INSTITUTE FOR LEGAL AND POLITICAL SCIENCES (ICJP)
LISBON UNIVERSITY FACULTY OF LAW (FDUL)

Lisbon Meeting on
ADMINISTRATIVE PROCEDURE

"FUNCTIONS AND PURPOSES OF THE ADMINISTRATIVE PROCEDURE: NEW PROBLEMS AND NEW SOLUTIONS"

Prof. Dr. Sabino Cassese, Prof. Dr. Veith Mehde, Prof. Dr. Carol Harlow,
Prof. Dr. Pascale Gonod, Prof. Dr. Vasco Pereira da Silva, Prof. Dr. Steffano Battini,
Prof. Dr. Gerdy Jurgens, Prof. Dr. David Duarte

Lisbon 2011

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PREFACE

In last June, the Lisbon University School of Law had the opportunity to host for a single one day conference some of the most interesting european legal scholars in administrative law. The opportunity was the "Lisbon Meeting on Administrative Procedure", an event organized by the editors of this e-book, a small conference which had as main subject the "New Purposes an New Functions of the Administrative Procedure".

In 2011, the Lisbon University School of Law, in association with the Institute Legal Political Sciences of the Lisbon University School of Law, organized for the first time a pos-graduate course on Administrative Procedure, with the contribution of local scholars and legal practitioners. The conference was the final event of this course, giving to students and to the general public interested in administrative procedure the occasion to access to foreign experiences on the matter and the chance to exchange ideas with the foreign scholars that honored the organization by accepting the invitation to be present.

As it is thought, the pos-graduate course will continue in the next years and, consequently, this e-book might be the first of many, collecting the interventions made and allowing them to be known worldwide. In this e-book, therefore, there are all the speeches made in the 2011 «Lisbon Meeting on Administrative Procedure» and we firmly hope that this publication, regarding the quality of the papers, can be a useful tool to the transnational dialogue on the administrative procedure and its evolution.

The Coordinators

Vasco Pereira da Silva
David Duarte

Lisbon, the 6th December 2011

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LISBON MEETING ON ADMINISTRATIVE PROCEDURE

"FUNCTIONS AND PURPOSES OF THE ADMINISTRATIVE PROCEDURE: NEW PROBLEMS AND NEW SOLUTIONS"

Coordination:
Prof. Dr. Vasco Pereira da Silva
Prof. Dr. David Duarte

JUNE 3rd, 2011
FACULDADE DE DIREITO DA UNIVERSIDADE DE LISBOA
LISBON, PORTUGAL

PROGRAM

09.45: Opening session:

- Prof. Dr. Eduardo Vera-Cruz Pinto (Dean of the University of Lisboa School of Law)
- Prof. Dr. Jorge Miranda (President of the Instituto de Ciências Jurídico-Políticas)

10.00: Morning Session:

- Chairman: Prof. Dr. Sabino Cassese (Corte Costituzionale della Repubblica Italiana)
- Prof. Dr. Veith Mehde (Leibniz Universität Hannover)
- Prof. Dr. Carol Harlow (London School of Economics)
- Prof. Dr. Pascale Gonod (Université Paris 1 Sorbonne)
- Prof. Dr. Vasco Pereira da Silva (University of Lisbon)

13.15: Lunch break

15.15: Afternoon Session:

- Chairman: Prof. Dr. Marcelo Rebelo de Sousa (University of Lisbon)
- Prof. Dr. Steffano Battini - (Università degli Studi della Tuscia)
- Prof. Dr. Gerdy Jurgens (Universiteit Utrecht)
- Prof. Dr. Rafael Barranco Vella (Universidad de Granada)

18.00: Overall debate:

- Chairman: Prof. Dr. David Duarte (University of Lisbon)

  Prof. Dr. Sabino Cassese, Prof. Dr. Veith Mehde, Prof. Dr. Carol Harlow, Prof. Dr. Pascale Gonod, Prof. Dr. Vasco Pereira da Silva, Prof. Dr. Steffano Battini, Prof. Dr. Gerdy Jurgens, Prof. Dr. Rafael Barranco Vella

Functions of administrative procedure: introductory remarks

To introduce this seminar, I shall make three points: the first on administrative proceduralization, the second on the regulation of administrative procedure, and the third on the ambiguities and paradoxes of this regulation.

Throughout the world, administrative proceduralization is increasing. Procedures are at the center of contemporary administrations.

This is due to two different factors. The first is the increasing complexity of administrative structures. As administrative complexity increases, it becomes important to establish which office acts first, which second, which third, and so on. In the European context, there is additional complexity, due to national-European shared or composite procedures.

A second factor is the weakness of representative democracy and the need to give the people a voice before decisions are taken (deliberative democracy). Deliberative democracy complements representative democracy. Administrative rights complement political rights.

Proceduralization has benefits and costs. It establishes well-ordered links between different bodies that are not necessarily hierarchically ordered, and gives the people an opportunity to be heard. But proceduralization also has costs: "one stop shopping" is less cumbersome than a procedure, because it requires less time and expenses.

As the operation of administrative bodies is more and more proceduralized, administrative procedure is undergoing increasing regulation. The regulation of administrative procedure is part of the 20th-century revolution in government.

The regulation of administrative procedure raises five questions.

First: what do we mean by regulation of administrative procedure? By this term, we mean a phenomenon akin to that described by the United States Administrative Procedure Act: not *ad hoc* regulation of each proceeding (e.g. in relation to specific sectors such as urban planning or environmental regulation), but a body of general principles that apply – at least in principle – to all types of administrative proceeding.

Second: what is the purpose of a general regulation of administrative procedure? A general regulation of administrative procedure may have four different purposes: to establish an order between different administrative bodies or to regulate the relevant sequence of acts (that is, establish an ordered list of events); to set standards that must subsequently be reviewed by independent courts (it is their job to review procedural irregularities, errors or flaws); to fill the gaps left by judicial review – courts can review only a very limited number of executive decisions (moreover, their decisions are necessarily *ex post*); to guarantee new rights for the people (e.g. the right to be informed may, in concrete, entail the right to disclosure of official documents or the right of access to documents; the right to be heard, the right to a hearing; the right to receive a reasoned decision may in turn give rise to a duty, imposed on the administration, to provide reasons for every decision that it takes). The last function becomes predominant in every country, because the regulation of administrative procedure becomes instrumental to the rights of citizens vis-à-vis the executive: "freedom grows in the interstices of procedure".

As for the third question that arises: why do some countries have an act that regulates administrative procedure, and others do not? Consider countries that do have an administrative procedure act and the years in which these were enacted: Austria, 1925; Poland and Czechoslovakia, 1928; Yugoslavia, 1930; USA, 1946; Hungary, 1957; Spain, 1958 and 1992; Switzerland, 1969; Germany, 1976; Italy, 1990. Countries such as the United Kingdom and France do not have a statute that regulates administrative procedure. While the case of the former country can be

explained by reference to the traditional British criticism of written constitutions and bills of rights and to their reliance on the courts as regulators, for France, the only explanation to be found can be traced to the traditional French deference *vis-à-vis* the executive, and the self-restraint displayed by the French Parliament in the regulation of internal administrative matters.

The fourth question: is there a minimum content (a minimum set of principles) that legislative regulation of administrative procedure must present? The answer is affirmative: an act regulating administrative procedure must regulate, at least, the right to be heard. This assumes that the State cannot be governed by the legislature alone: the executive branch of government is not a mechanical executor of statutes enacted by Parliaments. It is also under a duty to hear all interested parties (as occurred in the United States Overton Park case, of 1971; against the Chevron case, 1984). A similar development occurred in France, where there is no act that regulates administrative procedure, but there is a statute that regulates the "*débat public*", in a very similar fashion to that envisaged by the American interest representation model. The regulation of the duty to hear can produce a judicialization of administrative procedure: in the USA, the "hearing officer" has now become an "administrative law judge".

As for the final question: does the regulation of administrative procedure present a global dimension? Again, the answer is affirmative. Consider the effort made by the Council of Europe to establish a standard code for administrative procedure ("The administration and you", 1996), or the General Agreement on Trade in Services and the Trade-related aspects of Intellectual Property Rights Agreement 1995, that establish global standards for national administrative procedures; or the Internet Corporation for Assigned Names and Numbers (ICANN)'s by-laws, that contain a detailed set of rules on ICANN procedures.

The regulation of administrative procedure is full of ambiguities and paradoxes. First, this regulation runs counter to the common trend towards de-regulation and simplification. Second, regulation through statutes and statutory instruments overlaps with judicial regulation (this area of law is very much under surveillance

on part of the courts, that establish and develop principles for administrative procedure, such as proportionality and good administration). Third, regulation by means of statutes implies certain stability, while administrative procedure acts are subject to frequent amendments (the 1990 Italian act has been amended ten times in twenty years).

Sabino Cassese

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A legalistic tradition facing the managerialist challenge – The German Case

Introduction

Since the socialist administration has ceased to be an ideologically relevant and practically identifiable type, the typology of public administration has been shaped by one remaining divide: the one between legalistic and managerialist systems[1]. Although this characterisation cannot claim to be all-encompassing and although administrative systems regularly are permeable to influences from the respective other side, the typology is linked quite clearly to certain groups of countries. Traditionally, the USA, the UK and most of the Commonwealth countries are referred to as the Civic Culture administrations. In contrast, the continental European administrations are named the "classic" ones[2] as they have survived various political systems without major organisational changes. Therefore, while in the latter countries bureaucracy is older than democracy, in the Anglo-Saxon world it is, above all, the continuity of the democratic political structures which has guaranteed the subsistence of the administrative system[3]. In the present discussions about the reform of public administration and its future role in society, many of the concepts revolve around the dichotomy of managerialist systems on the one hand and legalistic ones on the other. The divide between the states that fall into one of the two categories takes shape along the same line as the one between the continental and the Anglo-Saxon types of administrative systems[4].

Recent developments in the field of administrative reforms are testimony to the fact that concepts which seem primarily suitable for the one type of administrative systems can become very influential in the other one as well. The managerial

[1] See König, Klaus, On the Typology of Public Administration, IRAS 69:4 (2003), pp. 449-462., 2003; Raadschelders, Jos C.N., Government: A Public Administration Perspective, Armonk, New York, London, England: M.E. Sharpe, 2003, pp. 189 ff.
[2] Heady, Ferrel. Public Administration: A Comparative Perspective, Sixth Edition 2001, New York/Basel: Marcel Dekker, Inc., pp. 192 ff.
[3] König, op. cit., p. 451.
[4] Derlien, Hans-Ulrich, German Public Administration: Weberian Despite "Modernization". In Comparative Bureaucratic Systems edited by Krishna K. Tummala. Lanham, Boulder, New York, Oxford: Lexington Books. 2003, pp. 97 – 122, at 119.

revolution caused by New Public Management[5] and the efforts summarized by the phrase "Reinventing Government"[6] generate an outstanding example of such "spill-overs". The waves of NPM, though, have not hit all countries with the same force. Some countries are in fact barely influenced at all or seem to pay only lip-service to the reform ideas. Some of the countries with - by most standards - the least efficient public administrations have been among the slowest to reform[7]. This might at least partly be a consequence of the fact that '[t]here is a prima facie tension between legal values and the new public management'[8].

Nevertheless, NPM has not only reinvigorated the influence of management theory in Civic Culture administrations[9] but has also set the agenda for managerialist reforms even in the classical or legalistic administrative systems[10]. One of the countries where the reform agenda has set out to change the administration fundamentally is Germany, whose administrative system seems legalistic in an almost idealistic way. The "clash of concepts" caused by the managerialist paradigm in legalistic environments is the subject of this article. If it is true that '[a]dministrative law is directly linked to the dominant theory of the state in vogue at any given point in time'[11], then a whole-hearted adoption of NPM ideas surely might affect the legalistic features of the administration. The German experience will be analysed in a detailed – and at the same time – exemplary fashion, i.e. with a view to assessing the challenges NPM creates for all administrative systems that have developed in a legalistic tradition.

[5] For a account of the central elements of the concept see Hood, Christopher, A Public Management for all Seasons?, Public Administration 69 (1991), pp. 3 – 19.
[6] See *Osborne, David E. and Gaebler, Ted. 1993. Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector, New York: Plume.*
[7] Hood, Christopher and Peters, Guy. The Middle Aging of New Public Management: Into the Age of Paradox? Journal of Public Administration Research and Theory 2004, 14(3), pp. 267 – 282, at 273; Hood, C. Paradoxes of public-sector managerialism, old public management and public service bargains. International Public Management Journal 2000, 3 (1), pp. 1 – 22, at 5.
[8] MacLauchlan, H. Wade. Public Service Law and the New Public Management. In The Province of Administrative Law edited by Michael Taggart. Oxford: Hart Publishing. 1997, pp. 118 – 133, at 118.
[9] Frederickson, H. George and Smith, Kevin B. The Public Administration Theory Primer. Boulder, Colorado and Oxford: Westview Press: 2002, pp. 119 ff.; Caiden, Gerald E. and Caiden, Naomi J. Toward More Democratic Governance. Modernizing the Administrative State in Australia, Canada, the United Kingdom, and the United States. In Public Administration: An Interdisciplinary Critical Analysis; Vigoda, Eran Ed. New York and Basel: Marcel Dekker, Inc. 2002, pp. 37 – 61, at 45 ff.
[10] Jreisat, Jamil E. Comparative Public Administration and Policy. Boulder, Colorado and Oxford: Westview Press: 2002, pp. 144 ff.
[11] Aman, Jr., Alfred C. Administrative Law for a New Century. In The Province of Administrative Law edited by Michael Taggart. Oxford: Hart Publishing. 1997, pp. 90 – 117, at 92.

Some remarks about the meaning of "legalistic"

The "legalisation" of organisations which as a result makes them appear "legalistic" is a common feature in modern societies. In general, the terminology expresses the fact that legal considerations play a significant – some may say an ever greater – role in organisational decision-making and thereby influence the actions that are taken by this organisation and its members[12]. This trend is not restricted to the countries that are traditionally regarded as standing in a legalistic tradition as far as their political and administrative institutions are concerned. As regards the private sector, anxieties about potential legal challenges are particularly strong in the almost proverbially managerialist USA, not least because of the potentially ruinous amount of so-called 'punitive' damages the courts are prepared to award.

In contrast, the legalistic tradition referred to in this article is linked to specific characteristics of the German public administration. 'Legalistic' as a feature attributed to public administrations – despite the variety of theoretical perspectives dealing with the phenomenon and despite the multitude of dimensions covered[13] – refers mainly to the role the law plays in administrative organisation and decision-making[14]. In this way, the characteristics of the legalistic type bear resemblance to the idealistic form of bureaucracy described by the German lawyer and sociologist Max Weber[15], so that classic or legalistic administrations can be referred to as Weberian ones[16]. Although the observation that '[u]nlike most interventions of the modern era, the rationalist, hierarchical Weberian state is seldom admired'[17] also applies to Germany, there is no doubt that many of the characteristics of the Weberian ideal constitute a fundamental part of

[12] Sitkin, Sim B and Bies, Robert J. The Legalization of Organizations: A Multi-Theoretical Perspective, In The Legalistic Organization, Sitkin, S.B and Bies, R.J. Eds., Thousands Oaks/London/New Delhi: Sage, 1994; pp. 19 – 49, at 20.
[13] Ibid.
[14] See e.g. – with regard to ancient China – Fu, Zhengyuan, China's Legalists: The Earliest Totalitarians and Their Art of Ruling, Armonk, New York, London, England: M.E. Sharpe, 1996.
[15] Weber, Max Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie, 1. Halbband, 5th Ed., Tübingen: J.C.B. Mohr (Paul Siebeck), 1976, pp. 124 ff.
[16] Heady, opt. cit., pp. 192 ff.
[17] Holland, Ian. Values, Institutions and the State. In Government Reformed: Values and New Political Institutions edited by Holland, Ian and Fleming, Jenny. Hants and Burlington: Ashgate, 2003. pp. 1 – 19, at 2.

the German administrative past and present[18]. This is certainly true with respect to the function fulfilled by rules in the administrative system, whether it be legal norms in the strict sense or the internal regulations that govern administrative proceedings.

From this perspective, it is one of the characteristics of the legalistic administration when faced with any new challenge to ask at the outset what the law says about this situation. In contrast to this approach, managerialist administrative systems might be described as being mainly preoccupied with pragmatic problem-solving and as enjoying ample leeway for decision-making, which is matched by an equivalent amount of individual accountability[19]. Civil servants from legalistic backgrounds are therefore often ridiculed as pale administrators in grey suits that sit in their offices, communicate only in writing, and force factual situations into the framework established by legal norms. In contrast, public managers are characterised as dynamic people who get to grips with the real problems and work towards a practical solution that then might be called 'unbureaucratic'.

In the case of the German administration, the characterisation as a legalistic system might also be deemed appropriate because of the fact that the majority of civil servants from the higher ranks of the public administration are lawyers[20] – a fact that has pejoratively been described as "Juristenmonopol" (lawyer's monopoly) or – in a less biased fashion – as "Juristenprivileg" (lawyers' privilege)[21]. Even the members of the "gehobener Dienst" (higher-level civil service), which comprises the civil servants of the middle ranks educated at state-owned polytechnics for public administration traditionally, are primarily trained in the application of legal and administrative norms. Therefore, it is hard to imagine any German writing a sentence like the one Rosenbloom has formulated with regard to the training of public administrators in the USA: 'Public administration courses and programs

[18] See Derlien, op. cit., pp.114 f.
[19] See Feldheim, Mary Ann. Downsizing in the Public Sector: Implications for Public Administration. In Handbook of Public Management Practice and Reform edited by Liou, Kuotsai Tom. New York/Basel: Marcel Dekker, Inc. 2001, pp. 493 – 512, at 496 f.
[20] See Derlien, op. cit., pp. 107 f.
[21] Mehde, Veith Neues Steuerungsmodell in der Verwaltung – „Juristenprivileg" in der Kritik, Zeitschrift für Rechtspolitik 1998, pp. 394 – 398.

generally emphasize management and the political context in which administrators operate'[22]. This implies far more than a question of the influence a specific academic profession acquires in the training of civil servants. The dominant educational background is of prime importance with regard to the culture that exists in an organisation and the approach taken in the course of administrative decision-making. Starting off by determining the relevant legal norms shapes the whole process in a completely different style than would be the case if the main focus were on problem solving.

"Legalistic" in legal terms

While the features mentioned so far describe the characteristics from a point of view that is mainly influenced by administrative science, there is also the – generally far less recognised – strictly legal explanation as to why public administration in Germany is regarded as legalistic. Legal thinking about the German public administration is governed by two meta-principles: the Rechtsstaat – a concept that can best be translated by the English expressions "rule of law" – and the constitutional principle of democracy. According to Art. 79 sec. 3 of the Basic Law, both principles are unalterable, i.e. the rules that govern the conditions for changes of the constitution do not apply to these principles. This is particularly remarkable because generally the German constitutional framework is rather flexible. Changes to the constitution have been frequent and are – compared to many countries with a written constitution – relatively easy to pass, namely by a two thirds majority in both houses of the German parliament.

The least obvious, but an undoubtedly crucial connection that is characteristic of the legalistic model in Germany, is the one between hierarchy – and therefore of the Weberian-style bureaucracy – and the democratic principle as established in Art. 20 sec. 2 ss. 1 of the Basic Law. According to the Bundesverfassungsgericht (Federal Constitutional Court), the principle that all power must evolve from the people, in organisational terms translates into ministers being accountable to parliament. Ministerial responsibility fails to generate the intended effects if the minister obtains

[22] Rosenbloom, David H. Administrative Law for Public Managers. Colorado and Oxford: Westview Press: 2003, p. 14.

no equivalent power in relation to the administration he is responsible for. The constitutional court goes on to deduce from these prerequisites of meaningful responsibility the argument according to which the constitution demands the presence of the most direct form of influence ministers can exercise – the power to issue directives both in general terms and with regard to specific cases[23]. Additionally, the binding character of laws serves as a means to relate administrative decisions to the will of the people represented by parliament. In this way, most elements of Weberian style bureaucracy are directly transformed into constitutional imperatives with regard to the organisational structuring of public administration. In other words, administrative reforms that could bring about changes in the legalistic set-up of the German administration face the danger of conflict with constitutional requirements.

What seems to be the most obvious characteristic of the legalistic set-up is the apparent absence of business-style thinking in the conceptual framework for administrative decision-making. The most important elements are deduced from the constitution. The principle of the Rechtsstaat leads to a number of rules the public administration has to comply with. Among these rules are proportionality, the requirement of precision in administrative and legal decisions and the need to give reasons for decisions as well as the prohibition of retroactive actions. In contrast, efficiency or economy are not principles that are explicitly prescribed by the constitution. The only expression of such a legal standard can be seen in Art. 114 sec. 2 of the Basic Law which makes “Wirtschaftlichkeit” (economy) and “Ordnungsmäßigkeit” (correctness) the standard for the controls of the federal auditing office. At first sight, it is quite a compelling argument that the standard for controls must in some way mirror the rules that govern administrative proceedings in the first place. Still, this line of reasoning is no basis for a rule that could alter the application of norms in administrative decision-making. Economic arguments are therefore restricted to the areas where the law leaves scope for administrative discretion and at the same time citizens' rights are not at stake.

The legalistic character of the German administrative system is also nurtured by

[23] Bundesverfassungsgericht E 93, 37 (66 f.).

the complex federalist structure. Far more than in other federalist systems, the various levels of government are intertwined even where they do not co-operate voluntarily. The main division of powers does not follow the distinction between different political fields, but between the legislative power, which rests almost exclusively at federal level, and the implementation of the law, which is dominated by the administrations of the federal states (Länder) and local government. This relationship becomes even more problematic because of the fact that the states and the local governments that depend on them also have to cover all the financial costs this implementation process entails, including the payment of social benefits. In other words, the federal level can make the states pay for its own political agenda. The only mechanisms available to mitigate this conceptual mismatch is the role the state governments play as members of the second chamber of parliament, the Bundesrat, which itself has to be seen as an expression of the "Politikverflechtung". It is hardly feasible to sustain this system if legal norms are not the main instrument to steer the administration and the basis for most control mechanisms. Especially the courts are crucial in guaranteeing that the law is applied properly.

Administrative reform in Germany

The German encounter with NPM-style administrative reforms did not occur before the early 1990s. In contrast to the states characterised as managerialist, the local level has played the most important role, both conceptually and with regard to the questions of implementation. The institution responsible for this was a think-tank financed by local councils, the Kommunale Gemeinschaftsstelle, generally known as KGSt. In 1991, it issued a preliminary report on a New Steering Model[24]. This report was very much inspired by the reforms developed in the Dutch city of Tilburg, which were analysed in an additional report[25]. Local government law, which in the German case falls under the powers of the states, was not a driving force in this context. Rather, it played an enabling and in some regards supporting role, as it described the powers of the councils and the mayor in

[24] KGSt, Dezentrale Ressourcenverantwortung: Überlegungen zu einem neuen Steuerungsmodell. Bericht Nr. 12/1991 1991; see also Das Neue Steuerungsmodell: Begründung, Konturen, Umsetzung. Bericht Nr. 5/1993.

[25] KGSt, Wege zum Dienstleistungsunternehmen Kommunalverwaltung: Fallstudie Tilburg. Bericht Nr. 19/1992.

accordance with the guidelines developed in the concept of administrative reform. Also, as will be described from a legal point of view, the rules governing the budgetary process had to be changed[26].

Reform in Local Government: Basic Elements

The label "New Steering Model" is an appropriate one as the aim of the model is to transform the way in which the steering of administrative processes takes place. The basic idea lies in a clear functional distinction between politicians – namely the member of the council – and the local administration. While the role of the first is to take the key strategic decisions, the latter are expected to have a large degree of autonomy regarding the details of how these strategic goals are to be achieved. Therefore, the NSM was described as being essentially based on the idea of decentralisation inside administration[27]. This decentralisation also related to the budget the various parts of the administration have at their disposal. Instead of the relatively small sums for narrowly defined purposes, the reform concepts argued in favour of bigger budgetary units which can provide much more scope for decentralised levels to allocate the funding and to shift it between the various purposes[28]. The steering mechanism accepted in this model are contracts that are meant to substitute any form of directive aiming at individual cases[29]. These contracts should be concluded between the political level on the one hand and the administrative one on the other, as well as between various levels within the administration. In this way, the budget and the output to be achieved can be linked together in one business-style undertaking. It is regarded as a leadership task within the administration to make sure that the contract concluded with politicians is mirrored by the ones the various parts of the administration enter into. These internal contracts must add up in such a way that the standards which the administration as a whole has agreed to achieve are eventually met.

