ITALIAN JOURNAL PUBLIC LAW

Vol 2 No 2/2010

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Proceedings of the workshop 'Twenty years later: the Italian law on administrative procedures. Achievements and prospects from a comparative viewpoint', University Suor Orsola Benincasa, Naples, 23 April 2010.

EDITORIAL

THE ITALIAN ADMINISTRATIVE PROCEDURE ACT: BACK TO THE FUTURE

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1. Were one to ask any Italian academic which piece of Italian legislation is currently the most important for administrative law, the reply would invariably be the law on administrative procedure (Law no. 241 of 1990).

From its very beginnings, Law no. 241 of 1990 has occupied a special place in the Italian legislative terrain. Indeed, it is the fruit of the work carried out by a commission of academics appointed in 1979 by the then Minister for the Civil Service, Massimo Severo Giannini, and presided over by Mario Nigro (two of the greatest professors of administrative law active during the second half of the twentieth century). Thus Law no. 241 was the product of the intellectual ambition of a narrow circle of academics. Basing their work not only on the consolidated line of administrative case-law but also on comparative legal research, they introduced the principles of participation, simplification and transparency: consider, for example the rules on timeframes and the officer responsible for procedures, as well as those governing agreements, the conference of services (a meeting of the representatives of the various public bodies involved in a procedure, who discuss possible solutions and take a decision by way of a majority of those present), communication of the commencement of a procedure and access to administrative documents.

Law 241/1990 was not, therefore, the product of a political season of administrative reforms. The political class hardly ever intervened during the law's gestation phase. On the contrary, the

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length of time passing between the bill's drafting (1982) and its enactment (1990) was due precisely to the indifference and suspicion with which Parliament, the government and the bureaucracy viewed the text.

The original text of Law no. 241/1990 was streamlined and basic and it looked at administrative action from a citizen's perspective. Indeed, it would be fair to say today that the main contents of this piece of legislation have deeply penetrated the fabric of society and have radically changed the relationship between the administration and those "administrated".

This original text regulating administrative procedure identified the principles common to all procedures and then constructed the essential rules governing action on the foundations of a common model of adjudicatory administrative procedure. If one takes the text of the original Law no. 241 as a whole, one can see how the legislator constructed the principles around just two broad procedural models: the adjudicatory procedure (which produces measures affecting individuals or categories of addressees that have been identified or are identifiable) and the general one (which results in the adoption of general regulatory or administrative measures having a certain degree of abstractness and generalness about them). The latter type was (and still is) outside the scope of Law no. 241 (a choice that was heavily criticised by some legal academics). So much so that the procedure law had the exclusive task of declining the principles common to all administrative procedures affecting individuals.

Furthermore, the original text of Law no. 241/1990 struck a perfect balance between the rules on simplification and those providing guarantees, seeking as it did to reduce procedural timeframes without affecting citizens' rights both to participate and to protection.

Lastly, it introduced rules on transparency (or, more precisely, on access to administrative documents) that were avant-garde at a world level at the time.

2. This original plan has subsequently been modified on various occasions by the legislator, often without regard for the unitary design but simply modifying individual provisions or parts of the statute.

In some cases, genuinely significant improvements have been made. For example, the rules governing failure to respect the timeframe for concluding a procedure have been made more effective, the decision-making mechanism for the conferences of services has been improved and the possibility of adopting agreements in substitution of authoritative measures has been generalised.

In the majority of cases, however, the changes have also had a distorting effect.

Administrative action has been viewed more from the perspective of the administration than from that of citizens.

The barycentre of procedures has been shifted to simplification and acceleration of action, diminishing the profiles concerned with guarantees. Thus the economic logic of results and competitiveness has been followed, marginalising that of the democratisation of administrative action.

Amendments have been introduced thinking more of the benefits of reducing administrative litigation than of the advantages to be gained during the procedural stage.

The law has been seen merely as the vehicle for transposing the most recent trends in case-law, thus altering the meaning of a statute containing principles common to all adjudicatory procedures.

The procedural models have fragmented into a thousand rivulets, creating a considerable divarication between procedures requested by individual parties and those commenced *ex officio*.

Attention has focussed anew on the legal regime governing a procedure's final act, instead of on a procedure's preliminary fact-finding activities.

A growing depreciation of the organizational dimension (as opposed to the procedural activities proper) has become evident.

The law governing access to administrative documents (which, in other European countries, has taken giant strides forward) has, for the most part, been left unaltered but has been modified for the worse in some respects.

In comparison with the wide-ranging manner in which European law guarantees the application of certain principles of administrative action, the Italian law has been left behind.

Lastly, there has been a steady reduction of the scope of Law no. 241's application, following exempting legislation that

has led to a flight from the general rules governing administrative procedure (see, for example, the emergency procedures and those relating to grand-scale infrastructures, which are not subject to the rules established by the procedure Act).

Ultimately, these endless amendments have produced a patchwork effect, in the sense that both the consistency and the original spirit of the law have been lost.

3. These critical comments certainly do not diminish the importance of Law no. 241/1990. The latter remains a fundamental legislative text and a benchmark that, in only a few years, allowed the Italian administration to make up a huge leeway as regards the principles of impartiality and good administration.

There is, however, a need to reason programmatically and *de jure condendo*. This for the purposes of initiating a new phase of jurisprudential building that may lead to the formulation of a new administrative procedure Act.

In the first place and on the basis of all that has been said so far, it seems desirable that the legislator should take a long break and abstain from making makeshift amendments to Law no. 241/1990 that simply follow the Council of State's latest judgement.

In the second place, legal science needs to return to investing significant sums in research dedicated to the study of administrative procedures. Such research should have the objectives of monitoring the procedures currently being followed by the Italian administration (in order to change, one must first be informed) and carrying out serious comparative legal studies. That would allow a complete mapping of the Italian situation which could then be compared with the experiences of the most highly developed legal orders.

In the third place, should the results of the second step merit it, a group of legal and administrative experts could be entrusted with a task similar to the one assigned to the Nigro Commission at the beginning of the 1980s. That is to say, the task of reflecting on a new administrative procedure Act capable of giving the country once again a coherent and innovative structure for administrative action and one capable of re-striking the balance between efficiency and guarantees.

4. In such a context, it is clear that the purpose of this edition of the IJPL is not exclusively commemorative. Nor does it intend merely to constitute a means of disseminating the contents of the administrative procedure law beyond national confines.

On the contrary, it has the programmatic aim of building a bridge between different legal systems, in order to exchange knowledge and experiences and create a network of academic contacts. Not to commemorate, therefore, but to build for the future.

This explains the motive for inviting illustrious European jurists to discuss both the positive elements and the most critical aspects of Law no. 241 of 1990 on the occasion of its twentieth anniversary.

For a return to the future of the Italian law governing administrative action.

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FORWARD

ADMINISTRATIVE PROCEDURES AND RIGHTS IN ITALY: A COMPARATIVE APPROACH

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I. Legal limits to despotism: from Constitutions to administrative procedures acts

In his classic essay on constitutionalism, Charles McIlwain argued that we should "Admit the truth of Paine's dictum that 'a constitution is not the act of a government but of a people constituting a government'"[1]. And, if this be true, this 'constitution' must be "Superior in character to the acts of any 'government' it creates". As a result, the 'constitution' must be also unalterable by ordinary legal process. This is not only a logical consequence, but at the same time a necessary one. The reason is, McIlwain continued, that "Constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law".

This is the reason why the first Western constitutions sought to protect the fundamental principles of human liberty. Consistently with ratio, more recent constitutions, such as those approved by Spain and Portugal in the 1970's after authoritarian governments were overthrown, added new rights to traditional civil and political rights. Such rights concern the relationship between citizens or individuals and the government. They include the right to be heard in individual procedures and the right to have access to files. As a result, the legal protection of such rights must be ensured not only against the government of the day, but also against the will of the majority of people's representatives.

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[1] C. McIllwain, Constitutionalism. Ancient and Modern (1947, 2nd).

In Italy there is no such constitutional basis for this new kind of right against the government. The Constitution of 1947 lays down only broad principles of good governance. However, in 1990, an Act of Parliament set out principles on administrative procedure. It codified judge-made law, in particular with regard to the duty to state reasons with regard to all administrative decisions, with the exception of those that lay down rules. It also recognized new rights, including the right to take part in administrative procedures. Last but not least, it provided any person with the right to access public authority records and information [2].

In the Italian political and administrative landscape, the importance of this Act may not be neglected. It was one of the most important innovations ever introduced by national legislation in the field of public law. It is, beyond any shadow of doubt, the Act most frequently invoked by lawyers and judges in this field (the pervasiveness of administrative due process litigation after 1990 is not necessarily a problem, but an element which deserves specific analysis). It raised, more than any other piece of legislation, questions for jurists and other social scientists. Whether it contributed to imposing real changes on central and local administrators, it remains however to be seen. Evidence of its success may be seen in the opposition that administrators have constantly displayed against it. Twenty years ago, according to the then-President of the Council of Ministers, the Act was approved during summer precisely as a way to avoid the opposition of the bureaucracy. Fifteen years later, when the Act was amended by Parliament, the bureaucracy succeeded in limiting some of the most significant changes introduced by the Act. For example, the default term (which must be complied with, in other words, if no specific term is set either by law or by a regulation) for concluding a procedure was extended from thirty to ninety days (Article 2, 3rd paragraph).

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[2] For an overview, see M. Cappelletti, J.H. Merryman & J.M. Perillo, The Italian Legal System. An introduction (1967) and, with regard to administrative law, D. Sorace, Administrative Law, in U. Mattei & J. Lena (eds.), Introduction to Italian Law (2002). See also S. Cassese, The Italian Legal System 1945-1999, in L.M. Friedman & R. Pérez-Perdomo (eds.), Legal culture in the age of globalization – Latin America and Latin Europe (2003), 220.

Whether this confirms McIlwain's thesis that the only way to secure fundamental rights is to enshrine them in a constitution is, however, debatable. An equally debatable issue is whether the Act was adopted with the idea of legitimising administrative power through controlling administrative process or, more simply, to demonstrate that politicians were not insensible to the growing demand for better administration, which took other paths during the last decade of the twentieth century.

II. Evaluating an Administrative Procedure Act through the comparative legal analysis

When considering, in its twentieth anniversary, whether the Act of 1990 provides forms of decision-making, participation and access for the modern administrative state, a question of standards arises. Too often, the Act is regarded exclusively from a national perspective, as if administrative law were only a province of the State, of each State. The idea that the performance of public institutions should be measured only against national benchmarks, however, is not only in contrast with, say, Maastricht fiscal criteria (often criticized by economic literature for its lack of theoretical foundations, but constantly used by technical and political institutions). It is in contrast also with the most recent achievements in the field of administrative procedures in the European legal field.

Such achievements derive, first of all, from a simple fact. As observed by a precursor, Giorgio Pastori, almost fifty years ago several European countries adopted a legal framework for their own administrative procedures [3]. Austria took the first step in this direction as far back as 1925, with a set of statutes. Other central European countries followed suit shortly afterwards: Czechoslovakia and Poland in 1928 and Yugoslavia in 1930. After the Second World War, other European countries adopted their own legislation to deal with administrative procedures. The fact that such countries included Spain and Hungary, at that time certainly not democratic polities, confirms Carol Harlow's remark that general principles of law must be distinguished from

[3] G. Pastori, La procedura amministrativa (1964).

underlying values, which are different and vary to some degree [4]. However, those principles existed and were shared, which is not irrelevant. Nor was it fortuitous that, after a second wave of statutes during the 1970's, with the Swedish Act of 1971 (later amended in 1986) and the German one of 1976, several European countries laid down principles of administrative procedure. Italy was one of such countries. Even France and the United Kingdom, whose legal and political culture long opposed the idea of a codification of administrative procedures, introduced specific statutes aiming at ensuring freedom of information. Once again, this does not demonstrate that national values coincide. Indeed, while in Scandinavian countries freedom of information is regarded as a basic right of citizenship, in the UK secrecy, instead of openness, has for a long time been the general rule. However, the similarities between national rules and principles should not be neglected. We may wonder whether, as Rudolf Schlesinger argued more than fifty years ago, the most important task for comparative lawyers is the study of the general principles of law common to the Member States, also with a view to the increasing globalization of law[5].

Secondly, some broad principles of due process and transparency were established by European organizations. In 1977 the Council of Europe passed a resolution on the "Protection of the individual in relation to the acts of administrative authorities", establishing several rights and duties. These are the right to be heard and to have access to both essential facts and legal advice, and the duties to provide reasons and provide a system of judicial review. Three years later, the Committee of Ministers adopted another recommendation, estabilishing, inter alia, that reasonable time-limits must be defined and complied with. The ECHR exerts a stronger influence on national procedural laws. It strengthens the standard of legality and ensures the protection of procedural rights within the scope of Article 6. The impact of the EU is even stronger. The Court of Justice has used general principles of law, like the duty to provide reasons and that of ensuring judicial protection against administrative acts, as instruments to reduce

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[4] See C. Harlow, Global Administrative Law: the Quest for Principles and Values, 17 Eur. J. Int'l L. 187 (2006).

[5] R. Schlesinger, Research on the General Principles of Law Recognized by Civilized Nations, 61 Am. J. of Int'l L. 734 (1957).

the procedural autonomy of member States. EU directives produce similar effects in specific fields. The same happens when international treaties, such as the Convention of Aarhus, are issued by the EU.

We must be aware, of course, that, although EU law is a powerful instrument to de-nationalize public law, it is re-nationalized when it is implemented within the Member States. As a matter of fact, implementation is affected by national institutions, processes, and legal cultures. This, however, does not soften the need for comparative analysis. Quite the contrary, this need is reinforced.

III. Strength and weaknesses of the Italian Administrative Procedure Act

As it becomes evident that the use of comparative analysis of law in the study of administrative procedures is useful or even necessary, a first question arises on why the Italian Parliament legislated only in 1990, so many years after other countries. The opposition of bureaucrats is not the only relevant factor, probably not even the most relevant. Legal culture, particularly the opinion of influential scholars against this kind of legislation, ought to be adequately considered.

Another problem is that since 1990 the Act was amended several times, more than ten in the first fifteen years, and twice in the last fifteen months. We may ask why such amendments were regarded as necessary, since the Austrian Act, for example, was modified very rarely. We may ask, moreover, whether such modifications altered the essential contents of the Act, unlike in the Austrian, German and U.S. contexts. We may ask, finally, why the Act was not amended in order to strengthen the right of access to documents, after the application of international treaties, such as the Convention of Aarhus, and the evolution of case-law in European courts.

The scope of application of the Act is still another problem, from the point of view of the division of competences between national and regional legislators. This Italian situation is by no means unique, in this respect. In the U.S., for example, the Freedom of Information Act, which was implemented in 1966 to provide any person with access to Federal Agency records, does

not apply to state agencies. Indeed, each state has its own public access laws that should be consulted for access. The German codification of 1976, too, recognizes the autonomy of each Land with regard to its own procedures. It is in light of these experiences, and others, that we may better understand whether the rules adopted in Italy, especially after the constitutional reform of 2001, strike an adequate balance between regional autonomy and procedural rights.

IV. A closer look to procedural safeguards against government

If we now turn to the contents of the Act of 1990, two complex issues emerge. Firstly, although other commentators have criticized the absence of legislative provisions concerning for example the right to petition, comparative analysis shows that this is not a common element to all other national legislations. It shows, more generally, that while some Acts codify procedural administrative law, for example the German federal Verwaltungsverfahrengesetz, others only lay down some general principles and rules, such as the Italian Act of 1990. The question is, rather, whether those principles and rules provide only a loose frame of reference for due process of law, particularly in two respects. First, unlike in other jurisdictions, what the Act ensures is the right to present evidence and documents and that to have access to files, but not the right to be 'heard'. Second, the rules of the Act, as distinct from its broad principles, are binding only for adjudication, not for rule-making. To make a brief comparison with the U.S. APA, there is no such thing as formal on-the-record rule-making. There is not even an informal notice and comment. In sum, although rule-making involves the exercise of discretion concerning not only the technical means of implementing a policy, but also the priorities to be accorded to relevant and competing interests, nothing is specified by the law, except the fact that everything is left to specific statutes (Article 13). The question thus arises whether the widespread opinion according to which the Act of 1990 creates at least the preconditions for administrative or deliberative democracy – that which in other countries is used in order to enrich political democracy or to overcome some of its limits – is simply wishful thinking.

The other issue is the balance between social values. Some of the first commentators held that the Act ought not to be regarded only from the point of view of the protection of human liberty, but also from that of administrative efficiency. That was, I believe, a correct and helpful remark. It introduced a useful degree of utilitarianism in a debate that would otherwise have been dominated only by lawyers (many years ago Massimo Severo Giannini warned public lawyers with regard to 'Il Diritto Degli Avvocati'). The appropriate enforcement of certain rights is important, but it does not exhaust our demand for a good life. When considering such demand, other aspects must be considered, for example the impact of those legislative provisions that oblige higher civil servants to identify who is responsible for carrying out each administrative procedure.

However, that kind of utilitarianism produced very different outcomes in the last years. Consider the duty to provide reasons. Whether or not it is the mildest of all constraints, as argued by Martin Shapiro, it is undoubtedly a constraint on governments [6]. It does not prevent governments from following a certain course of action, but it obliges decision-makers to state the reasons underlying their choices. In this respect, it achieves procedural fairness and transparency, a prerequisite of democracy. Of course, such procedural values are not the only ones that increase social welfare. It is not surprising, therefore, that administrative courts talk about balancing the interest of the party claiming a procedural due process right, for an accurate determination of the reasons upon which a certain decision is based. The problem is, rather, that not only the Act of 1990 does not require any kind of reasons for rule-making, but the amendment introduced by Parliament in 2005 clearly aims at preventing the annulment of administrative acts for the infringement of 'formal' requirements (Article 21-octies). This amendment, and the interpretation according to which such formal requirements include the reasons the authority omitted to specify, may reflect a cultural shift, the idea that procedural constraints are only laces, or obstacles to a well-intentioned decision-maker. Or, it may reflect another idea, notably that the

[6] M. Shapiro, The Giving Reasons Requirement, University of Chicago Legal Forum 179 (1992).

individual interest of that party claiming a procedural due process right may not be weighed against the collective interest that the administrative decision maximizes. However, the public also has an interest in knowing if public agencies duly and accurately implement political decisions, and assigns a social value to it. The question of how much society is prepared to assign importance to procedural constraints is not, therefore, purely a formal one. Nor is the question likely to be solved by the rhetoric of 'bound administration'. One can easily imagine situations in which the administration does not exercise discretionary powers with regard to substantive choices. However, as Maurice Hauriou once observed, that does not eliminate another kind of discretion, as far as the choice of time is concerned. Nor should issues of impartiality be easily neglected, when several decisions are taken by the same authority in a variety of situations.

A proper consideration of all these issues may greatly benefit from comparative analysis. We may wonder whether the consideration of the social costs and benefits that flow from granting or denying the use of some procedural tools varies remarkably from one legal order to another and, if so, why. We may try to understand, moreover, whether the tests applied by the courts are radically different or whether there is at least some element of convergence.

V. Improving the Act

All of the above shows that the Act of 1990 is quite an important one. To the extent to which it introduces, or codifies, procedural constraints on the government, it strengthens the 'limitation of government by law' which is still, as McIlwain argued, if not the most most important part of Western constitutionalism, beyond doubt the most ancient. However, when evaluating the Act, both its strengths and weaknesses ought to be considered, especially when the latter prevent the exercise of rights. In other words, the Act must not be idealized, but, rather, studied critically and, if possible, improved [7]. Comparative analysis may be very helpful also in this respect.

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ESSAYS

NATIONAL ADMINISTRATIVE PROCEDURES IN A EUROPEAN PERSPECTIVE: PATHWAYS TO A SLOW CONVERGENCE

Carol Harlow and Richard Rawlings*

Abstract

This paper looks at the evolution of principles and rules of administrative procedure in the European Union and their implications for national systems of administrative law. Section 1 treats the development of 'general principles of administrative procedure' by the Luxembourg Courts. Section 2 deals with problems of conflicts which may arise when procedural principles of administrative law gain the status of a fundamental human right, with special reference to the European Convention on Human Rights. Section 3 turns to the 'soft law' principles of good administration promulgated by the European Ombudsman in his Code of Good Administrative Behaviour. Section 4 looks briefly at the increasing volume of sector-specific regulation by the EU, which often directly imposes procedural requirements on national administrations. Section 5 covers horizontal EU requirements in respect of access to information and privacy. The authors foresee a gradual convergence of national procedural requirements, concluding that a gradual approach will prove more effective in the long run than codification at EU level or other attempts at formal procedural harmonisation.

