation is closer to it than formal law. If something outside formal law were not present, we would not be able to regulate, to think about regulation at all. AL therefore may have an objective side beside the subjective one: the prefix of 'meta' can denote areas which exceed the present and/or normal use of AL; we cannot deny its existence in a situation of crisis, when it is actually needed the most[58] or when we want to regulate some field *de novo*. In the framework of 'meta', that is of not being trapped within the legal rules because it is above them, there is a wide range of different factors at play: the complexity of surroundings, comprehensively

56 From Greek *nomos* (law) and *techne* (craft), ie the technic of preparing legal regulations that covers the methodical, structural and linguistic aspects of general legal acts.

57 The *Algera* case is the starting point for the EU judicial practice in the area of general administrative law: 'unless the Court is to deny justice, it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member states'. See Joined Cases 7/56 and 3-5/57, *Algera v Common Assembly* (1957).

58 In times of crisis, relations of public authorities should be the most unified, relationship of over- and sub-ordination should be clearly defined and respected; the execution of commands should take place at the highest level. The same goes for control, reporting, and information. It must not be overlooked that public administration has evolved from the military forms of action (hierarchy, line and staff management, controls and uniformity of control, logistics, communications, reforms, strategies). See eg Jay M. Shafritz, E.W. Russell and Christopher P. Borick, *Introducing Public Administration* (Pearson 2011) 215.

connected and intertwined influences, the interest of society as a whole, cause and value choice, cognition, common sense thinking, the subjugation of the empirical facts to the normative ones, movement between the public and the private, between principles, open, closed and indeterminate concepts of action, bounded actions and discretion, efficiency and legality, general legal principles et cetera.

Regardless of different situations there is always some form of order, there is always someone who coordinates, operates, proposes and orders, even if only informally or incidentally. Even if all the formal rules are set aside the states still work.[59] If a universal (omnipresent) norm is the basic concept of order, the same cannot be claimed about the formal law. The enforcement of the norm by any government, changes in the norm, the fact that it can take a different content, disrespect for the norm, and finally even its diametrically opposite effect from the initially envisaged, all of this shows that a norm lives outside of the positive-legal norm. A legal system therefore must rely on all of the observable consequences and effects; this is the basic idea of all regulatory impact analyses, the cost-benefit analysis, good regulation and the like. The legal system should also not lose sight of the fundamental non-entrapment, non-identifiability of order in strictly formal forms, although we should try to do this on a non-stop basis. Methodologies can help us to objectively encapsulate the state of things in the ever-changing surroundings, because of this we must consider the possibility of monitoring, of variations, and of complementing the factual state of affairs on a real-time basis. We must take into account the openness, the non-identifiability of all consequences at the time of the acceptance of a rule, its indirect effects, risks, innovations and adaptations. In other words, our work never stops.

The formal AL is enshrined in the 'meta-AL' that goes beyond the former and does not (judicially) refuse to make a decision about a certain right (especially where there are no formal legal remedies at all – as in the case of *Marbury v Madison*[60]) or any other legal question. This can be seen in cases with legal gaps. The 'meta-AL' is more in the hands of the judiciary than in those of the legislator (natural justice and/or the denial of justice);[61] it is some kind of gateway to AL, to which it is similar regardless of the

59 This can be observed at various *coups d'état*, switching of power and the emergence of new states and/or autonomies.

60 *Marbury v Madison*, 5 US 137 (1803) was a landmark case in which the US Supreme Court declared its ability to limit Congressional power by declaring legislation unconstitutional; the Court answered to the question about the applicant's availability of remedy (if he has a right, and that right has been violated) that 'very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection'.