[26] KGSt, Budgetierung: Ein neues Verfahren der Steuerung kommunaler Haushalte. Bericht Nr. 6/1993.
[27] Bull, Hans Peter Neue Steuerungsmodelle als Teil der Verwaltungsreform?. In Verwaltungsreform – Herausforderung für Staat und Kommunen; Ipsen, Jörn (ed.), Baden-Baden: Nomos, 1996; pp. 69 – 81, at 70.
[28] KGSt 1993b op. cit.
[29] KGSt, Kontraktmanagement: Steuerung über Zielvereinbarungen, Bericht Nr. 6/1998.

This new steering mechanism is accompanied by a number of different management tools that are supposed to serve as a sort of compensation for the loss of detailed budgetary steering on the side of politicians. One of the most important tools is a systematic controlling that is expected to generate the important information about the output produced and the money spent on a regular basis[30]. On the organisational level, the NSM promoted an organisational principle, according to which the task, the power to fulfil it and the responsibility for the output should fall into one hand[31]. This principle mainly aims at abolishing the distinction between the administration units purporting materials tasks and the ones responsible for supplying the resources necessary for this. Its elaboration was a consequence of the observation that too many people in the administration could deny responsibility for poor performance and blame malfunctioning on the lack of resources instead[32]. This lack, it has to be said, seems more severe than ever and undermines the persuasive power that otherwise one might have attributed to this new mechanism.

In what is a new aspect in the debate about administration in Germany, the NSM puts a lot of emphasis on the need to obtain feed-back from the citizens it serves who in this context are called clients. According to the plans, these clients should be asked about their satisfaction with the administrative services on a regular basis. This is linked to a perceived need for quality management[33]. In this way, the administration is seen as continuously improving its performance and at the same time as communicating with the people even at times when there is no election. While this form of responsiveness is directed towards the environment of the public administration, the internal functioning is reviewed especially with regard to the relation between the tasks performed and the costs that are caused.

Efficiency in public service provision was also expected to improve because of the

[30] Seidlmeier, Heinrich and Knauf, Jürgen T. New Public Management in der kommunalen Verwaltung, Berliner wissenschafts-Verlag, 1997, p. 64
[31] See KGSt 1993a, pp. 18 f.
[32] With a famous phrase Gerhard Banner ("Von der Behörde zum Dienstleistungsunternehmen", Verwaltung, Organisation, Personal 1991, pp. 6 – 11 at 7) described the old steering model as a system of "organisierter Unverantwortlichkeit ('organised irresponsibility');
[33] KGSt, Qualitätsmanagement, Bericht Nr. 6/1995.

introduction of elements of competition[34] which had been completely alien to the public sector in general and the various units in the administration in particular. The NSM argues in favour of "true" competition wherever possible, i.e. consumers and politicians can choose where to obtain the required administrative services. As long as this is – for legal or factual reasons – not feasible, competition surrogates are seen as a means to achieve similar effects[35]. These surrogates are expected to take the form of comparisons between the different municipalities, especially by calculating the costs for certain outputs produced by the administration. Because of the effort and the costs it causes to make these comparisons and perhaps because of the fear of rather not positive results, this reform element has never become very influential in practice.

Impact on the Federal/State level

The federal and the state level have followed these proposals to some degree albeit in a pragmatic and rather incremental manner[36]. Generally, one can say that in most cases these developments began with the establishment of commissions for administrative reform. On the basis of their reports, reform programs were started. The reforms at the federal level started in the mid-1990s. Here, the programs were based much more on assumptions concerning the role of the state in the modern world than in the general debate about the NSM. The first discussion therefore followed the *Leitmotiv* of the "Schlanker Staat" (lean state), thereby following the suggestion that the state was doing too much and consequently had to be cut back in order to make it exercise only the key tasks[37]. Also, there was a strong notion that regulation had gone too far and was literally suffocating much needed entrepreneurship. Introducing more flexibility into the budgetary process was another proposal. Conceptually, the whole approach did not break new ground[38]. It is difficult to say precisely how much actually was achieved in this context. Some of the changes in the law could also be linked to the influence of the NSM that had

[34] KGSt Kommune und Wettbewerb: Erste Überlegungen und Empfehlungen, Bericht Nr. 8/1996.
[35] Wallerath, Maximilian, Der ökonomisierte Staat – Zum Wettstreit zwischen juridisch-politischem und ökonomischen Paradigma, Juristenzeitung 56 (2001), pp. 209 – 218, at 213.
[36] Schröter, Eckhard. A solid rock in rough seas? Institutional change and continuity in the German federal bureaucracy. In Politicians, Bureaucrats and Administrative Reform edited by B. Guy Peters and Jon Pierre, London: Routledge 2001, pp. 61 – 72, at 72.
[37] Derlien, op. cit., pp. 116 f.
[38] Schröter, op. cit., p. 62.

become a catchword for many discussions about changes in the functioning of the state.

The work of the expert advisory committee entrusted with the task of producing an operational basis for the "Schlanker Staat" was concluded in September 1997[39]. Almost exactly one year later, the Kohl government lost the general election. The incoming coalition of the Social Democrat and Green parties had always made it clear that they did not believe in a lean state. Instead, the new *Leitmotiv* became the "Aktivierender Staat" (activating state)[40], i.e. a state that does not do everything itself, but feels responsible and tries to encourage civil actors to foster common goals. Although the ideological change became apparent, it was less obvious to see how this translated into concrete proposals for change. In fact, in the reports outlined on the central internet portal staat-modern.de (now: verwaltung-innovativ.de) any reform efforts pursued by the government are linked to this overall topic even if the connection with NPM or NSM is at best vague.

The theoretical and ideological background of German administrative reforms

The NSM was explicitly labelled the German version of NPM, although – as has been shown above – its main focus is on the internal functioning of the administration and its relation with the customer and the councils. In contrast to many approaches linked to NPM, it lacks explicit implications regarding the role of the state. According to the NSM, the state is not necessarily a reduced one, although in Germany - as in most OECD countries - the trend towards privatisation has been strong since the 1980s. But even this development owes more to the need to gather additional financial resources than to a political belief in a presupposed superior efficiency of the private sector. NSM itself says little about the role of the public sector in relation to the private one, although a certain preference is hinted sometimes but never clearly elaborated. In other words, there is far less reason to link NSM to any ideological trend than there is in the case of Anglo-Saxon style

[39] Sachverständigenrat „Schlanker Staat", Abschlußbericht. Bonn: Bundesministerium des Innern. 1997.
[40] Blanke, Bernhard, Erzählungen zum aktivierenden Staat, Verwaltung & Management 15 (2009), pp. 115 – 125.

reforms.

Nevertheless, the reforms were clearly inspired by management concepts. In the face of the heuristic dichotomy of legalistic administrative systems on the one hand and managerialist ones on the other, these initiatives seem to represent a shift in paradigms that are central to the German public administration. Even considering that the history of scientific management has generated a number of differently founded approaches[41], "managerialist" as a label says fairly little about the theoretical beliefs it rests on. There is the notion that administrative efficiency could improve if elements of private sector style management were to be applied. Also, the analysis that the state is doing just too much became very popular. The metaphor "lean state" is the most obvious expression of this analysis. It shows that the discussion about the legalistic character of the German administration for some time now has focussed on a very specific feature. First of all, it is somewhat overshadowed by the increasing difficulties in financing the social benefits. In fact, the lack of dynamics in the German state and society is often not perceived as a consequence of the legalistic tradition, but rather of the dominant character of the welfare state. The second topic that has to be discussed in this respect is also only indirectly related to the legalistic functioning as such. Rather, Germany is described as "overbureaucratic" in the sense that too many regulations exist making it difficult for individuals and businesses to start initiatives that could create jobs. It is therefore less the legalistic character than the sheer number of rules restricting independent actions that is regarded as something that needs to be changed.

The importance of public choice theory for public administrations and their reform has been analysed for some time[42]. In the German case, the concept for improving administrative performance has been influenced by thoughts that can be linked to principal-agent theory[43]. Looking at the roles the NSM attributes to political institutions on the one hand and to public administration on the other hand, one can see how the idea of an information divergence between principal – the

[41] See Frederickson and Smith, op. cit., pp. 95 ff.
[42] Dunleavy, Patrick. Democracy, Bureaucracy and Public Choice: Economic Explanations in Political Science, New York et al.: Harvester Wheatsheaf. 1991, pp. 225 ff.
[43] König, Klaus, Der Verwaltungsstaat in Deutschland. Verwaltungsarchiv 88 (1997), 545 – 567, at 562.

politicians – and agents – the administration – became influential[44]. The expertise regarding the details of politically relevant topics clearly lies in the sections of the administration that are closest to the problems that have to be solved. As a consequence, politicians interfering with details of administrative decision-making are regarded as a source of inefficiencies[45]. Politicians are required to formulate their expectations regarding the output of administrative actions while the administration itself should see how these can be brought about. In this way, both sides are seen to use their expertise most efficiently since the existing information divergence is translated into the definition of the appropriate roles. Bringing the two sides together is the task fulfilled exclusively by contracts because they have to be negotiated in a process which makes the political side formulate its expectations precisely while at the same time the administration can demand whatever it thinks the costs might be.

While against this background the influences of principal-agent thinking are obvious, it would be exaggerated to see the whole reform agenda in the context of new institutional economics. The reasoning set out in the basic documents is of a very practical nature and full of talk about experiences in the administration. Many practitioners took part in the development of the reform agenda. NSM certainly is no concept that was simply deduced from theoretical thinking. It is even more difficult to link it to any form of ideological movement. Above all, the managerialist background of the reforms in no way ideologically or theoretically challenged the aspects of German public administration that have been described as characteristic of the legalistic tradition.

4) The NSM and the legalistic culture

In Germany, the discussion about the necessity of economic rationality in public administration, has led to a factual or maybe just perceived need to increase the number of civil servants with an academic background in economics, business or

[44] Mehde, Veith Rechtliche Deutungsmuster des Wissensgefälles zwischen Politik und Verwaltung, in: Collin, Peter/Horstmann, Thomas (ed.), Das Wissen des Staates – Geschichte, Theorie, Praxis, Baden-Baden: Nomos, 2004, pp. 335 – 360.
[45] KGSt, 1993a, op. cit., p. 16.

social science[46]. Many of the prejudices that exist about bureaucracies and a legalistic culture in administrations have been personalised, as often lawyers, rather than the structures, have been described as a cause of the perceived inefficiencies. Therefore, a clear bias against lawyers and in favour of graduates with a background in business studies was characteristic of the employment strategy in times of NPM. With regard to the training of the higher-level of the civil service, more emphasis has been given to public management rather than legal subjects and more chairs for public management from a business perspective have been created in the polytechnics for public administration.

This might also be due to the fact that in the initial stages of the reform effort, management consultants who very often knew very little about the specific features of public, as opposed to private, administrations overran offices and in many cases were told more about what was illegal than about how changes could be speeded up. There is no doubt that legal arguments against changes have not gained more acceptance in the managerial movement since then. Nevertheless, there are some signs that seem to show that recruiting non-lawyers has lost its plausibility as a strategy for solving deficiencies. This development correlates with an apparent dissatisfaction with the process of defining performance indicators and administrative products, both of which were regarded as the new means for a both efficient and effective steering of the administration as a whole, and subordinated agencies.

Legal implications of and potential obstacles for administrative reforms

Even though the NSM did not create a new theoretical basis for administrative action, the question if it is compatible with the detailed legal requirements remains. Until recently, none of the reforms relating to NPM had much impact on legislation as such. In local government law, the powers conferred on the different actors were shaped so as to enable the municipalities to apply the principles of the NSM – especially the division of the political and the administrative aspects of local decision-making. Still, this does not necessarily lead to many changes in practice if

[46] Mehde, Veith, Neues Steuerungsmodell in der Verwaltung – „Juristenprivileg“ in der Kritik, Zeitschrift für Rechtspolitik 1998, pp. 394 –398.

the relevant actors lack the political will to do so. The field in which the changes in the law have been most significant is the budgetary process. The consequences of this development are further elaborated below. A second aspect that needs to be considered in this context relates to the question as to whether the administrative reforms comply with the two constitutional principles that have been described as the most elementary ones as far as the characterisation as legalistic is concerned: the principle of democracy and of the Rechtsstaat. Any compromises in this respect could well be interpreted as a breach in the legalistic tradition, so this might be a reason why the changes in the decision-making processes have not become as widely entrenched as was originally expected by the proponents of reform.

1) Budget law and the constitution

What makes the above-mentioned changes particularly relevant for the topic under discussion is the fact that the budget in the traditional system was not only seen as an appropriate way to secure the orderly pursuit of financial matters in the administration. Rather, it was regarded as the transformation of parliament's budgetary power into concrete legal rules[47]. Since this parliamentary power is not only of historical interest, but still constitutes an important element of the system of government, these changes have to be analysed from the perspective of democratic requirements. Linked to the democratic principle there are other, more concrete rules in the Basic Law that deal with the budget explicitly. Moreover, the basic law grants power to the federal parliament to legislate on the rules that should govern the budgetary process (Art. 109 sec. 3). Unusually, the law based on this competence is binding both for the federal level and for all states. Consequently, any new rule adopted by the states has to pass the test as to whether or not it complies with both the constitutional requirements and the respective federal legislation.

There seem to be various reasons why concerns about a possible shift in the institutional balance between the administration and parliament have hardly been

[47] See Dahm, Sabine. Das Neue Steuerungsmodell auf Bundes- und Länderebene sowie die Neuordnung der öffentlichen Finanzkontrolle in der Bundesrepublik Deutschland. Berlin: Duncker & Humblot, 2004, pp. 138 ff.

expressed. The first one is that up to now the product-based budgets have been introduced only additionally to, rather than as a substitute for, the traditional ones. Therefore, many parts of the budget look fairly similar to the traditional ones and only a restricted number of institutions have been granted a higher degree of independence. A second important element can be seen in the hope that the product catalogues forming the basis for output-oriented contracts could play a functionally equivalent role to the traditional system. This has turned out to be too optimistic as products of the public administration are hard to define in any meaningful way. The only argument that, under these circumstances, can help to justify the changes is deduced from the factual deficiencies of the old system. While fixed sums which are dedicated to narrowly defined purposes theoretically might provide an efficient steering mechanism, parliament hardly has the information required to assess the actual spending necessities. Therefore, the theoretical ideal should not be made the gold standard of the budgeting process. Rather, the factual steering capacity of the old system can be seen as the aspect any innovation has to be compared with. If these are the elements of comparison, then the new system looks less deficient than in the face of an unfulfilled ideal. Finally, there is also a more cynical explanation for the success of budgetary reforms: the suspicion is that politicians are not very likely to complain about the legal of factual loss of steering power since it can be quite convenient to cut costs in only general terms and to let the experts in the administration determine the details.

2) A question of democracy

The implications of the NSM with regard to the democratic prerequisites of public administration are particularly difficult to assess. The tension between the two is actually more obvious on the basis of abstract principles than with regard to the details. In an elementary view, there is the presumption of the Constitutional Court linking hierarchical structures in the administration to ministerial responsibility on the one hand and the quest for less hierarchical steering in the NSM on the other. As MacLauchlan has pointed out without special reference to Germany: ‘Perhaps the most fundamental way in which the new public management affects the quality of life and morale of public servants, including lawyers, is through its

essential questioning of the command culture'[48]. In other words, one could well argue that the NSM is also an attack on the very mechanism that in constitutional terms guarantees the democratic quality of the German public administration. This argument could easily be exploited by the opponents of managerial changes. Nevertheless, this argument played a role in academic debates[49] rather than in political discussions and in practical implementation. Practically, there has been no reason to suspect that there would be a court ruling on this because the developments inside the administration mainly took place without explicit changes in the law, so that there was little substance for a legal challenge to be based on.

Moreover, the necessity of a hierarchical administration was established in a case concerning legislation which also gave employee representatives a say in matters that concerned not only industrial relations, but general administrative and even political questions[50]. In contrast, the actors involved in NSM derive their legitimacy from their ministers and therefore indirectly from parliament. Also, in the NSM, the chains of command are not changed in a formal sense, so that the system in legal terms is not at stake[51]. Even if one did not take these aspects into account, the legal argument is not so clear-cut[52]. In fact, it could well be argued that the democratic principle gives enough scope to legitimise a decision-making process built on a pyramid-like system of contracts. In the face of the NSM movement it might turn out that the steering effects – while probably less effective regarding a specific decision that is explicitly based on a command by a superior – in the overall picture could prove to be as effective. In other words, there is a long way to go before the administrative reforms could be judged a threat for the democratic feature of the German legalistic administration. Utilizing legal aspects of the democratic principle as an argument against the NSM would clearly be a pretext.

What seems more important is the fact that, apart from these rather formal aspects, the NSM also sets out to change the focus of democratic perception. The

[48] MacLauchlan, op. cit., p. 132
[49] See e.g. Mehde, Veith, Neues Steuerungsmodell und Demokratieprinzip. Berlin: Duncker & Humblot, 2000.
[50] Bundesverfassungsgericht op. cit.
[51] Dahm, op. cit., pp. 197 f.
[52] Mehde 2000, op. cit., pp. 398 ff.

traditional German system is based on what could be called input-legitimacy[53] which refers to chains of nomination, of command, and of accountability[54]. The first aspect is expressed in the fact that the Constitutional Court sees the personal legitimacy of the responsible minister to some degree as being transferred to the civil servants they appoint to their departments. By the same token, legitimacy is transferred by implementing decisions that have been taken at the respective higher and ultimately political level. While the nomination and the steering within the administration is a top-down process, accountability is proceeding bottom up, with the minister at the top of the pyramid being responsible to the directly elected parliament.

In contrast, the NSM introduces the notion of a – as it seems – more direct form of democracy. Especially, it is a model in which the administration is expected to ask users about their satisfaction with administrative performance. The output produced in the administrations after the reform is expected to be so compelling that client satisfaction can play a legitimising role. In other words, the traditional representative model is described as somehow deficient. The link between the citizens and the administration in this view cannot be sustained by elections every four or even five years only, but by a permanent quality management based on regular examination of client satisfaction. Arguing for such a need of course produces some tension with the Basic Law and the constitutions of the states that introduce – apart from the option to hold referendums on certain topics – an almost exclusively representative model of governmental decision-making. In fact, the arguments for the NSM depict the representative model almost as a deviation from the direct link between administration and citizens. This correlates with another aspect, namely the redefinition of citizens as clients. Representative government, of course, is based on the idea of citizens forming the electorate, while clients are part of a business relationship[55]. It is this attachment with economic thoughts that causes many fears about giving up the legalistic characteristics. Nevertheless, it would be exaggerated to regard this tension as a means to change

[53] See Scharpf, Fritz W., Legitimationskonzepte jenseits des Nationalstaats, Discussion Paper 04/6, Köln: Max Planck Institute fort he Study of Societies.
[54] Bundesverfassungsgericht 83, 60, at 72; 93, 37 at 66 ff.
[55] See Maximilian Wallerath, Der ökonomisierte Staat – Zum Wettstreit zwischen juridisch-politischem und ökonomischen Paradigma, Juristenzeitung 56 (2001), pp. 209 – 218, at 212.

the legalistic tradition as such. Rather, the NSM serves as a supplementary means intended to bring about better services for the recipients of administrative services without changing their legal position.

3) The Rechtsstaat in danger?

Other important discussions have concerned NPM's implications with regard to the German-style Rechtsstaat. Any form of business-style changes brings about an anxiety that its particular rationality might actually challenge the legalistic tradition as such. In a strictly legal approach to administrative decision-making, economic arguments do not play a role as long as the law does not explicitly say so. In traditional administrative law, public bodies have to exercise discretionary powers – at least insofar as the legal position of citizens is at stake – without any regard to financial restraints. In other word, lack of financial resources is not regarded as a legitimate argument for the administration as far as legal entitlements are concerned. Under the influence of NPM and also because of the concurrent development of extremely high budget deficits at all levels of government in Germany, this principle seems to come under pressure in the debate about the "economic state". In fact, commentators with a business studies background in particular have argued in favour of a "reconciliation" of economic and legal needs[56]. Remarks like these, even when made with an apparent intention to find ground for compromise, are bound to cause resistance because compliance with the law in a legal perspective must not be traded against anything.

In fact, the decisive step that could have led to a redefinition of the Rechtsstaat has never actually taken place. Until now, no judgement has been published that could be interpreted as subscribing to a trade-off between economic and legal requirements. In fact, all major elements of judicial review of administrative actions have remained in place and entirely undisputed. Of course, not all administrative decisions are eventually challenged in the courts and not all the reasons that form the hidden background of certain administrative decisions can be traced. Therefore, there might be a trend towards more economic awareness on

[56] See e.g. Kuno Schedler/Isabella Proeller, New Public Management; 4th ed., Bern: Verlag Paul Haupt 2009, p. 194.

the part of administrators that does not influence legal reasoning and the rationale of which is not subject to any scrutiny in the administrative courts. The Rechtsstaat, it seems safe to say, will survive the challenge of NPM unharmed.

Assessment and the road ahead

It has been argued in this article that there are several tensions between the working-mechanisms of the traditional German administration on the one hand, and the ideas of NPM on the other hand. These tensions relate to various features of administrative decision-making. Administrative culture is one of the obvious aspects in this context. Related to this, and even more important, seems to be the concurrence of the traditionally strong legalistic culture and the managerial trend as such. Even where reforms are not illegal, they might be at odds with the way public administrations work in the context of a legalistic tradition. As described above, the classification characterises a whole approach to administrative decision-making, so that tensions with a different methodology occur not only in the sense that the new one is regarded as illegal.

1) Empirical Facts

Roughly twenty years after the first reports were published, the discussion has moved on. At present the arguments are not so much concerned with the question of how to implement the reforms as with assessing what has been implemented. Opinions regarding this problem differ significantly. While some commentators are sceptical and are inclined to describe the whole process as a failure[57], people closer to the practical side tend to stress its positive impact[58]. The difference in interpretations seems mainly a consequence of variations in expectations. There is hardly any doubt that certain positive changes have taken place. Administrations undoubtedly have become more service-oriented. Budgets have become much more flexible and discussions about the output of administrative actions have had a positive impact on the self-awareness of administrators everywhere in the country.

[57] E.g. Bogumil, Jörg et al., Zehn Jahre Neues Steuerungsmodell – Eine Bilanz kommunaler Verwaltungsmodernisierung Berlin: edition sigma 2007; Holtkamp, Lars, Das Scheitern des Neuen Steuerungsmodells, DMS 1 (2/2008) pp. 423 – 446.

[58] E.g. Banner, Gerhard, Logik des Scheiterns oder Scheitern der Logik?, DMS 1 (2/2008), pp. 447 – 455.

Nevertheless, if only the complete implementation of the concept is considered a success, then there can hardly be any doubt that this attempt at modernization has to be regarded as a failure. Neither the federal nor any regional or local government in Germany would claim to have implemented it full scale.

Supporters of managerial reforms have been faced with resistance to change at all levels of government and in all parts of the administration. While the improvement in service-orientation has not caused major changes in the decision-making processes benefitting most relevant actors, politicians and the civil service both in local and state government have scarcely shown any intention of altering the decision-making arrangements they have been practicing for decades. The advantages for both, although self-evident in theory, have been less apparent in practice. Political rationality and the interests of actors within the administration do not necessarily follow the rationality and the conceptual coherence of reform models. It is no coincidence that out of the many mechanisms that were meant to change the decision-making process the increase in budgetary flexibility has been the only major change that has taken place. The strict rules of Cameralistics have never provided politicians with particularly effective steering mechanisms. Giving more leeway for administrations in this respect has led to a situation in which politicians can cut budgets and at the same time let administrations decide on ways to ameliorate the impacts of these cuts.

The next generation of administrative reforms

The next generation of attempts to change also the working mechanisms of local governments and administrations also targets the mechanisms of budgeting. Following an agreement between the home secretaries of all 16 states in the year 2003[59], state legislatures have started to make private sector business-style accounting obligatory for all local governments[60]. Linking resources and output is

[59] See Strobl, Heinz, Auf dem Weg zur kommunalen Doppik – Reformkonzept in Deutschland, in: Henneke, Hans-Günter/Strobl, Heinz/Diemert, Dörte (ed.), Recht der kommunalen Haushaltswirtschaft, München: Beck 2008, pp. 67 – 95, at 89 ff.