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Introduction

This paper looks at the evolution of principles and rules of administrative procedure in the European Union from the viewpoint of their implications for national systems of administrative law. The term 'administrative procedure' is not without its complications. Generally, the term 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. It may however be used in an attenuated sense to cover values such as natural justice, consultation or transparency, which are seen to apply horizontally across administrative functions. The development of 'general principles of administrative procedure' in this sense by the Luxembourg Courts is briefly treated in Section 1. It is a familiar story, starting from the Treaty obligation to give reasons for all formal Community acts and expanding within competition proceedings to cover what are generally called the rights of the defence or, in Anglo-American terminology, due process rights.

To borrow the language of her well-known article, [1] this is Bignami's 'first generation' of participatory rights. Transparency, her 'second generation' right, is the subject of Section 5.

From the particular perspective of this paper, Bignami's 'third generation' of rights, which refer to the participation of 'stakeholders' and 'civil society' generally in rulemaking, is more problematic. The Constitutional Treaty and Treaty of Lisbon both make mention of citizen participation in 'the democratic life of the Union' and TFEU Article 11 not only requires the institutions to provide for opportunities for exchange of views and 'open, transparent and regular dialogue' but more specifically obliges the Commission 'to carry out broad consultations with parties concerned', something that more closely approaches an administrative law right. These provisions, which take up to Treaty level ideas introduced by the Commission in its White Paper on European Governance in 2001,[2] apply only to lawmaking at European Union level; the direct impact on national systems is therefore minimal. The same is true of the procedures set in place by the Commission to govern its relations with civil society, which for this reason receive only a brief mention in Section 6. Sector-specific regulation by the EU does, on the other hand, often provide for consultation and other participatory rights at national level. This issue is dealt with in Section 4.

Conflicts may occur when procedural principles expressed as general principles of EU law become applicable inside national legal orders or 'vertically'. This problem is exacerbated when general principles of administrative law, such as the rights of the defence or natural justice, are adopted in human rights texts as a fundamental human right, as is the case with Article 6(1) of the European Convention on Human Rights (ECHR). The potential for judicial conflict is magnified as similar procedural issues arise before different courts with differing perspectives. This is the subject of Section 2. Whether expressed in human rights texts or articulated judicially, these general principles of administrative

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1 F Bignami, Three Generations of Participation Rights before the European Commission 68 Law and Contemporary Problems 61(2004).

2 European Commission, White Paper on European Governance, COM (2001) 428 final p.1. For the special links with regulatory reform, see European Commission, Third strategic review of Better Regulation in the European Union, COM (2009) 15 final.

procedure are, however, justiciable. Other important procedural standards are expressed in 'soft law'. Section 3 deals with the Code of Good Administrative Behaviour promulgated by the European Ombudsman (EO), which has been particularly important in promoting good administrative procedures, leading in time to the crystallisation of the right to good administration in Article 41 of the European Charter of Fundamental Rights (ECFR). Whether or not the term 'codification' can be applied to this soft law code of practice, it represents an important path towards 'approximation'.

The term 'administrative procedure' may also refer to a single administrative process, such as the regulation of competition or of public procurement or of 'risk regulation procedures' such as food safety or the regulation of noxious chemicals. In this case, the procedures apply vertically in the sense of being sector-specific and selective: consultation procedures and third-party rights in environmental decision-making will, for example, be very different from the rights of the defence applicable to competition proceedings and different again to the rights of asylum-seekers. Again, there may be conflicts with cross-cutting general principles of administrative procedure. The extent of this type of sector-specific codification at EU level and its role in harmonisation is considered in Section 4. Section 5 approaches codification from a horizontal but single-purpose perspective, through a consideration of EU legislation on access to information and data protection. The problems that surround the regulatory process and the implications for national legal orders are in both cases addressed.

In Section 6, the authors suggest a pragmatic approach tailored to developments in EU governance. The emphasis, it is argued, should be on pluralism and gradual convergence. A multi-track approach, combining soft law, sector-specific codification and, where appropriate single-purpose horizontal regulation, is advocated.

1. A judicial contribution

a. Reason and remedy

The starting-point for principles of administrative procedure in the EU is in the founding treaties, which provided in

TEC Article 190[3] that all 'regulations, directives and decisions' must state the reasons on which they were based. This far-sighted provision has been adhered to strictly by the Luxembourg courts.[4] The ECJ's judgments reiterated that the duty was no mere formality: it provided an essential opportunity not only for those affected to defend their rights but (more important in the jurisprudence) for the Court to exercise its supervisory functions. Significantly, the ECJ also acknowledged a wider public dimension for 'member states and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty'.[5] This statement arguably presaged the democratic 'right to know' (Bignami's 'second generation' right of transparency) that underlies so many administrative procedures. The Treaty requirement of reasoned decisions stands as an inspiration to member states such as the UK, where no general duty to give reasons features in the national administrative law system,[6] but also as a warning that in every situation that involves elements of EU law where a preliminary reference from a national court under TFEU 267 (ex 234) is a possibility, reasons will be expected by the Luxembourg Courts (see the OMPI decisions below).

However, the nature and extent of the reasons required by a court in any given case leaves a wide margin of discretion to the reviewing court. At EU level, the balance fell to be struck by the ECJ, though latterly, for jurisdictional reasons, the CFI has taken up the running. The two Luxembourg courts took the view broadly that the statement of reasons must be 'appropriate' for the purposes of review: on the one hand, for someone adversely affected by an administrative decision or procedure to defend his

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[3] This later became TEC Art. 253 and is now replaced and marginally re-worded by TFEU Art. 296.

[4] For the sake of consistency the term EU law is used throughout this paper to cover what was previously EC law. Where it is necessary to distinguish EC and EU institutions, the term 'Community' is used. The convenient term 'Community Courts' is shorthand for all courts that play a part in the administration of EU law, while 'Luxembourg Courts' refers to the Court of Justice (ECJ) and the Court of First Instance, now the General Court, for which the abbreviation CFI is used throughout.

[5] This is the formulation of Case C-350/88 Delacre v Commission [1990] ECR I-395.

[6] C Harlow and R Rawlings, Law and Administration (3rd edn., 2009) at 630-636.

rights; on the other, for the reviewing court properly to exercise its powers of review.[7] This not only involved confirmation that due process had been observed but also that the decision-maker's reasons were well-founded: an evaluation of the quality of the reasoning, usually on the basis of a proportionality test. On other due process values the EC Treaties were silent. It therefore fell to the ECJ and Commission to set the agenda or, more correctly, their respective agendas.

The ECJ is often seen by commentators as the creator of European administrative procedure.[8] Certainly it did see itself as mandated to formulate 'general principles of EU law', many of which were - typically of administrative law - procedural in character. Drawn at first primarily from the legal orders of different member states, these procedural values were imposed by the Court not only on the Commission as Community executive but also on national administrations when acting as agents of the Community or where issues of Community law were involved. 'First generation rights' received recognition in Article 41 of the Charter, which selects for special protection a number of specific rights with strong legal connotations: the right to be heard and access one's file and the obligation to give reasoned decisions.

As Craig reminds us, all legal systems have to determine the content of the right to be heard. Amongst the possibilities, he lists: the right to notice of the relevant decision; whether there is a right to an oral hearing or only a paper hearing; whether the hearing must precede the relevant decision or whether it can be given thereafter; whether there should be any right to discovery of documents or any right to cross-examination; whether the evidential rules applied in a normal trial should be modified or relaxed in their application to administrative decision-making; whether there can be any contact between the administration and one of the parties prior to the decision being made; whether causation should matter, in the sense that the reviewing court should consider if the hearing would have made a difference to

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[7] Joined Cases 142/94 and 156/84 BAT and Reynolds v Commission [1987] ECR 4487; Case T-7/92 Asia Motor France v Commission [1993] ECR II-669 [33]; Case C-367/95P Commission v Syntraval and Brink's France SARL [1998] ECR I-1719. And see P Craig, EU Administrative Law (2006) at 381-384.

[8] Notably J. Schwarze, Developing Principles of European Administrative Law (1993) 229.

the final outcome; whether there is a right to be represented by a lawyer; whether reasons should be given for the decision; and the meaning to be given to impartiality.[9]

Almost every one of these issues has arisen in the context of EU administrative law and most of the due process requirements are now incorporated as principles of EU law.

Preliminary reference under TEC Article 234 (ex 177, now TFEU 267) gave opportunities to the ECJ to pronounce on national administrative procedures. The keystone of the Court's jurisprudence in this respect was the celebrated Heylens case, involving an application by a Belgian football trainer for a licence to work in France. The decision was based on an unreasoned opinion from a national body. The ECJ ruled that Heylens was entitled both to 'a remedy of a judicial nature' in situations where the decision of a national authority refused the benefit of a fundamental Treaty right and to a reasoned decision rendered either at the time or in a subsequent communication made at their request.[10] The decision had the effect of 'constitutionalising' the twin rights as general principles of Community law.

b. Competition law and beyond

That the due process principles developed by the ECJ possess a distinctly Anglo-American flavour is explained by the origins of EU procedural law in competition law. In competition, mergers, state aids and anti-dumping cases, the Commission looked very like a classical regulator[11] and had to play against powerful international corporations able to purchase the best corporate lawyers trained in the anti-trust procedures of American law and prepared to contest every available procedural point with a view to reversing or substantially delaying a final unfavourable decision from the regulator. The famous Regulation 17,[12] which activated the competition regime, granted draconian powers to the Commission rendering it, in the view of its many critics, judge and prosecutor in its own cause; it was, on the other hand, notably

[9] Craig, cit. at 7 at 361-2.
[10] Case 222/86 UNECTEF v Heylens [1987] ECR 4097 at [15].
[11] See G Majone, The rise of the regulatory state in Europe (1994) 17 W. Eur. Pol. 77.
[12] Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, OJ 21.02.1962, pp. 204/62.

short on procedural protections.[13] Both Commission and Court came under pressure to introduce procedural rules along the lines of the American anti-trust procedures with which the corporate players were familiar.[14]

What followed epitomises the way in which administrative procedures typically emerge as a shared responsibility of executive and judiciary. Motivated both by the Courts' jurisprudence on reasons and also no doubt by a wish to secure a measure of cooperation from their formidable rivals, the Commission issued a further procedural text incorporating concessions appropriate to corporate enterprises, such as a right to legal representation at hearings.[15] The ECJ eagerly took up the challenge in the Transocean Marine Paint case, [16] where the audi alteram partem rule, according to which persons whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make representations, was classified as a general principle of EU law. This allowed the ECJ to build on and embroider the principle, which it began regularly to do, walking steadily down the path mapped out by Craig (above). Strictly, rights formulated by the Luxembourg Courts in direct actions against the Commission were not applicable in national competition regimes, although the ECJ could, as it did in Heylens, 'constitutionalise' the principles by applying them to national legal orders in any case where an Article 234 reference was made.

Competition law lies at the heart of the single market, while freedom to offer services is one of the four freedoms central to the Treaties, so it can be argued in both cases that the 'constitutionalisation' of procedures is a legitimate ancillary effect. It can nonetheless be taken too far and become too intrusive. The controversial Watts decision[17] was one of a set of cases involving

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[13] K Lenaerts and L Vanhamme, Procedural Rights of Private Parties in the Community Administrative Process (1997) CML Rev 523.

[14] Bignami, cit. at 1 at 64-67.

[15] These were later fleshed out in 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, OJ 1963-4 p.47.

[16] Case 17/74 Transocean Marine Paint v Commission [1974] ECR 1063. And see Case 85/76 Hoffmann-LaRoche v Commission [1979] ECR 461.

[17] Case C-372/04 R(Yvonne Watts) v Bedford Primary Care Trust and Secretary of State for Health [2006] ECR I-4325.

national medical services in which the ECJ can be rightly charged with penetrating an area of national competence too deeply. The case concerned the right of patients to claim back from the national authority the costs of obtaining medical care in another member state. In his Opinion, Advocate General Geelhoud argued that waiting lists, of which Mrs Watts was complaining, 'should be managed actively as dynamic and flexible instruments which take into account the needs of patients as their medical condition develops'. This meant that 'in the interest of transparency, decisions regarding the treatment to be provided and when that is likely to be should be taken on the basis of clear criteria restricting the discretionary power of the decision-making body'. The ECJ required the waiting list system to be based on 'objective, non-discriminatory criteria known in advance'. Individual decisions must be properly reasoned and there must in addition be: "a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings" [18].

The objection to these instructions is that they are likely to have the undesirable effect of 'judicialising' what is essentially a clinical and administrative procedure. It may moreover be thought that detailed directions from the Court of Justice as to how hospitals in the British National Health Service should manage their waiting lists are in any event inappropriate.[19]

c. The challenge of new governance

The discussion has so far been in terms of a very traditional approach to administrative procedures conceived in the framework of a traditional 'two-tier model' of administration in which a sharp division is drawn between (small) areas of 'direct'

[18] Watts, Opinion at [75] and [76]; judgment at [116].

[19] C Newdick, Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity (2006) 43 CML Rev 1045. See also P Kiiver, Legal Accountability to a Political Forum? The European Commission, the Dutch Parliament and the Early Warning System for the Principle of Subsidiarity, Maastricht Faculty of Law Working Paper (2009-8) at 30-32 available on line on the SSRN network.

Commission administration and 'indirect' administration by national authorities. The addition of the 'Third Pillar' introduced a three-fold complication: first, the Pillar was built up not on the Community method but on longstanding habits of inter-governmental cooperation that were never abandoned; secondly, the Commission lost its position of primacy as the Council built up its own executive power;[20] finally the ECJ possessed only attenuated supervisory powers. There were hints here of challenge to the prevailing orthodoxy as the intermediate area of 'cooperative' or 'shared' administration, where the two tiers worked together, expanded.

In recent years, moreover, the two-tier classificatory system has been more directly challenged by the arrival of 'new governance' structures.[21] Cooperative networks of public and private actors emerged, working as in the Lisbon initiative on social policy towards a common goal and further elaborating indirect techniques of decentred and co- regulation.[22] New structures of 'decentralized administration' arrived. Even inside the central area of competition law, a policy now operates of downloading competition cases, a Commission responsibility, to national authorities. A European Competition Network composed of the Commission plus all the national regulators is in place, charged with a duty of close cooperation in the application of EU competition law.[23] The trend of agencification[24] both at European and national levels underwrites the broader development, with many sector-specific initiatives centred on an EU agency and/or network of agencies in collaboration.[25] The stated mission of

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[20] D Curtin, The Executive Power of the European Union (2009) at 81-91.

[21] R Rhodes, What is New about Governance and Why does it Matter? in J. Hayward and A. Menon (eds) Governing Europe (2003).

[22] F. Caffagi (ed.), Reframing self-regulation in European private law (2006).

[23] I Maher and O Stefan, Competition Law in Europe: The Challenge of a Network Constitution in D Oliver, T. Prosser & R Rawlings (eds), The Regulatory State: Constitutional Implications (2009).

[24] D. Geradin, R. Munoz & N. Petit (eds), Regulation through Agencies in the EU. A New Paradigm for European Governance (2005); European Commission, The European Agencies – The Way Forward, COM (2008) 135.

[25] S. Cassese, European Administrative Proceedings 68 Law and Contemporary Problems 21, 22 (2004); D. Coen & M. Thatcher, Reshaping European Regulatory Space: An Evolutionary Analysis 31 West Eur. Pol. 806 (2008); E. Chiti, The administrative implementation of European Union law: a taxonomy and its

Europol, a powerful ex-'Third Pillar' agency answerable to the Council, is, for example, to 'assist and support the competent law enforcement authorities of the member states' and foster the 'establishment of joint investigation teams', in which Europol staff are encouraged to participate.[26] In other areas, such as environment and telecommunications, international networks of public and private actors operate inside EU regulatory space. The recent world-wide 'credit crunch' opens up similar vistas.

'Composite' decision-making processes, which allow national officials to function extra-territorially, not only require ex-ante regulation by composite administrative procedures but also ex-post expansions of accountability machinery to keep them in check.[27] The Luxembourg Courts have, however, attracted much academic criticism for their slow reaction to problems of the so-called 'gap'. Their approach is seen by Scott and Trubek as old-fashioned: "Though it has been rare for the courts to actively thwart new governance, they have, in some cases, simply ignored the new changes. In others they have distorted the real nature of the new approach in order to fit it into preconceived legal categories"[28].

In one sense this is just what the ECJ did in the 1991 Munich University case,[29] which dealt with import duties on scientific apparatus intended for educational or research. It was nonetheless a landmark case, where due process principles were applied in a coherent fashion to a multi-level or composite decision-making procedure. The relevant regulations specified that national customs officials, who took the final decision to levy duty, had to consult the Commission on the key question whether apparatus of equivalent scientific value was manufactured in the country of

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implications in H. Hofmann & A. Turk (eds), Legal challenges in EU Administrative Law (2009).

[26] Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA).

[27] H. Hofmann & A. Türk, The Development of Integrated Administration in the EU and its Consequences 13 ELJ 253, 266-270 (2007). And see D. Curtin, Delegation to EU non-majoritarian agencies and emerging practices of public accountability in D. Geradin, R. Munoz & N. Petit (eds), cit. at 24.

[28] J. Scott & D. Trubek, Mind the Gap: Law and New Approaches to Governance in the European Union 8 ELJ 1, 9 (2002).

[29] Case C 269/90 Hauptzollamt München-Mitte v Technische Universitat München [1991] ECR I-5469.

importation, in which case import duty applied. The Commission effectively delegated this decision to a group of scientific advisers, making no provision for importers to make representations at any stage of the proceedings. In these circumstances the ECJ ruled that the person concerned must be able 'during the actual procedure before the Commission, to put his own case and properly make his views known on the relevant circumstances'. The due process requirements must cover not only a right to make representations but also to 'comment on the documents taken into account by the Community institution', implying an important right to access documents forming part of the case file. The requisite statement of reasons from the Commission: must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to enable the Court to exercise its supervisory jurisdiction.

The Munich University decision does not directly impinge on national administration, in principle free to apply their own procedural requirements – insofar at least as these comply with the general principles of EU law. In practice, however, a composite decision-making procedure envisages cooperation between administrators. And it must at the end of the day be acceptable both to the ECJ and to national courts.

2. Due process as a human right

In the last two decades, as human rights have gradually expanded as a source of law in national legal orders, an individual right of petition to the Strasbourg Court of Human Rights and similar transnational jurisdictions has been widely recognised and human rights litigation has escalated. Increasingly self-confident, the Strasbourg Court has extended its jurisdiction slowly but surely into the realm of administrative procedure. Two Articles are especially relevant: ECHR Article 6(1) and (2), which provide for a judicial hearing in the determination of a person's 'civil rights and obligations', and Article 13, which stipulates that states must provide an 'effective remedy' for violations. Both have been used by the Strasbourg Court to promote an arguably excessive judicialisation of the administrative process. Thus Article 13

allows the Court to assert that only legally enforceable, 'judicial' remedies are 'effective' for Convention purposes, as it notably did in the early Dutch Benthem case,[30] where a licence application was held to fall within the ambit of a 'civil right'. Consequently, the standard means of appeal through the administrative division of the administrative litigation section of the Council of State did not amount to an 'effective remedy' because its recommendations did not bind the Crown in whose name the decision was taken. There was a further indication of the direction in which the ECtHR was moving when it commented unfavourably on the fact that 'the text of [the section's] advice remained secret, being communicated neither to the appellant nor to the licence-holder nor to the issuing authority.'

a. Administrative justice in issue

This was, however, only the start of a set of ECtHR cases attacking systems of administrative justice, an attitude that, not unnaturally, has provoked conflict with national courts on several occasions. Whereas initially a French interpretation of the term 'civil rights' was adopted, according to which 'civil' and 'administrative' justice were distinguished,[31] the parameters of Article 6(1) expanded rapidly until many administrative processes, from welfare rights to taxation and immigration, came within its ambit. Planning procedures common to many European countries were attacked on the grounds that they were insufficiently independent and autonomous. A satisfactory compromise was reached in Bryan,[32] where the ECtHR ruled that, although the British planning inspectorate was insufficiently independent to satisfy ECHR Article 6(1), its quasi-judicial procedures did afford many of the requisite safeguards; it was thus sufficiently autonomous to establish facts and any deficiencies could be cured by the availability of a right of review in the ordinary courts. In a later planning case, the House of Lords roundly rejected the idea implicit in the Strasbourg jurisprudence

[30] Benthem v Netherlands , (1985) 8 EHRR 1.
[31] Ferrazzini v Italy (2002) 34 EHRR 45; Maaouia v France (2001) 33 EHRR 1037.
[32] Bryan v United Kingdom (1996) 21 EHRR 342. See also Zumbotel v Austria (1993) 17 EHRR 116.

of a single judicialised template for all administrative decision-making.[33]

Tsfayo v United Kingdom[34] marks a dangerous step in judicialisation of the administrative process with implications for all administrative systems. Miss Tsfayo was an immigrant in receipt of welfare benefits whose English was poor. She failed to claim her entitlements in time, maintaining that she had never received the relevant correspondence. Her story failed to convince the local authority review board, composed of elected members of the local authority and her subsequent application for judicial review on the grounds of irrationality also failed. The Strasbourg Court made heavy weather of her appeal, ruling first, that the case fell within the ambit of Article 6(1); secondly, that the review board was structurally biased, being 'directly connected to one of the parties in the dispute'. This involves classifying the review board's decision as adjudicative in character rather than as a step in an administrative review process.