61 The European Community itself is primarily made up of rules of administrative law drawn in particular from the area of law governing the management of the economy. 'The European Community described by the European Court of Justice as a community based on law could be more precisely termed a community based on administrative law'. Jurgen Scwharze, *European Administrative Law* (Sweet and Maxwell 1992) 4. Otto Mayer expressed in his famous *dictum* in 1924 already that 'constitutional law passes while administrative law remains' Otto Mayer, *Deutsches Verwaltungsrecht* (The Preface, Duncker und Humblot 1924). The constitutional/administrative law also exists in states that do not have a formal constitution, and it is well reflected in the jurisprudence of the ECJ, which in its

particular constitutional organisation.[62] It could be said that it 'flirts' with natural law. There is the extraordinary (the actual state of affairs) above the ordinary, just as there is a principle (the normative content) above a rule – they are both connected with each other (as the player and the explainer) in a new way.[63] This relation can be expressed in terms of subsidiarity, when a higher level (a paternal instance) leaves free operation to a lower one until the latter is no longer able to cope with the problems. A non-law protects or disposes of the formal law;[64] the absent exceptional conditions protect the regular,[65] just as the just order is protected in the shadow of a potential revolution. The meta-regulatory law is a living law, which regulates the life which people actually live. It could also be defined as Jellinek's 'normative power of the factual'[66] that has found a place in Ehrlich's 'norm for decision' and in Pound's separation between the actual law and the laws enshrined in books ('law in action' and 'law in books').[67] Its practicality is reflected especially in the main, open principles of AL (for example good governance, due care, and prudence), which also facilitated the emergence and development of the *acquis*, contributed to its maintenance and gave direction to a partially foreseeable future for the EU. The interpretation of the fundamental principles is based on a series of circumstances which are situated in and outside the law: a state of emergency, the days of mourning, holidays, pardon or mercy, a solemn oath, honour and conscience are beyond (classically considered) law, and yet all contribute to its content. The decision-making process always includes the subjective ([un]conscious processes, an automatism of common sense, moral principles, emotions) and objective (everyday circumstances, political and economic context, informal groups, normative power of the factual) meta-sides of AL. Although they are connected with us in the (still) unknown and/or different

decisions does not distinguish between constitutional and administrative law, from the *Algera* case (Joined Cases 7/56 and 3-7/57 *Algera v Common Assembly* [1957] ECR 39) onwards, when it had to find a solution which the founding treaties had not predicted.

62 The more one moves from constitutional law to administrative law and its rules and principles towards its methods, the less important are the basic differences between the political frameworks of the various legal systems. There is no substantial difference in the effects of the need for economic efficiency upon a system of administrative law between a parliamentary monarchy and a presidential democracy. Matthias Ruffert (ed), *The Transformation of Administrative Law in Europe* (Sellier 2007) 8.

63 We could talk about the universal meta-incidence that occurs when we cannot get to the (effective) output with an existing set of rules. Also a normal state contains the normal meta-incidence in the form of general principles of law that are recognised by civilised nations. At the EU level, Craig places the rule of law, institutional balance, effectiveness and cooperation, and administrative efficiency among the meta-principles. See Paul Craig, *EU Administrative Law* (OUP 2006) 270–279.

64 If the formal law is not consistent with most of the values in society, revolutions and other social upheavals provide for the enforcement of the 'new' law.

65 There are only the circumstances of concrete time and space, which always *de novo* dictate the public interest's content, the contents of 'normality' at any given moment (*Quod licet Iovi, non licet bovi*) according to the range of information and common sense processing, hidden behind these concepts.

66 Georg Jellinek, *Allgemeine Staatslehre* (Verlag von O. Häring 1914) 338.

67 For more on this notion, see Marc Hertogh, *Living Law, Reconsidering Eugen Ehrlich* (Hart Publishing 2009).

ways, we should be open-minded to these processes: dare to know, to care, to test, and to experience.

4. TRANSFORMATIONS OF ADMINISTRATIVE LAW AND ITS COMPLEX COGNITIVE INCIDENCE

Legal science is not yet fully aware of the psychological implications that are also one of its elements. The indefinability, the subjective and objective meta-sides of AL, all of these point to the complexity of AL, at the same time reminding us that we should not settle for what we know if there is more to be seen. On the contrary distress teaches us to think: 'You cannot do more good to a thing than if you persecute it with all the dogs'.[68]

> The administrative law continues to be a realm of legal contestation and redefinition. It is not just about fair and transparent procedures; honest, hard-working officials; and the protection of individual rights, although these are important. It also concerns the democratic legitimacy of government policymaking[69]

Although the last two mentioned above are important, they all rest on human thought which tells us whether or not something is democratic, legitimate and legal. As there were legal obstacles in the implementation of AL with the decline of absolute monarchies, especially within the discretion and prohibition of the further delegation of authority (expressed in the Latin dictum *delegata potestas non potest delegari*) on the grounds of the separation of powers,[70] the states today are similarly reluctant to apply or very careful in applying the norms that consist of experimental and other special types of clauses (for example a sunset clause, a Henry VIII clause, or an ouster clause), regardless of the fact that some of them are centuries old.