[60] Krengel, Felix, Zwischenstand beim neuen kommunalen Haushaltsrecht, Verwaltung & Management 14 (2008), pp. 213 – 219; Lasar, Andreas, Keine Harmonisierung im öffentlichen Haushalts- und Rechnungswesen, Verwaltung & Management 16 (2010), pp. 3 – 16.

one of the aspects these budget rules demand[61]. Local governments and administrations will now be forced to start defining the output of their work in order to comply with the rules governing the budget-process. The correct application of these rules is controlled by the state governments which have a number of mechanisms at their disposal that can guarantee a complete implementation of the rules.

In other words, the mechanism that has been an integral part of the theoretical concepts but has never become as influential practically as desired by the proponents of reform, can now – by way of changing budgeting rules – be forced on local governments in a very effective way. State legislators have used a – in the private sector – well established model that could easily be introduced by law to press forward. It is a particular irony of the German attempt at introducing managerialist reforms which aimed at modifying the legalistic functioning of the administration that changing the law is apparently the only way to implement them in a sustainable manner. It seems that the main obstacle for change was the lack of a coherent system that the legislature could force on local governments and administrations. Mere advantages in a management-perspective do not seem to be sufficiently forceful to alter well-established traditional working-mechanisms.

Conclusion

First of all, the analysis has shown that the law – although conceptually the most important element of administrative decision-making – plays an amazingly small role in the process of adopting elements of NPM. In fact, the only significant changes have taken place with regard to the budgetary process, where more flexibility has been introduced and the new rules have paved the path towards a new steering approach. Legal scrutiny by the courts could theoretically lead to at least a partial stop of any reforms. The fact that this seems far from likely at the moment is further proof that the implementation of NSM ideas has hardly influenced the legal foundations of German public administration. There is no erosion of any substance in the framework the constitution sets for administrative

[61] Mehde, Veith, Haushaltssatzung und Haushaltsplan, in: Henneke, Hans-Günter/Strobl, Heinz/Diemert, Dörte (ed.), Recht der kommunalen Haushaltswirtschaft, München: Beck 2008, pp. 97 – 114, at (104 ff.).

decision-making. In contrast to the legal side, factual modifications and new values could well be inferred by the changes in the rules of selecting the employees in public administration. A decline in the available legal knowledge might well lead to a change in administrative decision-making itself.

What has been described appears to be a process in which the diverse institutions try to act in an open-minded manner without leaving the logic of their traditional setting altogether. It seems that a system change in the sense that a legalistic administration like the German one embrace the managerial movement completely needs far more than a movement – even one that is as influential and that sets the agenda for discussions as much as NPM. After all, the German basic law is such a dominating force in political and legal reasoning that almost all topics that are to be tackled by the state are also viewed with regard to their legal implications. Nevertheless, it seems likely that the constant talk about economic rationality as well as the demand for decentralisation and the 'manager's right to manage' will leave their mark on the German administration in the long run. The changes attached to this will be cultural ones that the administrative law will mirror partly if at all. This does not disprove Aman's above thesis regarding the close connection between administrative law and the dominant theory of the state. Rather, his thesis is additional proof of the fact that the NSM in Germany did not concern the role of the state as such and that the way the political power developed und dealt with the concepts of the 'lean' or the 'activating' state is more a matter of rhetoric than of substance.

In a nutshell, the German experience appears to show that elaborate legalistic traditions are stronger than management ideas[62]. Management values can only fill the gaps that are left by the legal framework. At first sight, this seems to be quite a significant domain as even whole-hearted legalists would always accept that no law can provide regulatory solutions for all cases it might theoretically apply to. Consequently, even an administration that is bound by legal requirements will always retain some scope for discretionary decision-making. Nevertheless, the courts – which control the application of the legal standards – play a very

[62] See also Derlien, op. cit., pp. 119 f.

important role. They ultimately have to decide if a particular mode of exercising discretionary powers can be based on grounds of efficiency i.e. if efficiency is a suitable argument to fill the space left by the legal prerequisites. As long as economic arguments do not have the same legal force as questions of material justice, the managerialist revolution will stop short of administrative buildings. If the German bureaucracy is "a solid rock in rough seas"[63], then its legalistic tradition certainly forms the concrete embankment that prevents the tidal waters of NPM from eroding its foundations.

Veith Mehde

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[63] Schröter op. cit.

European Administrative Procedure:

The European Union as exemplar

1. Some Definitions

The term 'administrative procedure' is used in two main senses. Generally, it refers to the non-contentious procedures used by the administration: in other words, *all* those procedures followed by the administration before any issue of judicial review arises. Widely interpreted, these procedures cover matters ranging from notice to applicants or time limits at various stages of a process to rules for access to administrative dossiers or as to the format of administrative decisions. Procedural principles may be general, or 'horizontal', in the sense that they apply to all the activities of the administration; or they may be 'vertical' and 'sector-specific', in which case they govern a particular process. Competition[1] and public procurement[2] procedures are both good examples in EU administrative law, each with their own sector-specific 'codes', the former more detailed than the latter. In national systems, land planning law or social security law are administrative processes possessing detailed and complicated procedural codes, often hotly contested by applicants.

'Horizontal' procedures are often codified in national systems as an Administrative Procedures Act intended to apply across the board unless replaced by a sector-specific codification. Horizontal procedures may also be dealt with in specific legislation. Most European states, for example, now possess freedom of

[1] Council Regulation 99/63 EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17. And see K Lenaerts and L Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) CML Rev 523 and, for recent developments, S Kingston 'A "New Division of Responsibilities" in the proposed regulation to modernise the rules implementing Arts 81 and 82 EC? A warning call' (2001) European Competition Law Rev 340.

[2] Council Directives 89/665/EEC and 92/13/EEC and more recently, Directive 2004/18/EC on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Directive 2004/17/EC co-coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 2009/81/EC on defence and security procurement; Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts. And see S Arrowsmith, 'The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?' 35 *Public Contract Law Journal* (2006) 337.

information legislation governing the question of access to documents held by the administration or data protection laws covering the gathering and retention of information concerning individuals and the same is true of the EU.[3]

There is a secondary sense in which the term 'administrative procedure' is often used, more particularly by lawyers. In this more limited sense, the term refers only to over-arching principles and values such as natural justice or transparency, which are often considered to be constitutional in character and to apply horizontally across administrative functions. Typically such principles emerge from judicial rulings, as they did in the case of the 'due process' principles developed over time by the European Court of Justice.[4] They may later be incorporated in laws or regulation. An important exception to this generalisation about sources is the mandatory duty to give reasons imposed in EU administrative law by the founding treaties which, from the outset, gave a constitutional value to the provision:

> Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.[5]

This provision has been of great consequence in the EU in enabling judicial review, as the Court of Justice never fails to remind us in its case law. In an early case the Court asserted that

> In imposing upon the Commission the obligation to state reasons for its decisions, Article 190 is not taking mere formal considerations into account but seeks to give an opportunity to the parties of defending their rights, to the Court of exercising its supervisory functions and to Member-states and to all interested nationals of ascertaining the circumstances in which the

[3] *Respectively Regulation EC 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission Documents, 2001OJ L 145/43 and Directive 95/46 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data.*

[4] J Schwarze, 'Developing Principles of European Administrative Law' [1993] Public Law 229; J Schwarze, 'Sources of European Administrative Law in S Martin (ed.), *The Construction of Europe, Essays in Honour of Emile Noel* (Kluwer, 1994).

[5] Originally EEC Art. 190, renumbered as Art. 253, now TFEU Art. 296.

> Commission has applied the Treaty.[6]

Moving rapidly into the present era, we can note the centrality of the duty to give reasons in the difficult and sometimes controversial decisions taken by the two Luxembourg Courts in counter-terrorism cases. In the case of the Iranian Modjahedines,[7] for example, where the CFI (now the General Court) first started to spell out the due process principles applicable where preventive measures are taken against individuals suspected of participation in terrorist activity, the CFI firmly rejected an argument that a statement of reasons could consist 'merely of a general stereotypical formulation': e.g., an assertion not founded on evidence that 'the applicant is suspected of terrorism'. Reiterating its general jurisprudence, the CFI insisted that 'the actual and specific reasons' for listing or delisting must at least be indicated and must:

> disclose in a clear and unequivocal fashion the *reasoning* followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review of the lawfulness thereof.[8]

Concluding that the statement of reasons left uncertain 'how far the Council actually took into account the [national] decision, as it was required to do',[9] the Court annulled the Council decision.

Horizontal general principles are often articulated by an ombudsman. The *European Code of Good Administrative Behaviour*,[10] drafted by the European Ombudsman and approved by the European Parliament in 2001, contains as Article 1 a general requirement that:

> In their relations with the public, the Institutions and their officials shall respect the principles which are laid down in this Code of good

[6] A recurrent citation: see, e.g., Case 24/62 *Germany v Commission* [1963] ECR 69; Case 37/83 *Rewe-Zentrale AG v Direktor der Landwirtschaftskammer Rheinland* [1984] ECR 1229.
[7] Case T-228/02 *Organisation des Modjahedines des peoples d'Iran v Council* [2006] ECR II-4665.
[8] ibid at [96-8] and [141]. And see C Eckes and J Mendes, 'The Right to be heard in Composite Administrative Procedures: Lost in between Protection?' (forthcoming in *European Public Law*).
[9] Ibid at [154]-[159].
[10] *The* European Code of Good Administrative Behaviour *is accessible on the web site of the European Ombudsman.*

administrative behaviour, hereafter referred to as "the Code".

Despite this mandatory formulation, the 'Code' is not embodied in regulation – though, as we shall see, some people think that it should be. It remains 'soft law'. The content ranges from principles with legal effect, such as the principles of legality and proportionality, which could be enforced by the Luxembourg Courts, to matters of routine requiring officials to 'be service-minded, correct, courteous and accessible in relations with the public' and to 'try to be as helpful as possible', directing citizens where necessary to the official appropriate for handling their case. Correspondence is to be answered in the Treaty language used by the correspondent and acknowledged or replied to within a period of two weeks. Although such provisions might appear in an Administrative Procedure Act - and the language requirement does in fact make an appearance in Article 41 of the European Charter of Fundamental Rights (ECFR) - they are almost certainly best dealt with in soft law and by an ombudsman.

2. Functions and purposes

Procedural law plays a central part in every administrative law system; indeed, the functions and purposes of a procedural code can be seen as almost coterminous with those of administrative law. From a purely legal standpoint, administrative procedures are an important way to bring into effect the rule of law principle. Procedural requirements set limits on what administration can do and regulate the behaviour of public servants. As articulated by the American political scientist Martin Shapiro, this is the primary purpose of administrative law:

> Administrative law prescribes behaviour within administrative organizations; more importantly, it delineates the relationships between those inside an administration and those outside it. Outside an administration lie both the statute-maker whose laws and regulations administrators owe a legal duty to faithfully implement and the citizens to whom administrators owe legally correct procedural and substantive

action.[11]

Similarly, to a German administrative lawyer, procedure is an aspect of the rule of law crucial in ensuring control of the administration, and the Germanic understanding of the rule of law in terms of a *rechststaat* points strongly to written rules of procedure, preferably taking the form of a statutory codification. German author Jűrgen Schwarze situates proceduralism within the mainstream of twentieth-century administrative law, concerned with the reduction and appropriate structuring of discretionary power, when he says that:

> The fact that the administration is conceded a margin of discretion and of assessment seems nowadays justifiable only if discretion is exercised under strict observance of procedural guarantees.[12]

Within the administration, procedures serve a dual purpose. On the one hand, they contribute to efficiency. Max Weber indeed saw proceduralism, in which the business of the state is discharged 'according to calculable rules' and 'without regard for persons', as a central feature of bureaucratisation.[13] Both objectivity and the closely related principle of equal treatment find a place in the *Code of Good Administrative Behaviour*, Article 5 of which provides:

> 1. In dealing with requests from the public and in taking decisions, the official shall ensure that the principle of equality of treatment is respected. Members of the public who are in the same situation shall be treated in a similar manner.
> 2. If any difference in treatment is made, the official shall ensure that it is justified by the objective relevant features of the particular case...

[11] M. Shapiro, 'Administrative Law Unbounded' (2001) 8 *Indiana Journal of Global Legal Studies* 369.
[12] J Schwarze, 'Judicial Review of European Administrative Procedure' [2004] PL 146. See similarly G,Nolte, 'General Principles of German and European Administrative Law' (1994) 57 *Modern Law Review* 91; K. C. Davis *Discretionary Justice: a preliminary inquiry* (Louisiana State University Press, 1969).
[13] M. Weber, *Economy and Society,* 1925, (in transl., University of California, 1968). See also D. Beetham, *Bureaucracy* (Open University Press, 2nd edn., 1996).

Mass administration according to objective principles is best carried out through 'calculable rules': rules favour consistency and equal treatment; discretion involves choice, selection and discrimination. Because it is individual in nature and subject to challenge, discretion is often seen as costly and ineffective. This re-introduces the point made by Jürgen Schwarze that procedures contribute to the control of administrative discretion. Whether formal or informal, written rules contribute to transparency, making it easier for the public to know how a process ought to be administered or a decision executed.

More importantly perhaps, procedures help to maintain an administrative ethos in accordance with a framework of general principles established by courts and legislature.[14] In this sense, administrative procedure may have a constitutional value, as they have attained in Articles 41, 42 and 43 of the European Charter of Fundamental Rights, which (admittedly in a cursory and haphazard fashion) entrench some 'good governance' principles, including a general right to good administration, as fundamental rights of Union citizenship. Article 41 reads:

> 1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
>
> 2. This right includes:
>
> - the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
>
> - the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
>
> - the obligation of the administration to give reasons for its decisions....
>
> 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

The right also specifically includes remedies, providing in Article 41(3) that:

[14] Shapiro, above n.Erro: Origem da referência não encontrada.

> Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

together with a right in Article 43 to complain to the European Ombudsman against maladministration by the Union's institutions and bodies.

1. Procedure as values

Provisions of this type move procedure beyond efficiency and effectiveness and into the realm of values. At this higher level, American administrative lawyer Jerry Mashaw has propounded a 'dignitary theory' of procedural rules, at least in the case of the rules of natural justice or *audi alteram partem* principle, according to which individuals affected by an administrative decision shall be able make representations to the decision-maker. According to Mashaw:

> Due process can be said to have intrinsic value, i.e. as the very essence of justice. An opportunity for affected individuals or groups to participate in the administrative decision-making process 'expresses their dignity as persons"[15]

The same primacy is afforded to dignity in the German Basic Law (Art 1), even though the Basic law does not specify due process rights.

Writing in the context of EU law, Francesca Bignami has drawn attention to the fact that administrative procedures are not static but change over time. Bignami has suggested three generations of participatory rights in the evolution of EU administrative law. Bignami's 'first generation' consists of the individuated rights of due process or natural justice, largely built up in the first instance by the Court of Justice on foundations borrowed from national law, as with the *audi alteram partem* principle, borrowed from and built upon the natural justice principle

[15] J. Mashaw, 'Dignitary Process: A Political Psychology of Liberal Democratic Citizenship' (1987) 39 University of Florida Law Review 155.

strongly protected by English law.[16] Bignami's 'second generation rights' centre on freedom of information and more particularly access to documents and information government held by government institutions. Today, freedom of information is one facet of the wider transparency principle, which has emerged as a central principle of modern governance.

The European Commission recognised transparency as a 'good governance' principle in 2001, defining 'Openness' to mean that:

> The Institutions should work in a more open manner. Together with the Member States, they should actively communicate about what the EU does and the decisions it takes. They should use language that is accessible and understandable for the general public. This is of particular importance in order to improve the confidence in complex institutions.[17]

That the transparency principle is acknowledged by the Commission in this way has not however meant in practice that EU governance it is particularly transparent – rather the reverse!

The principle of transparency is now incorporated in Article 15 of the Treaty on the Functioning of the European Union (TFEU), which mandates the institutions to 'conduct their work as openly as possible' and provides at Treaty level for a right of access to documents. The difficulty experienced in reform of the existing regulation containing the law on access[18] suggests, however, a certain lack of enthusiasm for this horizontal value of EU governance and law. From the time when the Scandinavian member states entered the EU, concerned to protect long-standing constitutional rights to freedom of information, the matter has been a hotly contested and contentious issue at Union level. It has brought Member States in the Council and the institutions into conflict: Scandinavia v the UK, France and Germany; Commission and Council v European Ombudsman and to a more limited extent Parliament; and so on. Currently under review in the EU Transparency

[16] F Bignami, Creating European Rights: National Values and Supranational Interests (2005) 11 Col. J. Eur. Law 241.

[17] *White Paper on European Governance* (COM(2001) 428 final at p. 10).

[18] Regulation EC 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission Documents, 2001OJ L 145/43.

Initiative, new legislation is blocked by a dispute between the European Parliament and Council and the reform process seems to be dead-locked. Alongside, the position of the two Courts, left to interpret the existing Regulation, can only be described as wavering.[19]

Bignami's 'third generation' of procedural rights covers the participation of persons directly affected by rulemaking. The restricted standing rules of the Luxembourg Courts have left serious gaps in protection in this area, which ought to be closed.[20] Modern administrative law is, however, more concerned with questions of group rights. This implies a double extension of the participation principle first from individuals to groups and then to the *ex ante* participation of 'stakeholders' and 'civil society' in shaping policy and rulemaking. It has to be said that collective participation has not figured strongly in EU administrative law, though it was recognised as a good governance value by the Commission *White Paper*. From this point on, the Commission made some effort to engage more with 'civil society', for these purposes composed mainly of interest groups working in the various policy fields with which the Commission was dealing. It deliberately chose, however, to operate mainly through 'soft law'.[21] In general, it is fair to describe protections for consultation and participation in EU law as weak and as an area where the Luxembourg Courts have not played a very active role.[22]

The most recent manifestation of participation rights in EU law comes with the Lisbon Treaty. TFEU Article 11 not only calls on the institutions to 'maintain an open, transparent and regular dialogue with representative associations and civil

[19] See, e.g, J Heliskosi and P Leino, 'Darkness at the Break of Noon: The Case Law on Regulation No 1049/2001 on Access to Documents' (2006) 43 CML Rev 735; P Leino, 'Just a little sunshine in the rain : the 2010 case law of the European Court of Justice on Access to Documents' (2011) 48 CML Rev 1215.

[20] See the Opinion of A-G Jacobs in Case C263/02P *Commission v Jégo-Quéré et Cie* SA [2004] ECR I-03425. And see Case T-177/01 *Jégo-Quéré et Cie SA v Commission* [2002] ECR II-2365; Case C-50/00 *Unión de Pequenos Agricultores v Council* [2002] ECR II-2365. The position is partly ameliorated post-Lisbon by TFEU Art.253.

[21] Commission Communication, *European Transparency Initiative: A Framework for relations with interest representatives by the Commission (Register and Code of Conduct)* COM (2008) 323. For a general account, see D Obradovic, and J Alonso Vizcarino, 'Good Governance requirements concerning the participation of interest groups on EU consultation' (2006) 43 CML Rev 1049.

[22] S Smismans, 'New Modes of Governance and the Participatory Myth' (2006) European Governance Papers No N-06-0; B Kohler-Koch, 'Civil Society and EU democracy: "Astroturf" Representation (2010) 17 *J of European Public Policy* 100.

society' but also makes provision for 'citizens' initiatives' to inaugurate rule-making.[23] How this will play out in practice remains to be seen, however.

Finally, the Lisbon Treaty is likely to usher in a 'fourth generation' of procedural rights in the form of strengthened due process rights borrowed from human rights law and more specifically the European Convention (ECHR). This development will be predicated both on the new status accorded to the ECFR and the accession of the EU to the ECHR, on which agreement is now well under way.[24] The accession agreement is likely to be read as establishing the ECtHR as Europe's first court in matters of human rights, thus requiring the Court of Justice to step up its performance in due process matters.

2. Codification – an EU Administrative Procedure Act?

The demand for a general EU codification of administrative procedure comes from two main groups: the European Parliament and possibly the Commission and, externally, from public lawyers. Public lawyers were already showing an interest in codification in the early 1990s,[25] when they had set up a working group to consider the question. This can be seen as an aspect of other integrative movements for the elaboration of a 'common European law', notably for a European code of civil law (the *ius commune* movement) and for criminal procedure (the *corpus iuris* movement). It was not, however, until 2005 that a detailed case for a general codification based on empirical comparative data was commissioned by a Swedish Presidency from a Swedish research institute and later published.[26] This paper grouped national principles of administrative procedure into four different

[23] But see European Commission, *Green Paper on a European Citizens' Initiative* COM(2009) 622 final; V Cuesta, 'The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy' (2010) 16 EPL 123.

[24] A draft was agreed in June 2011 by an EU working party but needs the backing of the Committee of Ministers and Parliamentary Assembly of the Council of Europe and the EU's Council of Ministers and MEPs. It is expected that the Court of Justice, which has expressed reservations, will also be consulted.

[25] See C Harlow, 'Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot' (1996) 2 European LJ 3, originally a Jean Monnet Chair Paper No 25 (1995) commissioned for a workshop on codification held at the EUI.

[26] Swedish Agency for Public Management, *Principles of Good Administration in the Member States of the European Union* (2005). Available at: http://www.statskontoret.se/upload/Publikationer/2005/200504.pdf

traditions of administrative law, which proved to vary considerably. Unsurprisingly, the research succeeded in identifying common 'principles of good administration' but the overall conclusion of the report was that, although the Member States share many principles of good administration, this should not be interpreted as adding up to anything like uniformity:

> [E]ven though a rule looks the same across a number of countries, it doesn't mean that it is applied the same way. It will be interpreted in different ways and thus mean different things in different countries'. [27]

The Lisbon Treaty has breathed new life into the movement for codification with a new TFEU Article 298, which provides as follows:

> 1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.
>
> 2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.

Rightly or wrongly, this provision has been interpreted by the Legal Affairs Committee of the European Parliament as providing a base for intervention in the general area of public administration. The Committee has established a working group on European administrative law (ReNEUAL) with 'the aim of examining whether a codification of EU administrative law is possible and what such a project would involve in practice.' Claiming that EU administrative law has 'evolved on a policy-by-policy basis in an unsystematic and non-transparent manner', ReNEUAL maintains that 'simplification can be achieved by the rationalisation and improvement of structures and methodology used throughout EU policy fields'. ReNEUAL is working towards a series of 'draft restatements' and 'proposals for best-practice guidelines' of a general European administrative procedure law.

[27] Ibid. at p. 71.

Four main options appear to be open to ReNEUAL, each of which has received some support from members of the network:

1. A general harmonising Administrative Procedures Regulation or Directive applicable throughout the EU and its Member States.

Such a regulation might be based on the American Administrative Procedures Act, a horizontal default statute applicable in the absence of more specific regulation.[28] The relative lack of uniformity below the level of very general principle might, however, make such a codification hard to achieve. Again, it is likely to be perceived by Member States and national administrators as intrusive and might provoke national Parliaments into resorting to the Lisbon 'yellow card' procedure.

2. A relatively precise Administrative Procedure Act, as in a majority of Member States, applicable to EU administration *only*, whether executed by the Commission, EU agencies or Member States.

This option, which is more consistent with the Treaty principle of subsidiarity, would be likely to be more acceptable, hence more effective. It would probably also help to promote the gentle process of convergence that is already under way.[29]

3. A wide-ranging statement of principle aiming at gradual convergence

Such a statement could be based on a comparative survey resembling, but more detailed than, the already-mentioned Statskontoret survey. One persuasive precedent for such a 'softly, softly' approach might be the American Restatement of Laws. This is essentially a codification of the common law, notably judge-made law,

[28] F Bignami, 'The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology' 40 Harv Int'l LJ 451 (1999).
[29] See A Meuwese, Y Schuurmans and W Voermans, 'Towards a European Administrative Procedure Act' (2009) 2 *Review of European Administrative Law* 3 published by Leiden University at: https://openaccess.leidenuniv.nl/bitstream/1887/14697/2/REALaw.TowardsEuropeanAPA.pdf).

across the state laws of the United States. Restatements are not binding but they are highly persuasive, as the extensive input from judges, academic and practising lawyers suggests a consensus of the American legal community as to what the law is or ought to be. Thus the Restatements offer an opportunity for a gentle, consensual harmonisation which has the support of a number of academics experienced in public administration.[30]

Equally, it is possible to see in a 'softly, softly' approach a variant of current Commission practice in fostering the 'open method of coordination' as a modality of EU administration. This mode of 'soft' EU governance has the advantage of being already familiar to national administrators and therefore capable of easy adoption within their administrative systems.[31] It is likely also, because it is voluntary in character, to be acceptable within national public services and to member state governments. In the long run therefore, it is likely to prove the most effective method of encouraging 'best practice'. [32]

4. A non-binding or 'soft law' statement of general principle coupled with a continuation of the process of vertical regulation.