Tsfayo is also one of a number of cases to raise queries about the efficacy of English judicial review procedure, here on the ground that it provides no adequate judicial review of fact-finding. Quite naturally, it provoked a reaction from national judges. Tomlinson[35] involved appeal arrangements in cases where homeless persons apply for public housing. The new UK Supreme Court traversed the confusing and contradictory Strasbourg jurisprudence scrupulously before deciding that Article 6(1) was not engaged[36] or, if it was, that the absence of a full fact-finding jurisdiction in the reviewing court did not deprive the system of 'what it needs to satisfy the requirements of article 6(1)'. The Court was clearly concerned that 'no clearly defined stopping point' could be discerned in the ECtHR's jurisprudence, which risked 'over-judicialisation of dispute procedures in the administration of social and welfare benefits'. Tsfayo penetrates deeply into the administrative process, opening the way to wholly disproportionate, expensive and time-consuming litigation on fine points of institutional design – truly a human right for lawyers!

[33] R(Alconbury Developments) v Environment Secretary [2001] 2 All ER 929 at [91].
[34] Tsfayo v United Kingdom [2009] 48 EHRR 18.
[35] Tomlinson v Birmingham City Council [2010] UKSC 8.
[36] Salesi v Italy (1993) 26 EHRR 187; Mennitto v Italy (2000) 34 EHRR 1122.

The long-term effect must necessarily be the diversion of scarce welfare funds from needy claimants into bureaucratic structures, arguably an unfair prioritisation of the few over the many.

b. Sources of conflict

Very similar disagreements over administrative procedure mark the relationship between national courts and the ECJ. Disputes over the proper conduct of tax proceedings, for example, underlie the celebrated 'solange' jurisprudence in which the German Constitutional Court first challenged the Luxembourg claim to be the ultimate arbiter.[37] Similar problems entangle the Strasbourg and Luxembourg Courts, both of which claim jurisdiction in situations where national measures implement EU legislation or apparently fail to embody requirements of EU law. The two courts have already crossed swords in a notorious set of competition cases where the ECJ has been accused of excessive leniency towards the Commission or, to relate this point to the previous debate, where the ECJ has treated competition procedures as primarily regulatory and administrative, while the Strasbourg court has classified them as requiring the protections accorded in criminal proceedings.[38]

In a very different context, the potential for clashes within the triadic human rights structure is illustrated in the Bosphorus Airways affair. This centred on the detention of an aircraft belonging to a company based in Yugoslavia but leased to Bosphorus, an 'innocent' external economic operator acting in good faith. In response to a UN anti-terrorism resolution on asset-freezing, the plane was detained in Ireland, and Bosphorus first applied unsuccessfully for relief in the Irish courts. It then turned to the ECJ, which ruled on the substantive issue that to impound was not incompatible with EU fundamental rights when weighed against the international 'public interest' objectives of ending the state of war and the 'massive violations of human rights and of

[37] Case 11/70Internationale Handelgesellschaft mbh, [1970] ECR 1125 and BVerfGE 37, 271 (1974) and [1974] 2CMLR 541.

[38] Compare e.g., Case 374/87 Orkem v Commission [1989] ECR 3283 with Funke v France [1993] ECHR 7. In Saunders v United Kingdom (1996) 23 EHRR 313, the ECtHR took a similar view of the investigation of commercial fraud by inspectors appointed by the Department of Trade and Industry.

humanitarian international law in the region'.[39] A later application to Strasbourg failed on the grounds of the so-called 'primacy rule': that Ireland was merely implementing its international obligations. In respect of the proceedings in the ECJ, the ECtHR applied a version of the 'solange' test, to the effect that EU law, at least in this instance, provided a level of protection equivalent to that provided under the Convention.[40]

This severely criticised ruling,[41] which does not strictly concern administrative procedures, is the backdrop to a highly significant set of cases involving the procedures for freezing the assets of those suspected of involvement in terrorism, where due process rights were fully engaged. In Kadi, [42] a challenge to inclusion on the EU list of suspects, it was argued that listing by the UN (a process notable for its lack of due process and absence of transparency) made listing at EU level mandatory. Overruling the CFI, the ECJ confirmed in a key arrêt de principe that:

fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance.[43]

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[39] Case C-84/95 Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and communication [1996] ECR I-03953.

[40] "Bosphorus Airways" v Ireland App no 45036/98 (judgment of 30 June 2005).

[41] S D. Scott, A Tale of Two Courts: Luxembourg, Strasbourg, and the Growing European Human Rights Acquis 43 CML Rev 629 (2006); A. Dawes & B. Kunoy, Plate tectonics in Luxembourg: The ménage à trois between EC law, international law and the European Convention on Human Rights following the UN sanctions cases 46 CML Rev 73 (2009); C. Costello The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe 6 HRLR 87 (2006).

[42] Case C-402/05 Kadi v Council and Commission [2008] ECR I-6351 allowing an appeal from Case T-315/01 Yassin Abdullah Kadi v Council and Commission [2005] ECR II-3649 at [284]-[285]. See G. della Cananea, Global Security and Procedural Due Process of Law between the United Nations and the European Union 15 Col. J of Eur. Law 512 (2009).

[43] Case C-402/05 at [284]-[285].

It followed that respect for human rights was a condition of the lawfulness of EU acts and that measures incompatible with respect for human rights were not acceptable within the EU. This in turn meant that the Luxembourg courts had competence to review the Council decision.

It fell to the CFI to flesh out the implications of this reasoning for administrative procedures, which it did in a set of cases involving sanctions against the Organisation des Mojahadines (OMPI), originally founded to overthrow the regime of the late Shah of Persia but suspected on little concrete evidence of similar intentions in respect of the present Iranian regime. OMPI had been listed at every level - by the UN, the UK and the EU Council – but at no stage had there been an opportunity for adequate representations. The CFI explicitly invoked the concept of multi-level decision-making to rule that listing was 'a multi-level procedure, taking place at Community and national level' in the course of which due process must be observed. The individuated, adjudicated phase of the procedure took place at national level and required that the party be informed of evidence and afforded an opportunity to make representations, subject to possible restrictions 'legally justified in national law, particularly on grounds of public policy, public security or the maintenance of international order'. A second hearing before the Council, which acted in a legislative capacity, would not normally be necessary, provided that the first decision had been adopted by a 'competent national authority' in a member state.[44]

In a second OMPI case,[45] the CFI underlined its own responsibility for examining the record to establish whether the evidence relied on is 'factually accurate, reliable and consistent' and 'capable of substantiating the conclusions drawn from it'. It went on, however, to express great respect for the English decisions[46] as 'the the first decision of a competent judicial

[44] Case T-228/02 Organisation des Modjahedines des peuples d'Iran v Council [2006] ECR II-4665 [93], [94 and [117] [123] noted Sponenti (2009) 46 CML Rev 1239.

[45] Case T-256/07 Organisation des Modjahedines des peuples d'Iran v Council [2008] ECR II-3019 [85]. A further OMPI listing had to be annulled by the Court of First Instance in Case T-284/08 Organisation des Mojahedines des peuples d'Iran v Council [2008] ECR II-334 (appeal pending)

[46] Secretary of State for the Home Department v Lord Alton of Liverpool & Ors [2008] EWCA Civ 443. There was no further appeal and delisting was confirmed by

authority ruling on lawfulness under national law'. The CFI annulled the Council listing on the ground that the statement of reasons 'does not make it possible to grasp how far the Council actually took into account the POAC's decision, as it was required to do'.[47] For national legal orders, this reasoning is double-edged. On one interpretation, it could point to greater intrusion in national procedures by the Luxembourg Courts, more especially the CFI; on the other hand, it could point to a more permissive, pluralist regime of cooperation amongst the EU courts, as advocated by the authors in an earlier article on accountability networks.[48]

The extension of human rights into due process procedures sets in place different and possibly conflicting obligations to four distinct legal orders and at least three sets of courts: the international legal order, which claims primacy over all other legal systems; the EU legal order and the ECJ, author of the doctrine of primacy of EU law; the ECHR and the powerful ECtHR, accessible to individuals; and national law, to which individuals must normally turn first. Each of the courts has its own different perspective on due process rights and administrative procedures.

Although recent case law justifies a measure of optimism, it does not suggest that the problems of multi-level adjudication are near to resolution. We may indeed be witnessing a tendency for national courts to make 'unilateral declarations of independence' in constitutional matters including due process rights, which can only complicate an already over-complex system.[49] In respect of Luxembourg and Strasbourg, however, the Treaty of Lisbon may

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Resolution of the House of Commons: see HC Deb, vol 478, cols 98-118 (23 June 2008).

[47] Case T-256/07 above n. 45 at [179]. POAC is the Proscribed Organisation Appeals Commission, a specialised security tribunal whose procedures have been questioned: see Home Secretary v AF [2009] UKHL 28; A and others v United Kingdom [2009] ECHR 301.

[48] C. Harlow & R. Rawlings, Promoting Accountability in Multi-Level Governance: A Network Approach in D. Curtin & A. Wille (eds), Meaning and Practice of Accountability in the EU Multi-Level Context, CONNEX Report Series Nr. 07 (2008).

[49] Consider the conflicting Czech, Polish, German and Cypriot 'European Arrest Warrant' cases discussed by D. Sarmiento, EU: The European Arrest Warrant and the Quest for Constitutional Coherence in Int. J. of Con. Law 1 (2008). For similar UK developments, see R v Horncastle [2009] UKSC 14.

affect the power balance by providing for the EU to accede to the Convention.[50] This may prove important, as the text of the EU's own ECFR, which is 'recognised' by the new TEU, differs substantially from that of the Convention. Where there is overlap, ECFR Article 51(3) provides that the 'meaning and scope' of the rights shall be the same as those laid down in the Convention, a provision presumably intended to give the last word to Strasbourg. Some member states still have opt-outs and the ECFR applies in any event only to acts of the EU institutions with due regard for subsidiarity (TEU Article 6). There is scope here for considerable overlap and confusion. [51]

3. Principles of good administration

Although courts occasionally experiment with novel and original principles of administrative procedure, as the Luxembourg Courts have tentatively done with a 'principle of care or diligence',[52] in general they stick rather closely to individuated, adjudicative rights. It is to ombudsmen that we look for principles of good administration and it is indeed the EO who has developed the principles of care on which the good administrator is to act, in a Code of Good Administrative Behaviour.[53] To their credit, the first two European Ombudsmen[54] have shown quite as much interest in the dissemination of good administrative practice as in the investigation of instances of maladministration. Their ideal was recently outlined in a speech to the Europe Direct network, where

[47] See TEU Art. 6(2) and Protocol 5 relating to accession.

[51] On the dangers, see G. Gaja, New Instruments and Institutions for Enhancing the Protection of Human Rights in Europe? in P. Alston, J. Heenan & M. Bustelo (eds), The EU and Human Rights (1999); F. van den Berghe, The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems? 16 ELJ 112 (2010).

[52] See Case T-54/99 max.mobil Telekommunikation Service GmbH v Commission [2002] II-0313 [47]-[63] and the Opinion of Advocate General Maduro in Case C-141/02P Commission v T-Mobile Austria GmbH [2005] ECR I-1283 [16]-[21]. And see Craig, cit. at 7 at 373-381; H-P Nehl, Principles of Administrative Procedure in ECLaw (1998) Ch.8.

[53] European Ombudsman, The European Code of Good Administrative Behaviour, approved by Resolution of the European Parliament 6 Sep. 2001, available on the EO's web site.

[54] The founding EO was Jacob Söderman, previously Finnish Ombudsman, the second is Nicoforos Diamandorous, previously Greek Ombudsman.

the EO described 'good administration' as 'a citizen-centred administration, an open and accountable administration and an administration focused on results'. The good public servant acts impartially, fairly and within a reasonable time, avoiding unnecessary red tape and keeping administrative costs for citizens and enterprises to a minimum. The Code also sets out a principle of consistency, according to which an official should follow the institution's policies. It reminds the public servant to be at all times courteous, helpful and, when found to be wrong, to apologise. So too, procedural obligations, such as duties to provide information, keep adequate records, answer letters promptly and take decisions in a timely fashion, find a place in the Code. These principles then feed back into ombudsman investigations. For example, in a complaint alleging misuse of the tendering procedures, the EO criticised a statement made by the European Parliament on the ground that it 'did not seem to be consonant with the principles of good administration concerning the exercise of discretionary powers.'[55] In a later case, the EO found maladministration on the ground that the Commission had failed to ensure that all its services knew of a policy change. Making specific reference to the Code of Good Administrative Behaviour, the EO found that the Commission had not complied with the principles of good administration, which required the institutions to act consistently.[56]

Again, the Code deals with 'objectivity', which resembles the Courts' embryonic duty of care in obliging officials when taking decisions to 'take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration'. From Article 19 of the Code, this idea has travelled upwards to become the umbrella principle of Article 41(1) of the ECFR, which puts in first place the objectivity tenet that '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' and goes on to include within this right the 'first generation' due process rights mentioned in Section 1. As translated into hard law

[55] Complaint No 1315/2005/BB.
[56] Complaint No 1339/2008/MF

by Art.41, the EO's consumer-oriented approach is applicable in every area of EU administration.

The remit of the EO is European administration and his recommendations are not binding. They nonetheless possess considerable force. In his Annual Reports, the EO now publishes 'star cases', in which the administration is shown in especially favourable light. These feed into national administrations through the European Network of Ombudsmen, set up by the EO with domestic ombudsmen to foster good relations and good administration throughout the EU. This Network works co-operatively to promote high quality administration and provide effective remedies where needed. Extensive programmes of training and meetings to exchange ideas on good practice are already in place and the EO has declared his ambition to 'work concertedly and systematically with his national, regional and local colleagues to ensure that citizens' rights are fully respected throughout the Union'.[57] Parallel investigations are one way forward. In the medium term, these developments are likely to promote considerable convergence in administrative procedures.

4. Sector-specific codification

There is a marked divergence between the majority of member states, which operate with a rather detailed Administrative Procedure Act or sometimes more than one in the case of federal states, and the common law countries, which do not. Administrative Procedure Acts are usually subsidiary to legislation which specifies detailed vertical procedures for a particular administrative process, such as asylum decision-making or environmental regulation, considered in this Section and horizontal procedures such as the data protection and freedom of information legislation considered in the next Section, which also takes precedence over the general legislation.

As early as 1993, Schwarze, who like many other lawyers had been inclined to award primacy to the ECJ in the creation of Community administrative procedures,[58] was noting the

[57] European Ombudsman, Annual Report (2005) at 6.

[58] J. Schwarze, European Administrative Law, (1992); J. Schwarze, Sources of European Administrative Law in S. Martin (ed.), The Construction of Europe, Essays

increasing role and influence of legislation: procedural law had its roots 'in the codification of law relating to particular fields of administration, such as the common agricultural market, competition policy or anti-dumping matters'. Observing that these 'codifications' introduced 'a special procedure into the European administration or into the administration of the Member States',[59] Schwarze commented specially on the imminent arrival of a new public procurement directive.

a. Evolution

Public procurement is an archetypal example of European procedural codification directed to the member states. It is based on the idea of the 'pathway(s) model'[60] to frame the tendering process. Four main pathways are prescribed: an open procedure, allowing all interested firms to tender; a restricted procedure, where tenders are invited from a list of firms drawn up by the authority; negotiated procedure, with contractual terms negotiated with chosen contractors, the use of which has however been strictly confined precisely because of its informality; and competitive dialogue procedure, where discussions are had with suppliers about suitable solutions, on which chosen bidders are invited to tender. Three key directives are currently in force, covering in considerable detail the procedures to be followed by member states' public administrations in contracts of public works, public service, public utility and defence and security.[61] A fourth, the so-called Remedies Directive,[62] which requires legal remedies to be in place

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in Honour of Emile Noel (1994); J. Schwarze Towards a Common European Public Law 1 EPLR 227 (1995).

[59] J. Schwarze, Developing Principles of European Administrative Law (1993) 229, 231, 234 (emphasis ours).

[60] See for an account, C. Harlow & R. Rawlings, Law and Administration cit. at 6, Ch. 8.

[61] 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-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 2009/81/EC on defence and security procurement.

[62] 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.

at national level to deal with breaches of the procurement procedures, bites very directly on national legal systems, as Germany found when told by the ECJ that administrative measures were an inadequate method of implementation.[63]

This regulatory regime has undergone several cycles of reform more or less directive in character, with latterly some 'streamlining' of the rules and much emphasis on professional training and use of information technologies in the tendering process. Along the way there has been some distinguished jurisprudence from the ECJ, largely on substantive issues,[64] but the regime has in general adopted the pathway of EU procedural law from soft to hard law, while at the same time paradoxically following the pathway of public administration towards soft governance - though admittedly always with the option of legal enforcement in the background.[65] It is worth noting too that Commission infringement procedure, the ultimate sanction for breach of these highly-valued administrative procedures, has regularly been employed in respect of breaches of the public procurement directives, a further incursion into national systems.[66]

A very similar process is currently under way in the area of asylum. Asylum policy was first transferred to the 'First Pillar' at Amsterdam (TEC Title IV). The Common European Asylum System (CEAS) was part of the 'progressive establishment' of an EU area of freedom, security and justice and a vital element in EU migration law and policy. The Lisbon Treaty now provides that the EU 'shall' develop 'a common policy' on asylum matters, to be enacted by the European Parliament and Council (TFEU Article 78). In this way, a process that started with Conventions and inter-

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[63] Case C-433/93 Commission v Germany [1995] ECR I-2303. And see Case C-81/98 Alcatel [1999] ECR I-7671 (interim measures).

[64] E.g., Case C-225/98 Commission v. France [2000] ECR I-7455; Case C-513/99 Concordia Bus Finland v Helsinki [2002] ECR I-7213; C. Bovis, Developing Public Procurement Regulation: Jurisprudence and its Influence on Law Making 43 CML Rev 461 (2006).

[65] S. Arrowsmith, The Past and Future Evolution of EC Procurement Law: From Framework to Common Code? 35 Publ. Contr. L. J. 337 (2006).

[66] E.g., Joined Cases C-20/01 and 28/01 Commission v Germany [2003] ECR I-3609; Case C-480/06 Commission v Germany (judgment of 9 June 2009) noted K. Pedersen & E. Olsson, Commission v Germany – A New Approach on In-house Providing? 1 Publ. Procur. R. 33 (2010).

governmental cooperation has moved from the mongrel status of Common Positions into the mainstream methods of EU policy-making.

It needs to be emphasised that the legislative package of which the Asylum Procedures Directive (APD) forms part was the product of hard bargaining and much compromise. The measures have been developed against a backdrop, first, of the overarching international legal obligations of individual member states, more especially under the Geneva Convention,[67] and secondly, of considerable political and administrative controversy at the domestic level.[68] The first phase of the programme, outlined in TEC Article 63, is notable for the number of times the word 'minimum' appears, so that it is hardly surprising to find that the outcome is officially seen as allowing member states 'a wide margin of discretion'.[69] Even so the Irish, Danish and UK governments negotiated opt-outs, while the European Parliament successfully challenged the decision-making procedure in the ECJ.[70] There was no reference to minimum standards of harmonisation in the Lisbon Treaty, which points the way to closer convergence. But although the Commission has made a start with a proposal for a revised APD,[71] it is hard to accept either that the currently stalled proposal is a truly harmonised codification or that, at least in the short term, a true harmonisation is a real possibility. Indeed, the current Stockholm Programme signals a renewed emphasis on soft governance[72]: closer practical

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[67] 1951 Geneva Convention relating to the Status of Refugees.

[68] See G. Goodwin Gill, The Individual Refugee, 1951 Convention and the Treaty of Amsterdam in E. Guild & C. Harlow (eds), Implementing Amsterdam, (2000). Asylum is also specifically protected by Articles 17 and 18 of the ECFR.

[69] See C. Costello, The Asylum Procedures Directive in Legal Context in A. Baldaccini, E. Guild & H. Toner (eds), Whose Freedom, Security and Justice? (2007).

[70] Case C133/06 European Parliament v Council [2008] ECR I-3189 noted Craig (2009) 46 CML Rev 193.