The real emergence of AL, which goes back to the New Deal period,[71] together with the newly established agencies represent a fundamental abandonment of the concept of the strict separation of powers and the prohibition of mixing of functions, something that prior to that era would be regarded as tyranny. Ackerman argues that we need to say goodbye to Montesquieu's holy trinity:

> [I]nstead, we must modify the mantra to take account of an institutional world in which independent institutions play increasingly important functions – even though they cannot be

68 Nietzsche (n 55) 191.

69 Rose-Ackerman and Lindseth (n 31) 18.

70 In the US, this principle was mentioned for the first time at the Supreme Court of Pennsylvania in 1794 in the *M'Intire v Cunningham*, 1 Yeates 363 para 1794 decision. In the EU, there is a reluctance about the transfer of powers in deciding through decentralised bodies (especially the part which relates to the broader concept of discretion) based on the restrictive jurisprudence of the ECJ. See the basic case in this field, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] ECR 133.

71 The US Supreme Court has not invalidated a congressional statute on non-delegation grounds since 1935. See *Schechter Poultry v United States* 295 US 495 (1935) and *Panama Refining Co. v Ryan* 293 US 388 (1935).

> classified as legislative or judicial or executive. The holy trinity […] encourages us to ignore the difference dynamics governing administrative operations in parliamentary and presidential regimes.[72]

Although the debate about the separation of powers (which continues to be taught in schools and universities) is still present, in most states with a parliamentary democracy the scale has shifted to the executive branch of government, and with privatisation and liberalisation also to independent regulatory and supervisory public agencies. With the global crises and the inefficiency of states in overcoming them, states and thus AL as well have focused on citizens with the sufficiency of interest (public interest groups), on demands for a wider public consultation participation in open government initiatives and the right to public participation as a fundamental right. Transformations are taking place within the increasingly blurred boundaries between the state and society: the division of powers receives more aggressive oversight of the executive and public corporations by the public interest groups, the ombudsman and by the stakeholders who use in their doings not only legal, but also the non-legal, political, formal and informal means.

4.1. The Complexity of AL Power for Foucault

> is not an institution, and not a structure; neither is it a certain strength we are endowed with; it is the name that one attributes to a complex strategical situation in a particular society.[73]

AL with its complexity that has emerged due to its transformations also fits into this frame. Transformations emerge even when we do not want them, and when this happens it is possible to talk about complexity. The complexity of AL as the attribute of power that is present in AL itself, and is reflected in a set of splicing and relating effects (these are evaluated by the normative and factual situation in which the rules should have their effect) should be pointed out. The proportion of these effects is always different, and the same record causes different effects elsewhere or at another time. Effects depend on the rules and reality, on the way the rules and reality intertwine and the way they are perceived and, in particular, on the value judgments by the evaluator and the explainer.

The intertwining of a rule with reality starts with the development of its content, but the rule achieves its true content only through usage and all subsequent exponential repetitions, including all the reverse reactions. This process depends also on the socio-political context in which states exist. In society there are not only forces and the relations of production, but also the multidimensionality of a specific country and time. And this multidimensionality is uncertain in advance, while as such it displaces the principle of legality into the *ex post facto* assessment. With the prevalence of public agencies, the principles of AL are similarly pervasive in public law. The judicial review,

72 Bruce Ackerman, 'Good-bye, Montesquieu' in Rose-Ackerman and Lindseth (n 31) 131.

73 Michel Foucault, *The History of Sexuality, Vol 1: An introduction* (Vintage Books 1978) 23.

reasoned decisions, and regularised processes have become the hallmarks of acceptable legal action, however all of them still contain some ‘meta’ elusiveness that can be seen also in criminal law, where it would not commonly be expected:

> In a legal culture that is firmly committed to judicial review, wedded to reasoned decision making, and devoted to a fair and regular process, there is little space for the exercise of unreviewable legal power that is dispensed without reason and without the need to be consistent. Yet those are the hallmarks of three central means by which mercy is exercised in criminal matters: jury nullification, executive clemency, and prosecutorial discretion not to charge.[74]

Facts, which we compare with rules, are outside the law, and the same applies to unspecified legal concepts, discretion and legal principles. If the principles, undefined legal concepts, discretion, standards, best practices, and similar intangible examples have so far represented a device for the adaptation of general rules and their interpretations at a national level, they are now increasingly moving to the transnational and international levels. Restrictive measures, the Euro area, credit ratings, the protection of human rights, economic measures, financial discipline et cetera are gaining broader meaning. The rule of law/*Rechtstaat/Etat de droit* remains indifferent if it is not compared through human assessment with the consequences of the practical application of the above-mentioned concepts. At a time when all is subjected to measurement, evaluation, quality, excellence, and similar concepts, which were based on Taylor’s scientific management evident already from the beginning of the last century (above, these elements were referred to as the means in the objective meta-side of AL), it is again necessary to draw attention to the human and his or her value assessment without which there is nothing to be measured (one is reminded of Waldo’s ‘efficiency for what?’[75]). Without goals and criteria that *we* set for ourselves in the neutral world we cannot tailor our future.

One abstraction that resists empirical measurement is the notion of human rights, although it has been increasingly subordinated to the pragmatic aspect (in terms of reducing the standards of protection after the September 11 events in the USA).

> In matters pertaining to the law, modern culture operates within a peculiar tension, almost a contradiction. Even as it is increasingly determined by an empirical and, moreover, pragmatic style of thought, it nevertheless recognizes moral principles such as human rights, which are distinguished by their being categorically binding and which precisely because of this do not bend in the face of empirical and pragmatic thinking. Human rights have the rank of categorical principles of law, and insofar form a counterpoint within modern legal culture.[76]

Only through a common denominator which is located between the law and morality, between the law and facts (subjective and objective) can the above-mentioned tension

74 Rachel E. Barkow, ‘The ascent of the administrative state and the demise of mercy’ (2008) 121 Harvard LR 1332 at 1338.

75 Dwight Waldo and Hugh T. Miller, *The Administrative State: A Study of the Political Theory of American Public Administration* (Transaction Publishers 2006).

76 Otfried Höffe, *Categorical Principles of Law: A Counterpoint to Modernity* (Mark Migotti trs, Penn State Press 2002) 1.

either be left alone or resolved. Human rights themselves are a warning that reminds us not to bet all cards on formal rules, although they are indispensable for the full implementation of rights. Solely by requiring a bounded and/or legal functioning of the administration cannot solve the vagueness of legal concepts; thereby we would miss the essence of human rights protection – the rights must be balanced with each other and the public interest in specific cases and their circumstances. Both institutes can be a means of facilitating as well as violating each other, whereas the main means is human thought. It must be open-minded to be able to deal with the complexity, flexibility, and vagueness of today's concepts. Development moves faster than we are willing to admit. In times of globalisation, when states are increasingly under its influence, when 'Brussels', international organisations and capital markets dictate the pace of national states, we remain within the frame of apparent sovereignty, centralisation of power and the holy trinity of power-sharing, despite the fact that on-going global connections are operating within a network, a polycentric structure with numerous and a plurality of actors.

The era of globalisation, rapid change, complexity of the surroundings and volatility increases brings with it the importance of a (powerful) administration, to which the legislature is forced to render more competences and delegate more legislation. From these positions resulting from the individual's consciousness and directed at the community, it is easier to understand the idea of *change* [author's emphasis] from legal centralism into legal pluralism, as a situation in which multiple (in)formal systems with all their effects are simultaneously present. We can all imagine the notion of good, while we and/or every state reach for it in our/its own way. Before the concept of AL, in which there is a formally established legislator's intent present, the notion of the good for the community (that is formally expressed in the concept of the public interest) was located in the communities themselves. 'Meta AL' with its properties is very similar to chaos theory which studies the behaviour of dynamic systems that are highly sensitive to initial conditions, rendering a long-term prediction in general impossible. This also happens in AL even though it is deterministic, meaning that its future behaviour is fully determined by its initial (legal) conditions, with no random elements involved. The deterministic nature of systems does not make them predictable, although they always have or hide order in themselves.[77]

