THE NOTION OF ADMINISTRATIVE LAW:

Administrative Law can be defined as a group of laws, rules and regulations characterised for being applied to every legal relation where at least one public body is involved.

Administrative Law is part of the so called 'public law'. It is the 'common' law of the public administration, and it is broadly a statutory law.

The administrative legal system collects concepts and institutions from other legal systems such as civil law, criminal law, or even labour law. At the same time, it is self-sufficient; there is no need to bring rules from other areas of law to fill in the gaps.

Theoretically speaking, public law affects society as a whole. While private law affects individuals, families, or small groups, in their interactions with each other. Thus, public law deals with people's dealings with their government, as well as dealings between the government's institutions. It also applies to dealings between the different branches of government.

The following are the distinguishing **elements of Administrative Law**, with regards to other legal systems and codes:

a.- **Privileges and powers** in favour of one of the parts of the legal relation, the public administration.

Administrative law acknowledges the privilege of self-enforcing. Under administrative law the burden of challenging administrative decisions shifts to the citizen. Administrative law conflicts are addressed in a special way. Plaintiffs must appeal first before the upper administrative body, and only later, once exhausted the administrative channel, are allowed to bring the case before the Administrative Courts or Judiciary.

b.- **Burdens and limits** affect the public administration.

Administrative bodies have both, a positive and negative link to law. They are obliged not only not to do what the law forbids, which is a common place, but to enforce the law. The Administration cannot waiver the implementation of its responsibilities and powers. Administration lacks free will, unlike citizens.

Administrative law brings about lots of formal and procedural burdens, as well as strict financial conditions. Expenses are subject to the public budget.

KEY FEATURES:

a.- Administrative Law can be regarded a **'proactive**' law.

Its rules endorse public intervention on society and economy. Three types of public interest activities characterise administrative action: limiting, promotion and public services provision. Public bodies have specific mandates and grant broad powers. The main sources of Administrative Law are regulations, plans and programs, agreements and contracts, and administrative decisions.

b.- **Efficacy and efficiency.**

Many Administrative Law institutions are strictly linked to these principles. Efficacy means that every public body must act accordingly to the assigned goals. Efficiency means that targets must be met maximising benefits and minimising costs.

The public administration´s targets are not comparable to those of the private companies. It is perfectly possible that administrative policies give rise to financial losses or result in lack of economic benefits. What is relevant is that the public service is completely fulfilled to the lower financial cost possible.

c.- **Public interest.**

The public interest is the purpose of every administrative action. And consequently, it is the aim of the Administrative Law. Defining the public interest is not easy and may vary in time and place. Under the rule of law and constitutional systems it is broadly defined by fundamental and socio-economic rights and principles.

Every administrative decision must have a reason to show that it is really founded in the public interest. If not, the citizen might challenge the decision.

d.- **Open government, public accountability and public participation.**

The public administration manages the public interest and, what´s more, the public budget. Therefore, public officers deal with the money of all the citizens and have to use all the resources effectively. Citizens have the right to know how officers manage their money, and the law should provide accurate proceedings to make it real.

ADMINISTRATIVE LAW VALUES AND BENEFITS:

There are some values that are expected, by the community, to characterise the Administrative Kaw system, which focuses particularly on the way in which decisions are made in the public sector

- lawfulness
- fairness
- equal treatment
- rationality
- openness and transparency
- efficiency

Thus, the administrative law system has been identified as having the following benefits:

- it provides a mechanism for achieving justice in individual cases by enabling people to test the lawfulness and the merits of decisions that affect them
- through the provision of feedback to decision makers, it improves the quality of government administration
- it provides a mechanism for ensuring that the government acts within its lawful powers

- it contributes to the accountability system for government decision making

Administrative Law aims to enhance justice, good governance, lawfulness and accountability.

PROBLEMS REGARDING ADMINISTRATIVE LAW:

In order to grant these principles, any administrative statement or decision has to follow a **formal proceeding**, that means a series of procedural decisions and parties' acts. The administrative proceeding is a group of formal steps leading to the definitive decision. All the documents (physical or electronic) except for the definitive decision are procedural stages intended to build a reasoned and fair definitive decision.

Every single democratic state has a regulation of administrative proceeding. Some of them have created a regulatory structure mostly based on case law, such as the common law countries and others such as France or even the European Union. Others, however, have created a legal framework so to deal with procedural aspects. This model is adopted in the USA, Germany, Italy (1990 law) or Spain.

Administrative proceeding tries to maximise the so called 'general interest' and it is a relevant tool to protect citizen´s rights, since it allows them to know all the fundamentals of the case and to actively participate, lodging allegations, and even appealing to upper authorities. Moreover, proceeding helps monitor administrative actions.

But, despite being essential and necessary, administrative proceeding certainly creates bureaucratic burdens and may impede citizen's quick access to a final decision or judicial review. Excessive red tape is negative for the economy as well. That is the main reason why sometimes, agencies try to "flight from Administrative Law" … by moving into private law.

The traditional view of Administrative Law is that its mechanisms apply only to public sector agencies, leaving private law remedies, including tort law, contract and consumer protection legislation to govern activities outside the public sector. That view is increasingly being challenged.

ADMINISTRATIVE LAW GETAWAY:

So far, excessive procedural burdens have been a good pretext to what is named as: '*administrative law getaway*'. The flee from Administrative Law is common when it comes to creating and operating public entities under private law schemes, and tactically using private law in regular legal relations such as contracting out, staff regulations, etc.