[71] Commission Proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing international protection, COM (2009) 554/4; and Annex to the Proposal. But see now Commission Communication, Action Plan implementing the Stockholm Programme (Brussels, COM(2010) 171 at 6-7.

72 The Stockholm Programme – An open and secure Europe serving and protecting the citizens, Council Doc. 17024/09 (December 2009). See also

cooperation between member states in the form of technical assistance, training, and exchanges of information and experts. The new European Asylum Support Office (EASO) is tasked to promote this.[73]

It is doubtful that this approach will meet the demands of the United Nations Refugee Agency in a recent report based on a survey of eighteen key provisions of the APD in twelve member states. This showed that the APD had not achieved the harmonization either of legal standards or of practice across the EU sought by the UN. This was partly due to the wide scope of many provisions, which explicitly permitted divergent practice and exceptions and derogations but, significantly, it was also due to 'differing interpretations of many articles (including mandatory provisions), and different approaches to their application'. The APD, an instrument intended to be at the heart of CEAS, had not yet brought about consistent approaches and did not always ensure fair and accurate outcomes. Much further work and further legislative reform would be needed at both national and EU level to ensure that the necessary safeguards were in place.[74]

b. Enhancement

Reflecting and reinforcing the idea of 'public participation' as a key ingredient of effective and legitimate decision-making, EU environmental law increasingly stands for an enhanced conception of administrative procedures, and one which consciously ranges beyond a classical, individualised model (rights of the defence).[75] Specific requirements for consultation directed to the member states[76] are today almost a sine qua non of

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Commission Communication on Strengthened Practical Cooperation, COM (2006) 67 final). .

73 For the policy development, see Commission Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office, COM(2009) 66.

74 UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (March, 2010) at 13, 91-2.

75 J. Holder & M. Lee, Environmental Protection, Law and Policy (2nd edn, 2008); J. Scott, Environmental Protection: European Law and Governance (2009).

76 For the disparities with the European level, see D. Obradovic, EC rules on public participation in Environmental Decision making operating at the European and National levels 32 EL Rev 839 (2007).

the legislation (water[77], waste[78] and greenhouse gas emissions[79], preparation of plans and programmes,[80] etc). The long-standing and (in view of alignment with the Aarhus Convention[81]) heightened demands of environmental impact assessment (EIA) for development projects provide a template[82] for what is a marked proceduralisation[83] of regulation. Again denoting minimum requirements, the amended Directive (EIAD) imposes a general obligation on member states to conduct assessments of those schemes which are assumed or considered after screening 'likely to have significant effects on the environment'. This requires that 'the public concerned shall be given early and effective opportunities to participate' in the decision-making procedures and 'shall, for that purpose, be entitled to express comments and opinions when all options are open', in other words, prior to the decision on the request for development consent. This is subject to 'reasonable time-frames' and determination of the 'detailed arrangements' by member states. The results must be taken into consideration and the reasons for granting or refusing a development consent made available to the public. These requirements are flanked by special rights of access to environmental information and of access to justice (review of 'the substantive or procedural legality' of decisions).

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77 Art. 14 of Directive 2000/60/EC establishing a framework for Community action in the field of water policy.

78 Art. 31 of Directive 2008/98/EC on waste,.

79 Art. 8 of Directive 203/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community.

80 Art.6 of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.

81 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) discussed by M. Lee & C. Abbot, The usual suspects? Public participation under the Aarhus Convention 66 Modern L. R. 80 (2003).

82 Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (EIA Directive); amending Directive 97/11/EC; and Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Directives 85/337/EEC and 96/61/EC (Directive concerning integrated pollution prevention and control).

83 J. Steele, Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach 21 Oxf. J of Legal St. 415 (2001).

Super-imposing this framework on domestic procedures constitutes a natural litigation 'hot-spot'. Whether at the suit of developers or other interested parties, national courts must grapple with the full range of problems of implementation, and in particular of 'fit' with pre-existing structures and understandings. This is well-illustrated in the UK, where some judges have trumpeted the EIAD as requiring an 'inclusive and democratic process'[84], one which 'seeks to redress to some extent the imbalance in resources'[85], while others have displayed more cautious attitudes.[86] The ECJ has vigorously asserted the broad scope and purpose of the Directive in a string of cases.[87] For example, a repeated emphasis on cumulative effects targets the classic administrative device of 'salami-slicing' (splitting projects into sub-projects so as to avoid requirements).[88] Again, the Court has recently buttressed public participation by establishing a reasons-providing requirement for negative screening decisions.[89] On the other hand, in the first case on administrative procedural autonomy in the form of 'detailed arrangements', the Court has proved understandably protective of member states. In Commission v Ireland,[90] the issue was the charging of administrative fees for making submissions during the EIA process. Whereas the Commission pointed up the potential 'chilling effect', the Advocate General observed tartly that EIA does not mean an unrestricted right for everybody to be consulted. Proceeding on the basis that the Community legislature wished member states to have 'wide discretion' in determining

84 Berkeley v Secretary of State for the Environment [2000] UKHL 36. Common law and European law challenges frequently appear in the same case: see R(Edwards) v Environment Agency [2008] UKHL 22.

85 R v Hammersmith and Fulham LBC, ex p Burkett [2002] UKHL 23.

86 As in Jones v Mansfield District Council [2003] EWCA Civ 1408. And see generally, R. Gordon, EC Law in Judicial Review (2006), Ch. 14.

87 Beginning with Case C-72/95 Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland [1996] ECR I-5403.

88 See e.g. Case C-207 Abraham v Région wallonne (judgment of 28 Feb. 2008) and Case C-75/08 Ecologistas en Acción-CODA v Ayuntamiento de Madrid (judgment of 25 July 2008).

89 Case C-75/08 R(Mellor) v Secretary of State for Communities and Local Government (judgment of 30 April 2009).

90 Case C-216/05 Commission v Ireland (2006) ECR I-10787 noted by Ryall (2007) 19 J. of Environmental Law 247.

practicalities, the Court held that the administration was in principle free to make a charge, provided that this was not so excessive as to constitute an obstacle to exercising the rights to participation. The case is thus authority for a substantial element of subsidiarity: pluralism in the design of more plural procedures.

Periodic assessment by the Commission of application and effectiveness is a standard feature of the regulatory framework. The latest report in 2009 confirms that, although EIA is now effectively entrenched at national level, the challenge of ensuring consistent implementation is a continuous one.[91] The common thread is indeed the scope for and scale of diversity in administrative practice and procedure. 'EIAs carried out in the various MS vary considerably (from fewer than 100 to 5000), even when comparing MS of a similar size'. National officials 'often exceed their margin of discretion': for example by only taking account some of the selection criteria. Again, despite increasing public participation, there still is 'no standard practice across the EU'; timeframes, for example, 'vary considerably'.[92] Nor is it surprising to learn of 'major differences in the quality of EIA documentation, not only between different MS but also within MS themselves.' As well as non-compliance underwritten by the pressures for development, so-called 'gold-plating' is in evidence. 'In several cases, MS have introduced obligations which go beyond the Directive's minimum requirements'. The report rightly stresses the knock-on effects in terms of soft governance. 'Many MS have also developed their own guidance on good practice and on specific project categories and issues. These national experiences can be shared across the EU.' A suggested simplification exercise increasing the degree of harmonisation would certainly be challenging.

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91 Report from the Commission on the application and effectiveness of the EIA Directive, COM(2009) 378. See for further details, DG Environment, Study concerning the report on the application and effectiveness of the EIA Directive (June, 2009).

92 Nor from a grassroots perspective should the many practical obstacles be overlooked: C. Nadal, Pursuing Substantive Environmental Justice: The Aarhus Convention as a "Pillar" of Empowerment 10 Env. L. Rev. 28 (2008).

c. Contemporary trends

The EU is today at the forefront of burgeoning disciplines of 'risk regulation': a major forcing ground for new administrative procedures in the multi-level system. We find a multiplicity of directives prescribing in very considerable detail the steps to be followed when, for example, granting Community authorisation for additives in foodstuffs or protecting against dangerous pharmaceuticals. [93] Bound up today with the meta-policy of 'better regulation',[94] strict requirements are imposed on the Commission and its scientific advisory and regulatory committees for the gathering and handling of scientific evidence. This has given rise to a raft of cases in which the Luxembourg Courts have had to grapple with new forms of procedural complaint such as errors of risk assessment or management and misapplication of the precautionary principle, a novel standard of proof required in scientific matters.[95] The Courts have ruled, for example, on the degree of risk necessary before preventive measures can be taken and, in consequence, on the proper approach to the evaluation of scientific evidence.[96] Typically such directives impose reporting procedures and other obligations on member states, which greatly restrict their domestic freedom of action.

In Greenpeace France,[97] for example, the issue was the effect of Directive 90/220, designed to approximate the laws, regulations and administrative provisions of the member states in respect of

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[93] S. Krapohl, Risk Regulation in the Single Market (2008); and for a comparative perspective E. Fisher, Risk Regulation and Administrative Constitutionalism (2010).

94 Which places a particular premium on impact assessment: see C. Radaelli & A. Meuwese, Hard Questions, Hard Solutions: Proceduralisation through Impact Assessment in the EU 33 West Eur. Pol. 1 (2010); and, for a legal perspective, A. Alemanno, The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission's Walls or the Way Forward? 15 ELJ 382 (2009).

95 See Communication from the Commission on the precautionary principle COM (2000) 1.

96 These procedures have sparked a mountain of litigation of which the most important cases are probably: Case C-331/88 R v MAFF ex p Federation de la Santé animale (FEDESA) [1990] ECR I-4023; Case T-13//99 Pfizer [2002] ECR II-3305; Case T-70//99 Alpharma v Council [2002] ECR II-3475; Case C-236/01 Monsanto Agricultura Italia SpA v Presidenza del Consiglio dei Ministri [2003] ECR I-8105.

[97] Case C-6/99 Association Greenpeace France v Ministère de l'Agriculture et Pêche [2000] ECR I-1651.

genetically modified organisms (GMOs).[98] In accordance with French law, the Minister issued a decree permitting the sale of genetically modified maize. This was attacked by Greenpeace on the twin grounds that it had been adopted following an irregular procedure and that it infringed the precautionary principle. A preliminary reference established that the French authorities possessed no discretion in the matter: 'whilst another wording might have made it more explicit that the Member States' powers were circumscribed', the provisions indicated 'clearly and unequivocally' that the Member State concerned was obliged to 'issue its consent in writing'. The Directive specifically established 'harmonised procedures and criteria for the case-by-case evaluation of the potential risks arising from the deliberate release of GMOs into the environment'. The only procedure left to the French authorities was to report any doubts to the Commission. In the ABNA case,[99] which involved animal foodstuffs, an ancillary point arose as to whether national administrations could avail themselves of administrative powers to suspend the operation of a community directive pendent lite. The response of the ECJ, invoking due process principles, was that only a national court could make such an order.

If the EU risk frameworks are to function effectively, national agencies must establish flexible and responsive procedures for dealing with urgent matters. Domestic courts may in turn have to determine how far to press in regulating the regulator. For example, Friends of the Earth recently challenged the British Food Standards Agency over its handling of a known risk of contamination in imported foodstuff.[100] The pressure group complained that although earlier threats of judicial review had prodded the independent regulator to greater efforts, the warnings it gave were insufficient in the light of EU requirements. The court took the innovative approach of 'stopping the clock' at various points, better to test the evolving regulatory response, before giving the agency the benefit of a margin of discretion.

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[98] Now replaced by Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms.

99 Joined Cases C-453/03 R(ABNA and Others) v Health Secretary, C-11/04 Fratelli Martini v Ministerio delle Politiche Agricole e Forestali, C-194/04 Nevedi v Productschap Diervoeder [2005] ECR I-10423.

[100] R (Friends of the Earth) v Food Standards Authority [2007] EWHC 558.

Strongly associated with the area of risk regulation, the role of agencification in driving new administrative procedures deserves special emphasis. Let us recall that, developing in successive waves, there are now over 30 'EU agencies': bodies which, though not amounting to 'regulatory agencies' as that term is commonly understood in the Anglo-American tradition, nevertheless exercise an important range of individualised decision-making, advisory and collaborative functions. These Euro-agencies network with their national counterparts. The British Food Standards Agency, for example, set up like the European Food Standards Agency in the wake of the BSE crisis has a website replete with contributions to, and opinions emanating from, the scientific advisory work of EFSA.

Yet, if only because of the sheer scale of the organisational development, first place in the European 'rule of networks' belongs to competition proceedings. Enforcement is now a shared responsibility of the Commission and national agencies and provision for the exchange of confidential information and re-allocation of cases with a cross-border dimension represents a defining feature of the European Competition Network. In other words, a collaborative decision-making procedure has emerged in competition cases, with domestic administrative law agencies becoming increasingly integrated in the EU administration. 'Soft law' developments promoting consistency follow on naturally: detailed Commission guidelines, a pan-European system of liaison officers and a plethora of working groups for establishing best practice. Commentators have remarked both on the danger of undue interference with national legal orders[101] and on the intense challenges posed in terms of the good governance values of transparency and accountability.[102]

Much further exploration is needed of sector-specific procedural legislation, which could be described as the spearhead of EU regulatory policy. This short survey suggests, however, that sector-specific legislation has the potential to be the most coercive form of EU regulation and the most likely to penetrate deeply into

[101] S. Kingston A "New Division of Responsibilities" in the proposed regulation to modernise the rules implementing Arts 81 and 82 EC? A warning call Eur. Comp. L. Rev. 340 (2001).

[102] Maher and Stefan, cit. at 23.

national administrative procedures. By way of comparison we turn in the next section to horizontal regulation selecting, in the absence of a general EU Administrative Procedures Act, examples of legislation in the field of access to and retention of information.

5. Horizontality: access to documents and data protection

a. Access to documents

The genesis of freedom of information legislation in the EU is Council Declaration 17 annexed to the TEU at Maastricht, which declares unequivocally that transparency of the decision-making process is necessary to 'strengthen the democratic nature of the institutions and the public's confidence in the administration'. TEC Article 255, inserted at Amsterdam, placed the initiative squarely on the political institutions, a provision construed by the ECJ as barring judicial activism.[103] The response of the institutions was, however, sluggish and did not meet the deadline imposed by TEC Article 255(2) - a first indication of disagreements that would follow. In the absence of any legislative initiative, Codes of Conduct were promulgated by the institutions providing for access to documents in their possession,[104] a practical approach stiffened by the first EO, Jacob Söderman, whose first 'Own Initiative Investigation' was designed to ensure that all EU institutions and bodies had an access code in place.[105] When finally the Codes were superseded by a Council Regulation on public access to documents[106] based largely on the text of the Codes, the uneasy settlement between the widely differing attitudes of the institutions and member states was reflected in its ungenerous text to the annoyance of the EO. Both Söderman and Nikiforos Diamandoros, the second EO, have taken a significant

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[103] Case C-68/94 Netherlands v Council [1996] ECR I-2169. But see now Case T-211/00 Kuijer v Council [2002] ECR II-1301.

[104] Council Decision 93/731/EC, OJ 1993 L 340, p. 41 and Code of Conduct, p.43; Commission Decision 94/90 EC on public access to Commission documents, OJ 1994 L 46, p. 58; and European Parliament access rules [1997] OJ L263/27.

[105] European Ombudsman, Special Report and Decision by the European Ombudsman following the Own-Initiative Inquiry into Public Access to Documents held by Community Institutions and Bodies (December 1997).

[106] Regulation EC 1049/2001 regarding public access to European Parliament, Council and Commission Documents (hereafter Regulation 1049).

interest in transparency and have fought hard for freedom of information.[107]

Regulation 1049 reiterates the grandiose sentiments of Declaration 17, underscoring the objective of enabling citizens to participate more closely in decision-making; to lend greater legitimacy to EU administration; to 'guarantee' effectiveness and accountability; and to strengthen respect for democracy and human rights. It is, however, hardly a model of open government. The list of exceptions is considerable, ranging from usual exceptions for security, defence and international relations (Art. 4(1)) to wide exceptions in respect of confidentiality, commercial secrecy and third-party or member state documents (Art. 4(4) and 4(5)). Many of the exceptions are mandatory, leaving the institutions with little or no discretion; others are mandatory subject only to complex public interest tests: legal advice, for example, can be disclosed if there is 'an overriding public interest in disclosure' (Art. 4(2)), while documents drawn up by an institution for internal use (Art. 4(3)) must not be disclosed if disclosure would 'seriously undermine' the decision-making process unless 'there is an overriding public interest in disclosure'.[108] Although the CFI in particular has gone some way to lessen the effect of these restrictive exceptions by ruling that they must be strictly interpreted, the judicial record is decidedly uneven.[109]

Unlike the sector-specific legislation considered in the previous section, Regulation 1049 applies only to EU institutions and, with few exceptions, has no direct impact on member states. National freedom of information legislation is very variable: the UK stands at one end of the openness/secrecy scale with a Freedom of Information Act 2000 that came into force only in 2005 and is generally regarded as 'one of the world's more restrictive

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[107] J. Söderman, The Role and Impact of the European Ombudsman in Access to Documentation and the Transparency of Decision-Making in V. Deckmyn & I. Thomson (eds), Openness and Transparency in the European Union (1998).

[108] See on the interpretation of this test in the context of Art. 4(2), Case T-84/03, Maurizio Turco v Council [2004] ECR II-4061 and note the intervention by and joinder of Sweden in the appeal: Joined Cases C-39/05, C-52/05 Sweden and Turco v Council [2008] ECR I-4723.

[109] J. Helioskosi & P. Leino, Darkness at the Break of Noon: The Case Law on Regulation No 1049/2001 on Access to Documents 43 CML Rev 735 (2006).

pieces of information legislation';[110] Sweden stands at the other, with a tradition of open government dating to 1766, which receives specific protection in the Swedish Treaty of Accession. The potential for negative impact on national provisions is demonstrated by the Swedish Journalists case,[111] where the Swedish journalists' union, believing that joining the EU had damaged the openness of Swedish government, applied under Swedish law for documents in the possession of the EU Justice Council, obtaining around 80%; an application to the Council under EU law resulted in the release of just 20%. Only a partial remedy was forthcoming. The CFI annulled the Council's decision on the narrow procedural ground that inadequate reasons for refusal had been given. This case was decided under the Codes of Conduct; paragraph 15 of the Preamble to Regulation 1049 now warns member states of their duty of loyal cooperation to 'take care not to hamper' the proper application of the Regulation and to 'respect the security rules of the institutions'. Article 5 is more coercive. It requires a member state to 'consult' with an institution before releasing one of its documents 'in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation'.

The two articles most likely to impinge on member states are, however, Article 4(3), which requires the Commission, faced with an application to access documents originating with 'third parties' to consult them before granting or refusing access; and Article 4(5), which allows a member state to 'request' an institution not to disclose one of its documents without its prior agreement. The meaning of these provisions, thought until recently to amount to a right of veto, was tested in the IFAW case,[112] where a non-governmental organisation active in the field of animal welfare and nature conservation asked to access a Commission Opinion on the declassification of a German conservation site for development purposes. The Commission refused access, giving as its reason Germany's refusal when consulted under Article 4(5). According to the CFI, a request made by a member state under Article 4(5) constituted an instruction to the institution not to

[110] Constitution Unit, Balancing the Public Interest: Applying the public interest test to exemptions in the UK Freedom of Information Act 2000 (London, 2006).
[111] Case T-174/95 Svenska Journalistforbundet v Council [1998] ECR II-2289.
[112] Case T-168/02 Internationaler Tierschutz-Fonds v Environment Secretary [2004] ECR II-4135.

disclose the document in question; otherwise the Article would risk becoming a dead letter. The importance of this ruling for national provisions explains why Sweden had the support of Finland, Denmark, and the Netherlands in its appeal.[113] The ECJ ruled that 'joint decision-making' was involved and that both levels must give reasons for non-disclosure; at EU level, the last word lay with the Commission, which must carry out its own assessment; there might be circumstances in which documents were released by the Community when not available at national level but the fact that national law forbade disclosure would be a pertinent factor in the Commission's decision-making. Purportedly to implement this judgment, the Commission has proposed an amendment designed to safeguard the autonomy of national legislation. This would leave the Commission to assess the adequacy of any objections based on EU law, while maintaining the right of a member state to base a refusal on specific provisions in its own national legislation.[114] Reform of Regulation 1049 is, however, currently deadlocked by inter-institutional dispute and disagreement between member states.[115]

b. Data protection

In contrast to the indirect impact of Regulation 1049, EU data protection legislation encroaches directly on national space. The stated objective of the Directive on Data Protection (DPD)[116] is to coordinate and approximate national law so as to 'ensure that the cross-border flow of personal data is regulated in a consistent manner that is in keeping with the objective of the internal market', while at the same time leaving a 'margin of manoeuvre' to the member states. Extended on several occasions in sectoral legislation, it was extended to electronic telecommunications in 2006, when the Preamble to the new Directive explicitly referred to

[113] Case 64/05 Sweden v Commission [2007] ECR I-11389.