4.1.1. Cultural conceptions of administrative law

Cultural theory can help to describe the complexity of AL (the subjective and objective sides of it at the same time) because it has the same denominator: inherited ideas, beliefs, and values which bind society together. These are also present in AL that binds us to one another through the public interest and solidarity. To cultural theory, the boundary between the legal and the non-legal is not self-evident because it is *socially* [author's

77 See generally Ilya Prigonine, *Order Out of Chaos* (Bantam New Age Books 1984).

emphasis] constructed. This construction reflects different predispositions from which people are constructing that boundary, so its position is always in dispute arising from the social context. Although classifications are always culturally constructed, they provide a methodology with which to work. The most famous typology for the distribution of values within a population is Mary Douglas's grid and group analysis[78] which shows the connection between the types of social organisation and the values that uphold them. Her model of the distribution of values gives a fourfold typology of solidarities or four ideal types of cultural bias: individualism, hierarchy, fatalism and egalitarianism:

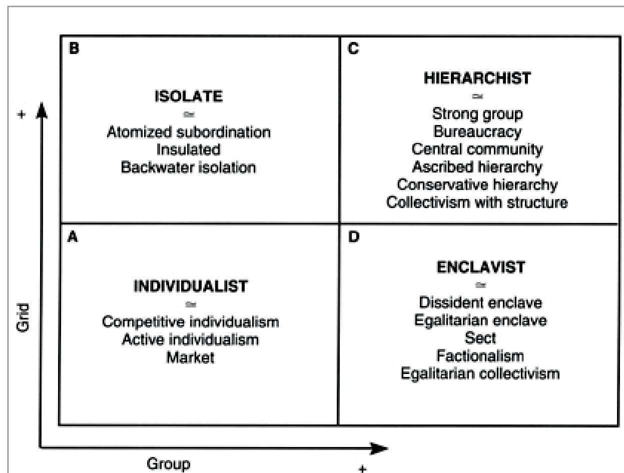

Figure 1: Some synonyms for the four quadrants of grid and group[79]

It is noticeable that Douglas's model fits in with Kaufman's patch procedure:[80] 'It can be a very good idea, if a problem is complex and full of conflicting constraints, to break it into patches, and let each patch try to optimise, such that all patches coevolve with one another'.[81] The optimum patch-size distribution is the edge of chaos: small patches lead to chaos; large patches freeze into poor compromises. He found that a square

78 Mary Douglas, *Natural Symbols: Explorations in Cosmology* (Routledge 2003). The group dimension taps into the extent to which 'the individual's life is absorbed in and sustained by group membership', while the grid dimension is characterised by 'an explicit set of institutionalised classifications that keeps individuals apart and regulates their interactions' in Mary Douglas (ed), *Essays in the Sociology of Perception* (Routledge Kegan & Paul 1982) 202–203.

79 Richard Fardon, *Mary Douglas: An Intellectual Biography* (Routledge 2001) 224.

80 The basic idea of the patch procedure is simple: take a hard, conflict-laden task in which many parts interact, and divide it into a quilt of non-overlapping patches. Try to optimise within each patch. As this occurs, the couplings between parts in two patches across patch boundaries will mean that finding a 'good' solution in one patch will change the problem to be solved by the parts in the adjacent patches. Since changes in each patch will alter the problems confronted by the neighbouring patches, and the adaptive moves by those patches in turn will alter the problem faced by yet other patches, the system is just like our model co-evolving ecosystems. Stuart Kaufman, *At Home in the Universe: The Search for Laws of Self-organization and Complexity* (Oxford University Press 1996) 138.