Essentially, this option virtually represents the *status quo*. There is, as stated earlier, already an EU *Code of Good Administrative Behaviour.* All that is needed is for this to be further fleshed out by the European Ombudsman, adopted by the European Parliament and brought into force in the way originally adopted for the freedom of information legislation, by institutional codes of administrative practice. As with the ECFR in its pre-Lisbon, non-binding period, the Code would act as a guideline for all institutions, including the Luxembourg Courts.

[30] E.g., J Ziller, *Towards Restatements and Best Practice Guidelines on EU Administrative Procedural Law* (Note to the European Parliament´s Committee on Legal Affairs – Working Group on EU Administrative Law, October 2010) available on line.

[31] For relevant accounts of OMC, see A Heritier, 'New Modes of Governance in Europe: Policy Making without Legislating?' in A. Heritier (ed) *Common Goods: Reinventing European and International Governance* (Rowman and Littlefield, 2001); C Radaelli, *The Open Method of Coordination: A new governance architecture for the European Union?* (Swedish Institute for European Policy Analysis, 2003); S de la Rosa, 'The Open Method of Coordination in the New Member States – the Perspectives for its Use as a Tool of Soft Law' (2005) 11 European LJ 618.

[32] C Harlow and R Rawlings, 'National Administrative Procedures in a European Perspective: Pathways to a Slow Convergence?' (2010) 2 *Italian Journal of Public Law* 1, available on line.

5. The case for inaction

All this rather assumes that action needs to be taken in this area. Not all Member States possess Administrative Procedure Acts. The United Kingdom has, for example, managed satisfactorily for several centuries without a general codification of administrative procedures. There is instead a very considerable body of horizontal, judge-made, general principle, covering the protection of individual rights through natural justice[33] and the structuring of discretionary power.[34] Case law also makes it well-nigh impossible to evade judicial review.[35] The flexibility of the common law system and the fact that procedures have not been reduced to writing has left considerable leeway to the judges to develop new principles over the years in line with evolving practices of governance. The courts have, for example, developed the notion of rationality to the point that a decision-maker must today collect all evidence relevant to policy or decision-making; exclude all irrelevant evidence; act within his powers; and act in a fashion that courts do not regard as 'unreasonable'.[36] Courts have used the concept of 'legitimate expectation' to expand the ambit of procedural regularity[37] and are in the process of further expansion and rationalisation under the heads of equal treatment, parity and consistency.[38]Alongside, they have been experimenting – not entirely satisfactorily, it has to be admitted - with the idea of substantive legitimate expectation.[39] Consultation rights conceded as a matter of good practice by government and central government departments are beginning to be recognised by the courts; indeed, English courts are moving further and faster than Luxembourg in creating participatory rights in the policy and law-making process.[40]

[33] *Ridge v Baldwin* [1964] AC 40.

[34] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

[35] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

[36] *R (Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392. The often-criticised 'unreasonableness' principle derives from the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

[37] *A-G of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 508.

[38] *R (Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392; *Masimba Kambadzi v Home Secretary* [2011] UKSC 23.

[39] *R v North and East Devon Health Authority, ex p Coughlan* [2000] 2 WLR 622.

[40] E.g, *R(Greenpeace) v Industry Secretary* [2007] EWHC 311; *R(Luton BC and Nottingham CC) v Education Secretary* [2011] EWHC 217. So far this is largely confined to the lower courts: see

This does not mean, however, that the legislature has left everything to the judiciary. True, the advent of the Human Rights Act 1998, effectively a piece of horizontal legislation that makes the ECHR directly applicable in the United Kingdom and justiciable in its domestic courts, has greatly expanded the power and confidence of the judiciary. It is largely through the influence of the ECtHR, for example, that experiments with the proportionality principle have been conducted in English law.[41] But Parliament has been equally active. There is a vast quantity of vertical, sector-specific legislation, in recent years regularly updated and amended. This is, in the English style, highly specific, very detailed and typically in procedural matters fleshed out in executive regulation. There is also some horizontal regulation, notably the relatively new Freedom of Information Act 2000, which came into force in 2005 or the Equality Act 2010, which requires the administration to conduct an impact assessment when developing policy and legislation.

Thus the United Kingdom experience suggests that procedural law may be safely left to develop through administrative practice, case law and sector-specific statute without any general codification. This is incidentally, largely the pattern that has been followed in EU administration, where the Commission has been actively engaged in regulation and the Courts and European Ombudsman in standard-setting. Although the Legal Affairs Committee appears reluctant to consider the non-interference option, no pressing need for intervention has been demonstrated. It may be best to let well alone.

Carol Harlow

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R(Bapio Action) v Home Secretary [2008] UKHL 27.

[41] T Poole, *Proportionality in Perspective (*LSE Legal Studies Working Paper No. 16/2010), available on line.

France

Fonctions et buts de la procédure administrative:

nouveaux problèmes et nouvelles solutions

Avec celle des structures administratives, la question de la complexité des procédures administratives est très tôt dénoncée, notamment dans la littérature du XIXè siècle. Celle-ci est particulièrement féroce, comme en attesteraient au besoin les lectures de Balzac dans «s employés» de (1837) ou «Physiologie de l'employé» (1841) ou de Courteline, «Messieurs les ronds de cuir» (1893). C'est qu'intrinsèquement, les procédures administratives portent en elles–mêmes un conflit. Les procédures ont pour vocation unique de constituer des garanties offertes tant aux administrés qu'à l'administration elle-même, et sont précisément imposées, selon la formule devenue classique, afin «d'éviter une erreur, d'empêcher une injustice, d'assurer la maturité et l'opportunité de la décision». Mais, au-delà, elles répondent –ou peuvent répondre- à des exigences dissociées. Ainsi, elles sont, pour les premiers, un mode d'accès aux valeurs de la citoyenneté administrative[1] sur laquelle l'accent est mis depuis les années 1970, et se traduit par l'adoption, alors, d'une série de lois visant à renforcer les droits des administrés et des partenaires de l'administration face à cette dernière (avant que l'expression elle-même ne soit retenue par les textes dans les années 1990[2]). La loi du 12 avril 2000 relative aux *droits des citoyens* dans leurs relations avec les administrations en constitue à cet égard une forme d'aboutissement, et l'on ne saurait ignorer qu'au fil des révisions dont elle a été l'objet, la Constitution est à son tour marquée par la progression de ce mouvement[3]. Pour la seconde, et dans les contraintes qu'elles lui imposent (motivation des actes administratifs, mécanismes assurant la concurrence et la transparence dans la conclusion des contrats, par exemple), les règles procédurales pèsent nécessairement dans le

[1] *Sur cette question voir not. V.Champeil-Desplats, «La citoyenneté administrative», dans P.Gonod, F.Melleray, P.Yolka, «Traité de droit administratif», Dalloz, 2011, t2.*

[2] *Voir par exemple la circulaire du 23 février 1989 relative au renouveau du service public ou la charte des services publics du 18 mars 1992.*

[3] *Art. 72-1 de la Constitution (référendums locaux décisionnels), art. 7 de la Charte de l'environnement (droit accès aux informations en la matière), art. 71-1 de la Constitution (Défenseur des droits)…*

cours de l'action administrative. En attesterait au besoin le sort qui en est fait dans l'application des régimes d'exception, et notamment dans la jurisprudence dite des «circonstances exceptionnelles»[4].

Il est remarquable que la promotion, au moyen des procédures, de la «citoyenneté administrative» corresponde à l'avènement de la légitimité procédurale de l'action publique, dans laquelle il y a lieu de voir un renouvellement de la fonction des procédures administratives. La perspective européenne ne compte pas ici pour rien: l'article 41 de la Charte européenne des droits fondamentaux de l'Union européenne[5] pose, après le juge[6], le principe du «droit à une bonne administration» [7]. Or, cette disposition présente intérêt en ce qu'elle donne une clé d'accès à une légitimation nouvelle de l'action administrative, en marge de la légitimité démocratique, et qui emprunterait la voie procédurale –on pourrait aussi parler de *légitimité procédurale*[8]-: serait une administration légitime une administration répondant aux critères de la «bonne administration».

La «bonne administration» est certes une notion des plus ambiguës n'ayant pas de signification précise, mais l'article 41 de la Charte en livre cependant des éléments constitutifs. Après avoir affirmé un principe général analogue au contenu de l'article 6-1 de la Convention («1-Toute personne a le droit de voir ses affaires traitées impartialement, équitablement et dans un délai raisonnable par les institutions et organes de l'Union»), sont en effet posées par ce texte trois règles de procédure -qui fixent les principes des droits de la défense, du droit d'accès à son dossier personnel, de l'obligation de motivation-[9], ainsi que le principe de

[4] *C.E., 28 juin 1918, Heyriès, GA.*
[5] *G.Braibant, «La Charte des droits fondamentaux de l'Union européenne, témoignage et commentaires», Points, Seuil 2001.*
[6] *La jurisprudence communautaire consacre le principe de la bonne administration: Cour 31 mars 1992, C-255/90P, Burban, R1992, I-2253.*
[7] *Qui a été préféré à celui d'une «bonne gouvernance» dont le sens est sans nul doute encore plus complexe à appréhender.*
[8] *Sur ces questions voir en particulier M.Ruffert (dir.) «Legitimacy in european administrative law: reform and reconstruction », Europa Law Publishing, Groningen, 2011*
[9] «2. Ce droit comporte notamment:
. le droit de toute personne d'être entendue avant qu'une mesure individuelle qui l'affecterait défavorablement ne soit prise à son encontre;
. le droit d'accès de toute personne au dossier qui la concerne, dans le respect des intérêts légitimes de
la confidentialité et du secret professionnel et des affaires;

responsabilité administrative[10]. Si l'on excepte le quatrième point de l'article, spécifique à l'Union européenne[11], il y a lieu de remarquer que l'approche européenne du droit à une bonne administration traduit cette même tendance que l'on observe en France à une «juridiciarisation» de la procédure administrative[12]. Il y a également lieu de relever que la rédaction de l'article 41 envisage la relation administrative au-delà de la citoyenneté: tout en figurant dans un chapitre dédié à la citoyenneté, il traite de la «personne» et non du citoyen, soit, à l'instar de la conception française de l'administré, englobe la personne hors de sa qualité de citoyen, embrassant par suite les étrangers, même non résidents, et même irréguliers.

Pour traiter des «nouveaux problèmes, nouvelles solutions» concernant la procédure administrative, l'on pourrait être tenté de s'attacher à tous les «comportements qui interviennent dans la préparation de la décision et pour l'entrée en vigueur de la ou des normes administratives qui en résultent»[13] ; sans négliger totalement une telle perspective d'approfondissement des droits procéduraux, et parce que les procédures administratives sont (ou présentées comme étant) au cœur de la réforme de l'Etat, on privilégiera –de manière arbitraire donc- une approche plus externe de la procédure administrative. Il est en effet ainsi possible de cerner un glissement dans la vocation –ou les fonctions- des règles de procédure administrative, la procédure administrative pouvant être détournée en devenant l'objet –prétendument principal- des politiques dites de simplification administrative, tout en résistant toujours au mouvement de codification (I). La procédure administrative est en outre contrainte à des adaptations du fait de l'émergence de nouvelles technologies de l'information et de la communication (NTIC) que l'administration ne saurait ignorer (II).

. l'obligation pour l'administration de motiver ses décisions.»

[10] «3. Toute personne a droit à la réparation par la Communauté des dommages causés par les institutions, ou par leurs agents dans l'exercice de leurs fonctions, conformément aux principes généraux
communs aux droits des États membres.»

[11] «4. Toute personne peut s'adresser aux institutions de l'Union dans une des langues des traités et doit recevoir une réponse dans la même langue.»

[12] On remarquera toutefois qu'au sens de l'article 41, qui s'abstient de le reconnaître, la «bonne administration» n'inclut nullement un droit d'attaquer l'administration en justice.

[13] *Pour reprendre la définition de la procédure administrative livrée par G.Dupuis, M.J. Guédon, P.Chrétien, „Droit administratif", A.Colin, 12è ed, 2011, p.488.*

I la procédure administrative «détournée»?

Pour provocatrice qu'elle puisse paraitre, une telle interrogation justifie d'être formulée pour deux motifs principaux, et dès lors que l'on accepte la finalité initialement et traditionnellement affectée à la procédure administrative. D'une part, en effet, alors que l'on s'attache à approfondir les droits procéduraux des administrés, dont celui de l'accès à l'information et au droit, paradoxalement on le prive d'un instrument par ailleurs présenté comme l'outil d'excellence de l'accès au droit, soit un code de procédure administrative. Cette dernière demeure curieusement réputée incompatible avec la codification (B). D'autre part, et sous le prétexte de faciliter la relation administrative, on réalise une simplification des procédures qui procède d'une confusion entre la garantie qu'ouvre une procédure et l'idée d'une tracasserie inutile, et ce au détriment de la première (A).

A- la simplification des procédures administratives

Au milieu du XIX Siècle, Vivien écrit: «On ne peut dissimuler combien l'administration française est lente, embarrassée, chargée de complication. Elle défend les intérêts de l'Etat, mais à grands frais; elle sert les citoyens, mais au prix d'une longue attente; elle atteint son but, mais au prix de mille obstacles»[14]. Et ce juriste de chercher, déjà, à en établir les causes et tenter de dégager des moyens d'y remédier. La simplification est aujourd'hui communément perçue comme en constituant un, et figure aussi en bonne place dans les politiques d'amélioration des relations entre l'administration et les administrés, lesquelles sont elles-mêmes un instrument de l'adaptation de l'administration à l'évolution de son «environnement». Outre qu'ils ont porté sur les structures administratives, les règles juridiques, les efforts de simplification ont pour objet les procédures et formalités administratives[15]. La simplification inaugurée par la loi du 2 juillet 2003 s'inscrit donc dans une certaine continuité de préoccupations; au demeurant, elle présente des aspects originaux. Outre la succession des textes législatifs de

[14] *Vivien,* «Etudes administratives*», 3è ed. 1859, t.1, p.343.*
[15] *Sur une présentation générale de ces questions voir notamment, C.Wiener et M.Le Clainche (dir.),* «Le citoyen et son administration*», Paris, Editions techniques, 2000.*

simplification (le dernier adopté date du 17 mai 2011[16]) qui marque l'existence d'un véritable mouvement de simplification, l'on assiste à un renouvellement de l'appréhension de la signification de la simplification (qui ne s'exprime pas seulement par la facture à l'incontestable aspect «fourre-tout» de chacune de ces lois…[17]).

Telle qu'elle figure en effet dans les programmes d'action de la politique gouvernementale, la simplification concernait jusqu'alors les procédures administratives proprement dites, quand bien même il faut admettre que le vocabulaire utilisée à son endroit semble manquer d'assurance. Il s'agit en effet alternativement de «simplifier des procédures», de procéder à la «simplification de nos procédures administratives», de mettre en place un «pouvoir de redressement et de régulation» face à certains «mécanismes administratifs», de procéder à un «allègement du formalisme administratif», ou encore de «maîtriser l'envahissement paperassier»[18]. Pourtant, avec l'incontestable extension du domaine de la simplification, qui passe de celle des *procédures* à la simplification du *droit*, et absorbe la codification[19], le législateur doit prendre aujourd'hui la précaution de se défendre de l'idée selon laquelle la simplification puisse être «synonyme de déréglementation, de contractualisation des normes», ou encore être «assimilée à la réduction drastique du nombre des textes»[20]. Or, si l'on s'en tient à l'idée d'une simplification administrative dans son acception initiale (expression d'ailleurs conservée dans le langage courant pour désigner la variété des mesures auxquelles la loi donne formellement unité), il peut être extrêmement complexe de dissocier d'un côté l'élément de procédure obsolète ou superfétatoire, dont l'exigence relève de l'entrave inutile tant au fonctionnement de

[16] *Loi n° 2011-525 du 17 mai 2011 de simplification et d'amélioration de la qualité du droit, JO du 18 mai 2011 p.8537; voir également la décision du Conseil constitutionnel n° 2011-629 DC du 12 mai 2011.*

[17] *Le Conseil constitutionnel a d'ailleurs estimé dans la décision précitée que l'hétérogénéité des dispositions de la loi ne sont pas, à elles seules, contraire à l'objectif constitutionnel d'accessibilité et d'intelligibilité de la loi.*

[18] *Par exemple, A.N., débats parlementaires, séance du 8 avril 2003. précèdemment: loi n° 2007-1787 du 20 décembre2007 relative à la simplification du droit et loi n° 2009-526 du 12 mai 2009 de simplification et de clarification du droit et d'allègement des procédures.*

[19] Voir P.Gonod, «La simplification du droit par ordonnances», commentaire de la loi n° 2003-591 du 2 juillet 2003, *A.J.D.A.*, 2003, n°31, p.1652, et «La simplification du droit par ordonnances » dans R.Drago, «*La confection de la loi*», P.U.F., Cahiers des sciences morales et politiques, 2004, p.167.

[20] *Rapport de la commission des lois, Assemblée nationale, n°752, avril 2003.*

l'administration qu'à l'efficacité de son action, et, de l'autre côté, celui qui est essentiel au processus de décision. Par suite, la simplification ne saurait avoir ni pour objet ni pour effet de mettre en cause de telles garanties, sauf à opérer, sous couvert de garantir leur intelligibilité et leur clarté, à leur modification. Pour s'en tenir à un exemple figurant dans le champ de la première loi de simplification (2003), on comprend aisément les inquiétudes qui ont pu être exprimées s'agissant de procéder à «une série d'ajustements immédiats», pour reprendre les expressions d'un rapport parlementaire, en matière de marchés et commande publics. De même, si l'on peut admettre la réduction du nombre de comités et commissions, il doit être pris garde de ne pas supprimer les garanties liée à la consultation qui en a, un jour, déterminé la constitution.

Il relève, à l'évidence, de la seule appréciation des autorités compétentes de modifier ou non le fond du droit, et selon les procédés juridiques dont il lui appartient de déterminer la pertinence. Pour autant, et quand bien même est réalisée une extension du champ de la simplification, doit être évitée toute confusion entre l'objectif que poursuit la simplification et l'instrument qu'elle constitue aux mains des gouvernants, soit d'un coté l'appel, des plus contestables[21], à la procédure d'habilitation de l'article 38 de la Constitution, et d'un autre coté, le glissement des objets de la procédure supposée superfétatoire au fond du droit.

Si le champ de la simplification subit une extension, les politiques de simplification procèdent en outre à une assimilation, celle de la codification. Or, alors que la codification contribue à «œuvrer à la simplification et à la clarification du droit»[22] , et participe à ce titre de la garantie de l'intelligibilité et de la clarté du droit – objectif constitutionnel-, ainsi qu'à l'accès aux règles de droit qui figure au cœur de la citoyenneté administrative, curieusement, la procédure administrative résiste encore, et toujours, au processus de codification.

[21] *Y.Gaudemet, «Sur l'abus ou de quelques abus de la législation déléguée» dans R.Drago,* «La confection de la loi*», op.cit. , p.101.*
[22] *Décret n° 89-647 du 12 septembre 1989 modifié relative à la Commission supérieure de codification.*

B- la codification de la procédure administrative

Un code de l'administration, qui a vocation à regrouper les dispositions générales sur les procédures et les structures administratives non reprises dans des codes spécifiques, et à s'articuler autour de ces deux thématiques, a été envisagé et sa confection entreprise.

La relance de la codification a débuté en 1989, mais ce n'est qu'en 1995 que figure au sein du programme général de codification un projet de code de l'administration: le principe en est arrêté lors du séminaire gouvernemental sur la réforme de l'Etat en septembre 1995, adopté par la commission supérieure de codification au titre de son programme d'action 1996-2000[23], et rappelé dans la circulaire du Premier ministre sur la codification des textes législatifs et réglementaires de 1996[24]. L'élaboration de ce code est alors engagée en 1998, mais ne figure pas dans le champ d'application de la loi du 16 décembre 1999 qui autorise le gouvernement à adopter, par ordonnances, la partie législative de neuf codes[25]. Les travaux d'élaboration de ce code se poursuivent néanmoins, la commission supérieure de codification relevant dans son rapport d'activité de 2000: «Une première version de la première partie du code relative aux relations entre les administrations et le public est prête (...), l'élaboration du second livre (…), est toujours en cours d'élaboration.», termes repris dans son rapport d'activité 2001. Curieusement, le rapport annuel 2002 ne comporte qu'une seule et unique mention du code de l'administration, dans un développement consacré à l'accomplissement du programme de codification, à savoir: «Quant au code de l'administration, la commission y a provisoirement renoncé, faute de structure ministérielle pour mener à bien sa réalisation.»; en 2003, le rapport de la commission supérieure de codification se contente d'indiquer: «Il est également souhaitable que la commission soit à même d'adopter les plans du code de l'administration, du code du sport et du code général des transports avant la fin de l'année 2004.» Ce qui ressemble assurément à un abandon n'est toutefois que de

[23] *6è rapport 1995 CSC, publications du JO, p.30. Les rapports ci-après cités sont consultables en ligne www.ladocumentationfrancaise.fr*
[24] *30 mai 1996, JO du 5 juin.*
[25] *Loi n°99-1071, JO du 22 décembre ; voir également la décision du Conseil constitutionnel, n°99-421DC du 16 décembre 1999, JO du même jour.*

courte durée, puisque si la loi du 2 juillet 2003 qui chahute quelque peu tant la conception que le processus de codification ignore le code l'administration; en revanche, la loi cadette du 9 décembre 2004, autorise le gouvernement à procéder à l'adoption par ordonnance et à droit constant, de la partie législative dudit code, dans un délai de 18 mois. Ce renouveau semblerait donc s'inscrire non pas dans le strict cadre de la poursuite de la codification, mais dans celui de la réactivation, parallèle, des actions menées en vue de la modernisation de l'Etat. Reste que les rapports annuels suivants de la commission supérieure de codification ne comportent qu'une citation du code l'administration, et comme étant «en projet». Cette instance réitère encore dans son dernier rapport -pour 2009,- son refus de réaliser un code de l'administration au motif d'abord fallacieux que le projet est pratiquement irréalisable, puis, plus réaliste bien que sans justification, que le projet «manqu(e) de pertinence».

Sur le fond, «le corpus à codifier» est rapidement «bien cerné»[26] . Il a été en effet prévu que «la partie consacrée aux relations entre les administrations et le public devrait rassembler les dispositions législatives adoptées depuis les années 1970, avec les premières réformes tendant à améliorer la transparence administrative et les droits des usagers. Seraient ainsi codifiées les lois relatives à la protection des données à caractère personnel (loi du 6 janvier 1978), à l'accès aux documents administratifs (loi du 17 juillet 1978), à la motivation des actes administratifs (loi du 11juillet1979) et au Médiateur de la République (loi du 3 janvier1 973). Trouveraient également leur place dans cette partie du code les dispositions plus récentes issues de la loi DCRA du 12avril2000, ou des ordonnances à prendre en application du présent projet de loi, sur l'administration électronique.»[27]. En revanche, il n'est pas envisagé d'inclure dans ce code les procédures en matière de contrats et marchés, celles-ci étant appelées à prendre place dans un code autonome,celui des marchés publics, dont la nouvelle mouture, adopté en 2001[28], et corrigé depuis lors à deux reprises (2004 et 2006).