[114] Commission Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents COM(2008) 229 final, proposed Art. 5(2).

[115] The matter was struck from the agenda of the 2009 Swedish Presidency.

[116] Directive 95/46/EC of the European Parliament and Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

the need for harmonisation due to 'legal and technical differences between national provisions concerning the retention of data for the purpose of prevention, investigation, detection and prosecution of criminal offences'. The national provisions varied considerably. [117]

The DPD thus requires national administrative systems to be set in place for the collection of personal data. It affects substantive content - data must be 'adequate, relevant and not excessive' in relation to the purposes for which it is collected and/or processed and processing of some types of sensitive (such as ethnic or religious) data is prohibited without the express consent of the subject (Art. 8) – but also extends to procedure. Data must be: (a) processed lawfully and fairly; (b) collected only for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes; (c) kept up to date or otherwise disposed of. Retention must be based either on individual consent or 'some other legitimate basis laid down by law'. There are ancillary rights of access and to have misinformation rectified. The importance of data protection to individuals is emphasised by its inclusion both in Article 21 of the EO's Code of Good Administrative Behaviour and in ECFR Article 8 and the clear intention of the policy-makers is harmonisation or approximation of national laws on data protection. Yet significantly the Council has drawn back from extending the DPD to data collected for 'Third Pillar' purposes of security and criminal investigation.[118] The sector is overdue for a revamp under the provisions of the Lisbon Treaty. Observers have, however, expressed serious concern at inadequate implementation of what already exists and the European Data Protection Supervisor (EDPS) has argued that full implementation of existing provisions should precede reforms. He has asked for better Commission measures of supervision, including resort to infringement

[117] Recitals 5 and 6 of Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC OJ L105.

[118] Directive 2006/24/EC covers criminal proceedings in the area of telecommunications for which reason it was unsuccessfully challenged by Ireland: see Case C-301/06 Ireland v Council and European Parliament [2009] ECR I-593.

procedures, Commission guidance and 'the promotion of non-binding instruments', such as best practice and self-regulation.[119] Perhaps in recognition of this reproof, infringement proceedings have been started against the UK on the ground that UK rules governing the confidentiality of electronic communications breach EU law.[120]

Problems may be caused when different types of procedural provision conflict. In the Bavarian Lager case,[121] BL made several requests under Regulation 1049 for access to documentation concerning a meeting convened by the Commission with member state representatives in the course of projected infringement proceedings. The papers included the names of those attending. The Commission rejected BL's confirmatory application on the ground that the relevant Regulation[122] prohibited disclosure, bringing the two Regulations into apparent conflict. This case involved two horizontal provisions operative at EU level and two rights classified as fundamental by the Advocate General, who with great ingenuity managed to reconcile them. But similar points quite commonly arise in national systems where a general, horizontal Administrative Procedures Act clashes with vertical sector-specific legislation, and could also arise where national procedural legislation seems to be out of accord with EU legislation. This situation should perhaps be governed by the principle of procedural autonomy applied by the ECJ to judicial procedures, whereby national rules prevail subject to the proviso that effective legal remedies for violations of EC law must be available in the

[119] EDPS Press Release 07/8 (25 July 2007).

[120] Commission Press Release, IP/09/1626 (29/10/2009). These proceedings involve Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector.

[121] Case T-194/04 Bavarian Lager v Commission [2007] ECR II-4523; Case C-28/08P Commission v Bavarian Lager with the Opinion of AG Sharpston (pending).

[122] Regulation 45/2001/EC on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

national legal order and must not discriminate against non-nationals.[123]

6. Looking ahead: a multi-track approach

This paper confirms Franchini's view of the EU law of administrative procedures as 'spotty': 'the norms do not go so far at present as to create a general law or a "tight web"[124]. The web of principle is a loose one, woven of disparate threads. The general principles have been laid down by the Luxembourg Courts as and when litigation provided an opening, sometimes created by those Courts in the interests of the Community, sometimes drawn from national constitutions and installed at EU level at the insistence of national courts. Due process principles have been bought in from human rights texts, often in response to the jurisprudence of the ECtHR. Inter-court competition, currently on the increase, is liable to increase the 'spottiness' of EU procedural law still further. Reform by judicial process is necessarily piecemeal and cannot easily be avoided when access to the court is a fundamental right. Moreover, human rights values are never static, as witnessed by the volume of litigation built up around human rights texts, the constitutional status of which means that they are hard to change.

Amongst other sources of important procedural principle are the EO's Code of Good Administrative Behaviour and the Commission's White Paper on European Governance, where openness and participation sit together with accountability, effectiveness and coherence. The Commission has taken steps to flesh out its general principles in procedural format: for example, guidelines now govern Commission rules of conduct towards civil society organisations, a register of potential consultees is maintained and made publicly available on-line and, more important, a principle of public on-line consultation has been established.[125] Serious gaps remain, however. There are, for

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[123] See Case 33/76 Rewe-Zentralfinanz eG and Rewe-Zentral AG v Land Wirtschaftskammer fur das Saarland [1976] ECR 1989 and for analysis, Craig, cit. at 7 at 791-803.

[124] C. Franchini, European principles governing national administrative proceedings 68 Law & Contemp. Probs. 183, 187 (2004).

[125] Notably Commission Communication, General principles and minimum standards for consulting non-institutional interested parties COM(2002) 277;

example, no 'notice-and-comment' rights in EU rule-making procedures other than on a sector-specific basis,[126] an omission which, for administrative lawyers raised in systems where administrative procedures are codified, must seem anathema.[127]

As already indicated, much of the day-to-day substance of administrative procedure is contained in detailed, sector-specific regulation: we have instanced the areas of competition law and public procurement, asylum law, environment and risk-regulation. But 'spottiness' has grounded an argument for codification at EU level based on the values of consistency and openness. In this way, the argument might run, codification could be a step in the direction indicated by the White Paper, of bringing the EU closer to its peoples.[128] The fact that a majority of member states already possess an Administrative Procedures Act and their public servants are accustomed to function within its framework is likely to add to the already considerable pressure for similar legislation at EU level. Although a European APA would not be directly applicable within national public administration, its effect would be felt in every area of activity governed by EU law. But how comprehensive such a text might be is controversial: Meuwese, Schuurmans and Voermans, for example, suggest compromising on specially defective areas, notably the rights of participation mentioned above. The outcome would be a compromise closely based on the American APA.[129]

Commission Communication, Towards a reinforced Culture of Consultation and Dialogue - General Principles and Minimum Standards for Consultation of Interested Parties by the Commission COM (2002) 704 final. In Case 3617/2006/JF, the EO demanded that the Commission abide by its promises.

[126] E.g., in lawmaking through the social partners: see S. Fredman, Social Law in the European Union: The Impact of the Lawmaking Process, in P. Craig & C. Harlow (eds), Lawmaking in the European Union (1998). And see Case T-135/96 UEAPME v Council [1998] ECR II-2335 discussed in C. Harlow, Civil society organisations and participatory administration: a challenge to EU administrative law? in S. Smismans, Civil Society and Legitimate European Governance (2006).

[127] Craig, cit. at 7, ch.10; F. Bignami, The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology 40 Harv Int'l LJ 451 (1999).

[128] For a recent call in this direction, see E. Nieto-Garrido & I. Delgado, European Administrative Law in the Constitutional Treaty (2007).

[129] A. Meuwese, Y. Schuurmans & W. Voermans, Towards a European Administrative Procedure Act 2 Rev. of Eur. Adm. L. 3 (2009).

Codification of administrative procedures on a trans-European basis would be a more difficult undertaking. There is a sharp variance in attitudes to codification between civilian and common law countries. Work on codification of European civil law started twenty years ago. It has not so far had any very positive outcome despite the fact that a majority of member states have civil codes. What has emerged from the project, however, are very helpful compendia of common principle, closely resembling the non-binding Restatements published by the American Bar Association.[130] Again, work on codification of criminal procedures was first undertaken by the Storme Commission, which in 1994 had to report failure: the basic distinction in European legal systems between adversarial and inquisitorial procedures was 'so deeply enshrined in the respective legal cultures as to make harmonisation practically unfeasible'.[131] Work on approximation is under way but it now follows the less ambitious pathway of focusing on specific problem areas such as arrest, victims' rights or the double jeopardy rule.

Similarly, it is dangerous simply to assume that common principles of administrative procedure exist and are accepted in every national administration. As part of a 'better governance' initiative in 2004, the Swedish Government commissioned a study from the Swedish Agency for Public Management (Statskontoret), which administered a questionnaire to twenty-five member states on the subject.[132] Selecting twelve principles seen as core to good administration, ranging from legal principles, such as the due process and proportionality principles and duty to give reasons, to principles valued by administrators and ombudsmen, such as obligations to document administrative procedures, keep registers and be 'service-minded', the study set out to discover if the principles were recognised in national public services. The authors concluded that up to ten of these principles were widely

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[130] See Resolution of the EP, OJ 1989 NC 158/4006. And see A. Hartkamp & A. Hesselink (eds), Towards a European Civil Code (3rd edn, 2004); C. von Bar et al. (eds), Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (2009).

[131] M. Storme, General Introductory Report, in M. Storme (ed), Rapprochement du Droit Judiciare de l'Union Européenne (1994) at 63.

[132] Statskontoret, Principles of Good Administration in the Member States of the European Union (2005) (available on line).

recognised throughout the EU and found expression in national codes of practice or legislation. But even when a common core of good administration principles was discernible, the weight attached to any given principle varied as the national legislative texts varied stylistically. Uniformity was largely illusory: 'Even 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'.[133] The 'tidiness' of codification may also be illusory. The hard law of codification is regularly undercut by the soft law of administrative practice, as the UNHCR report into the operation of the Asylum Procedures Directive amply demonstrates.

Whether the theoretical arguments for harmonisation justify attempts to overcome the difficulties is questionable. The argument for harmonisation is essentially political, bound up with the dream of a federal or quasi-federal 'state' with a common political and administrative culture, whose institutions seek legitimacy.[134] A market version of the 'level playing field' argument is based on the convenience of multi-national corporations and their need to trade efficiently in several jurisdictions.[135] As we have seen, this has had powerful driving force in the construction of due process principles for competition law. A softer consumer version of the 'level playing field' argument exemplified in Heylens fastens on unfairness to users of public services, who are faced with different procedural regimes in different member states. This argument is at its strongest in respect of a limited number of due process rights, when human rights entitlements can be invoked.

The Community emerged as an economic regulator, a form of delegated administrative governance for which a claim of legitimacy based on economic efficiency could be made.[136] This

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[133] Ibid at 71.

[134] S. Cassese, Global Standards for National Administrative Procedure 68 Law & Contemp. Probs. 109 (2005).

[135] See H. Schermers, The Role of the European Court of Justice in the Free Movement of Goods in T. Sandalow & E. Stein (eds), Courts and Free Markets (1982).

[136] See A. Menon & S. Weatherill, Legitimacy, Accountability and Delegation in the European Union in A. Arnull & D. Wincott (eds), Accountability and Legitimacy in the European Union (2002); G. Majone Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth (2005).

was the context in which the 'first generation' of due process rights evolved. Equally, the Community was able to develop a very large volume of executive legislation, largely agreed by bureaucrats functioning in committees and vertically applicable inside the territory of the member states. We are, however, living through an era of rapid economic change and experimental globalisation, in which politics increasingly takes place in international conventions and meetings of the G7 and G20. The EU too is undergoing rapid geographical, political and administrative change. The classical nineteenth-century model of 'bounded government' based on conceptions of sovereignty and power-sharing between executive and legislature is sharing space with more fluid forms of executive governance: governance through expert networks or, increasingly, expert agencies.[137] Outside the confining boundaries of the nation-state, in the framework of EU regulatory governance, this trend is particularly marked. As suggested earlier, the emergence of network governance at EU level and the move to composite decision-making has been matched by techniques of 'soft governance', based less on law than on cooperation between member states, agencies and EU bodies in the form of technical assistance, training, and exchanges of information and experts. These new governance structures and techniques bring together national and supranational actors in a multiplicity of horizontal and infra-national collaborations and partnerships. Public administration is also changing very rapidly under the influence of information technology. This serves as a strong catalyst for organisational change, facilitating networking and collaboration. It has the potential dramatically to transform public sector organisations and processes and impact on traditional Weberian bureaucratic organisations.[138] The beneficent side of information technology is its potential for transparency and citizen involvement. Less benign is the potential for surveillance. In their different ways, the Commission and Council have both turned information technology to their advantage.

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[137] M. Shapiro, Administrative Law Unbounded, 8 Ind. J. Global Legal Stud. 369 (2001); D. Oliver, T. Prosser & R. Rawlings (eds), The Regulatory State: Constitutional Implications (2010).

[138] Pan Suk Kim, Introduction: challenges and opportunities for democracy, administration and law 71 Int'l Rev. Adm. Sciences 101-2 (2005); J. Morison, Online government and e-constitutionalism (2003) PL 14.

This is a fluid and complex set of issues, of which administrative procedures is only one dimension. Our own approach to the problems is pragmatic, as our approach to the problems of public law and administration has always been; we 'do not demand consistency with some overarching theory of the administrative state'.[139] We would therefore advocate a multi-track approach to administrative procedures, which fits the contemporary trajectory of European governance. We would want to underline the important place of soft law in promoting values and general principles. The European Ombudsman's Code of Good Administrative Behaviour is in this respect an important precedent. The Code is capable of replication at national level through the Network of European Ombudsmen, already working together in a teaching and training network to assure local implementation.

This situation is, however, not without its dangers. It is, indeed, the very way in which the EU has built up some of its most contestable administrative practices in the 'Third Pillar'. In the dark and windowless areas of asylum procedures and anti-terrorism measures, for example, this has led to the creation of data banks lacking in adequate supervision. In certain areas therefore, we recognise the need for a strong injection of single-purpose horizontal regulation along the lines of the access to information Regulation. We have heard repeated calls, as yet unsuccessful, for something similar in the area of data protection. Significantly too, a thoughtful and wide-ranging paper from the European Data Protection Supervisor has just been published arguing for a new basic principle of 'privacy by design' to be built into all EU measures, private and public.[140] We also support the further development of sector-specific legislation on a case-by-case basis. Spotty this may be but it is, after all, the central idea of functional integration.

The Luxembourg Courts will doubtless continue to make an important contribution in procedural matters. They could conceivably move further in the direction of a coercive model of harmonisation, though such a step would require change in the

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[139] S. Shapiro, Pragmatic Administrative Law in Issues in Legal Scholarship, The Reformation of American Administrative Law (2005) cited in Harlow and Rawlings, at 6.

[140] Opinion of the European Data Protection Supervisor on Promoting Trust in the Information Society by Fostering Data Protection and Privacy (18 March 2010).

present, somewhat confused but generally pluralist approach to national procedural regimes at a time when national courts are showing signs of assertiveness. This would be out of place. The 'interlocutors' of the ECJ have greater legitimacy and are now more powerful and more self-confident. National parliaments are demanding greater respect for subsidiarity, evidenced by the role allocated to them in the Lisbon Treaty.

The arguments in favour of pluralism and diversity are powerful, more especially in the context of an enlarged and enlarging Union. National procedures grow out of national cultures. There is, for example, no absolute advantage of adversarial over inquisitorial procedure; one is not inevitably more independent or inherently less arbitrary than the other; each can operate fairly. Again, some societies have strong cultures of 'non-law', a preference which may be reflected in their procedures. To rule out ombudsmen as a remedy because their recommendations are not technically binding alters the very concept of justice in a society.[141] Furthermore, as Abraham once argued, cultural uniformity precludes experiment and creates a real danger of stultification.[142]

Gradual approximation and convergence of administrative procedures is in any case likely to be achieved through administrators working in 'new governance' relationships with a little assistance from time to time from legislators and courts. This approach has the advantage of being both 'bottom up' and based on national experience. It is surely a source of strength that diverse national practices reflected in national codes are there to be drawn on. At one and the same time these reflect particular historical experience and cultural traditions while becoming increasingly open to European and external/comparative influences.

[141] C. Harlow, Voices of Difference in a Plural Community, 50 Am. J. Comp. L. 339 (2002).

[142] R. Abraham, Les principes généraux de la protection juridictionnelle administrative en Europe: L'influence des jurisprudences européennes, 9 Eur. Publ. L.

Vol 2 No 2/2010

THE ORIGINS OF LAW NO 241/1990 AND FOREIGN MODELS

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Abstract

This article argues, first, that law No 241/1990 has its source in a shift of perspective occurring in Italy with regard to the regulation of administrative activities, and, second, that the strengthened protection of procedural rights is not only coherent with the interpretation of Article 97 of the Constitution, but also with European Union law. From the first point of view, although the Italian Constitution laid down in 1947 the principles of impartiality and sound administration, it was not until the 1980s that our legal culture accepted the idea of a general legislation on administrative activities. In the last twenty years, however, the protection of procedural rights has been gradually strengthened and such rights are now included within the standards that are established by State laws. From the second point of view, procedural safeguards are coherent with the principles laid down by the European Union as well as with those of the ECHR, although national standards of protection are more restrictive and must, therefore, be adjusted.

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I. The traditional concept of administration and administrative procedure.

My task in this short essay is essentially historical and comparative, to the extent that I will consider the origins of the Italian law on administrative procedure, law No 241 of 1990, the influence of foreign legal models and, finally, the impact of the new framework governing administrative procedure.

It ought to be stated since the outset that the law No 241/1990 has its source in a shift of perspective occurring in Italy in the regulation of administrative activities, and it reflects such shift in its layout, although its provisions appear to need completion and improvement. The dynamic of change becomes more evident when considering the starting point. In accordance with the common view of the rule of law (or, more precisely, Rechtsstaat) of 19th century continental Europe, Italian administrative law was traditionally based on the concept of administration as a manifestation of the power of government over society. Such power was to be regulated and limited by law. However, governmental power kept a position of superiority, and a sort of separation from individual and associated citizens.

From this viewpoint, there was no room for regulation of the exercise of administrative powers that could ensure the participation of affected interests in the process of administrative decisions. In the context of the administrative unification laws of the Kingdom of Italy, issued as far back as 1865, only for some of the most economically and socially significant administrative decisions were provided some specific procedural guarantees in the sense meant above. Nor was a general law on administrative activities, regulating procedures in accordance to specific principles and guarantees for interested parties, adopted subsequently. There was only a variety of rules governing an individual procedure or a set of procedures, without such regulation being connected with common principles or models.

It is in this legal context that, from the thirties onwards, a notion of administrative procedure took form in la doctrine. Such notion aimed at including all the kinds of administrative procedures known in that epoch, but from a merely formal point of view. That is to say, the procedures were simply seen as a sequence of preparatory acts in view of the adoption of the final decision, the only one which produced effects on the recipients of administrative action.

Only some years later did a substantive concept of administrative procedure take shape. Administrative procedure was regarded above all in its nature of decision-making process that had to be regulated in the way to ensure the best elaboration of administrative decisions, specially of discretionary decisions, giving in particular the affected interests the opportunity to be represented and participate.

Control over the non-arbitrary and unbiased exercise of discretionary powers was essentially assigned ex post to the administrative judge, after 1890. It ought to be observed that the administrative judge did not limit itself to ensuring compliance with the formal lawfulness of administrative activities, but also progressively identified – through censure over the faults connected with excess of power – principles and rules both of a substantive nature and of a procedural nature, beyond what was set out by the laws. All this ensured a more penetrating and rooted impartiality in the discretionary decision-making process.

II. Different attitudes on the regulation of administrative procedure after the Constitution (1948)

The entry into force of the new Republican Constitution since 1948 did not change radically these initial features of administrative procedures, despite what is provided therein.

In particular Article 97 of the Constitution specifically considers the administration as a separate activity from government, to be organised and regulated in accordance with the basic principles of good management and impartiality. However, when considering administrative action, unlike jurisdiction, the Constitution does not lay down principles or rules of a procedural nature concerning the performance of such activities.

It is interesting to mention that, during the preparatory works for the new Constitution, the problem truly arose in light of

the democratic order that was being laid out. Foreign legislations on the matter were considered, such as the Austrian laws of 1925, and the US Administrative Procedure Act of 1946. However, a different opinion prevailed. According to this opinion, it would be a task for the future parliamentary legislation to set general principles aiming at protecting citizens, such as the rights of information and participation, and the duty to give reasons, which are today summarised in the principle of a fair procedure (or due process of law), or in accordance to European rules, fair administration.

This task, however, has not been fulfilled by Parliament for many years after the entry into force of the Constitution. During the first two decades (1948-1968), several draft bills aiming at introducing a general regulation of administrative activities were elaborated and debated. However, not only such draft bills have never been approved by Parliament, but they were still based on the traditional idea according to which administrative procedures were a only formal sequences of the preparatory acts for a final decision.