This phenomenon is also known as 'privatisation' and can manifest itself in different ways: de-publication of services, adoption by the administration of typically private forms of organisation (companies or foundations, for example) and the externalisation of the administrative activity itself through collaboration (usually contractual) with private parties. In short, privatization is the transfer of public services or assets to private ownership or management.

Not only does this result in a loss of identity (and force) of Administrative Law, but there are also consequences for the guarantees and rights of citizens, both the recipients of the service provided and the potential providers, which are now subject to private law and, therefore, to its principles. Privatization transfers responsibility for services traditionally managed by the government to private entities. This can blur lines of accountability, as private entities are not directly subject to public sector oversight mechanisms like parliamentary or budget scrutiny.

Certainly, the performance of public functions through private organisational forms, which are used as an instrument of the Administration, are sometimes used in purpose to avoid the application of the major 'burdens' of Administrative Law (slow and bureaucratic operation, staff selection requirements and the need to comply with the requirements of the public administration). However, by escaping from red tapes, they avoid also guarantees for the citizen (such as proceedings, public liability regime or budgetary control).

One of the most obvious manifestations of privatisation is the decline of the interventionist state and its retreat into a regulatory role or, to use a famous expression: the emergence of the subsidiary state.

Public service was, before being a legal notion, the response to a social need motivated in Europe by the outcomes of industrial revolution in the 19th century. Back then, the growing volume of welfare demands, the necessary improvement in working conditions and an incipient technological revolution that allowed improvement in service infrastructures in terms of communication (railways, roads and shipping) and energy (gas, electricity and other supplies), were determining factors that definitively convulsed the relationship between State and society. This change entailed a radical transformation in the conception of administrative activity. The public administration, as the executing arm of the new social shaping mission, became the owner and manager of the social benefits and services that were considered essential for the community and needed to be 'protected' from the exclusionary rules of the market.

The legal technique that made this enterprise possible was, in France, the public service. At that time, public service came to be fully identified with the entire administrative function. All Administrative Law was seen through this prism (administrative organisation, for example, was the organisation of services; it was public service that determined the extent of judicial review, etc.). The classic conception of public service was based on a subjective element (a public person), a material element (an activity of general interest) and a legal element (subjection to Administrative Law). Public services were supposed to be compulsory, general, uniform, efficient, universal, accessible, regular and quality.

An idea just opposite to this French view was that of the American public utilities. There, the starting point is a defence of the market and private initiative, in favour of relegating public authorities to regulatory functions. Thus, when free competition is not capable of guaranteeing the provision of basic services, administrative intervention is accepted, but not to provide the service, but rather to impose obligations and limits on the private companies providing these services for reasons of public interest. These ideas eventually spread their influence on the European Union.

The European Union has coined the doctrine of services of general interest, which it sees as an essential element of the European model of society. The construction is based on a functional approach (what is characteristic of the service and what will condition its regulation is not who provides it, whose ownership it is or its public/private legal regime, but rather that it corresponds to general interest needs) and therefore, on a generally liberalised market, rules can be established which derogate from free competition and which are precisely called public service obligations.

Services of general interest may be of an economic nature or a non-economic nature. If they are not directly economic in nature, free competition does not apply, although the principles of non-discrimination must be respected. This is a dynamic boundary, but education, health, social and cultural services are generally considered to be non-economic. In these areas, the freedom of each State to define public service obligations and to organise itself, even with exclusive rights for certain entities, is greater.

Among the economic services of general interest, network services (transport, postal services, energy, telecommunications, etc.) stand out, which can be publicly or privately owned and are subject to strict regulation (so much so that they are often referred to as regulated sectors) in order to impose public service obligations and, where appropriate, universal service obligations. To minimise risks, the EU has established a principle of separation between regulators, entrusting this function to independent Authorities, and has also separated infrastructure owners and service managers, forcing market liberalisation, based on free competition.

Today, and despite the fact that the end of public service has been announced many times, the legal category still exists, albeit it has changed a lot. This has given way to a more restricted notion of public service, which identifies it only with publicly owned activities whose direct object is the material provision of a service to citizens as users, while management may be private and subject to payment. Frictions arise above all in periods of budgetary restrictions, when even the pillars of the Welfare State, which were created precisely to protect those groups that have been expelled from the market dynamic, are called into question. Difficulties also arise due to the permeable barrier with public industrial and commercial activity and with private services of public interest, or the so-called improper public services, such as taxis and pharmacies.

One risk of privatization is that corporate industries can wield significant influence over regulators, potentially leading to regulatory capture, where regulators act in the interests of the private companies they oversee. This challenges the role of administrative law, as it must ensure regulators remain impartial and uphold public welfare.

EXTENSION OF ADMINISTRATIVE LAW

We can appreciate also a countermovement of the Administrative Law getaway. Indeed, mechanisms already developed in Administrative Law have been adopted by the private sector, for example, industry specific ombudsmen and other complaint-handling schemes as well as use of codes of conduct, the development of ethical cultures or the use of statements of reasons

Furthermore, as the role of government and the private sector blur, the community has increasingly begun to expect private corporations to provide similar protections for their

interests as provided by government and to be accountable for themselves in ways traditionally limited to the public sector. Yet while the private sector itself has had recourse to administrative law to manage its relationship with the public sector, it has not traditionally seen itself as being regulated by the same administrative law principles. As the division between public and private activities becomes more problematic, it is timely to consider the extent to which private corporations, by borrowing public sector concepts and values, are developing a new model of private sector accountability.

In such a scene… which are the characteristics of today Administrative Law? Should we still talk about public activity as a part of Public Law or inside of a Welfare State? Is the public/private distinction overemphasized? Was that distinction useful at one time, but increasingly less so? Is the public/private law choice important regarding citizens equality and vulnerability?