La possibilité de la codification de la procédure administrative n'est pas

[26] *R.Schwarz, loc.cit.*
[27] *Rapport Sénat n°5 7 octobre 2004 de B.Saugey, v. à Article 56.*
[28] *Décret n° 2001-210 du 7 mars 2001*

contestable, et l'idée que des difficultés propres à l'opération de codification viendraient brider la réalisation de ce code ne sont évidemment pas convaincantes: d'ailleurs été réalisé une codification privée de la matière, sur la base du plan arrêté en 1998[29]... C'est aussi vers la singularité de la matière qu'il faut se tourner pour saisir ce qui constituent de véritables résistances à la codification de la procédure administrative[30].Celle-ci apparaîtrait comme une menace à la place, jusqu'ici accordée, du fait des conditions historiques, à la jurisprudence dans la formation du droit administratif français. Sans revenir sur la contestable opposition entre production textuelle et production jurisprudentielle du droit administratif et sur le supposé déclin de son caractère jurisprudentiel, comme sur cette idée que la codification aurait pour effet de faire du juge une autorité sans pouvoir, on ne peut s'abstenir de remarquer combien la conviction selon laquelle le droit administratif français serait impropre à la codification ne se laisse pas aisément ébranler, et nourrit, encore, des réticences à la codification du droit administratif. Or, à travers elle, c'est bien la question de l'étendue des pouvoirs du juge administratif qui est à l'œuvre.

Il n'y a pas lieu d'insister ici sur cet aspect de la question, mais de faire mention de deux conséquences qu'elle emporte. D'une part, alors que l'on entend valoriser et approfondir la relation administrative par le développement des droits des citoyens, on se prive d'un instrument dont on défend parallèlement la pertinence pour permettre à ces mêmes citoyens d'accéder aux droits que garantissent les procédures administratives. En d'autres termes, il y a prévalence de la préservation des pouvoirs du juge administratif sur les garanties qu'assurent les procédures administratives. D'autre part, et en quelque sorte par un phénomène de «compensation» aux mains de leurs promoteurs, se développe la technique des «chartes» au sein de l'administration, et depuis, la charte des services publics, se généralise à tous les services, telle la charte d'accueil des usagers dans les services publics, dite «charte Marianne». Il s'agit de documents le plus souvent adossé à des circulaires, et qui sont l'expression incontestable d'une

[29] *Code de l'administration réalisée sous la direction de Bernard Stirn et Simon Fornery et publiée aux éditions Litec, «juris-code», 1er édition 2004.*

[30] *P.Gonod, «La codification de la procédure administrative», A.J.D.A, 2006, n°9, p.489; A.Le Pors et S.Formery, «Le décret du 28 novembre 1983 : suites et fin. Du nouveau dans les relations administration-citoyens? »,* AJDA *2007, p. 626.*

action administrative[31]; reste que, tout en ayant des liens avec l'ordre juridique, figurant certainement au centre d'un «ordre administratif», ces documents sont généralement relégués dans «l'infra-droit». Les chartes évoquent une forme de contractualisation –factice- des relations de l'usager avec le service, sans remettre en cause la situation juridique des usagers à l'égard du service. Comme le remarquait le Conseil d'Etat

dans un avis formulé en 1993 sur le bilan 1992 de la Charte des services publics, la notion de charte est «étrangère aux traditions juridiques françaises, et (…) que la rédaction de documents de ce type comporte des risques réels d'ambiguïté», et reconnaissait néanmoins que «leur mise en place et leur publication (peut) constituer un instrument utile de rapprochement du point de vue de l'Administration et de celui de l'usager»[32]. Mais encore faudrait-il, ajoute-t-il l'année suivante, «qu'un choix clair soit opéré entre la formule du bilan publicitaire, celle du bilan critique, celle du programme d'action, et celle du guide ou du *passeport* en vue d'une bonne compréhension et du bon usage du type de services susceptibles d'être fournis par une administration déterminée»[33].

II les procédures administratives adaptées

Des contraintes externes ont exigés la rénovation et l'adaptation des procédures administratives. A cet égard, il y a lieu de signaler l'influence des droits européens, celui de l'Union européenne comme celui du Conseil de l'Europe, et notamment de la jurisprudence de la Cour de Strasbourg. Pour s'en tenir à un unique exemple, les directives dites marchés, et en particulier celle du 31 mars 2004, qui fixent un corps de règles faisant prévaloir les principes de transparence, de libre accès à la commande publique, et de l'égalité de traitement des candidats, ont-elles imposées des modifications du fond du droit de la commande publique et des adaptations du code des marchés publics. Ce type de rénovation, comme chacun sait, n'est pas

[31] *Sur cette question, voir C.Daadouch, « La circulaire et l'exercice de l'autorité dans l'administration », Thèse, Paris X-Nanterre, 1999, citée par J.Caillosse, « Sur les modes de règlements non juridictionnel des conflits interne à l'administration », AJDA 2003, p.880.*

[32] *Cité dans les considérations générales de son rapport public pour 1994 « Rapport public du Conseil d'Etat », n° 46, p.98.*

[33] *Ibid.*

propre à la procédure administrative et imprime toutes les règles de droit. En revanche, un autre phénomène de contrainte que ne peut ignorer l'administration et auquel elle ne saurait même résister, conduit, notamment, à un profond bouleversement des procédures suivies devant elle, à savoir, les technologies nouvelles de l'information et de la communication (NTIC) [34]. Autrement dit, il s'agit ici de s'intéresser aux supports de la procédure et non pas au contenu des normes procédurales, et au risque de confusion –et à l'utilisation de cette possible confusion- du contenant et du contenu.

A- l'administration et les NTIC

L'administration ne peut demeurer en marge de l'évolution technologique, et les potentialités offertes par les NTIC sont prises en compte, de même qu'elles imposent aux acteurs publics, et en particulier à l'Etat, une rénovation de ses modes d'organisation et de fonctionnement.

Au cours des années 1960, l'informatique est introduite dans l'administration, permettant principalement, tout d'abord de traiter des opérations standardisées, jusqu'alors réalisées de manière manuelle -comme la paye des agents, la liquidation des pensions , la tenue de la comptabilité, la gestion du matériel...- ; ensuite, de mobiliser rapidement les informations relatives aux usagers (casier judiciaire, sécurité sociale, titulaires du permis de conduire...), et d'assurer la production de masse de certains documents (carte grise par exemple). Par suite l'informatique apparaît comme un outil permettant d'accroître l'efficacité de l'action administrative, et tout à la fois, d'améliorer le service rendu aux usagers en rénovant les conditions de travail des agents. L'informatique accompagne ainsi, sans le bouleverser, le fonctionnement traditionnel de l'administration. C'est au milieu des années 1980, qu'un changement

[34] *Que l'on peut ici entendre de manière large comme «toutes les technologies participant aux opérations de traitement, de production et d'échange de l'information, sous toutes ses formes: du téléphone -fixe ou portable-, à l'Internet, en passant par la carte à puce ou les systèmes de visioconférence, sans oublier (...) la télévision numérique», Rapport B.Lasserre, «Vers une administration à accès pluriel », La Documentation française, janvier 2000.*

s'opère dans la perception de ce que peut apporter l'informatique à l'administration, à savoir qu'elle peut constituer un levier de la réforme des modes d'organisation et d'action de l'administration, un instrument d'amélioration du service rendu aux usagers[35]. Alors, les ministères sont invités à se doter d'un schéma directeur de l'informatique, de la bureautique et des réseaux de communication, comportant la définition des objectifs poursuivis et un plan de développement, et évaluant les coûts et avantages des programmes envisagés. L'informatique est alors diffusée dans l'ensemble de l'administration. Avec le développement de l'Internet dans les années 1990, une mutation qualitative s'opère dans la perception de ce que peut apporter l'outil informatique, qui tient essentiellement à ce qu'est l'outil Internet lui-même[36].

Par l'ouverture de sites administratifs ou la mise en ligne gratuite de données publiques essentielles (Journaux officiels et données juridiques, rapports officiels, annonces des marchés, catalogue de la Bibliothèque nationale etc…), l'information du citoyen est mieux assurée; les démarches et formalités administratives sont facilitées par la dématérialisation des procédures (les téléprocédures) et l'offre de services à valeur ajoutée (les téléservices). La dématérialisation de la procédure peut comporter divers degrés[37]. Il peut s'agir de la simple mise à disposition en ligne d'un formulaire, qui, une fois imprimé complété et adressé par voie postale; un degré supérieur permet la transmission électronique à l'administration du formulaire, avec envoi de pièces justificatives par voie postale; plus encore, l'usager peut utiliser une application interactive, laquelle lui permet de ne livrer, en ligne, que les informations liées à la demande qu'il formule, informations intégrées puis traitées par l'administration, et dossier auquel l'administration donne un numéro et adresse un accusé de réception. La procédure est alors entièrement dématérialisée jusqu'à l'édiction de la décision finale; un degré de dématérialisation plus important est atteint lorsque le processus précédent est

[35] *V. le rapport Basquiast, juillet 1985.*
[36] *V. C.Dhenin, «Vers une administration sans papier», La Documentation française, 1996.*
[37] *Voir le rapport Carcénac, «Pour une administration électronique citoyenne», La Documentation française, 2001, p.20-21*

généralisé à l'ensemble des acteurs de la vie économique, aux domaines les plus variés[38]. Téléprocédures et téléservices permettent donc à l'usager de bénéficier de la rapidité évidente des échanges, lèvent les contraintes liées aux horaires d'ouvertures des services publics, à leur éloignement géographique. La réduction des coûts pour l'usager, comme pour l'administration, peut ne pas être négligeable, de même que l'amélioration des conditions de travail des agents.

Un véritable basculement se produit en 1997/1998[39], l'Etat s'engageant alors dans un triple rôle: sensibiliser les particuliers (citoyens et entreprises) aux perspectives qu'offrent les NTIC et favoriser leur accès à ces nouveaux services; apporter une aide à l'essor des réseaux de l'information; établir un cadre juridique (législatif et réglementaire) propre à garantir la protection des personnes. Un «Programme d'action gouvernementale pour préparer l'entrée de la France dans la société de l'information» (dit PAGSI), est aussi adopté le 16 janvier 1998 par le premier Comité interministériel pour la société de l'information, qui notamment, érige la dématérialisation des procédures administratives et l'essor des téléprocédures au rang d'objectif prioritaire.

Il ne s'agit pas ici de s'arrêter sur les réalisations, alors et depuis lors[40], mais de s'interroger sur la mutation qui s'opère, sachant que, pour reprendre le titre d'un rapport[41], il s'agit de construire une administration en réseau, décloisonnée et construite autour du citoyen, tache actuellement poursuivie par la direction générale de la modernisation de l'État au ministère de l'économie, des finances et de l'industrie.

[38] *Seules les deux premières étapes sont aujourd'hui développées, la 3° est mise en place pour la fiscalité des entreprises*
[39] *Les priorités de l'action gouvernementale concernant l'entrée de la France dans la société de l'information sont définies par le Premier ministre l'occasion de l'Université de la communication (qui a lieu tous les étés à Hourtin), en août 1997.*
[40] *Pour un dernier état, voir notamment „L'administration numérique au service des usagers", Cahiers de la DGME, octobre 2009 et „Amélioration de la relation numérique à l'usager", rapport du groupe d'experts, 12 février 2010, Ministère du budget.*
[41] *«L'hyper-république, bâtir l'administration en réseau autour du citoyen», 8 janvier 2003*

B- L'impact des NTIC

Certains estiment qu'avec l'introduction des NTIC dans l'administration, l'on assiste à la réalisation d'une véritable révolution qui implique une «re-fondation» de l'administration. Outre l'innovation technologique serait source de transformation organisationnelle[42], l'exploitation des NTIC conduit à une profonde transformation de la relation avec l'usager et cela dans le sens de la promotion d'une réelle interactivité. C'est là qu'apparaît le thème de la " co-production " du service, à savoir que le service serait produit dans/par l'interaction entre le fonctionnaire et l'usager. Ce mouvement serait accentué par l'introduction des NTIC. Pour d'autres, cette dernière invite seulement à une adaptation de l'administration, laquelle montrerait sa capacité à se perpétuer, comme en attesterait, en ce qui concerne les rapports avec les usagers, le maintien des anciens modes de communication, notamment de la procédure papier et de la difficulté qu'il y aurait pour l'administration de passer au «tout électronique». Sans trancher ce débat, la situation appelle deux remarques.

Tout d'abord, l'expression d'administration électronique (ou encore «administration en réseaux», «e-administration») semble se parer de toutes les vertus quand elle ne trouve à s'opposer qu'à la seule qualification du même ordre, péjorative, «d'administration paperassière» (puisque l'on a jamais désigné une «administration de papier»). Que deux conceptions de la circulation de l'information soient en œuvre (l'une en silos, l'autre en réseaux) n'est pas contestable, mais l'expression, trompeuse, ne doit pas devenir abusive. Il ne s'agit en effet nullement ni de substituer un modèle administratif à un autre, ni même de substituer un mode d'accès à l'administration à un autre, mais de permettre un accès pluriel à l'administration[43].

[42] *Elle comporte de multiples facettes, parmi lesquelles: la modification du travail administratif, par l'élimination des tâches mécaniques ou répétitives, la polyvalence des agents et l'adaptation corrélative des métiers (et, autre corollaire indispensable, la " gestion prévisionnelle des effectifs "), la modification de la relation hiérarchique, du fait de l'aplatissement prévisible des pyramides hiérarchiques, etc...*

[43] Le titre comme l'illustration du rapport du Commissariat général du plan l'exprime très clairement: il porte sur «l'Etat et les technologies de l'information, vers une administration à accès pluriel» et figure sur sa couverture une feuille d'arbre: on y distingue nettement les nervures, qui se regroupent autour de la tige, et, avec la même netteté, la texture de la feuille qui est précisément composée d'un maillage de lignes qui établissent le lien entre toutes les nervures. La constitution de

Ensuite, s'agissant des usagers auxquelles les NTIC ont vocation à profiter (en facilitant notamment l'information, la consultation, la participation…), la situation est contrastée. On a pu relever des réactions négatives face aux téléprocédures, qui peuvent parfois effrayer l'administré, du moins le particulier[44]. On peut en trouver une explication dans le fait que, en opposition aux principes de l'information et de la participation que l'on promeut par ailleurs au titre des droits procéduraux, les téléprocédures ont été introduites sans réelle concertation avec les usagers. Par suite, elles sont souvent, et le seront vraisemblablement sans doute de plus en plus, imposées par l'administration et subies par l'usager, quand bien même celui-ci peut le plus souvent conserver le choix du mode de communication. Il y a là une démarche qui doit impérativement être corrigée, et d'ailleurs, il a été recommandé de partir des besoins des usagers, et non de ceux des services, sauf à laisser se creuser un écart entre ceux des usagers qui maîtrisent ces technologies et en tirent profit et les autres - les plus âgés, les plus fragiles, les plus vulnérables (phénomène que l'on désigne comme étant le "fossé numérique" ou la "fracture numérique"). Ces recommandations figurent encore parmi celles énoncées en 2010 par un groupe d'experts[45]. Précisément, si les NTIC comportent incontestablement des avantages pour les administrés, elles sont potentiellement au moins constitutives de risques.

Parmi ces derniers, le «fossé numérique», en d'autres termes l'aggravation des inégalités dans la relation administrative. Il est certain que, dans la mesure où l'information va toujours plus à ceux qui en sont les mieux pourvus, les NTIC leur profiteront d'abord. Or, malgré les actions de formation mises en œuvre, l'on peut certes craindre, par une rupture du principe d'égal accès au service public, l'installation de fait d'une administration à deux vitesses. Dans le même ordre d'idées, le développement des NTIC comporte le risque de dé-personnalisation de la relation entre l'administration et les administrés, c'est à dire un curieux retour en arrière sur les efforts fournis précisément pour lutter contre cette dé-

cette texture est aujourd'hui en œuvre,

[44] *Cela paraît moins vrai pour les entreprises, par exemple, comme le prouve le succès d'opérations du type « Télé-TVA ».*

[45] *„Amélioration de la relation numérique à m'usager", rapport du groupe d'experts, 12 février 2010, Ministère du budget, op.cit.*

personnalisation[46]. Un autre risque tient à l'accélération de l'action administrative consécutive à l'exploitation des NTIC: celui de réduire les garanties que les usagers tirent du formalisme des procédures.

* * *

Remarque conclusive: la promotion, par les procédures, de la citoyenneté administrative est réelle; toutefois, elle conduit à quelques interrogations et à une appréciation contrastée.

S'opère en effet sans aucun doute un approfondissement des garanties offertes par les procédures administratives dans les relations que l'administré entretient avec l'administration: cela est perceptible dans les politiques menées depuis les années 1970, dans la réforme de la décentralisation, la mise en place du Défenseur des droits etc..Au demeurant, sur le fond et comme il l'a établi, «si les administrés ont sans doute les armes juridiques pour être plus informés aujourd'hui qu'ils ne l'étaient il y a trente ans – et c'est sans doute sur ce point que les avancées ont été les plus significatives –, leur place reste plus aléatoire dans les procédures de participation» [47]. Ce qui vaut pour les procédures d'information et de participation, vaut sans nul doute pour les garanties qu'offrent notamment les procédures de consultation. Mais les mutations qui s'opèrent dans la confection du droit, et dans la recherche d'une meilleure qualité du droit rendant son accès plus aisé, comme certains impératifs de management administratif dont les NTIC sont , aussi, un instrument, pèsent sur les fonctions affectées à la procédure administrative, au risque tout à la fois d'en reléguer les fonctions initiales, et de malmener un autre principe, celui de l'égalité.

Mai 2011

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[46] *Le développement massif des téléprocédures et des téléservices offre en effet la possibilité sinon d'éliminer, ou du moins de réduire, le contact direct avec l'usager*
[47] *V.Champeil-Desplats, loc.cit.*

Functions and Purposes of the Administrative Procedure:

new problems and new solutions

Introduction

I shall start to say that, for me, it is a pleasure and an honor to participate in this Lisbon Meeting on Administrative Procedure, where we are invited to appreciate and compare our national systems under a European view.

My lecture will be divided in 3 parts:

1) the new relevance of the procedure in the Administrative Law;
2) the Portuguese Administrative Procedure Code: present situation;
3) the need to reform the Portuguese Administrative Procedure Code.

1- The new relevance of the procedure in the Administrative Law

There are, to begin, major transformations in the world of facts that introduce a new relevance to the procedure in the universe of the Administrative Law, that were brought by the transition from the "Aggressive Administration" ("Eingriffsverwaltung") of the Liberal State (in countries like France, Italy, Spain and Portugal), or of the so-called "Rechstaat" (in Germany), to the "Giving Administration" ("Leistungsverwaltung") of the Social State (BACHOF)[1] and, afterwards, to the "Infra-structural Administration" (FABER)[2] of the Pos-Social State, we are living in.

[1] *OTTO BACHOF, "Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung», in «Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer», n.º 30 Regensburg, 1971), Walter de Gruyter, Berlin, 1972, pp 193 ff..*

[2] *HEIKO FABER, «Verwaltungsrecht», 3rd. edition, Mohr, Tuebingen, 1992, p. 337.*

These transformations brought together the crisis of the administrative act or, better saying, the crisis of the constructions of the Administrative Law centered in the administrative act. As a matter of fact, we can say that the initial period of the Administrative Law (18th. and 19th. centuries, mainly) can be called as the "difficult childhood"[3] of the Administrative Law, characterized by an authoritarian perspective of the Administration, centered in the "administrative act", seen as a mere power structure (O. MAYER[4], M. HAURIOU[5]). In that period, the doctrine took the police use of power for the concept model of the entire administrative act notion, what was, in fact, theoretically incompatible with the global approach of the Liberal State. What requires a special caution for the jurist, that needs to realize a kind of psycho-analysis of the Administrative Law – one of my books is named: "Administrative Law in the couch of Psycho-analysis"[6] –, namely because there is a need to remember the traumatic facts of the past in order to learn how to "live with them". This exercise of "catharsis", of a "talking cure", seems to me to be the right way to deal with this "traumatic period" of the concepts and institutions of the Administrative Law.

Today, the administrative act is only «an instant photo of moving administrative relationships»[7] (BACHOF), what means that we need to consider "the whole film" (what happens before and after its practice) and not just the photography (the act itself). In this new approach there is the search of a "new center" to the Administrative Law[8], that follows two main theoretical directions:

- the discovery of the procedure as the new "center" of the Administrative Law, what seems to be the orientation of the Italian doctrine (See for all,

[3] *VASCO PEREIRA DA SILVA, «O Contencioso Administrativo no Divã. Ensaio de Psicanálise Cultural do Processo Administrativo», 2nd. edition, Almedina, Coimbra, 2009, p. 9 ff..*

[4] *OTTO MAYER, «Deutsches Verwaltungsrecht», I volume, 6th. edition (reimpression of the 3rd. Edition of 1924), von Duncker & Humblot, Berlim, 1969, p. 93.*

[5] *MAURICE HAURIOU, «Précis Élèmentaire de Droit Administratif», 5th. edition (with the co-operation of A. HAURIOU), Sirey, Paris, 1943, p. 6 e ff..*

[6] *VASCO PEREIRA DA SILVA, «O Contencioso Administrativo no Divã. Ensaio de Psicanálise Cultural do Processo Administrativo», Almedina, Coimbra, p. 9 e ff..*

[7] *OTTO BACHOF, «Die Dogmatik des V. vor den G. der V.», cit., in «Veröffentlichungen der V. der D. S.», nr. 30, cit., p. 231.*

[8] *See VASCO PEREIRA DA SILVA, «Em Busca do Acto Administrativo Perdido», Almedina, Coimbra, 1996, pp. 111 ff..*

NIGRO[9], CASSESE[10], SANDULLI[11])

- the discovery of the administrative relationship as the new "center" of the Administrative Law, what seems to be the orientation of the German doctrine (See for all, BACHOF[12], MAURER[13])

These two perspectives, however, were not incompatible and both contributed to give a new relevance to the procedure, replacing the "classical" approach focused on the final result of the administrative action. And, on the other hand, these two approaches came closer to the British perspective of the Administrative Law, much more turned to the administrative procedure instead of the use of power by the administration[14]. What brings an important turning-point of the modern Administrative Law: as the focus goes, now, from the result of the administrative power towards the decision procedure, from decision to decision-making.

That new approach brings together the need of looking to the Administrative procedure with autonomy, abandoning the traditional perspective of looking at the procedure and process as if they were the same thing. In fact, the (classical) "trauma" of the identity of procedure and process came from:

- the French idea of the "separation of powers", that was proclaimed and, at the same time, denied by the creation of an Administrative Court, that was not really a Court and was instead a part of the Administration ("Conseil d' État"). Being that, what I use to call the "original sin" of the (continental) Administrative Law[15];

[9] *MARIO NIGRO, «Diritto Amministrativo e Processo Amministrativo nel Bilancio di Dieci Anni di Giurisprudenza», in ALLEGRETTI / BATTAGLINI / SORACE, «Diritto Amministrativo e Hiustizia Amministrativa nel Bilancio di un Deccennio di Giuriaprudenza», vol. II, Maggiole Editore, Rimini, 1987, p. 967.*

[10] *SABINO CASSESE, «Le Basi Costituzionali», in SABINO CASSESE, «Trattato di Diritto Amministrativo», vol. I («Diritto Amministrativo Generale»), Giuffrè, Milano, 2000, pp. 159 ff..*

[11] *ALDO SANDULLI, «Il Procedimento», in SABINO CASSESE, «Trattato di Diritto Amministrativo», vol II («Diritto Amministrativo Generale»), Giuffrè, Milano, 2000, pp. 927 ff..*

[12] *OTTO BACHOF, «Die Dogmatik des V. vor den G. der V.», cit., in «Veröffentlichungen der V. der D. S.», nº 30, cit., p. 231.*

[13] *HARTMUT MAURER, «Allgemeines Verwaltungsrecht», 17th. ed., Beck, München, 2009, pp. 164 ff..*

[14] *See SABINO CASSESE, «La Costruzione del Diritto Amministrativo», in SABINO CASSESE, «Trattato di Diritto Amministrativo», vol. I («Diritto Amministrativo Generale»), Giuffrè, Milano, 2000, pp. 1..*

[15] *VASCO PEREIRA DA SILVA, «O Contencioso A. no D.. E. de P. C. do P. A.», cit., pp. 13 ff..*

- the positivist theory of the "executive power", looking at the administrative and the judiciary power as two identical State functions (KELSEN, MERKL[16]), considering they were both secondary and executive functions.