Nor has the Italian legal culture soon detached itself from its early emphasis on "acts", by establishing a fully distinct concept of administrative procedure. More broadly, administrative action was still conceived as a unilateral manifestation of authority, operating in accordance with different procedures or means in the various areas of public policy. In this context, even the principles of good management and impartiality established by Article 97 of the Constitution were initially considered merely as a confirmation of the conceptual framework that had already existed since many years. Indeed, the decisions of both the constitutional and administrative courts may be seen as fulfilling a culturally conservative role, to the extent that no serious attempt was made to interpret Article 97 as a potential basis for affirming the principle of a fair procedure. Nor was such principle derived from other rules of the Constitution, such as Article 24, which lays down principles concerning jurisdiction.

On the other hand, until the 1980s those academic circles that were trying to revise public law doctrines in order to make them more coherent with the Constitution could not reach a widely shared opinion concerning the opportunity of a general legislation on administrative activities.

On the one side, some scholars strongly advocated the need to launch a new legislative framework ensuring that the affected interests could have a reasonable opportunity to be heard during the formulation of administrative provisions, as well as access to the documentation held by the administration and an adequate knowledge of the grounds of the decision taken. All this aimed at bringing the respective positions of citizens and the administration closer, and thus ensuring transparency and democracy in the decision-making process of the administration.

On the other, the more traditional strains of la doctrine were sceptical about the adoption of an administrative procedure act, if not openly against it. Even some of the most distinguished scholars feared that the introduction of the principle of participation may lead to a further worsening of the Italian administration, which was already severely slow and inefficient. To this we must add the hostility of politicians and civil servants towards a legislative framework based on the principle of fair procedure that would at any rate contribute towards limiting the arbitrary exercise of discretionary powers.

Other strains of la doctrine, more advanced, were favourable to regulating administrative activities in general in accordance to models such as the Austrian or American one, or at any rate in accordance to a participation-based model. However, they argued that there was first of all a need to reform the structures and the organisation of the administration, so as to set up an administration apparatus that would have been able to deal with the increased amount of workload that may derive from legislative regulation of procedures. This explains why, still in 1979, in the well-known report on the main problems of the administration of the state, presented by the then-Minister of Public Administration Giannini, the main focus was on the organisation and streamlining ("deforestation") of procedures.

III. The elaboration of law No 241/1990: driving forces and political guidelines

If not only the political environment was hostile to a profound legislative innovation, but also the legal culture was at least sceptical, we may wonder why and how things changed during the 1980s. The question thus arises, in other words, of

which were the driving forces leading to the adoption of law No 241.

A first explanation focuses on the increasingly serious and self-evident estrangement between citizens and the institutions, not compensated even by the effective creation of regional institutions after 1970. Indeed, the decentralisation of administrative functions to Regions and local authorities was not accompanied by a different method of carrying out administrative activities towards citizens and society. Another possible explanation, that does not necessarily exclude the other one, focuses on the experience of other European countries. As a matter of fact, during the course of the 70's, neighbouring France saw the approval of regulations aiming at promoting transparency, and in 1976 Germany adopted a federal law on administrative procedures.

All of this re-focussed Parliament and the Government on the need to issue new regulations that aimed in general to the "improvement of relations between citizens and the administration". The Agenda approved by the Senate on the 10th of July 1980 focussed specifically on this topic. The new government (led by Bettino Craxi) that took place after the general elections of 1983 implemented more than one initiative in terms of the reformation of the administration. In particular, a Government Commission was appointed to make propositions for new laws, so as to remove or contribute towards the removal of three great reasons for the lack of citizen satisfaction towards the administration: inscrutability, unjustified slowness, and the surpassed authoritarianism of the administration itself. The appointment of the Commission thus provided that with this in mind, there should be an identification of the "well-defined rights" of citizens in terms of the public administration. This in particular aimed at the democratisation and concurrent simplification of procedures.

The task was therefore complex: not only there was a need to implement principles of impartiality (transparency and participation), but also those of good management (simplicity, immediacy, fair cost) as considered by the foreign laws mentioned above.

It is also important to recall the essential features of the appointment of the Commission, because it helps in understanding

more clearly what the layout was for the proposal brought forward in mid-1984, and of the law that derived there from in 1990. Right from the terms of the appointment, we may as a matter of fact understand how the viewpoint according to which the Task Force should operate was completely new with respect to the dominating Italian tradition, and at the same time was also removed from foreign law models on administrative procedure.

Provisions were made in general for the improvement of relations between the administration and the public, recognizing to the latter several rights that enabled the democratisation and at the same time the simplification of procedures. The law was not therefore conceived as a regulation of procedure (in accordance to one or more procedural models as in the other applicable foreign laws), but, rather, as a law that in the first place would reshape the relationship between citizens and the administration. Not only it would lay down new principles, distinct from the ones deriving from the traditional theories of public administration, but it would also strengthen citizens' rights in terms of the performance of administration activities. This meant that the focus (as opposed to the prevailing one in the past) should be on the citizen or on the interested parties, and that there was an acceptance of the idea of procedure of a substantial nature as being an instrument and place of representation and protection of the substantial interests and rights that were involved or affected by the final decision.

As a consequence of all this, the legislative framework that the Commission was expected to elaborate went clearly beyond the regulation of procedure. It impinged, more broadly, on the relationship between citizens and public administration. Accordingly, the Commission should not limit itself to consider the regulation of guarantees within administrative procedure, but should have also provided measures aiming at ensuring the expected outcomes for affected interests, in terms of the final decision.

IV. The Law No 241/1990 as a general law of principles and rights in terms of administrative activities

The proposals elaborated by the Commission have followed scrupulously the political guidelines and thus have lead to the new law, finally approved by Parliament on August 7, 1990, albeit

with non-negligible limitations. The title of law No 241 still refers to "new provisions on administrative procedure" (even after several amendments occurring in the past twenty years), but in truth it is a law that, as we already saw, does not regulate one or more procedural models (like the Austrian, the North American, the German or more recently the 1992 Spanish one).

It is a law introducing a series of general principles and procedural devices, whilst at the same time affecting administrative activities well beyond the scope of procedures. As a matter of fact, law No 241/1990 contains several provisions regulating, among other things, agreements between public administrations and access to files.

According to the law No 241/1990 were such principles of administrative procedures regarded as rights granted to citizens vis à vis public authorities. In this respect, the rights recognized by the law are coherent with the rights stemming from European treaties and the case-law of European courts. The law, therefore, is a catalogue of the (new) rights of citizens or a statute of citizens in terms of public administrations.

There are several provisions or guarantees, connected with the right to a fair procedure or, more broadly, with the right to good administration, albeit only with regard to the issue of provisions of an individual and concrete nature and not of a general nature[1]. Such provisions include the right to communication or preventive information, the right to participation (albeit only exercisable in a written form), the giving reasons' requirement, and possibility that agreements between the administration and the interested parties either integrate or substitute unilateral decisions of a discretionary nature.

Many other provisions aim at ensuring sound management and transparency. Among the former, mention must be made of the right to obtain the closing of procedures within a set time limit (i.e. the right to an administrative decision), the right to the unitary conduction of each procedure through the institution of the "person responsible for the procedure" for proper compliance

[1] For further analysis of the distinction between regulation and adjudication and their partly different legal frameworks, see B. Mattarella, Participation in Rulemaking in Italy, infra.

with time limits, the right to concentration of the procedures relating to the same activity or the same result through the institution of a "services conference". Another fundamental device is the substitution of authorisations or licenses with a statement made by the interested party, affirming that the activities that he/she intends to pursue are in compliance with existing legal requirements (statement on the beginning of activities). The so-called tacit approval (silenzio-assenso) is still another legal instrument. When authorisation by a public authority is still required, its silence after the time limit previously established "is tantamount to acceptance of the application". Other measures imply the simplification and acceleration of procedures.

Last but not least, chapter V of the law is fully dedicated to transparency, to the right of accessing administrative documents though, differently from what proposed by the Commission, it provides such right as a right of the interested parties and not as a right of the citizen as such, of the quisque de populo.

V. The innovative elements for the whole administrative system

Even a quick look at the law No 241/1990, thus, shows that, first, it has been a turning point and, second, that its constitutional relevance is undeniable.

From the first point of view, the law has overturned the traditional viewpoint that regarded citizens as subjects with respect to the administration, to the extent that it equipped the former only with the possibility of reacting against the unlawful acts of the latter, by asking the administrative judge to annul such acts.

Nevertheless it should undoubtedly be noted that individual procedural rights were recognized, but often in restrictive way. We should also avoid hiding the difficulties affecting the implementation of the law. However, twenty years after its entry into force, the meaning and scope of law No 241 have become increasingly relevant for the development of Italian administrative law.

Firstly, it must be observed that subsequent parliamentary legislation refers to law No 241 as a basis for the rules governing administrative activities and procedures in a variety of policy fields. To the extent that law No 241 lays down complementary

and subsidiary rules (e.g. with regard to the time-limit for concluding a procedure), this law integrates the rules concerning specific administrative procedures, which often refer to it.

Secondly, it must be pointed out that the law, or better the law's general approach, has also provided the grounds for subsequent reforms in terms of administrative organisation. The new pattern of the relationship between citizens and the administration has inevitably affected subsequent primary and secondary legislation. On the one hand, its choices aimed at improving such relationship, by considering each citizen an end itself, not only a beneficiary of collective action. On the other hand, the law No 241 has introduced several instruments aiming at granting increased autonomy and responsibility to technical/ professional administrative structures with respect to political ones. That said, it must be noted that in both legal culture and administrative practice there is still a strong influence of the traditional bureaucratic/authoritarian-model of administration that is not consistent with the spirit and the letter of law No 241.

Thirdly, the new legislative framework governing administrative procedures has gradually determined an improvement of judicial protection. Once each citizen as well as other parties have been entitled to veritable rights with regard to public administration's activities, the demand for new forms of judicial protection has grown. Not only has the traditional action for the annulment of unlawful administrative decisions been strengthened, but new judicial remedies for ensuring compliance and compensation in case of non-compliance have also been introduced. At least two examples of the first type of new remedies may be indicated. One is the action aiming at obtaining a decision against the silence kept by the administration. Another is the action aiming at obtaining the display of documents in case of unjustified denial by the administration. In this case, the administrative judge may order the administration to provide access. With regard to compensation, the recent law n. 69/2009 has amended law No 241/1990, introducing a new kind of liability (from delay). According to the new provision, if the administration does now comply with the terms previously set out for concluding a procedure, it has the duty to compensate the damages suffered by the interested parties.

VI. The constitutional relevance of law No 241

The legal importance of law No 241/1990 emerges clearly also at constitutional level, and from different angles. On the one hand, the Constitutional Court in its most recent judgments changed its opinion concerning the principle of a fair procedure (or due process of law). While in earlier judgments the Court had affirmed that "due process of law" was not a constitutional principle, but a general principle of the legal system applicable only to regional statute law but not national one, this no longer the case. Indeed, the Court has sought to find a constitutional foundation and has found it in Article 97 of the Constitution, laying down the principles of impartiality and sound administration. In addition to admitting that "due process of law" is constitutionally relevant, the new trend of constitutional case-law provides a constitutional coverage to the law's provisions. On the other hand, and consequently, the Court has used the law No 241 as frame of reference when evaluating the constitutionality of individual pieces of legislation. If specific rules diverge from the general provisions of law No 241/1990, the Court says, their reasonableness must be ascertained.

The constitutional relevance of the law No 241/1990 has been addressed also with regard to the rules applicable to both Regions and local authorities. What was at issue, after to the constitutional reform of 2001, which extended the lawmaking and regulatory powers of Regions and local authorities, respectively, was whether law No 241, being an "ordinary" (as opposed to constitutional) law of the State, could produce binding effects with regard to Regions and local authorities. Although the Constitution does not mention administrative procedures, it was possible to affirm that these fall within the "minimum level of services connected with civil and social rights that must be guaranteed across the nation", for which any determination is reserved to the exclusive legal competence of the State (Article 117, paragraph 2, letter m), of the Constitution) and therefore removed from regional and local determination [2]. This interpretation has been recently confirmed by law 69/2009, already mentioned earlier, which has

[2] For further analysis of these issues, see R. Bifulco, Legislative regulation of administrative procedures: the role of the State and regions in Italy, infra.

amended law No 241. Following the new constitutional interpretation, it can be thus argued that the provisions of law 241 that apply also to Regions and local authorities are binding, except for higher levels of protection of the citizens that Regions and local authorities may choose to offer. This is the interpretation more coherent with the legislative intent of strengthening the rights of citizens and interested parties. Presumably, therefore, the Constitutional Court, will confirm such interpretation, should it be requested to pronounce on the matter.

VII. Prospects for the enrichment of law No 241/1990

The legislative intent of strengthening citizens' individual and collective rights is not only coherent with the interpretation of Article 97 of the Constitution, but also with European Union law. After the amendment introduced in 2005, Article 1 of the law No 241/1990 refers, more precisely, to the principles of the legal order of the EC. As a consequence, national administrative activities shall be subject not only to the principles set out by law No 241 itself, but also to the principles of the legal order of the EC. The constitutional reform of 2001, too, introduced an explicit mention of EC law. Article 117, paragraph 1, now affirms that state laws and regional ones are required to comply both with the legal order of the EC and international obligations. In other words, EC provisions and international obligations have been included within the parameters for judging the constitutionality of the laws themselves.

This change is particularly important in view of the application of the Treaty of Lisbon, which includes the Charter of Fundamental Rights of the EU, adopted at Nice, and of the European Convention of Human Rights. As a consequence of this, any interpretation of procedural rights must pay due attention to the rights enshrined into the Charter and the Convention, as well as to the case-law of the two Courts, of Luxembourg and Strasbourg, respectively. More precisely, both the rights recognized by law No 241 and the standards in accordance to which these were defined must now be integrated with the provisions of European law. In many respects, the standards of protection by law No 241 are more restrictive and should therefore be integrated and completed. Consider, for example, the right to

be heard in administrative procedures. Although the intervention of interested parties within such procedures is formally provided by law No 241, it only takes place in written form. Consider also the legislative regulation of transparency and the right of access to documents, which has far more extended scope in the EU than in Italy (legislative decree No 150/2009). Last but not least, consider that the principles of law No 241 are not applicable to rule-making and planning activities, which the legal systems of different countries and the European ones already provide specific participatory instruments.

The framework of law No 241/1990 as a law of principles and of rights eases this task of comparison and integration. However, there is no doubt that such law must now be completed and enriched with the provision of types of differentiated participatory tools, in accordance to the different substantial environment of the different types of procedures, so as to achieve the social demand of an administration more coherent with the ideals of democracy.

There is a good chance to do so, since a new revision of No 241/1990 has recently been announced by Government. A draft law has been elaborated and is now under parliamentary examination. If approved, it may lead to adoption of a Charter of Duties of the public administration, and to the implementation of a unified wording including general rules on administration activities, which would also include law 241. It remains to be seen, of course, whether this occasion is fully exploited. Where law No 241 should formally disappear, it is to be hoped that new legislative framework draws inspiration from its spirit and complete and enrich its provisions. In this respect, the indications and suggestions that may be produced by comparative legal analysis, like the one that was provided by this conference, would be invaluable.

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Vol 2 No 2/2010

ADMINISTRATIVE PROCEDURES: TWENTY YEARS ON

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Abstract

This article argues that the law governing administrative procedures has a fundamental importance. Not only has it limited the discretionary powers of public authorities in order to prevent them from degrading into arbitrariness, but it has also introduced a set of legal instruments aiming at simplifying administrative action and liberalizing economic activities, in line with the principles of freedom enshrined in the EU legal order (and in part by the Italian Constitution itself). A retrospective of the last twenty years cannot ignore the fact that many elements of change have been attenuated by public administrations. Neither politicians nor la doctrine have always contrasted these obstacles to the enforcement of Law No 241/90. This has, however, contributed to addressing a significant part of the relationship between citizens and public administrations. It is for this reason that it should be considered a milestone in the Italian administrative system.

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I. A shield against administrative abuses and inertia.

When assessing, twenty years on, the impact of law no. 241/1990 on the relationships between citizens and the public administration in Italy, it is worth recalling a number of aspects of the situation as it was until the late eighties.

Before this law on administrative proceedings was passed, it was held that the administration had the obligation to proceed, but not always the obligation to issue a provision. And even when it had to issue one, i.e. to conclude the procedure with a decision, there was no obligation to do so within a set time limit. If it failed to do so, the interested party could only give notice to come to a decision within a time limit of no less than thirty days, and if, at the end of this time, nothing had changed, he would have to resort to an administrative judge contesting the so-called tacit rejection. Silence, even after notice and the deadline assigned, was fictitiously equated to a dismissal of the private individual's application. The latter could bring an action against it: and if the judge admitted the action (if for no other reason than that the rejection, being tacit, was without justification), he would rule that the administration should reach a decision. Often the administration would fulfil this obligation by dismissing the application which it had anyway dismissed with its tacit rejection: so, after much expense and effort, the citizen would be left with nothing for his pains.

Law no. 241/90 and subsequent laws which have modified it have served to fill this substantial lacuna to provide safeguards in three ways: stating that the proceedings must come to a conclusion within a prescribed time limit (established by law, regulation or organisation norm), and that it must conclude with the issue of an express measure (and not with silence) and that a delay by the administration gives the private individual the right to compensation for any unjust damages.

Before the law on procedure came into force, there was no general obligation to express the grounds for an administrative provision.

To justify such a conclusion, a first line of reasoning originates, somewhat surprisingly, from the Constitution. The Constitution states that the grounds must be given for all judicial decisions (Art. 111 Cost.), but says nothing concerning administrative decisions. As a result, it was argued, using classic

reverse logic, that there is no constitutional obligation to provide the grounds for administrative provisions.

Administrative case law, it is true, already contained a significant series of cases where the administrative authority was obliged to provide grounds: measures restricting the legal sphere of the citizen, measures removing, cancelling or revoking previous findings for the citizen, acts of comparative assessment, administrative decisions etc. However, only law 241/90 prescribes a general obligation to state the grounds for all administrative measures (except regulatory acts – i.e. regulations and acts of a general nature, such as town planning regulations or an economic programme). Art. 3 of the law also gives details about the contents of the grounds. They must indicate the assumptions of fact and the legal reasoning which led to the administration's decision on the basis of the findings of the preliminary inquiry. In this way the law also provides an indication of the structure of administrative proceedings establishing that this must include a preliminary inquiry: where, as specified later in art. 6, the "facts are officially ascertained" (i.e. the assumptions of fact together with the legal reasoning to form the grounds) "carrying out the necessary acts" (e.g., "technical assessments", "inspections", orders to produce documents, art. 6 cit.).

A defect in the preliminary fact finding or even a superficial consideration of the facts which the law requires for a decision to be made (for example, that the party requesting permission to build be the owner of the land or have the right to make use of it, or that the construction plans are compatible with the planning guidelines, that the land is not allocated to another building etc.) are detrimental to the final measure, making it illegitimate. Which means they constitute a violation of the law. In this way a practice in administrative case law finds support in legislation where a defect in the preliminary inquiry gives rise to an excess of power, and thus makes the act void.

II. From the right of defence to participation in administrative procedures.

Before the nineties, there was no general rule guaranteeing that both parties could submit their case and reply to the case of the other side in administrative proceedings.

The citizen knew that there was a proceeding regarding him only if he was the one who had begun it by applying for an authorisation, a licence, clearance etc., or only in cases where laws pertaining to a given sector required notification of the initiation of proceedings (e.g. expropriation, disciplinary proceedings).

And even if he was aware that the proceeding was pending, he knew nothing of the specifics of the activities of the offices handling the proceedings, and often did not even know which office or official was involved. The fact that officials were bound to professional secrecy was an obstacle even to the interested party, an obstacle that grew as the case was passed from office to office so that it became impossible, or in any case difficult, for the interested party to know which office was handling the dossier at any given time.

Even though la doctrine, as of the seventies, had addressed the issue of the adversarial approach in administrative proceedings, taking inspiration from the Constitution (e.g., from the principle of the impartiality of the Public Administration enshrined in Article 97 of the Constitution), there was a widespread conviction that the right to a defence could only be upheld at trial (Article 24 of the Constitution establishes that "the right to a defence is inviolable at every stage and moment of the proceedings" cf.) and that administrative proceedings were essentially unilateral in form.

Law no. 241/90 radically changes the existing legal framework, dedicating a whole chapter (III) to participation in administrative proceedings.