81 id 144.

lattice, with the same couplings among the parts, which is broken into four patches is the optimum patch procedure. The diagram below presents some of the AL tools that can be used for these ideal types:

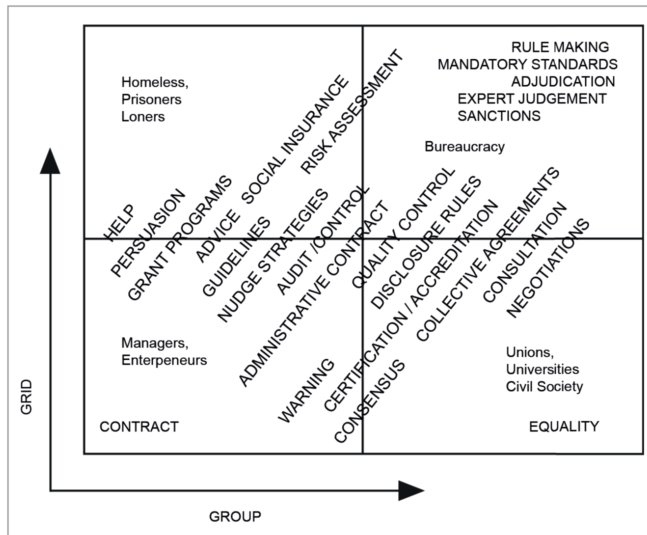

Figure 2: Regulatory tools in grid and group cultural model

The regulatory tools in the square are placed according to the main characteristics of the grid and group model. An analysis of people's preferences (whether they tend to be individualists or loners and/or whether they prefer a relationship of subordination and superiority instead of equality in the group or *vice versa*) would provide an opportunity to choose the most appropriate policies and their corresponding tools. For instance, an online voting platform for people to voice their opinions and choices on political views or similar issues important to them using questionnaires or surveys could help make a better choice of the most appropriate regulatory tools. Regulatory tools keep changing as the result of the ever changing social contexts and people's preferences; thus these tools can never form a final set which would be valid for all times and situations.

5. CONCLUSION

All branches of government are required to meet the rules in their concreteness, while none of them stands alone: the rules are based not only on the abstractly-imagined rational individual (common sense, logic), but also on his concrete specifics (values, ideas, wishes, emotions, needs). In this way the holy trinity becomes a mix of internal and external factors. What significance has this mix of abstract/concrete, subjective/ objective, and rational/irrational connections with the hierarchical but also more and more network-based forms for AL? It, too, is generated within the complex, intertwined

socio-political situations, within case law, legislation and universality of order. This complex whole resides in each individual. The *homo mensura* (Protagoras) approach is all we have – because we are imperfect, because our senses are unreliable, because information is incomplete – such are our approximations to our ideals. Just as we recognise the universality of human rights, they should always be accompanied by a universal public law (it may also be called the public interest, meta-administrative law).

Despite the different legal systems, methods of application and interpretation in AL, it contains universal elements: the public interest, competences, rule of law, rationality, prohibition of excessive interferences, will and intention of the legislature, good faith, diligence, safety, care, transparency, accountability. At a higher level, in the form of transnational linkages, globalisation, polycentricism, global connectivity, interdependence and scarcity of resources, we can provide a new basis for a broader view of the world. Freedom is inextricably linked to its limitation due to its maintenance and expansion. Although AL is still meant as the combination of public authorities and the correct application of public rules, it is also becoming more open to the different organisational forms and methods of the management of society. If AL has always been understood only as a one-way process composed of the actions of authorities, in the future it will also be a two-and-more-ways process directed and re-directed to actions of all its recipients.

Preparedness [author's emphasis] for new forms of legality, transparency, accountability and justifiability of decisions, regardless of the location of decision-making and implementation, is the main issue of our time, to which we must find new answers. The transformation of society is the basic evidence of the meta-presence of AL. We can all make a difference for a better tomorrow. For AL, this means that we must find what relations between the state and society and between the state and public institutions are *de facto* present in its daily implementation. There is much to be done and lawyers are not the only part of AL. We do not know enough about the psychological, economic, and other factors that have their (potential) role in AL. Despite the fact that we cannot know everything about AL, we must use it for the good of the people. In this way we will know more than we know today. Therefore, we should dare, hope, and care for the people, test AL, and use it again and again. Having said that, Scalia's quote from the beginning of this article is only partially right: AL is far from being dull (it can be very interesting even for those who are not lawyers: it is implemented in life mainly through people who are non-lawyers and who can be seen as the inspiration behind legal corrections), though it really needs a great deal of persistence.