According to this new approach, the process can be no longer the model for the administrative procedure. The process should not be seen as a general category with three derivations (legislative, administrative and judicial), but quite opposite each State power (or function) should have its own autonomous procedure. The procedure is "the form of the function" (BENVENUTTI)[17], meaning that each function has its particular aims and characteristics that require a specific procedure. What brings no longer a category of process with three different genres, but three different categories of procedures (being the judiciary one called as process).

This new approach affected the traditional continental views of the Administrative Procedure (like the Portuguese one, that before was called Administrative Process, and was seen as being unified with the process of the courts); but also affected the British and American approach of joining together procedure and process (and by creating something in the middle, like the "Administrative Tribunals" or the "Agencies")[18].

2- The Portuguese Administrative Procedure Code: present situation

The requirement of an Administrative Procedure Code was imposed by the Portuguese Constitution of 1976 as a trade-mark of the new democratic Administration. As established by the art. 267, nº. 3, of the Constitution,

[16] *See HANS KELSEN. «Teoria Pura do Direito», Arménio Amado, Coimbra, 1979; ADOLF MERKL, «Allgemeines Verwaltuingsrecht», Julius Springer, Wien / Berlin, 1927.*

[17] *FELICIANO BENVENUTTI, «Processo Amministrativo (Struttura)», in «Enciclopedia del Diritto», vol XVIII, Giuffrè, Varese, p. 463.*

[18] *See P. P. CRAIG, «Administrative Law», 4.ª edição, Sweet & Maxwell, London, 1999; BRADLEY / EWING, «Constitutional and Administrative Law», 13.ª edição, Longman, Harlow / London, 2003; WADE / FORSYTH, «Administrative Law», 9.ª edição, Oxford University Press, Oxford, 2004;*

«Administrative procedures shall be dealt with in a special law, which shall ensure rationalization of the methods to be used by departments and participation by the citizens in the decision-making process or in deliberations which concern them».

However, as OTTO MAYER recalled, changes in Constitution are quicker than in Administrative Law and, in Portugal, we had to wait until 1992 to have an Administrative Procedure Code (D.L. 442/91, of 15th November). To have an Administrative Procedure Code has been «the little biggest revolution in the Portuguese legal order» (FREITAS DO AMARAL)[19]. As a former member of the Commission (presided by FREITAS DO AMARAL) that prepared the Administrative Procedure Code, I remember very well the controversy and the rejection that the idea of having such a codified regulation created among us[20].

There are two main codification models in other countries' Administrative Laws:

- the minimalist model, like the Italian (and, in a certain sense, also the French, even if in France there is not a Code as such, just some specific regulations) way, where the idea is to have effective but limited regulation. In this model of partial regulations of the procedure there is a concern in choosing "the right issues" (as CASSESE once said) in order to assure the best prosecutions of public interests as well as citizen protection;
- the maximalist model, like the German, Spanish and Portuguese way, where the idea is to have a complete regulation of the procedure, including also some substantive Administrative Law[21].

In the Portuguese case, the codification of the procedure was seen as an opportunity to rule all the main Administrative Law field. Therefore instead of an Administrative Procedure Code we created a real Administrative Code. In fact the Portuguese Administrative Procedure Code is divided in 4 parts (and just one concerns only procedure), as follows:

[19] *FREITAS DO AMARAL, «O Novo Código do Procedimento Administrativo», in «O Código de Procedimento Administrativo», INA, 1992, pp. 53.*

[20] *See ROGÉRIO SOARES, «Codificação do Procedimento Administrativo Hoje», in «Direito e Justiça», vol VI, 1992, pp. 16 ff..*

[21] *See VASCO PEREIRA DA SILVA, «Em Busca do Acto Administrativo Perdido», Almedina, Coimbra, 1996, pp. 311 ff..*

- 1st. Part - General Principles (not only of the procedure but of the whole Administrative Law);
- 2nd Part - Subjects;
- 3rd Part - Administrative Procedure;
- 4th Part - Administrative activity. This last part is also divided in three chapters, as follows:
    - Administrative rules or regulations;
    - Administrative Acts;
    - Administrative Contracts or Public procurement.

One of the main conquests of the Code was the right to be heard before a public body previous to a decision. I remember very well that, by the time we prepared the Code, we have made a questionnaire to be sent to the public authorities and in almost all the answers we got the rejection of that principle was complete. But all the resistances were overthrown and the right to be heard was established and applied. Today, there is no resistance in the Public Administration to apply the rule that imposes to all the public bodies the need to hear the affected persons before taking a decision.

I have to say that I don't agree completely with the solution given by the court to apply that principle. Because the absence of the hearing should be sanctioned by the strongest form of illegality, since we are talking, in my opinion, about the violation of a fundamental right stated in the Constitution[22]. To me (according to a position also shared by others, like SÉRVULO CORREIA[23] or, in a sense, MARCELO REBELO DE SOUSA[24]), the right to be heard is a procedural fundamental right of the third generation, integrated in the constitutional principle of participation, while others (FREITAS DO AMARAL) reject that qualification, proposition a more restrictive view of fundamental rights. That last perspective has been adopted by the Courts that, refusing the idea that it was a fundamental right, have been although very effective in the repression of the absence of the hearing,

[22] *See VASCO PEREIRA DA SILVA, «Em Busca do A. A. P.», cit., pp. 430 ff..*

[23] *SÉRVULO CORREIA, «O Direito à Informação e os Direitos de Participação dos Particulares no Procedimento e, em Especial, na Formação da Decisão Administrativa».*

[24] *MARCELO REBELO DE SOUSA, «Regime do Acto Administrativo», in «Direito e Justiça», vol. VI, 1992, pp. 37 ff.*

by revoking those decisions.

Looking back to this (already) old discussion, now, I believe that the right to be heard has been applied and it is effective in our legal order, no matter what the arguments are, but that goes also with its application as a formal principle, which does not mean, in the practice, that all the interests are really taken in consideration in the decision. So, I believe that we must consider a new kind of material vice of administrative acts by not taking in consideration the interests manifested in the procedure. Taking in consideration the interests expressed in the procedure means evaluating each one of them (and not necessarily following them) in the decision; and not doing so is a (material) violation of the law.

In conclusion, in the actual Portuguese situation, if the courts follow the formal approach, and the right to be heard is already a reality in nowadays Administration activity, the material approach, of taking in consideration the interests heard in the procedure in the final decision, is not yet reached.

3) The need to reform the Portuguese Administrative Code

In my view, there are three main reasons to reform the Portuguese Administrative Code:

A) the need for updating and "refreshing" the concepts of the Portuguese Administrative Code;
B) the need to adapt the Portuguese Administrative Code to important legislative changes that took place in the meantime (the reform of the Administrative Process, the Public Procurement Code);
C) the need to open the Portuguese Administrative Code towards European and Global Law, in general, and in particular the necessity of conciliation of its rules with the "Services Directive".

3.1- The need for updating and "refreshing" the concepts of the Portuguese Administrative Code

This need for updating and "refreshing" the concepts of the Procedure Code can be showed by a few examples:

1) the automation of the public Administration was not considered at the time the Code was made, but the Administration by machines can not mean an "escape to the law"[25]. The Administrative Procedure Code establishes, however, the application of the general principles of the administrative Law to the technical activity of the administration (art. 2, n.º 5), what can be a starting-point for the regulation of the automation, but it is not enough. The need for a specific regulation of the automation by the Portuguese Administrative Code is required because:
    a) automation can collide with fundamental rights. According to the art. 18th, n. 1, b), of the Portuguese Constitution, the possibility of aggression of fundamental rights should be ruled by law;
    b) law should determine the field of application and the limits of automation in the public administration;
    c) specificities of form and procedure of administrative activity produced by machines requires a special law (and that law, in Portugal, according to our model of codification, should be the Administrative Procedure Code).

2) Several concepts used by the code are updated. For instance, the concept of administrative act is "old fashioned", since it has been shaped according to the model of the authoritarian administration, that no longer exists (by the way, the title of my doctoral thesis, long

[25] *See MARCELO REBELO DE SOUSA / SALGADO DE MATOS, «Direito Administrativo Geral», mx. vol. III, D. Quixote, Lisboa, 2007.*

time ago, was "In Search of the Lost Administrative Act")[26]. We can see that very clearly if we look at the so called self-executing administrative act (that corresponds to the French expression of "decision exécutoire"[27]) – see article 149 ff., of the Administrative Procedure Code. This key-concept is no longer correct because:

a) Self-execution is not a general characteristic of the administrative act, since it can characterizes only some acts of use of power (for instance, police action) and not all the administration action. On the other hand, all the "giving acts" of the Administration (for instance, a scholarship given to a student, a subvention given to a private according to agricultural public policies) cannot, by nature, be executed against the will of the private, because they benefit the private, that asked for and participated in the procedure in order to ensure them;

b) Self-execution only exists when it is previewed by the law, according to the principle of legality. Self-execution is not a "natural privilege" of the Administration, but a power conferred and authorized according to the rule of law;

c) The practice of an administrative act previous to the use of force is not a guaranty against illegality. We can clarify this by using the "movie-case" of the "dirty Harry", that was a character performed by Clint Eastwood of the early days (when he made "macho man" films), where the use of force was a perversion of the law by practicing a previous administrative act and applying all the formal rules. In the movies, when "Dirty Harry" catches up a criminal, first he shoots against his feet or his harms, and then (practicing the administrative act previous of the use of force) he cries: «Come on, make my day!», before the final shoot down. Ironically, we could say that "Dirty Harry" was an "old school" applicant of the law, a "classical" Administrative lawyer, because he never forgot to prac-

[26] *VASCO PEREIRA DA SILVA, «Em Busca do A. A. P.», cit..*
[27] *MAURICE HAURIOU, «Précis É. de D. A..», cit., p. 240*

tice an administrative act previous to the use of force.[28]

In conclusion, after these two examples (but we could appreciate much more) we can say that there is a need to update and to "refresh" the theoretical concepts of the Administrative Procedure Code.

3.2 - The need to adapt the Portuguese Administrative Code to important legislative changes that took place in the meantime (the reform of the Administrative Process, the Public Procurement Code)

After the Portuguese Administrative Procedure some other reforms took place, affecting it, such as:

a) the major reform of the Administrative Process Law (a Law on the Organization of the Administrative Justice and a Code of Administrative Process, that entered in power in 2004) that, among other things, introduced remedies to condemn the Administration (namely the so called "action of condemnation in the practice of an administrative act"). From now on it is no more need to pretend that there has been an administrative act, when the Administration has done nothing, in order to allow its anullment, as the law determined before. The judge may directly condemn the Administration when she does not act, or when she denies the request (pretension) made by a private.

This reform had the effect of a "talking cure" (in Freud's sense) of one of the biggest "traumas" of the Portuguese Administrative Justice, coming from the times of its "difficult childhood", the one that conducted to the statement that "the judge can anull, but never condemn the Administration". Now, after the reform, the Administrative judge is considered as a full judge that has all the powers he needs to protect the rights of the privates and solving the conflicts with the public authorities - what seems to be (also from a psycho-analisis point of view) a more reasonable way to deal with the problems;

[28] *See VASCO PEREIRA DA SILVA, «Em Busca do A. A. P.», cit., pp. 544 ff..*

b) the establishment of a Public Procurement Code, determined by European Law[29], that enlarged the traditional regulation of the so called administrative contract (according to the French tradition of "le contrat administrative") to all the contracts celebrated by the public authorities[30]. Apart from all the other modifications, that changed the nature of the Administrative Procedure Code that pretended – and was, indeed - an Administrative Code, by putting out of the Code the matter of the public procurement. What brings to the arena, again, an old principle question, the question of the models of codification: should the Administrative Procedure Code keep being a general code, integrating (at least some) principles of the new Public Procurement Code, or should it become a real procedural codification, or else, should he stay something in between?

3.3- The need to open the Portuguese Administrative Procedure Code towards European and Global Law, in general, and in particular the necessity of conciliation of its rules with the "Services Directive"

The "national approach" of the Portuguese Administrative Procedure Code must be conciliated with European and Global Law that also contributed to the revalorization of the procedure by introducing a global dimension. In particular, today, there is a necessity to conciliate the rules of the code with the "Services Directive".

The main rule of the Services Directive, for that matter, is the art. 5, n.1, that creates a principle of simplification of the administrative procedure by determining that «where procedures and facilities (…) are not sufficiently simple, Member states shall simplify them». This rule means a real revolution in administrative procedures and the Services Directive establishes some main consequences, such as:

[29] *See the Directive 2004/18/CE, from the European Parliament and the Conseil, from 31st. March 2004, and the Directive 2004/17/CE, from the European Parliament and the Conseil, from 31st. March 2004.*

[30] *See MARIA JOÃO ESTORNINHO, «Direito Europeu dos Contratos Públicos – Um Olhar Português», Almedina, Coimbra, 2006.*

- the acceptance of equivalent documents from other member States (art. 5, nº. 3);
- the creation of administrative "points of single contact" (art. 6);
- the right to a complete information through the points of single contact (art. 7);
- the creation of distant and electronic means to access the procedures and formalities (art. 8);
- the principle of the minimum of authorizations required to access a service activities (art. 9);
- the principle of non duplication of requirements in different Member States (art. 10, nº. 3)
- the principle of a complete assistance for recipients, including information about the exercise of the activity, about the means of redress available in case of dispute, about associations or organizations from which providers or recipients may obtain practical assistance (art. 21).

It is time now to come to a general conclusion. The need for updating and "refreshing" the concepts, the need for adaptation with the legislative reforms that took place in the meantime (the reform of the Administrative Process and the Public Procurement Code), the need of a global dimension and, in particular, the necessity of conciliation with the "Services Directive", are three good reasons to reform the Portuguese Administrative Procedure Code. And, by the way, I think that I am in a good position to say, having been a member of the former Commission that elaborated the Code and being proud of it, that now is the time to reform the Administrative Procedure.

Vasco Pereira da Silva

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The Crab of Chuan-tzu: the Regulation of Italian Administrative Procedures in a Global and Comparative Perspective

In the third of his "*Six Memos for the Next Millennium*", on quickness, Italo Calvino tells the following tale: "Among Chuan-tzu's many skills, he was an expert draftsman. The king asked him to draw a crab. Chuan-tzu replied that he needed five years, a country house, and twelve servants. Five years later the drawing was still not begun. I need another five years – said Chuan-tzu. The king granted them. At the end of these ten years, Chuan-tzu took up his brush and, in an instant, with a single stroke, he drew a crab, the most perfect crab ever seen".

Calvino's story could fittingly depict one of the most important problems faced in efforts to regulate any type of procedure: namely, the trade-off between accuracy and efficiency[1]. On one hand, accuracy requires participation. In order to "draw a perfect crab" – that is to say, to issue a lawful, reasonable and sound administrative decision – all interests affected ought to be introduced into the decision-making process, taken into consideration, and reasonably balanced. To this end, those representing such interests – whether they be private subjects or public offices – must be allowed to take part in the procedure. On the other hand, however, participation produces delay. The more interests are introduced, the

[1] *See L.B. Solum,* Procedural Justice*, (February 23, 2004). U San Diego Law & Econ. Research Paper No 04-02 (stating that: "a fair procedure must, at a minimum, strike a fair and reasonable balance between the benefits of accurate outcomes and the costs imposed by the system of procedures").*

more complex and lengthy the procedure. Simplification then comes into the picture, in order to compensate for the increase in (both public and private) participation.

In the light of the foregoing, to expect a legislature, in any given legal order, to simultaneously enhance both participation and simplicity in administrative procedures, may appear as expecting a circle to be squared. Yet, the circle must be squared, for reasons that globalization has strengthened, stressing both the need of accuracy and that of efficiency.

This paper takes globalization as a starting point. Part II recalls the influence of economic and social integration, both within and outside Europe, on national administrative procedures. Globalization may not have created, but has certainly exacerbated, the problem of accommodating the tension between accuracy and efficiency in the regulation of administrative procedures, stressing the importance of both needs. In the subsequent parts, the paper addresses the domestic regulation of administrative procedures, focusing particularly on the Italian experience. The latter, however, as long as possible, is examined in a comparative perspective and with greater emphasis on general problems, rather than on the details of the legal framework. Part III refers to participation. Three main issues are taken into account: the scope and content of due process rights (III.1); the relationship between procedural (due process) and judicial (substantive) guarantees (III.2); and the relationship between political representation and administrative participation (III.3). Part IV explores simplification. It addresses three main techniques: regulation of the lenght of administrative proceedings (IV.1); streamlining of procedures by providing general solutions for all types - or at least for a wide category - of procedures (IV.2); simplification of specific types of procedures, on a case-by-case basis (IV.3).

II. *Why and how globalization matters*

Globalization produces a deep and fundamental change in public law: domestic rules and decisions increasingly acquire extraterritorial impact. Those rules and decisions, though formally binding in a single territory, substantially affect individuals throughout the world, and particularly in those regions which

share a common market. Domestic authorities are still politically accountable only to the citizens who have elected them and have conferred powers upon them. The exercise of those powers, however, directly affects the lives, properties and liberties of foreign subjects, to whom domestic authorities are not accountable in the least. While the traditional problem of public law consisted of the conflict between *public* authority and *individual* freedom, its contemporary embodiment is the conflict between *domestic* authority and *foreign* freedom. As the solutions applicable to the first problem are often not suitable for the second, the entire public law system must be engaged to adjust to such a fundamental change. Administrative procedures make no exception.

As for the latter, globalization appears to produce three main trends: convergence; growing importance of participatory rights; simplification.

First, global markets require uniformity. From the perspective of firms operating across a single market, diverging national regulations entail significant costs. Divergence implies the need to comply with each and every set of rules governing the same economic space. The "uniformity requirement" applies to substantive as well as procedural rules. Reference to a single example may suffice: in 2005, the United States sued the European Union before the WTO Dispute Settlement Body, challenging the alleged "*non-uniform*" manner in which the European Communities administered its customs laws and regulations. According to the claim advanced by the US, the EU «administers [such laws and regulations] in 25 different ways. As administration is the responsibility of each Member State […] traders are subject to 25 different procedural regimes for bringing goods into free circulation in the EC. The net result is an administration that distorts rather than facilitates trade and that imposes transaction costs that should not exist where administration is uniform»[2]. Although the Panel and the DSB[3] did not uphold the US claim in several respects, the case illustrates the link between the globalization of markets and the uniformity of administrative procedures. As to the EU, in particular, internal procedural convergence among Member States becomes an external duty of the Union.

[2] European Communities – Selected Customs Matters (*Report of the Panel* - WT/DS315/R 16 June 2006, p. 18).

[3] European Communities – Selected Customs Matters (*Report of the Appellate Body* - WT/DS315/AB/R 13 November 2006).

The second trend brought about by globalization is the growing importance of procedural safeguards and, especially, participation in administrative procedures[4]. In most democratic legal orders, the protection of citizens' rights against public administration is based on two pillars: political supervision and judicial review. On one hand, administrative decisions are adopted by authorities which, directly or indirectly, represent the citizens affected by those decisions. On the other hand, administrative decisions are reviewed by courts independent from the deciding authorities. Both safeguards, however, are less effective in the context of the relationship between domestic authorities and foreign freedoms. As to the democratic pillar, namely political representation, foreign subjects affected by the exercise of domestic powers are not represented by the deciding authority. As to the rule of law pillar, judicial review mainly ensures that administrative authorities adhere to rules, and pursue interests, which are approved and selected by a legislature which does not represent foreign subjects. Moreover, national courts, when viewed from abroad, appear less independent from the administrative authorities of their country, whose decisions they review. The increasing ineffectiveness of these pillars in a global context partially explains the growing importance of the third, namely direct participation of private parties in administrative procedures. Globalization tends to increase such form of participation, and to enlarge the area of subjects having standing. Since participation is granted to the persons affected, rather than to citizens alone, it is open to foreign subjects as well as to domestic ones. The increasing proceduralization of domestic decisions, therefore, tends to become an instrument through which legal and institutional globalization is ensured: through administrative procedures, the interests of a globalizing civil society, not represented in national political bodies, are taken into account by domestic administrative agencies. Evidence of this globalization-related trend can be easily drawn, once again, from the WTO context: for example, both the Agreement on the

[4] *A similar trend of "proceduralization" was recently noticed by Jean Bernard Auby, who observed that citizens' safeguards against public administration are increasingly ensured by means of procedural rather than substantive elements, and by administrative proceedings more than judicial review. Auby ascribes this trend to several factors. However, globalization seems to be an important part of his explanation. See J.B. Auby,* Procédure administrative et garantie des droits des citoyens en droit français*, in A. Massera (a cura di) ,* Le tutele procedimentali. Profili di diritto comparato*, Napoli, Jovene, 2007, p. 31.*

Application of Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT) impose a "notice and comment" requirement upon those domestic agencies responsible for adopting rules which impact on global trade[5].

Finally, globalization requires simplification. Economic integration is based on free access to domestic markets, which frequently depends on the grant of licences or authorizations by national regulating agencies. However, access to domestic markets can be denied not only by means of an explicit refusal. It could also be limited by delay. The lenght of procedures is thus in itself an obstacle to trade, irrespective of the substantive content of the outcomes. For example, one could take the well-known, and highly debated, EU-US dispute on Genetically Modified Organisms (GMOs). In that case, the Panel did not find that the EU acted inconsistently with WTO law because it denied approval of biotech products; rather, the US claim was upheld by the Panel because of an "undue delay" in the completion of EU approval procedures[6]. Moreover, globalization brings around a competitive dynamic in the relationship between domestic legal orders, both in terms of attracting foreign investments and in terms of favouring locally-established firms within the global market. A business-friendly administrative system, and more specifically simple and quick administrative procedures, do play important roles in such competition, as is often recalled by the World Bank's "Doing Business" rankings, which measure how conducive domestic regulatory

[5] *According to the SPS Agreement (See Annex B, par. 5), "Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall: (a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation; (b)notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account; (c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations; (d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account". Similar provisions are contained in the TBT Agreement (See Art. 2.9). The* notice and comment *requirement allow only States to partecipate in the decision-making process of other Member States. However, States usually represent the interests of foreign private parties directly affected by domestic measures (See on the topic G. Shaffer,* Defending Interests: Public-Private Partnerships in WTO Litigation*, Brookings Institution Press, 2003).*

[6] European Communities – Measures Affecting the Approval and Marketing of Biotech Products - DS291, 292, 293.

environments are to the starting and operation of local firms: Italy currently holds the 80th position, immediately following China[7].

In summary, globalization places strong pressure on national legislatures. These must converge, by establishing uniform procedural regimes, ensuring greater participatory rights and reducing the costs deriving from the complexity and duration of administrative procedures. How do national legislatures react? In particular, how does the Italian legislature respond? The domestic regulation of administrative procedures shall now be expounded, with emphasis on the Italian experience, albeit in a comparative perspective; the problems referring to participation on one hand and those regarding simplification, on the other, shall each be examined in turn.

III. *Participation*

III.1. *Convergences: when is due process required, and what process s due*

In comparing rights of participation before administrative agencies in different legal orders, two questions are relevant at the outset: when is due process required? Also, what process is due?

A preliminary answer to both questions is that one must refer to the specific statutes to be applied: due process is due when provided for by such statutes, and to the extent they so provide. This is certainly true in most, if not all, domestic contexts. Yet, this response simply calls for more questions: is there a general right to due process, to be granted regardless of the provisions of specific statutes ? If so, when does such a right exist and what is its content?

In this connection, the traditional divide distinguishes countries that have passed a statute generally applicable to administrative procedures, from countries that have no such law. Most of the countries considered to be "developed" in administrative terms fall within the former category, and include, among several others, Austria (1925), U.S. (1946), Germany (1976), Spain (1958 and 1992), Portugal (1962) and Italy (1990). The most prominent examples of countries belonging to the second category are, as is very well known, the United Kingdom

[7] *Data are available at http://www.doingbusiness.org/rankings.*

and France[8].

However important such difference may be, as far as due process is concerned, it should nevertheless not be overrated, for several reasons.

First, the absence of a general statute on administrative procedures is not equivalent to an absence of a general right to due process. Both in the UK and in France, such a right has long been ensured by the courts. In the UK, the common law principles of "natural justice", and subsequently the principle of "fairness", essentially imply due process requirements, such as the provision of notice of the case and of an opportunity to be heard. However, the scope of application of those requirements, and their exact content, is left to the courts, which decide on a case-by-case basis and with a great degree of flexibility, taking into account the effect of the administrative decision and the importance of the interest at stake. Moreover, in France, specific aspects of due process, such as the duty to give reasons (Loi n. 79-587 du 11 juillet 1979) and the right to be heard (Loi n. 2000-321 du 12 avril 2000), are regulated by legislative rules applicable to a broad set of administrative decisions, namely adjudicative decisions having adverse effects (*décisions administratives individuelles défavorables*) or an exceptional nature (*décisions administratives individuelles qui dérogent aux règles générales fixées par la loi ou le règlement*).