According to the new rules:

a) the interested party has the right to be notified of the initiation of proceedings (Article 7);

b) whether they have received such communication or not, the interested party has the right to intervene in the proceedings, presenting pleadings and documentation (Article 10 letter b);

c) having presented pleadings and documentation, the interested party has the right to have them assessed by the administration where they are pertinent to the case in hand (Article 10 cit.);

d) in order to prepare the pleadings in his defence, or which in any case represent his point of view, the interested party

has the right to see the files (Article 10 letter a) and, in general, to have access to the documentation of the administration (Article 22). The rule on access thus replaces the rules on professional secrecy. Access is denied only to documents covered by state secret or when the privacy of third parties would be violated (Art. 24);

e) the anonymity of the administration (the citizen does not know which office and which official is handling the case at any given moment) is covered by Law no. 241, which provides for a procedure officer, i.e. a natural person responsible for the investigation until the moment of the final order that he himself adopts or else for which he prepares the model for the office adopting it (Article 4). The interested party is informed of the name of the official in charge of the proceedings upon institution of the proceedings (Articles 4, par. 3, and 8 letter c), so that that citizens have a definite reference they can turn to at any time for information on the state of the proceedings.

The officer must oversee communication between the various offices involved in the proceedings and at the same time make sure the time limit is observed. In this way an attempt was made to avoid hold-ups in a given office because there is no-one pushing the case, at the same time blocking the other offices that have to work on the next step.

As in all legal systems where there is a general discipline governing administrative proceedings, the relationship between the administrative authorities and the citizen becomes subject to rules which are borrowed from judicial process.

Notice to the interested party that proceedings have been initiated against him has the same function as a notified writ of summons.By exercising the right of access and presenting pleadings and documents, the citizen exercises his right to a defence which is constitutionally recognised in civil, criminal and administrative process (Article 24 Const.). The obligation of the administration to conclude the proceedings with a definite decision corresponds to the prohibition of the denial of justice (non liquet) by which all judges must abide; the obligation to give grounds for the final decision corresponds to the obligation on the judge to give the grounds for a judgment but also any other judicial ruling (Article 111 of the Constitution).

There is joint input in the relationship between the administration and the private individual, and in the relationship between private individuals, when, as often happens, the administrative proceedings produce effects, favourable for some, unfavourable for others. Suffice it to think of a land grant which several persons seek to obtain, or the parcelling out of urban territory to which the neighbouring landowners are nominally opposed, or the choice of the area where public works are to be carried out, or an application to build an environmentally harmful plant, or a large shopping centre, etc. In all these cases all those involved in the proceedings express different and often opposing points of view: so the final decision is expected to solve a disagreement as if the administration had a judicial function.

In sum, it may be said that law no. 241 extended a number of features of the judicial process to administrative procedures.

III. Simplifying administrative action.

The length of administrative procedures depends not only on the substantial lack of sanctions for delay, but also, in certain cases, on the form of the particular proceeding. Consider, for example, when the stages follow a prescribed order – the opinion which must precede the decision, the technical assessment or appraisal which has to precede the decision. Consider also when more than one administrative authority is involved – each one representing a specific public interest or when the execution of a given private activity is subordinate to a number of administrative measures each of which is to lead to the conclusion of separate administrative proceedings. A further example might be setting up a large shopping centre requiring the assent of various levels of authority (municipal and regional), of authorities safeguarding the environment (e.g. who have to provide an assessment of any environmental impact), the local authority for roads and traffic (when the shopping centre has to be connected to an arterial road) or health (the local health authority monitoring health conditions within the complex) or safety (fire extinguisher systems and assessment by the Fire Brigade).

In all these cases, the inertia of one of the competent offices will bring the proceedings to a halt because it will prevent the next office along the chain from operating, or because it prevents the

completion of the series of authorisations to which the individual is subject.

To cope with such problems, Law no. 241 adopted a series of measures aiming to "simplify administration" (chapter IV of the law).

First, concerning the opinions which laws sometimes require for an administrative measure to be adopted (e.g. the opinion of the State Council for the approval of a Government regulation, the opinion of the Territory Adjustment Council for permission to build), Article 15 states a time limit for issue (45 days) after which the competent administrative body can proceed "regardless of whether the opinion has been obtained". When the decision is instead subject to a technical opinion by a specialist, i.e. when the opinion regards technical matters (engineering, health, the environment etc.), provision is made for a longer time limit (90 days). If after this time no opinion has been received, the administrative authority may turn to another office with similar technical competence or to a university (Article 17). In this way, a remedy has been sought to the delays caused by the inertia of the offices called upon to express a technical opinion or carry out an assessment, authorising the administration to decide regardless of the opinion or to look elsewhere for a technical assessment.

Second, to solve the rather more complex problems caused by the legal possibility of there being several administrative authorities involved in a single procedure, or more than one procedure required for the execution of a private activity, law No 241 lays down some general provisions regulating the "services conferences" (Article 14 ff.). This legislative instrument aims at preventing the offices involved in the procedure or set of procedures from acting unilaterally with findings that, if negative, block the proceeding itself or in any case have a negative effect on the outcome. Instead of acting unilaterally, such offices must meet in a conference. In this way the decision is taken collegially by the majority. What would be a power of veto outside the conference, thus become points to be put to the vote, thus, broadly speaking, the procedure or set of procedures become a collective act.

There is, however, the risk that the public interest is endangered if the opinion of offices which are in the minority within the conference is completely ignored at the time of the final order. In order to eliminate or at least attenuate this risk, the

legislator has placed a number of limitations on the application of the majority principle.

First of all, dissent by one or more representatives of the administrations involved must not only be justified, but must contain the specific indications of the changes to be made to the project in order for approval to be granted (Article 14-4). In other words, the dissenting office cannot merely say no, but has to make an alternative proposal so that, if accepted, it would give its approval. The underlying idea is not only to prevent decisions being remitted to the mere fact of a majority vote, but also that an attempt must be made to encourage dialogue between participants leading to a positive result.

Secondly, when the dissenting administrative body is responsible for safeguarding the landscape, the environment, health, or the historical and artistic heritage, a majority vote is not sufficient. The decision in these cases is the province of the political organs (the cabinet, the regional council, the city council: Article 14-4). These are deemed to be the most qualified to solve the conflict between offices if the holders of the public interest considered most important (the environment, landscape, health etc.) are in the minority at the conference.

IV. The advantages and disadvantages of simplification.

At the roots of the rules – just mentioned – aiming at simplifying administrative action there is an important assumption, that is to say that administrative pluralism has costs that are shifted on end users.

If the decision has to follow on from an opinion or a technical assessment carried out by public offices other than the one which will reach a decision, and if the protection of specific public interests is entrusted to a different public authority for each of these interests, administrative procedures will go on for a period of time that is simply not foreseeable. The one who suffers from all these drawbacks is the citizen who is counting on the decisions and who can undertake a specific activity or build something only on the basis of the final measure of the administrative procedure.

The law on administrative procedures is the result of a parliamentary decision. It is more important that citizens be

satisfied in their expectation of an expeditious administration with its effects on his/her freedom (especially economic freedom) rather than to satisfy the need for total satisfaction of all the public interests which that freedom will have to come up against. To satisfy such an expectation it is by no means impossible to forego an opinion or ignore the dissent of the office opposing the measure because - it may usefully be underlined - dissent is not expressed by an office favourable to the measure in opposition to a majority against but, in the great majority of cases, comes from an office which is against a proposal favourable to the private individual.

The rules on simplification suggest a further reflection. Are we absolutely sure that the proliferation of public interests, each entrusted to one specific administration, and the consequent need for a variety of administrations to remove the barriers to the activity of a private individual, is compatible with our constitutional order which, enriched by principles of the European economic constitution, gives pride of place to economic freedom and institutions of property and enterprise?

The rule of the so-called maximisation of specific public interest, set out in public law doctrines, which shows the close connection between the proliferation of the public interest and the multiplication of the administrative offices, often leads an administration to obtuse and prejudicial stands hostile to the private individual. The "conference of services" was an attempt to dilute these positions in the midst of the collegiate dynamic, stripping them of power when they become a minority voice within the conference. Seen in this light, the simplification of administrative procedures produces effects convergent with the liberalisation of private activity. The fewer the administrative fetters, the greater the freedom the private individual enjoys.

V. From simplification to liberalization of economic activities.

The connection just mentioned between the simplification of administrative procedures and the liberalization of economic activities becomes still more evident when considering two further instruments provided for in Law No 241, the notification of

commencement of work and tacit approval (silenzio-assenso), that are regulated by Articles 19 and 20, respectively.

When the authorisation or act of consent, whatever terminology is used, envisaged by the law, are bound in so far as they depend exclusively on compliance with the requirements and prerequisites of law, they can be substituted by a declaration of the interest supported by a personal declaration also in lieu of the certificates and attestations required by law. Thirty days after the declaration has been made to the authority, the work subject to it can begin.

The public authority may prevent the activity from being carried out within thirty days of receiving the declaration, or it can interrupt it even afterwards as long as it keeps to the prerequisites of official annulment or withdrawal (such as a factor emerging subsequently, or a specific public interest).

A public authority may only block private works if the activity that the private party declared it was able to carry out requires discretionary authorisation (not being subjected, thus, to the norms disciplining the notification of commencement of work) or if the activity actually carried out is different from what is declared – i.e. it is an activity that has to be authorised through a discretionary measure. Thanks to the substitution of the authorisation by the notification of commencement of activities, the private individual has greater freedom. This happens every time the public authorities' previous power to intervene becomes subsequent (and possible) power.

Even if it has been included in the chapter of Law No 241 dealing with administrative simplification, the notification of commencement of work is, at least ideally, a form of liberalisation.

It is true that administrative procedures are simplified because public authorities are freed of the necessity to examine applications for authorisation and take the corresponding measures. But what is more important from the legal and political point of view is that an individual may exercise economic freedoms without having to wait for the measures that public authorities have the power to take. As a result, it becomes the individual's responsibility to assess the prerequisites and the requirements established by law for carrying out the activity.

The other legal instrument for which a connection between simplification and liberalization emerges is the tacit approval

(silenzio-assenso), which is provided by Article 20 of Law No 241/90, after the amendment introduced in 2005 (Law No 80/2005). When authorisation (or in any case the act of consent) by a public authority is still required, its silence after the time limit previously established for the conclusion of the procedure "is tantamount to acceptance of the application".

This rule might appear revolutionary if its scope of application were not drastically reduced by the exceptions envisaged by paragraph 4 of Article 20. Indeed, tacit approval cannot be applied to proceedings concerning the cultural heritage and landscape, the environment, national defence, public security and immigration, public health and safety, or cases where the law states that the administration's silence is tantamount to the rejection of an application, or other procedures which the government might identify. Therefore, there can be no tacit authorisation by the national heritage and environment bodies, nor a tacit assessment of environmental impact, nor a tacit issue of a passport, nor the tacit issue of a residence permit to an immigrant.

So the principle of affirmation remains. While in the past the inertia maintained by the administration regarding private applications was equated to a rejection, today, if the application has been formalised as described in section 1, this inertia is in principle tantamount to an approval of the application. It shows, arguably, a friendlier approach to the private individual coming into contact with public authorities.

VI. The liberalization of private activities between the Italian economic constitution and that of the European Union.

In its original form, Article 20 of Law No 241/90 attributed to the government the recognition of the laws that subjected private activity to administrative authorisation. This resulted in the monstrous figure of around 10,000 authorisations. What was at issue, then, was not only if and how the administrative regime (using notification of commencement of works in place of bound authorisation and subjection of discretionary authorisation to the regime of tacit approval) could be mitigated, but also whether, in actual fact, the authorising regime was to be maintained or private activities could be freely carried out.

A clear indication in favour of freedom has come from European Union law. The European Union is founded on the "principle of an open market economy based on the "principle of an open market economy with free competition" (Art. 4 par. 1 Treaties of Rome). Among the member States there is "a common market characterised by the elimination of obstacles to the free circulation of merchandise, people, services and capital" (Art. 3 letter c), Arts. 23-31, Arts. 39-60); public companies are subject to the rules of competition (Art. 86 par. 1); the same holds for firms appointed to manage services of general economic interest, whether public or private (Art. 86 par. 2). Access to the market by new firms is guaranteed by the prohibition of understandings or practices limiting competition (Art. 81) or abuse of the dominant position (Art. 82).

It is in the light of these constitutional provisions governing the economy that authorising instruments (such as authorisations, licences. clearance, qualifications, enrolment in registers or lists) must be considered. All such instruments often create barriers to the entry of new firms or new subjects in specific markets, especially when there are constraints or overall contingents. They imply, consequently, an attenuation of competition, if not its elimination. It must be observed also that the anti-competitive effects are multiplied when the act of consent by public authorities is requested by foreign firms intending to trade their products on a market other than the native one and have already requested and obtained authorisation and a license in their own State. In this case, the incompatibility of much national legislation with the principles of European Union law becomes still more evident.

First, the Court of Justice of the European Communities, followed by the Commission, have approached the second of the two problems using the criterion of mutual recognition. It implies that, in principle, any goods that have been legally produced and marketed in its country of origin (Home State) may be marketized within another Member State (Host State), without being subject to the authorisation regime in force there.

Second, the problem of reconciling economic freedom and public control has been taken up by the European Commission and the Council with a series of directives imposing the liberalisation of a series of activities – from road transport, transport by sea and air to the production of electrical energy and

electronic means of communication: activities which in the past, and the recent past at that, were subject to authorisations, concessions, licences etc. and which are now free. In all such cases, EU law does not deny the need or at any rate the admissibility of public control. Indeed, the Treaty lays down an explicit provision allowing each Member State to limit the free movement of goods, together with the prohibition of such measures that amount to quantitative restrictions on import or export (measures which are usually administrative) (Art. 30 Treaties of Rome). However, the underlying reasons for this limitation – i.e. the public interest which justifies it - are peremptory: public morals, public order, health reasons, the protection of the cultural heritage, the protection of industrial or commercial property (Art. 30 cit.). And the Court of Justice has always denied that the reasons for limiting the free movement of goods (and the rule is valid also for other freedoms of circulation: people, services, capital) can also be of an economic nature. Thus, a Member State cannot introduce limitations (and thus authorising regimes) which in themselves are based on economic grounds or economic policy, because this type of assessment is the exclusive province of the market.

From this point of view, the economic constitution of the European Union differs from the Italian one, which is made up of the provisions of the Constitution which concern the economy. Article 41 of the Italian Constution recognises free enterprise (paragraph 1). However, it states (paragraph 3) that laws shall institute the appropriate programmes and control of public and private economic activity so that it can be directed and coordinated for social purposes. This effectively makes it possible to functionalise commercial activities for social purposes (by law, i.e., coercively and irrespective of the will of the entrepreneur). It may be argued, therefore, that this form of public intervention is completely irreconcilable with the "principle of an open market economy and free competition".

The conflict between the two visions of the relationship between the State and the market first came to the fore with the establishment by the European Court of Justice, of the supremacy of EU law over the domestic law of the Member States, which was eventually accepted by the Italian Constitutional Court in 1984. The conflict become still more evident after the constitutional reform of 2001. Among other things, Article 117 of the

Constitution was modified. It now establishes that the legislative power is exerted (by the State and Regions) not only "in accordance with the Constitution", but also through the observance "of the limitations deriving from the Community legal system and international obligations". Seen in this light, Law No 241, with its admittedly timid indications regarding the liberalisation of private commercial activity (notification of commencement of work and tacit approval), follows the EU line.

VII. Twenty years later: successes and failures.

If we seek to understand if and the extent to which the law governing administrative procedures has determined a shift in the framework of relationships between the citizens and public administrations, we cannot limit ourselves to a comparison of the normative situation before Law No 241 and what came out of the 1990 law and the numerous changes that took place over the successive twenty years. Indeed, it must also be said that the public administrations have put up strong resistance, and in some cases a strenuous one, to the innovations introduced by Law 241. Some examples may illustrate this.

The norms concerning the limit for the conclusion of the proceedings and the obligation to define this with a specific measure have been systematically disregarded. The recent changes to law No 241, which envisage compensation for damage arising from the delay, is itself an attempt to counteract this behaviour, providing sanctions for the failure to meet the obligation that has been systematically violated.

Along with delay in issuing the measure, there still remains the practice of failing to conclude procedures, a silence which, despite the recent extension of the conditions for the application of the tacit approval model, still remains a meaningless silence which only through the action of the interested party (now exonerated from compulsory presentation of notice to an inert administration) becomes tacit rejection.

On this point, the legislator has intervened outside the law on administrative procedures by introducing a special fast track for cases heard by administrative judges (Article 2, Law No. 205/2000 which corresponds to Article 21-bis of Law No 1034/1971 on the institution of regional administrative courts).

Rather than the long wait of the old cases appealing against tacit rejection and having to wait for a judgment which simply reiterated the obligation of the administration to arrive at a decision, the claimant now has the right for his action against the inert behaviour of the administration to obtain a ruling within thirty days of making the claim with the Administrative Court. With his "succinctly motivated" ruling, the judge gives the administration a short time limit within which a decision must be reached (no more than thirty days), and with the same ruling, or a subsequent one, sought by the claimant, an officer is appointed to act in place of the defaulting administration.

Another provision of Law No 241 that is systematically ignored requires the previous administration to obtain the documents in its possession or held by another public administration (Art. 18). The legislative intent in transferring from the citizen to the administration the burden of procuring the necessary paperwork, or that which in any case is required for the decision, has been to a large degree frustrated.

Nor has simplification always been successful. Most of the time, the administrative body which is supposed to reach a decision, and which could do so without the prescribed opinion, once the time limit has expired (as established by Article 16), prefers to wait to make sure that the opinion is issued even if with great delay, making use of the protestative formulation of the specific provision" ("[…] the administration may proceed with or without having obtained the opinion", Article 16, paragraph 2).

Even more frequent is recourse to the faculty of bypassing an office which has not expressed a technical opinion within the legally required 90 days, sending the request to another office with equivalent jurisdiction or a university (Art. 17).

Turning now to the conference of services, it is effectively a way of significantly accelerating the work of the administration if the work takes place within the ninety days established by the law (Article 14 ter, par. 3). However, it sometimes takes an extraordinary number of meetings, many of which come to nothing because of the non-participation of offices whose representatives do not show or because they abstain from taking a position pending consultation either with colleagues or with their superiors. Another obstacle emerges when the representatives of the same office, who change each time, express different opinions.

Often the minutes are so confused that it is not possible to understand what the official position is supposed to be.

All the above is couched in the most general terms, and the assessment of the situation is a little impressionistic, given the lack of sufficiently reliable data on how the institution operates. However, with regard to both the conference of services and the other institutions of Law 241, it should however be pointed out that performance varies from administration to administration and, above all, from region to region. The poor performance of the administrations of the south of Italy, due to the unsatisfactory quality of the personnel (many of whom are employed outside the canons of meritocratic selection procedures), and the predominant political-administrative culture in these areas which turns the citizen-user into a subject and the bureaucrat into an arbitrary master, explains how some of the innovations, while meritorious, brought about by Law 241, have not taken hold.

VIII. The role of la doctrine.

The remarks just made with regard to the cultural environment ought to be completed by considering another important element, that is to say the thoughts about public law. Among the forces opposing the full enforcement of Law No 241/90 and, more generally speaking, the liberal spirit which inspires it, a particular mention needs to be made of part of administrative doctrines (and the case law).

The notification of the commencement of works and tacit approval have been looked upon with suspicion, as if the two institutions were likely to bring about anarchy, devastation of the territory, and destruction of the environment.

It is significant that the majority of doctrinal contributions on the notification of the commencement of works regard the protection of third parties. The underlying idea is that third parties could be harmed by private individuals carrying out unauthorised works, taking advantage of the notification of the commencement of works. This is a way to neutralise the innovative range of the institution, which offers above all a means of liberalising the actions of private individuals.

Equally significant from the cultural point of view is the debate which has blown up over the nature of the notification of

the commencement of works. A part of the case law followed by a part of la doctrine argues that the notification of the commencement of works is an administrative measure (and not a declaration by the private individual) since its efficacy in terms of authorising a private individual to act does not depend on the notification (and thus the answerability of the private individual), but on the fact that the administration has not intervened within the time limit assigned to it to prevent the private individual from going ahead. The implicit assumption is, however, at least questionable, in that freedom is in any case the result of a decision, albeit negative (of a concession), of the administrative authorities.

There is therefore a long way to go before the Italian administrative system brings itself into line with the principles of freedom enshrined in the EU legal order (and in part by the Italian Constitution itself). Law No 241/90 has, however, contributed to covering a significant part of the way. It is for this reason that it should be considered a milestone in the Italian administrative system.

Bibliographical references

Given the nature of this short essay, only some bibliographical references will be provided.

1. My interpretation of law No 241 as a powerful element of (potential) change has been advanced in several pieces, including G. Corso & F. Teresi, Procedimento amministrativo e diritto di accesso ai documenti amministrativi (1992, 2nd ed.), and G. Corso, Manuale di diritto amministrativo (2009).