Second, in countries where general legislative regulation of administrative procedures exists, this regulation may sometimes merely set out a procedural model, which applies as long as specific statutes provide so. In the US, for example, the "formal adjudication" procedure, as regulated by the APA, applies only "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing" (5 U.S.C. § 554). Failing that, "informal adjudication" takes place, meaning that most procedures need only respect the constitutional provisions on due process, whose content is determined by courts on a case-by-case basis, and according to flexible criteria, not very dissimilar from those used in UK[9]. The German APA (*Verwaltungsverfahrensgesetz, VwVfG*) provides

[8] *See on the topic S. Cassese,* Legislative Regulation of Adjudicative Procedures. An Introduction*, in "REDP/ERPL", 1993, numero speciale, pp. 15-26.*

[9] *See, for example, the U.S. Supreme Court case of* Mathews v. Elridge*, 424, U.S., 319 (1976): «identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of addi-*

a slightly different solution, as it regulates both a model of "formal procedure", to be followed only when required by law (§63), and a minimum standard of due process, which tends to apply to all adjudicative procedures (§13 and §28, on hearing of participants; § 39, on statement of grounds). In both countries, therefore, whereas a right to due process is based on general legislative or constitutional provisions, one must often look to specific statutes, and to judicial decisions, in order to find more precisely when due process is due, and exactly what elements of the process are due.

Third, due process "minimum standards" are increasingly defined at international and supranational levels. In Europe, this pattern of convergence is mainly due to judge-made general principles of Community law, which the European Court of Justice also drew from traditions common to the Member States[10]. These general principles, however, were subsequently codified in primary legislation. A "European minimum standard" of due process is now set out in Article 41 of the Charter of Fundamental Rights of the European Union, which refers to the "right to good administration". This includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file; and (c) the obligation upon the administration to give reasons for its decisions. Minimum due process rights are therefore granted to private parties, regardless of domestic regulations and the differences that exist between these.

Turning now to the Italian experience, the situation is as follows: a general statute on administrative proceedings, namely Law n. 241/1990, sets out minimum due process rights, which can be expanded by specific statutes and by courts, should need arise. According to the Italian minimum standard, which is largely equivalent to that established by the European Charter, due process is due when a private subject could be adversely affected by an administrative adjudicative decision. And when it is due, due process grants at least: (a) a right to be notified

tional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail».

[10] *J. Schwarze,* European Administrative Law*, London, 2006. Id,* Legal Protection by and within the Administrative Procedure. Some Observations on the Legal Situation in German and European Community Law*, in A. Massera (a cura di),* Le tutele procedimentali. Profili di diritto comparato*, Napoli, Jovene, 2007.*

when the procedure begins, provided that the subject potentially affected is identified or easily identifiable; (b) a right to access to the file; (c) a right to make written submissions; (d) a duty upon public administration to give reasons. Beyond this standard, further enlargement of the scope of application of due process rights and/or enrichment of their content is left to specific statutes. For example, specific statutes determine whether due process is due in rule-making processes other than adjudication. Specific statutes determine whether due process requires a right to be heard, other than a right for one's written submissions to be read. Specific statutes determine whether the notice required by due process must also report the decision intended and grounds in its support, other than the simple information that the procedure has begun.

III.2. *Divergences: civil law substantialism vs common law proceduralism*

Although a trend of convergence between domestic administrative law systems, molded by pressure on part of globalization and Europeanization, must be acknowledged, divergences still remain. Among the latter, two instances stand out as particularly remarkable, as they are deeply rooted in different constitutional and legal traditions. The first refers to the relationship between due process and judicial review. The second regards the relationship between political representation and administrative participation.

As to the first kind of divergence, France and the UK play in opposite teams in this context. Here, the dividing line can in fact be drawn roughly between civil law countries on one side and common law countries on the other.

In the latter group, and particularly in the UK and the US, the main safeguard protecting citizens against possible abuses on part of the public administration is due process, which comes into play before administrative decisions are taken. As the distinction between administrative and judicial activity is traditionally less clear-cut, the citizen is protected by extending, to administrative proceedings, the same safeguards established for judicial activities; that is to say, by "judicializing" the administrative procedure itself, rather than by subjecting its outcome to judicial review. Thus, common law principles of natural justice, as well as constitutional provisions on due process, apply to both

administrative and to judicial proceedings, albeit in different forms. Instead, in continental countries, and particularly in France and Germany, the most important safeguard available against the public administration is judicial review, which takes place only once the administrative decision has been taken. This decision – the "*Acte administratif*" – is actually at the center of the system. The citizen's main guarantee lies in triggering judicial review, which can involve an evaluation of the substantive reasonableness of the administrative decision, through standards such as the "*bilan coûts et avantages*" established in France, or the proportionality test in Germany.

Obviously, due process is important in France and Germany too, and judicial review is very important in the UK and the US. It is a matter of emphasis. Yet, the emphasis sometimes can make a difference.

From a continental point of view, the value of administrative procedures is mainly "instrumental": procedures are important as long as they can contribute to the quality and correctness of the outcome. From a "procedural justice" point of view, this conception corresponds to an *ex post* perspective, according to which "only substantive outcomes really count, and only substantive rules or their application can truly be said to be just or unjust": as a consequence, "a perfectly just procedure would guarantee correct outcomes" and "a procedure would be more or less fair or just insofar as it approximates this ideal"[11]. Moreover, the civil law lawyer is likely to stress the ways in which due process supports judicial review, providing courts with all the data and information necessary to perform an accurate control of the substantial legality and reasonableness of the administrative decision.

On an Anglo-Saxon view, a "non-instrumental" conception of due process might prevail, according to which participation is a value in itself, important for citizens irrespective of its potential impact on the substantive content of the final decision[12]. From a "procedural justice" point of view, this conception approaches a

[11] *L.B. Solum,* Procedural Justice*, cit., p. 3.*

[12] The independent value of due process is linked to the dignity of those affected by the decision, according to J. Mashaw, *Due Process in the Administrative State*, 158-253 (1985). See also, by the same author, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885 (1981); *Dignitary Process: A Political Psycology of Liberal Democratic Citizenship*, in Univ. Fla. L. Rev., 433 (1987); *Reasoned Administration: the EU, the US and the Project of Democratic Governance*, in A. Massera (a cura di), *Le tutele procedimentali*, *ibid*., p.123..

"Participatory Legitimacy Thesis", according to which procedures perform an action-guiding function as long as they are regarded "as legitimate sources of authority"; in other words, "just procedures can confer legitimate authority on incorrect outcomes": "we can regard ourselves as legitimately bound by an erroneous judgment if it results from a procedure that affords us a meaningful opportunity to participate"; "Procedural justice is the route to reconciliation with substantive error"[13]. An Anglo-Saxon lawyer is also more likely to emphasize how judicial review assists due process, ensuring that the administrative decision has been made with actual consideration of the arguments advanced by the parties to the process.

The more recent evolutionary stages of the Italian regulation of administrative procedures provides evidence of this diversity of accent, demonstrating contradictory trends: on one hand, a move towards proceduralism can be perceived; on the other, a move toward substantialism appears to materialize.

The first trend refers to the content of the notice required by due process. This is an extremely important aspect in the UK context. In a famous case, if only because it involved the father of the late Lady Diana's partner and owner of a popular football team[14], the Court of Appeal upheld the right of Mr Mohamed Al-Fayed to be notified of the grounds supporting the refusal of his application for citizenship, prior to the adoption of the decision, regardless of the fact that the statute excluded the duty to give reasons once the decision had been taken. According to Lord Woolf, "English law has long attached the greatest importance to the need for fairness to be observed prior to the exercise of a statutory discretion" while it "has not been so sensitive to the reasons to be given for a decision after it has been reached". The explanation is very simple: reasons attached to the notice facilitate the right to be heard, which in the UK constitutes the most important safeguard, while reasons attached to the final decision facilitate judicial review, which in the UK is a safeguard of lesser importance. Such an explanation, however, may not appear as straightforward in continental legal orders, in which the hierarchy between due process and judicial review is somewhat reversed. In the

[13] *L. B. Solum,* Procedural Justice, *cit., p. 8*

[14] *Court of Appeal, R. v. Secretary of State for the Home Department, ex p. Fayed (1997), 1 All. E.R. 228.*

continental context, a general duty to give reasons usually applies to final decisions, while a duty to state the grounds supporting the intended decision, prior to its adoption, is rarely imposed, except in particular procedures (for instance in the imposition of penalties) and by specific statutes. Such was the situation in Italy until 2005. As has been already mentioned, Article 7 of Law n. 241/1990 confers a right to be notified of the commencement of the procedure, upon those subjects which may be adversely affected by the decision. As to the content of the notice, Article 8 establishes that it must include the subject-matter of the procedure, the time required for its completion, the responsible unit and officer, and the means of accessing the related file. There is no reference to a duty of disclosure of the decision intended and its supporting grounds. Yet, such a duty was introduced in 2005, albeit only for those procedures initiated by individual parties. In this case, according to the new Article 10-*bis* of Law n. 241/1990, before refusing an application, the public administration body must provide the applicant with a notice stating the reasons against granting the requested benefit; the applicant then has time to submit documents and briefs, which the administration must take into consideration, explaining, if necessary, why it did not accept these in the final statement of reasons. Italian scholarship has welcomed this new provision, rightly remarking that it introduced a true right to equitable cross-examination in the context of the decision sought to be adopted[15]. However, its scope of application is limited, as *ex officio* procedures are excluded. The grounds for such an exclusion are difficult to guess: one might ask, as Charles Reich would have put it, whether the new property, which is granted by procedures initiated by individual parties, is now better protected than the old one, which is threatened by *ex officio* proceedings. Have privileges become more important than rights? It may be that courts are capable of eliminating such a contradiction, by means of interpretation. Up to now, however, they have not done so.

This move toward proceduralism, however, is balanced by a move in the opposite direction, namely toward a continental, and more precisely a German, substantialism. In the German Administrative Procedure Act, as revised in 1996, an instrumental vision of due process prevails: once ascertained by the courts that the

[15] *See for example F. Merusi,* Diritti fondamentali e amministrazione (o della «demarchia» secondo Feliciano Benvenuti), *in* Dir. amm.*, 2006, 541 e ss.*

decision taken is reasonable and lawful from a substantive point of view, procedural rules tend to be somewhat degraded to the status of pure formal requirements. Therefore, their breach is significant insofar as it is considered to have altered the outcome: according to Section 46, an "application for annulment of an administrative act […] cannot be made solely on the ground that the act came into being through the infringement of regulations governing procedure, form or local competence, where it is evident that the infringement has not influenced the decision on the matter". Moreover, the failure to comply with procedural requirements prior to the adoption of the decision, can be subsequently corrected before the courts: according to section 45, for example, the obligatory hearing of a participant and the necessary statement of grounds shall be ignored, if the hearing is subsequently held or reasons are subsequently provided. In 2005, these ideas were introduced in the Italian Administrative Procedure Act. The new Article 21-*octies*, clearly transposing Section 46 of the German Act, established that procedural breaches, such as the failure to give notice, do not cause annulment of the decision taken in cases of non-discretionary competence, or if the authority can prove, before the court, that a different decision could have not been taken upon the facts and therefore that the procedural infringement had no influence on the outcome of the proceedings. Moreover, this move toward substantialism encouraged some courts to be more permissive in relation to authorities' *post-hoc* rationalizations. Italian scholarship has been mostly critical about such an injection of substantialism. On one hand, fears of weakening due process rights have been expressed. On the other hand, it has been rightly noted that substantialism would imply a less deferential standard of review than that usually considered by Italian administrative courts, which in fact have so far "invariably str[uck] down discretionary decisions when participation rules have been violated"[16]. In any case, in this respect, the Italian system now tends to depart from those legal orders which demonstrate a serious commitment to participation. If one takes participation seriously, the very concept of a "useless due process" may appear to be unacceptable: if useless, due process is not required; if instead it is required, it

[16] R. Caranta, *Participation into Administrative Procedures: Achievements and Problems*, in *Italian Journal of Public Law*, n. 1/2009, 311, 325. See also Id., *L'alternativa tra forma e sostanza e il sindacato giurisdizionale sull'attività amministrativa*, in G. Falcon (a cura di) *Forme e strumenti della tutela nei confronti dei provvedimenti amministrativi*, Padova, Cedam, 2010, p. 121 ss.

cannot be for the courts to ascertain *ex post* whether or not it could have been useful upon the facts. For similar reasons, *post-hoc* rationalizations are not admitted. By giving reasons before the court, once the decision has been adopted the agency can prove its substantial reasonableness, but it cannot show that it was the concrete outcome of a dialogue between the agency and the participants. Therefore, bearing in mind the precise objective of ensuring meaningful participation, courts must quash decisions supported by reasons which are adequate but were not given at the time those decisions were taken: as stated by the U.S. Supreme Court, "if adequate reasons were not given, then adequate reasons cannot be given"[17].

Proceduralism and substantialism both entail costs. The former may contribute to an "ossification" of administrative action, frequently requiring agencies to repeat decisions that had been set aside on procedural grounds. The latter is likely to shift the burden of individual protection onto judicial review, frequently requiring courts to take the place of agencies in conducting discretionary assessments. Globalization, however, appears to advance procedural guarantees more firmly than substantive ones, for several reasons. First, it is easier to obtain uniformity in procedure than on substance. Substantive choices reflect the different views, held in different countries, of what is deemed reasonable and correct for pursuing a specific public interest in given circumstances. Procedures are more neutral in this respect, and in others which have been mentioned earlier above (*supra*, II): administrative procedures are open to the introduction of domestic as well as foreign interests, while substantive judicial review mainly seeks to ascertain whether the decision taken conforms to legislative rules approved by bodies representing domestic interests alone. If this were true, German and Italian substantialism could sooner or later prove to be outmoded.

III.3. *From divergences to convergences in rule-making? Legitimacy by political representation and legitimacy by administrative participation: European vs American models*

A second important line of divergence refers to participation in rule-making

[17] *U.S. Supreme Court,* Motor Vehicle MFRS. ASSN v. State Farm Mut*, 463, U.S., 29 (1983).*

procedures, and divides the US from the EU. In the US, the APA has long mandated administrative agencies to follow a notice-and-comment procedure in rule-making, which has been defined as "one of the greatest inventions of modern government"[18]. Very briefly, it requires the regulating agency to give notice of the proposed rule to the public, to accept and take into account comments from the public and to adopt the final rule adducing explanations of its basis and purpose. On the contrary, in most European countries, there is no such general right of affected parties to take part in rule-making procedures; nor is such a right provided in the EU legal order, with the exception of consultative mechanisms introduced by non-binding and soft law instruments.

Why does such a divergence exist? And are the US and the EU likely to converge in this respect? A brief answer to the first question may assist in responding positively to the second.

Although many other explanations could be given, this divergence rests fundamentally on the different constitutional backgrounds of US and European States and, especially, on the different positions endorsed by the public administrations.

In the US constitutional system of divided powers, the legislative function is vested only in the Congress and, in principle at least, cannot be delegated. Since the New Deal era, the "non-delegation doctrine" has been largely overcome, particularly by delegating wide rule-making powers. These, however, were not delegated to the Executive as a unitary power. Rather, statutes often vest rule-making powers in the heads of agencies directly. Moreover, since the power to oversee agencies is contended between the Congress and the President, some agencies are rendered "independent" by the former, so as to limit their structural link to the latter. As a result, agencies are, on one hand, the formal holders of rule-making powers; on the other, they lack structural links with an elective body constitutionally vested with legislative power: agencies can be independent and, however, they have a structural link with an authority - the President - who in turn does not possess the constitutional legitimacy to exercise legislative powers. Agency rule-making is thus structurally affected by a democratic deficit, which is compensated for by providing procedural instruments such as the notice-and-

[18] *K.C. Davis,* Administrative Law Treatise*, §6.15, at 283 (Supp. 1970).*

comment requirement.

In the constitutional systems of most European countries, for a long time this was not the case. In a parliamentary constitutional system, in which the executive derives its democratic legitimacy from the legislative branch, it is absolutely normal to delegate rule-making powers to the government, which is in charge of public administration. As a result, in most European contexts, administrative agencies were not the formal holders of rule-making powers, which were instead vested in ministers –officers structurally linked to an elective body that is constitutionally empowered to legislate. As the political representation of affected people "covered" rule-making powers, the need for an alternative, procedural source of legitimacy was not perceived as strongly.

Today, however, globalization tends to reduce these divergences, by increasing the number of regulatory relationships between domestic rulemaking authorities and foreign subjects affected by those rules. From the perspective of foreign subjects, a structural nexus with a political body, elected only by domestic citizens, is not capable of providing the regulating authority with sufficient democratic legitimacy. Moreover, rather than a source of legitimacy, that link could even be perceived as a source of bias, insofar as the regulating authority could be supposed to favor the represented national interests over foreign, unrepresented, ones. For these reasons, globalization contributes to a fundamental change. European political authorities have progressively been urged to outsource their discretionary powers, including rule-making capacities, to administrative authorities, among which independent agencies. The more such agencies become autonomous and independent formal holders of rule-making powers, the more they grow, like their American counterparts, to require alternative and procedural sources of democratic legitimacy: thus, "notice-and-comment" increasingly provides an attractive model for ensuring legitimacy of European rule-making authorities. As structural political representation withdraws, functional administrative participation expands.

Italy is no exception to this trend.

On one hand, Articles 3 and 13 of Law n. 241/1990 confirm, as a general rule, that participation and the duty to give reasons are necessary only when the administrative decision in question affects a specific person or group of persons,

whose interests are in need of protection. Rule-making, on the contrary, does not require participation or a statement of grounds, as long as it affects general and open classes of persons or entities, whose interests are all collectively represented and balanced by the deciding political authority. Therefore, according to the Italian general statute, "participation is a tool for the protection of individuals [...] but it is not an instrument of democracy" [19].

However, the general statute does not prevent specific statutes from requiring participation in rule-making. This is increasingly true. Forms of participation in rule-making are established, and not only in traditional sectors such as that of town planning. Under the influence of Global and European law, participation in rulemaking is increasingly provided for in the field of environmental law and, especially, in that of market regulation. In the latter sphere, for the reasons explained above, participation in rule-making can be established through statutory provision; it may be granted spontaneously by the regulating authorities themselves; or it may be mandated by the courts, which have clearly recognized that, as far as the rule-making powers of independent agencies are concerned, due process is a necessary surrogate of political representation and ministerial responsibility[20]. It is not fortuitous that participation in rule-making advances especially in regulation of environmental and market affairs and that such participation is mandated by supranational organizations. Indeed, in those fields, the influence of globalization is greater, as is the impact of domestic rules upon foreign subjects. Administrative participation is thus the most important instrument for introducing foreign interests into domestic decision-making processes, which, as a consequence, become less domestic. Therefore, participation in rule-making not only acts as a surrogate for domestic political representation. It also compensates for the lack of supranational political representation, being a powerful device of horizontal, rather than vertical, institutional integration[21].

[19] *B.G. Mattarella,* Participation in Rule-making in Italy, *in* Italian Journal of Public Law, *n. 1/2009, 339, 341..*

[20] *Consiglio di Stato, sez. VI, n. 1215/2010, in* Foro it.*, 1/2011, 281; Consiglio di Stato, sez. VI, n. 7972/2006, in* Giorn.dir.amm.*, 4/2007, 377.*

[21] On this topic, a more detailed analysis can be found in S. Battini, *The Procedural Side of Legal Globalization: The Case of the World Heritage Convention*, Jean Monnet Working Paper n. 18/10, http://centers.law.nyu.edu/jeanmonnet/papers/10/101801.html.

IV. *Simplification*

Globalization contributes to endowing participation with a central position in administrative systems; indeed, participation serves both as a defensive instrument, in the course of adjudication proceedings, and as a source of legitimacy, in rulemaking. Increased participation, however, may contribute to the "ossification" of administrative procedures[22]. The risk is even greater in countries where, as in Italy, the plurality of civil society interests is closely mirrored by the complexity of the State's administrative organization, which in turn complicates administrative procedures: any social interest tends to assume a public nature, being entrusted to a specific public office; as a consequence, decisions affecting different public interests must be taken with the participation of all public offices representing those interests. Therefore, public participation, even more than private participation, produces delay in administrative procedures, a situation which – as has already been remarked – is in itself an obstacle to market integration and to the competitiveness of the domestic economy.

For these reasons, the policy of simplification of administrative procedures, developed in all European countries in accordance with common global and european models[23], is particularly urgent in Italy. Simplification is mainly directed

[22] T. O. MCGARITY, *Some Thoughts on Deossifying the Rule-Making Process*, 41 Duke L.J.1345 (1992); ID., *The Courts and the Ossification of Rule-Making: a Response to Professor Seidenfeld*, 75, Texas L. Rev. 525 (1997). .

[23] *At the global level, the WTO regulation, and particularly the SPS and TBT Agreements, is once again important. For instance, the SPS Agreement, Annex C, regulates the domestic procedures to check and ensure the fulfilment of sanitary or phytosanitary measures, stating, among other, that Member States must ensure that: (a) "such procedures are undertaken and completed without undue delay […]"; (b) "the standard processing period of each procedure is published" or "the anticipated processing period is communicated to the applicant upon request"; (c) "when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies (and even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests); (d) upon request, the applicant is informed of the stage of the procedure, with any delay being explained"; (e) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures"; and so on.*

At the European level, the most prominent example is the Directive 2006/123/EC, which regulates, among other, the authorization procedures to which Member State may subject the access to a service activity or the exercise thereof. According to art. 13, these authorisation procedures and formalities "shall not be dissuasive and shall not unduly complicate or delay the provision of the service". They also "shall provide applicants with a guarantee that their application will be processed as quickly as possible and, in any event, within a reasonable period which is fixed and made public in advance". Moreover, "failing a response within the time period set […], authorisation shall be deemed to have been granted".

at reducing the impact of "public participation" on the length of those administrative procedures that condition the access to economic activities or the exercise thereof.

In broad terms, in Italy three main strategies have been followed: (a) regulation of the time period within which administrative procedures must be concluded; (b) streamlining of procedures by means of a "generic approach"[24], namely through general techniques as provided by Law n. 241/1990 and applied by the administration regardless of the content of the specific statute applicable; (c) streamlining of administrative procedures on a "case by case approach", i.e. by modifying the provisions of the specific statutes which define the procedural structure.

IV.1 *Regulating the timeframe of administrative procedures*

In truth, the first strategy may not properly be considered as a form of simplification, as it does not alter the structure of the procedure and does not therefore remove the root cause of delay. Rather, it regulates the consequences of delay, thus influencing the distribution of its risk and costs.

To regulate the consequences of delay, it is necessary to first identify the moment of delay: when does administration begin to lag? Law n. 241/1990 (Article 2) provides that all administrative proceedings must be concluded within a time period established and made public in advance. Such a period generally amounts to 30 days, unless a different period is fixed by the specific statute regulating the proceedings or by the administration itself. In the latter case, however, it cannot exceed 90 days (or, in exceptional circumstances, 180 days). In excess of this timeframe, the administration is delayed. What are the consequences? Before Law n. 241/1990, both burdens of risks and costs of delay were sustained by the party interested in the successful conclusion of the proceedings, often a private firm. Law n. 241/1990 has now partially shifted that burden onto the public administration.

First, Law n. 241/1990 and its subsequent amendments have reduced the

[24] *See B. G. Mattarella,* La semplificazione per la ripresa economica, *in G. Vesperini (a cura di),* Che fine ha fatto la semplificazione amministrativa?, *Milano Giuffré, 2006, p. 45 (borrowing the wording from S. Breyer,* Two models of Regulatory Reform, *in* South Carolina Law Review, *34, 1983, n. 3, p. 629).*

costs of delay incumbent upon private parties. Before Law n. 241/1990, in case of delay, the remedies available to the interested party were the following: silence on part of the administration was equated to a fictitious dismissal of the application; the interested party could challenge this dismissal before a court; the court could only order the administration to reach a decision, whatever its substantive content. At the end of the day, the private party was often obliged to a long wait and to sustain the costs of both the administrative procedure and judicial review, simply to see its application dismissed!

Today, the situation has improved considerably in several respects. First, an interested party may immediately challenge, before a court, the failure to decide within the set deadline. Second, when the decision requested does not involve an exercise of discretion, the court can directly order the administration to grant the authorization. Third, even when the requested decision entails an exercise of discretion, the court can provide compensation for any damages caused by the delay, regardless of whether the application was accepted or refused.

Therefore, the costs of delay are partially transferred from the private party to the sphere of the general community. The private party, however, still bears the risks entailed by the delay: until the administrative decision is adopted, the party does not obtain the desired good. Yet, such risks are also transferred upon the community at large, on the basis of two instruments, introduced by Law n. 241/1990. When an individual or a firm requires a discretionary administrative decision, the first instrument, namely tacit approval, applies: in absence of a response within the deadline, the requested decision shall be deemed to have been granted. The second instrument applies when the authorization requested for an economic activity is non-discretionary, and the decision depends exclusively upon a simple assessment of compliance with the requirements envisaged by law. In such cases, the private party can start the activity immediately, with a simple communication to that effect to the administration and declaring its compliance with the legal requirements: in absence of a prohibition issued in the subsequent 60 days, the right to exercise the activity becomes final. In both cases, the risks entailed by the delay do not lie on the private party any more: as a consequence of delay, the latter can now achieve what it desired.

The reverse side of the coin, however, is that the burden of risk is again

simply shifted onto the public party: once the issue of an express approval is no longer necessary, there is no guarantee that an accurate assessment of the compatibility of the exercise of a private activity with the public interest at stake has taken place. The trade-off between accuracy and efficiency resurfaces once again. For this reason, on certain occasions European law demands an express measure and forbids tacit approval. For the same reason, Law n. 241/1990 excludes the application of the above instruments when a list of public interests, to be considered more important than others, are at stake, such as cultural heritage, environment, health, national defense, immigration, national security and so on. The list is so extensive, and the interests mentioned so significant, that the instruments of simplification illustrated above are likely to apply only to minor occurrences.

IV. 2. *Streamlining administrative procedures by means of a "generic approach".*

The second strategy for simplification explored above impacts upon the structure of administrative procedures to remove the cause of delay. However, it does not amend the specific statutory provisions which establish that structure. Rather, it authorizes the administration to implement some general instruments of simplification, introduced by Law n. 241/1990, when applying those provisions.

For example, a frequent cause of delay is the necessity to obtain the opinions of several different authorities, imposed by specific statutes, before an administrative decision is to be adopted. As a remedy, Law n. 241/1990 established a time limit for delivering the opinion, after which the decision could be lawfully adopted in absence of the opinion required by statute.

The most important cause of delay, however, refers to cases in which, according to specific statutory provisions, a successful administrative outcome depends on the consent of several authorities, which can be involved in a single procedure, or in different procedures which all condition the same activity or result. In these cases, the disagreement of a single authority is in itself capable of blocking the proceeding or producing a negative outcome. The remedy, provided by Law n. 241/1990, consists of a specific instrument and takes the name of

"conferenza di servizi" (conference of services): the deciding authority can invite the involved public offices to take part in a single conference and to decide "in a single shot", simultaneously, rather than separately and in sequence during the procedure. The regulation of this instrument, however, has been modified many times since 1990 and its very purpose has changed over time. Originally, as long as the conference was obliged to decide by unanimity, it was simply a way of speeding up the procedure. Each authority was compelled to vote during the conference, instead of issuing a separate decision, but the impact of its own view on the outcome, as set by the specific statute applicable, did not change. Each authority retained the power to prevent a positive conclusion of the procedure. However, the purpose of the instrument has radically changed once the principle of decision on the basis of the prevailing views expressed in the conference was introduced. Now, by convening the conference, the administration can alter the balance of interests envisaged by the specific statutes which it is called to administer: even if those statutes require the consent of a given public office, its dissent can be overcome, should such a decision come to prevail in the conference.

The transition from unanimity to majority voting (*recte*: decision on the basis of the prevailing views) in the conference reflects a more general and fundamental change, which is mainly related to the balance between public interests and private activities. According to the traditional vision, which has been transposed to many statutes and is adhered to when the conference must decide by unanimity, the exercise of private activities is subjected to an *analytical* assessment of its consistency with the public interest: that means that activities can be performed, as long as they have been considered consistent with each and every different public interest potentially affected, by each and every public office representing those interests. On the contrary, according to the new vision, embodied by the "majority conference", private activities are subjected to a *synthetic* evaluation of their consistency with the public interest: if compatible with most, albeit not all, public interests potentially at stake, the private activity shall be permitted, or the project shall be approved.

This coin, however, also presents negative sides. The main problem is that the principle of majority is based on the principle of equality. According to Tocqueville, the former is nothing more than the application of the latter to human

intelligence: there is more intelligence in many men gathered together than in a single one. Yet, unlike men, public offices, and the interests they represent, are not equal. Law n. 241/1990 reflects this awareness, stating that, as some public interests are "more equal" than others, the dissent expressed by public offices representing those interests cannot be overcome by the majority rule (in these cases, the decision must be referred to the higher political authority). Yet, such a remedy is far from satisfactory, if only for two reasons. First, the longer the list of highly-ranked public interests (cultural heritage, landscape, environment, health, safety, etc.), the narrower the scope of application of the majority rule and the lesser its impact on simplification. Second, the ranking of different public interests should not be made in absolute terms, without regard to the specific type of decision to be adopted and to the circumstances in which it must be taken. This would be a largely blind choice, as well as an arbitrary one, as many other different public interests and values, not included in the list, have a legal basis in the Constitution. It is not for a general statute to decide, once and for all, which public values are more important than others. The specific statute regulating a single type of procedure, and the administration applying it, are in a better position by far to make such a choice.

IV. 3. *Streamlining administrative procedures with a "case by case approach".*

The problems in applying the conference of services instrument, as well as those related to the implementation of tacit approval, indicate that, unlike participation, simplification cannot be achieved mainly by means of a general act. The provisions of Law n. 241/1990 are certainly important to this end, but they must be supplemented by specific alterations in the structure of the various types of administrative procedures, which number to about 6,000 for the central administration alone. Such a "case by case" approach was introduced, in Italy, by the Ciampi Administration. In 1993, a law authorized the Government to amend statutory provisions so as to simplify administrative procedures (Law n. 537/1993) and, thanks to the efforts of Sabino Cassese, then Minister for Public Administration, more than 70 procedures have been simplified in a few months. Since then, however, the policy of simplification of administrative procedures on a

case by case basis has had its up and downs. A new attempt at simplification was made in 1997: a law which authorized the government to simplify a new set of administrative procedures, and requesting that a similar law (simplification law) be approved every year, was passed. To date, however, only four such simplification laws have been approved. Moreover, the simplification programs contained in such laws have been poorly implemented. Finally, the "simplification laws" have tended again to resort to a generic approach. On some occasions, they modified the provisions of Law n. 241/1990. On others, the laws moved from simplification of procedures to a more generic program of simplification of rules, through ambitious and unrealistic instruments, such as the "cut-the-laws" measures ("*taglia-leggi*"), according to which all laws approved before 1970 are to be repealed unless saved by subsequent acts, to be approved within a time limit which has been of course extended.

V. *Concluding Remarks*

Under the pressure of economic integration, domestic legislatures are increasingly and forcefully required to grant further participatory rights to private subjects, including foreign ones, while at the same time reducing the impact of complicated procedures. In order to meet such needs, legislatures have no choice but to alter the way in which different domestic public interests are introduced into administrative proceedings. As private participatory rights must be increased, simplification is to be achieved mainly by reducing the impact of public "participatory rights", granted to various public offices. Therefore, ongoing reforms of administrative procedures are not neutral. Overall, they affect the equilibrium between the "public" interests of domestic political communities, on one hand, and the "private" rights of the members of an increasing global civil society, on the other. In particular, simplification of administrative procedures by means of a generic approach may risk cutting off necessary public participatory rights as well as unnecessary ones. To establish when the consent of a specific public authority is truly indispensable and when it is redundant, or when an express decision is necessary to guarantee the accuracy of the assessment and when a tacit approval could be enough, a case by case approach appears to be the correct course of

action.

Yet, such a prospect is a long and tiring one. It could require what Chuan-tzu asked of the King: several servants and years. Nonetheless, perhaps, after ten years, the administration would become able, if not to draw perfect crabs in an instant, at least to take accurate decisions in reasonable time.

Stefano Battini

Back to TOP

Functions and purposes of the procedure before the administrative courts in the Netherlands: new problems and new solutions

1. Introduction[1]

What is the actual purpose of the existence of a separate jurisdiction for the administrative courts? And which consequences for the design of administrative procedures should be drawn from this purpose? Answering these questions comprehensively would be going far beyond the space available for this contribution. But I would like to touch upon some essential current discussions in the Netherlands regarding some adjustments – improvements – of the system of proceedings before the administrative courts.

By way of a background it is important to note that from a Dutch perspective two purposes of the judicial review of administrative decisions can be broadly distinguished. First, judicial review could be seen as a mechanism to guarantee the lawfulness of administrative decisions and to enhance the quality of administrative decision making. Thus review serves the promotion of 'good administration'. Secondly, the function of judicial review could be to guard the rights and interest of the individual against the abuse of official power. Historically the focus was on this first function. But after a decennial debate, the Dutch legislator cut the knot on the occasion of the introduction of the General Administrative Law Act (hereafter GALA) in 1994: a judicial review by the administrative courts is supposed to serve to protect citizens, and not to uphold the law or improve governmental quality, although of course this can be seen as a by-product. This choice affects the nature of the judicial procedure. For instance, since the introduction of the GALA the courts are inclined to restrict their control mainly to matters which are raised by the parties; apart from some exceptions they will not evaluate ex officio other

[1] *References are only made to relevant materials published in English on the Dutch administrative law system.*

aspects of the contested decision.[2]

In this contribution I will delve more deeply into two discussions which are also inspired by this focus on the protection of individual rights and interests. First the discussion as to who should have access to judicial review and which arguments against the contested decision should someone be able to present with some chance of success. Secondly, I will take notice of the discussion regarding the finality of the administrative procedure.

Apart from this juridical context, another kind of background is also important. During the last decade there has been a growing tide of criticism aimed at the system of judicial review in the Netherlands. This criticism is heard both in political and governmental circles as well as among the various social actors. Time and again initiating proceedings against an administrative decision is considered as throwing a spanner in the works. Judicial review would cause an unacceptable delay in realizing important projects and thus frustrate the promptness of action by administrative authorities. Moreover, judicial review procedures take a long time, much too long in fact, and their outcome is often unforeseeable and they do not lead to the final settlement of the dispute. Therefore public support for judicial review is beginning to decline. This is another reason to look for changes in the administrative procedure which could help to temper the amount of procedures and to improve the court's ability to settle the dispute.

So, when we take a look at the developments regarding administrative procedures in the Netherlands, two major subjects arise:

1. The tendency to limit the flood of appeals to the administrative courts
2. The aim of improving the significance of the judicial decision for bringing the administrative dispute to an end: the ambition of finality in administrative proceedings.

In this contribution I will touch upon both subjects.

[2] *A.J.C. de Moor-van Vugt and B.W.N. de Waard, Chapter 17 'Administrative Law' in: J.M.J. Chorus, P.H.M. Gerver and E.H. Hondius (eds.), Introduction to Dutch Law, Alphen aan den Rijn 2006, p. 364.*

2. The tendency to limit the flood of appeals to the administrative courts

In order to be able to commence legal proceedings in an administrative court, Dutch law requires that the person instigating proceedings must be qualified as an 'interested party'. Case law has shown that this is the case when an administrative decision affects certain interests of the person concerned. It is sufficient that the plaintiff's interests are *potentially* affected. Whether these interests could or even should play a part when the decision is taken by the authority is not of any further relevance here. The relationship between the plaintiff's interests and the administrative decision is not a normative one; a mere actual connection is sufficient; this means that a fairly large number of people have access to justice. Besides natural persons, legal persons which represent general or collective interests can also be classified as an interested party. These general or collective interests are then 'their' interests, as it were, during the appeal proceedings. One of the developments arising from the tendency to limit the flood of appeals to the administrative courts is that the courts have sharpened the requirements for these legal persons for being able to enter into administrative proceedings: the formal description of the interests represented by these kinds of legal entities must be rather specific and they have to show activities on the area of these interests that include more than only commencing judicial proceedings. But to put this into perspective: distributing flyers is sufficient.[3]

Once the interested party has 'entered' the administrative courts, all kinds of arguments can then be presented to the court against an unacceptable decision by an authority, regardless of whether the mistakes of which the authority is accused have anything to do with the interest which a citizen wishes to defend. In other words: no relativity or Schutznorm requirement is laid down during the review.

An example will make this clearer. An owner of a grocery shop, who wants

[3] *Hanna Tolsma, Kars de Graaf and Jan Jans, The Rise and Fall of Access to Justice in the Netherlands, Journal of Environmental Law 21:2 (2009), p. 309-321.*

> to prevent a competitor – a supermarket – from setting up business in the same municipality, can take action against this competitor when it has been granted the required planning permission by the local authority. The fact that the granting of planning permission enables a competitor to set up business is viewed as an event that affects the interests of the already established shopowner. As a result of this the owner of the grocery shop can commence proceedings in the administrative court as an interested party. He can then raise the argument, for example, that the construction work will not comply with the applicable safety requirements and that because of this his competitor should not have been granted planning permission. These safety requirements have not been specifically laid down in his interest, but invoking them is convenient for him because his competitor's planning permission will be revoked if his motion is upheld.

Examples like this in the Netherlands have in recent years given rise to the question of whether the possibilities for legal protection offered under administrative law might be used improperly. A solution for excluding actions like this one is to introduce a relativity requirement. The Dutch legislator seized the opportunity to create legislation which was meant to combat the economic crisis and so a relativity requirement was introduced. The underlying idea of this so-called Crisis and Recovery Act (*Crisis en Herstel wet*) is that it simplifies and shortens the administrative decision-making process for major spatial, environmental and infrastructural projects as well as the judicial review of these administrative decisions and thus will strengthen the economy. The area of application of the Crisis and Recovery Act is as yet restricted to major spatial and infrastructural project and the period of operation of the act is limited to 5 years. However, the intention is to broaden these measures to the whole area of administrative law and to give them a permanent character.

The relativity requirement implies that in a procedure for judicial review the applicant can only successfully invoke legal norms which protect the interests of the person who is invoking them. The Dutch legislator holds the view that this relativity requirement is not in breach with European law. My comment in this

respect is that this is not completely self-evident.[4] The analysis of the case law of the ECJ shows that the requirement of *effective legal protection* demands that in all cases where Community rights are at stake, there should be access to a court and a possibility to submit arguments derived from Community law. Working with a relativity requirement – a protective norm doctrine – is therefore only possible if the European explanation of what exactly is understood by 'protective norms' will be taken into account. A second concept of Community law - that of the *'effet utile'* - could possibly be a greater obstacle to setting a relativity-related requirement. If the concept of 'direct effect' is not only used for the qualification of the provision under Community law in question with a view to its being relied upon, but also with a view to having access to justice, that would mean that a relativity requirement would be in breach of Community law in a fairly large number of cases where directly effective provisions are at stake. Another complication for environmental issues might be found in the Aarhus Convention. There are many questions regarding the interpretation of this Convention. An interpretation in which a relativity requirement could be problematic is that everyone who makes use of the right to participate in the decision-making process is entitled to plead during the judicial review that the administrative authority has not taken account of his arguments, regardless of whether these arguments are based on legal norms which specifically protect the interests of the person who is invoking them.

Personally, I think that it is doubtful whether the relativity requirement really helps to reduce the amount of appeals going to the administrative courts and whether it will help to relieve the workload of the courts. Answering the question of which interests the legislator meant to protect can be quite complicated and might demand extensive research. My other argument is on a more fundamental level: in my view the relativity requirement does not prevent the applicant from successfully arguing that the administrative authority applies a certain provision differently in like cases and thus acts in breach of the principle of equality. Another still potentially successful argument would be that the way in which a provision is applied is in breach of the principle of legitimate expectations. On balance, such

[4] *Gerdy Jurgens, Introduction of a Relativity-related Requirement in Dutch Administrative Law, JEEPL 4/2007, p. 260-269.*

arguments could wipe the floor with the relativity requirement. From what I have heard from several administrative judges, they tend to lean towards considering this way of reasoning to be disregarding the legislator's intention.

> At this moment there are about ten cases in which the Administrative Division of the Council of State has delivered a decision on the relativity requirement. My first impression is that the relativity requirement excludes a few arguments by the applicants; it does not, however, exclude an appeal in its entirety. An example is a case in which a home owner sought to protect the view from his house when a factory was to be built by pleading that people who live nearer this factory than he does will be affected by too much noise pollution from the factory. The court decided that provisions concerning the neighbours' protection from noise could not be invoked by the applicant who sought to protect the view from his house. The idea behind this decision seems to be that the interests which the applicant seeks to defend need to correspond with the interests which are protected by the provisions he is invoking.

In due course we will be able to evaluate the relativity requirement. As I said I am rather sceptical about the high hopes of some politicians that this would be the lucky strike to turn the tide in the workload of the administrative courts. Neither will it be the solution to the delay in major spatial and infrastructural projects caused by administrative procedures.

At the same time I recognize the demand for some kind of solution to exclude the kind of appeals in which an applicant successfully invokes the breach of a certain provision, but in which compliance with this provision would not make a difference for the applicant regarding the disadvantage he experiences as a result of the decision he seeks to fight. An example is a neighbour who contested a planning permission granted for a flat opposite his house claiming that the stairs inside the building did not meet safety standards. Even if the stairs would meet the necessary safety standards he would be confronted with a building he did not like. A relativity requirement would of course exclude this appeal but an easier solution would be to

state that the applicant's interests are not harmed by the breach of this provision. I think this is an easier judgement – a factual decision – than the more complex and normative judgment (although not in this example) that the invoked provision does not protect the interests of the applicant. Dutch law authorizes the administrative court to rule that the applicant is not harmed by a breach of a certain provision, but this kind of judgement is restricted to cases in which no one could possibly be harmed by the detected infringement. I would favour the broadening of this option.

In the meantime another draft proposal, which has recently been made, might have much more important effects: a proposal to increase court fees. At the moment the court fee for administrative proceedings is in social security cases € 41 and in other cases € 152 for natural persons and € 302 for legal persons. According to the government's proposal this will be increased to € 500. An appeal from the court's decision in the first instance will cost € 1250. In many cases this will be more than three times the current fee. However, there are some income-dependent discounts. Among administrative lawyers there is of course strong resistance against these new proposals. It is very likely that this proposal will be more effective than the more technical-juridical options which I touched upon earlier.

3. The aim to improve the significance of the judicial decision for bringing the administrative dispute to an end: the ambition of finality in administrative proceedings.

When the administrative courts grants the appeal, it shall annul all or part of the disputed decision. In most cases the annulment will result in an obligation for the administrative authority to take a new decision in which it will have to integrate the findings of the judgment.[5] In case the quashing of the decision is a result of a procedural impropriety, the administrative authority can try to rectify the improprieties identified by the court by hearing the party involved, by conducting an additional investigation or by providing further reasons for the decision. In

[5] *René Seerden and Frits Stroink, 'Administrative Law in the Netherlands', in: René J.G.H. Seerden (ed.), Administrative Law of the European Union, its Member States and the United States. A Comparative Analysis (Antwerp – Oxford), p. 196-199.*

doing so, the administrative authority can still take a new decision with the same substance and conclusion as the original one. When the applicant holds that this new decision – again – does not meet the legal standards, the new decision can subsequently be challenged before the courts, after which it may again be overturned and referred back to the administration, *et cetera*. In the Netherlands this is called the 'ping-pong effect of an action for annulment'. (Ping-pong naturally refers to a game of table tennis.)

This course of action is increasingly being perceived as a serious problem; an administrative dispute may drag on for years in a row, which in its turn may come into conflict with the 'reasonable time' requirement contained in Article 6 of the European Convention on Human Rights. Moreover, it will be particularly frustrating for the citizen concerned to be confronted with substantially the same administrative decision after an initial 'victory' in the courtroom. In Dutch we call this: fobbing someone off with a dead sparrow. Finally, this phenomenon is often likely to obstruct the diligence of the administrative policy in question. In the Netherlands, for instance, this last complication occurs especially in the policy area of environmental law, more in particular when decisions regarding major infrastructural projects are quashed by the Dutch administrative courts for procedural reasons. It may take the administrative authority involved considerable time to reformulate its original decision in order to comply with all formal requirements so that the administrative court, again after a lengthy procedure, can uphold the decision on this occasion. In the meantime, the infrastructural project remains idle, a consequence which is considered less and less acceptable from a political point of view.

In order to escape the disadvantages of this system of annulment, the Dutch legislature has sought for some solutions to introduce a greater amount of procedural finality into Dutch administrative law. I will touch upon two important tools of the administrative courts: the power to determine that the courts judgment shall take the place of the annulled decision and the so-called 'administrative loop'.

Dutch law grants the administrative courts the possibility to definitely settle the administrative dispute themselves. Thus, in such instances, the courts will not

only annul the contested decision but they may determine that their judgement shall take the place of the anulled decision, which means in fact that the court takes the new, final, decision in the case. In the Netherlands all administrative courts are generally authorized to take the new decision on its own account. However, this option is restricted to cases in which there is no discretion left for the administrative authorities. This limitation can be traced back to the fundamental concept of the separation of powers, which dictates that it is up to the administration and not to the judicature to decide on the manner in which it will utilize its executive leeway. It also follows from the separation of powers that it is not open to the courts to go into the merits of the authority's decision. As a result of this restriction, the Dutch administrative courts will replace the original decision only if it does not emanate from a discretionary power of the administrative authority involved. Thus the competence granted to the courts will only be of use in a restricted amount of cases.

The second tool which can help to improve the finality in administrative proceedings is the 'administrative loop', an instrument to prevent the action for annulment's ping-pong effect from occurring. This instrument provides the Dutch administrative courts with the possibility to render an interlocutory judgment, in which they may indicate the formal deficiencies of the disputed decision. While the case is still pending before the court, the administrative authority concerned is subsequently enabled either to rectify these procedural flaws or to draw other conclusions from the interlocutory judgment. Depending on the nature of the flaws identified by the court, the administration can try to repair the original decision by hearing particular persons, by conducting additional investigations or by improving the statement of reasons, but it can also take a new decision which integrates the considerations of the interlocutory judgment. Subsequently, the court will reopen the case and may review whether the administrative authority has rectified the identified flaw in a satisfactory manner, or whether the new decision meets the standard of legality, after which the judge may definitely settle the dispute. However, if the rectified or new decision still does not meet the legal standards, the court may either reinitiate the administrative loop, or annul the decision and refer the case back to the administration. In this final case the administrative loop has failed.

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The administrative loop offers the courts the possibility to definitely settle administrative disputes without having to curtail the administrative authority's discretion by replacing the authority's point of view for that of its own. For in such instances the administrative court bases its judgment on the administration's modified point of view. The main advantage of this instrument is that the decision can be changed while the case remains before the court, and that the court can instantly determine whether the modifications can prevent the contested decision from being annulled. It seems that such a procedure, when it works out the way it is meant to, can save all parties involved a considerable amount of time. However, whether this is really the case, remains to be seen.

4. Conclusion

Judicial review in the Netherlands is in a state of flux. In my opinion administrative law has always been an exciting area, but especially now we, administrative lawyers, have to take up the challenge to prevent society from developing an aversion to administrative law. As part of this challenge I think that it is very important to explain the basic values and principles of administrative law. And we have to make sure that administrative procedures do not develop into endless technical-juridical disputes, remote from the realities of daily life, misunderstood and unaccepted by society. I think in the Netherlands we have taken up the gauntlet, but we are still far from being in calm waters.

Gerdy Jurgens

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"[...] this e-book might be the first of many, collecting the interventions made and allowing them to be known worldwide. In this e-book, therefore, there are all the speeches made in the 2011 «Lisbon Meeting on Administrative Procedure» and we firmly hope that this publication, regarding the quality of the papers, can be a useful tool to the transnational dialogue on the administrative procedure and its evolution.

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