2. There are not many analyses of law No 241/1990 in English. Among these, see D. Sorace, Administrative Law, in Ugo Mattei & Jeffrey Lena (eds.), Introduction to Italian Law (2003), 125; M.P. Chiti (ed.), General principles of administrative action (2006); G. Pastori, Recent Trends in Italian Public Administrations, 1 Italian Journal of Public Law 18 (2009).

THE CONVERGENCE OF NATIONAL ADMINISTRATIVE PROCEDURES: COMMENTS ON THE EUROPEAN PERSPECTIVE

Jacques Ziller*

The so called 'Napoleonic system of administration' which has been referred to by so many today has changed very quickly. The French administrative system of the XIXth Century is not that of Napoleon, but has much to do with Benjamin Constant, Alexis de Tocqueville, and Alexandre François Auguste Vivien de Goubert, who is hardly known outside of France. Reading Vivien, who wrote his "Études administratives" in the middle of the XIXth Century, one discovers that French public administration, and hence also the French law of administration, was very much about contract.

Referring now to the legge 241's amendment in 2005, it may indeed be considered as a 'bad translation' of a recent norm of the German code of administrative procedure; it was also a 'bad translation' of the jurisprudence of the Conseil d'Etat. It is true that the Conseil d'Etat considers that not applying some formal guarantees of administrative procedure does not necessary lead to the invalidity of the subsequent decision if the result would have been the same, had the formal guarantee been applied. But this is only true for formal requirements embedded in regulatory norms (actes réglementaires); the non application of formal guarantees set by statute on the contrary necessary leads to declaring the resulting decision void: this is not a heritage of Napoleon, but of Constant and Tocqueville, i.e. French liberalism.

Turning now to EU law, I would like to underline that there is nothing common between EU law and so called "global law". Thinking that there is something in common between EU administrative law and "global administrative law" can only be wishful thinking.

I would like to concentrate my comment on a case which has been mentioned in the paper by by Carol Harlow and Richard

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Rawlings, the Bavarian Lager case (C-28/08 P Commission/Bavarian Lager). This is a case which is with the EC in appeal. At present, what is available are the judgment of the Court of First Instance of 8 November 2007, Bavarian Lager (T-194/04, ECR. 2007, p.II-4523) and the opinion of Advocate general Sharpston of 15 October 2009 (not yet published in the ECR). The case is extremely interesting because it is based upon an apparent contradiction between Regulation n° 1049/2001 on access to documents and the Regulation n° 45/2001, which may be considered as a "transposition" into the law applicable to EU institutions and bodies of Directive n° 95/46 on data protection.

What this has in common with the Italian situation regarding law 241, is first, that Regulation n° 1049/2001 is under a so-called "recast procedure", an amendment procedure to adapt it to new circumstances. At present the procedure is in a stalemate, and many specialists are rather happy with this situation – as is my case – because looking at the proposal by the European Commission one gets the impression that the institution who is starting the process (the Commission in its participation in the legislative function) is using the opportunity to try and go back on previously acquired principles; it is also showing how a bad use of comparative law can be made. One of the proposals by the Commission is to change the definition of what is considered as "a document". The Commission proposes the introduction into EU law of a definition similar to the traditional definition of a document in the Swedish law on freedom of the press of 1776, the ancestor of modern laws on access to document. In Swedish law, only "completed" or "final documents" may be accessed. As the Swedish law has an excellent reputation of openness, the comparative law argument might seems to be in favour of openness. But the Commission is forgetting one very important element: in the Swedish system, any document which comes from outside and which is in the possession of an administrative agency is considered as a "final document". Today Swedish State administration is made out of about 240 independent agencies, the "ministries" being very small administrations who support the members of government and are comparable in shape and functions to the "Presidenza del Consiglio" in Italy – or to the Secretariat general of the European Commission. A document coming from another agency is by definition a "final document" in

Sweden. In the Swedish context, the definition of "final documents" has thus a rather limited impact on the availability to the public of documents in the process of policy-making; whereas in the EU Institutions context it would definitely contribute to considerably shrinking the number of documents available to the public.

Where the Bavarian Lager case is really interesting for us is that it is shedding light on two issues which according to me would also need to be considered in the Italian context.

First, issues of codification. There is a contradiction between two pieces of EU legislation which are of the same year: Regulations n° 45/2001 and n° 1049/2001. In her opinion, Advocate general Sharpston says (at point 93, enhancing added) "it is inconceivable that the Community legislator, in adopting the Access to Documents Regulation, was unaware of the detailed provisions that he had laid down barely six months previously in the Personal Data Regulation", a statement which I would tend to consider as a typical example of British humour. Reading the two Regulations, one gets the impression – and this was at stake already in the procedure with the Court of First Instance – that there are real contradictions between those two pieces of legislation. The situation in EU law is quite complex: one Regulation (n° 1049/2001) is in a way standing on its own, as there is no legal basis for an EU wide directive on access to documents; the other one (n° 45/2001) needs to be put into the framework of Directive n° 95/46 on data protection, which, by the way, is also in the process of being amended. In both cases we have to deal with fundamental rights protected by the EU Charter, articles 42 on access to documents, and 8 on data protection.

The Bavarian Lager case shows the difficulties of getting a comprehensive codification of citizen's rights against public administration. Access to documents is not only linked to administration, but also the legislation, in the EU context. Regulation n° 1049/2001 goes much further than the usual national legislation on access to documents, because it includes access to the Legislator's documents, i.e. documents of the European Parliament and of the Council, with a single body – the European Ombudsman – which is in charge of ensuring access to legislative as well as administrative documents. At any rate, in national law as well as in EU law, access to documents is about

public institutions; it does not apply to private bodies, on the contrary, the latter are usually protected by professional secrecy. On the other hand, the data protection law is typically applying not only to the public sector, but also to the private sector (this is the reason why the French law of 1978 has been called "loi informatique et libertés" – informatics and freedom – which is also the name of the body in charge of ensuring data protection the Commission Nationale de l'Informatique et des Libertés). In the field of data protection, private firm have sometimes far more powers – and dangerous powers, due to their total absence of accountability – than public administration. Therefore – as a difference to access to administrative documents – it is not possible to regulate data protection in a general administrative procedure act, which by definition cannot deal with private bodies.

There are a lot of tensions between the need of codification for a better understanding of their rights by "the public" and the technical constraints of codification which are linked to the scope of application of the law which has to be codified.

Second, the "collision" between two sets of rights (to use a concept of German legal theory). The hart of the matter in the Bavarian Lager case is a collision between the right to access documents and the right to data protection. It happens that in the EU law framework those two sets of rights are protected according to different pieces of legislation, although Regulation n° 1049/2001 is taking into account personal data protection as one of the exceptions to access to documents. Looking at both regulations it becomes clear that the issue is not only about protecting the citizens against administration, it is also protecting rights of the individual as against protecting rights of "the public". "The public" sometimes means a collection of individuals; sometimes it means diffuse interests; sometimes it means powerful NGO's or associations of interests. It is a duty of public administration to try and protect both types of rights. It also happens that the clash is between the rights of two individuals: one who wants access to a document, and another one who does want to keep confidential his participation in a procedure in which he has been involved.

There are basically two ways to try and deal with these types of collisions, which need to be kept in mind also for a possible application at national level. One way is illustrated in an extremely interesting way in Advocate general Sharpston's

opinion on the Bavarian Lager case. She tries and make what we lawyers ought to do, that is building categories of situations in order to be able, as much as possible, to avoid clashes between the two applicable sets of provisions, by determining which provisions apply to what categories of facts. Reading her opinion, the reasoning appears extremely convincing in theory; however, it seems that many practitioners find the reasoning brilliant, but not workable in most practical situations. If so, there is the second way to deal with such a collision, a solution which Advocate general Sharpston also envisages as a second best: balancing interests. Balancing interests of access to documents with interests to protect privacy is what the Court of First Instance had done in the Bavarian Lager Case.

What is furthermore interesting in the Bavarian Lager Case is that it shows extremely well that it is not only a question of balancing interests, but also a question of who is balancing interests: the Commission, the European Ombudsman and/or the European Data Protector, the Court? The provisions of Regulation 1049/2001 clearly indicates that it is the European Institution to which the request for access to a document is being addressed which has to do the balancing of interest. According to the Regulation, the principle is access; there are a few exceptions to the principle of access, amongst which the protection of privacy; and there is an exception to the latter, i.e. an "overriding public interest" which would request the document to be communicated. In practice, the latter exception to the exception seems never to have been invoked by the European Commission or other EU Institutions in order to disclose a document. The Commission on the contrary has tended to use the exception of privacy in order not to communicate a document. This is easy to explain in terms of public administration, because communicating documents takes time and resources, which administration prefers to use otherwise. It is thus far more comfortable for the Commission to indicate that a document contains names of individuals in order not to have to communicate it, as the Commission did for a long time in the Bavarian Lager saga. The Bavarian Lager case shows that there are remedies if the administrative agencies do not undertake the right balancing: not only judicial remedies, with courts, but also extra-judicial remedies, with the European Ombudsman for access to EU Institution's documents. Interestingly, the European Data

Protector intervened in the Case both before the Court of First Instance and with the ECJ, defending the same position as the plaintiffs, the European Ombudsman. The case says thus a lot in favour of having, beyond courts, and before or as an alternative to judicial review, independent authorities specialised in promoting and defending certain rights. Maybe this is a question which should be also looked at in the framework of possible complements to Law 241 in Italy.

A COMPARISON WITH THE SPANISH REGULATION OF ADMINISTRATIVE PROCEDURES.

Luis Ortega*

Abstract

The emergence of due process requirements in Spain is neither a recent phenomenon, nor one that depends mainly on the influence played by European institutions, unlike other parts of the national administrative system. Nor is it directly related to the increasing activism of government. Indeed, between the end of the Nineteenth century and 1975, the legislative regulation of administrative procedures aimed at preserving citizens' rights and interests and thus ensured the legality of the administrative process. Only later have different views of administrative procedures been accepted, including particularly those views emphasizing interest balancing. Only after the Constitution of 1978 was adopted, moreover, have administrative procedures been considered as instruments for achieving citizens' participation. The renewed attention for procedures in terms of accountability of public bodies and the impact of new technologies are the most recent trends that emerged in the last twenty years.

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1. Antecedents and the development of a Common Administrative Procedure Act.

Spanish administrative law emerged in the first half of the nineteenth century. Its development was deeply influenced by French administrative law. As early as 1889 an Outline Act, known as "Ley Azcárate", was adopted which regulated the bases for administrative procedures.[1] This attempt to unify administrative procedure was a significant step in the development of Spanish administrative law.

In the following years, it was implemented by each Ministerial Department that established its own rules of procedure. Therefore, in spite of the fact that the Outline Act aimed at bringing together and systematizing scattered procedural provisions, the situation evolved into an inflated and disordered body of rules governing different administrative actions.

In the context of the important reforms of Spanish administrative law that took place in the 1950s, a new Administrative Procedure Act was passed in 1958 in order to standardize and simplify administrative procedure and to ensure common action in the internal functioning of all Ministerial Departments[2]. The new Act also improved both citizen participation in administrative proceedings and their procedural rights of defence. Standardisation of the procedure was seen, in fact, as an instrument for individuals' protection.

Adopted in a political environment in which fundamental civil liberties were not guaranteed, the 1958 Administrative Procedure Act became an important instrument for the protection of citizens against public authorities' actions infringing those individual rights, such as property, which were generally recognized by the regime. In spite of the autocratic context in which it operated, the highly technical quality of this statute allowed a form of "State of administrative law" or "Administrative rule of Law" to develop where respect for

[1] Ley de Bases sobre el procedimiento Administrativo, 19 October 1889.

[2] M.F. Clavero Arévalo, Ámbito de aplicación de la Ley de Procedimiento Administrativo, Revista de administración pública 29 (1959); R. Entrena Cuesta, El proyecto de Ley de revisión de la Ley de Procedimiento Administrativo, Documentación administrativa 68 (1963); F. Garrido Falla, El procedimiento administrativo de 1950 a hoy, Revista de administración pública 150 (2000).

procedure was the cornerstone for the protection of individual rights.

So, even where there was not a recognition of fundamental rights and political freedoms, the area of administrative activity on economic issues (property, licences of trade and commerce, industrial development, building licences, etc) was under a very strict legal review. It was an area which deeply impacted the Franco´s regimen dominant classes, specially the financial sector, that created a strong industrial investment asset.

The consequence of this approach was a extremely formalized approach to Spanish Administrative Law. Administrative decisions, as product of a dictatorial government, couldn't be challenged on the merits, but it was possible to oppose the infringement of economic interests by burdensome legal requirements.

In doing so, the main scope of legal doctrine on administrative procedure was to enable a judicial decision to declare void and null an administrative act, due to formal infringements on procedural rights.

Three decades later the 1978 Constitution proclaimed Spain as a social and democratic State, subject to the rule of law, renewing the foundations of Spanish administrative law and, therefore, of administrative procedure[3].

In the Preliminary Title, where the articles referring to general issues are placed, article 9.3 develops the general principle of the rule of law stated in article 1, bringing many specific principles of public law to the constitutional level. In this section it is declared that: "the Constitution guarantees the principle of legality, the normative order, the non-retroactivity of punitive provisions which are not favourable to, or which restrict individual rights, legal security and the interdiction of arbitrariness of public powers".

Also included in Title IV is a catalogue of general principles applicable to the activities of public administrations. According to Article 103, the Public Administration serves the general interest with objectivity and according to the principles of efficiency,

[3] T.R. Fernández Rodríguez, Los principios constitucionales del procedimiento administrativo, in J. Acosta Sánchez et al. (eds.), Gobierno y Administración en la Constitución, Vol. I. (1988).

hierarchy, decentralization, de-concentration and co-ordination, and the principle of legality of Administration.

Furthermore, Article 105 orders the Legislature to regulate the following procedural requirements and rights:

> a) The hearing of citizens directly, or through the organizations and associations recognized by law, in the process of drawing up the administrative provisions which affect them;
>
> b) Access of citizens to administrative files and records, except as they may concern the security and defence of the State, the investigation of crimes and the privacy of individuals;
>
> c) Procedures for taking administrative action, guaranteeing the hearing of interested parties when appropriate.

The Constitution guarantees, therefore, many principles of Administrative Law and, in particular, that Public Administrations are subject to administrative procedure. It also guarantees that individuals enjoy procedural defence rights , including both the right to be heard and the right of access to administrative files, in order to protect their substantive rights and legitimate interests.

Outside of the constitutional principles on administrative procedure, there is another important regulation concerning the division of constitutional competences between the State and the Autonomous Communities. In article 149, 1,18ª the State has the competence to establish: "The bases of the legal system of the public administrations and the statutory system for its officials which shall in every case guarantee that the administered will receive a common treatment" and "a common administrative procedure".

So in the Spanish case, administrative procedural State law is not a law of general principles, but an extensive legal compilation of 146 articles, plus additional, final and transitory clauses. In addition, the interpretation done by the Constitutional Court on the 18th clause of article 149,1, is that it is not an usual competence which divides a subject between the legislative or executive power of the State and the Autonomous Communities. Rather it foresees the organization of the Spanish State as a whole. Under this view, the State is the one in charge of making the

operative rules for the functioning of the different public administrations.

But what should be strongly emphasised is that the administrative procedural principles placed in the Spanish Constitution were already applied by the legislation, doctrine and jurisprudence of the pre-constitutional period, especially during the 1960´s.

So there are two important aspects to be highlighted. First of all, on the Spanish developments reflect the importance of legal doctrine in applying comparative models. The principles of administrative procedure used in Spain under the dictatorial regime combined techniques for the most accurate control of administrative resolutions from the received traditions of French, Italian and German law.

Secondly, we must not commit the error of thinking that this is an example of uselessly placing administrative procedure rules in the Constitution. On the contrary, we know that in the pre-constitutional period the principle of legality was only applied to economic activity, property, licences, condemnation, etc. Only after the Constitution was the relationship between individuals and public authorities adequately governed by administrative procedural rules, because of the new legal status afforded to citizens.

This demonstrates the importance of a constitutional basis for administrative procedures, and the more specific the basis the better it is. Even in the absence of such specific rules, it is always possible to find in the Constitution other rules that will condition the reach of a singular conception of administrative procedure. Such rules include: fundamental rights; principles of internal organization of public administrations; principles and rules for the cooperative functioning of multiple levels of government; and specially the constitutional rules on the institutional conception of public administration as a constitutional power.

Another indicator of the necessity of constitutional rules on administrative procedure is shown by the fact that in many cases the administrative law institutions that may be referred in the Constitution each has its own interpretative culture and legal history. This is due to their distinct sources of law, civil servants, public domain, administrative infringements, causes of public utility or social interest, etc.. In the end, this requires some

balance understanding of their differences that in many cases should be expressed in an administrative procedure.

In this new constitutional framework, Act 30/1992, was enacted on 26th November 1992 to update the Administrative legislation prior to the 1978 Constitution[4]. Act 30/1992 regulates the bases of the Public Administrations' legal regime, the common administrative procedure and the system relating to the liability of Public Administration.

Act 30/1990 on the Common Administrative Procedure (hereafter ACAP) is central to the Spanish administrative system. It establishes the common elements and standards of administrative procedure applying to all Public Administrations, and stipulates the minimum guarantees that citizens must enjoy when affected by administrative action. However, such regulation does not exhaust State, Autonomous Community or local authorities' competences to establish specific procedures for any given matter but in any event, the specific procedures must respect the Act's guaranties.

Article 3 ACAP enshrines the general principles which govern any Public Administrations' actions: the principles of legality, efficacy, respect for hierarchy, decentralisation, de-concentration and coordination among different administrations. I In their relations with citizens, in particular, Administrations must also act in accordance with the principles of transparency and public participation, and their actions must respect the principles of good faith and legitimate expectation.

This list of principles is completed in Article 4, devoted to the principle of institutional loyalty among Spanish Public Administrations.

[4] E. Garcia De Enterría, Algunas reflexiones sobre el Proyecto de Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común, Revista Española de Derecho Administrativo 75 (1992); S. Muñoz Machado, Los principios generales del procedimiento administrativo comunitario y la reforma de la legislación básica española, Revista Española de Derecho Administrativo 75 (1992); F. López Menudo, Los principios generales del procedimiento administrativo, Revista de Administración Pública 129 (1992); L. Parejo Alfonso, Objeto ,ámbito y principios generales de la Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común, in J. Leguina & M. Sánchez Morón (eds.), La nueva Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (1993).

Furthermore, under the heading "The activity of Public Administrations" Title IV of Act 30/1992 contains the regulation of basic citizens' rights in administrative proceedings[5]. The following should be highlighted as significant improvements:

(i) It includes some rights directed at improving citizens' participation in Administrative procedures such as the right to bring pleas and submit documents at any stage of the proceedings prior to the hearing, or the right of citizens to use the official languages of their Autonomous Communities.

(ii) It also regulates procedural rights that aims to bring transparency into administrative action, such as the right to identify the authorities and officials responsible for conducting the proceedings, the right to know at any time about the state of the proceedings in which a citizen is classified as an interested party, and the right of access to information in administrative files and registers and the right to receive information and guidance.

Even though there are other administrative principles that have to be found in specific legislation, such as the precautionary principle which can be found in health and environmental law, there are also even broader principles, such as the proportionality principle, which has a broader scope than the one pictured in the Act 30/1992.

The reforms enacted later in 1999, were essentially technical details to improve formal mechanisms, such as an administration's silence, end of official administrative procedures, etc.

But coming again to the importance of placing in the Constitution administrative procedural rules, even if there is a consistent development of the constitutional principles in ordinary law, any fundamental Constitutional right that grants to the citizen "the right to effective protection of the judges and courts" or "the right to an effective hearing before public administrations", the citizens' legal guarantees will be much more real and the protections deeper.

Under the control of the Constitutional Court, the fundamental right of "nulla poena sine lege" demonstrates how

[5] A. Embid Irujo, El ciudadano y la Administración (1994).

constitutional principles can improve the merits of a legal institution using administrative infringements procedural claims.

2.- Administrative procedure: meanings and main elements.

The characteristic of citizens' guarantees is usually the way in which the administrative procedure is noticed. As an element this characteristic shows the formality of the rule of law or to say the "legality principle"[6].

The main idea of this approach is to prove that the administrative decisions have been adopted properly, so they can resist any plea during the latter judicial review process.

This has been the main option of the Spanish legislature concerning administrative procedure and also is the most important option of the Italian law nº 241/1990.

There have been permanent, intensive and extensive import of the techniques of the judicial review, which are, in concert with the constitutional function of the judiciary, based upon the legal control of all elements of administrative procedure.

In fact, this formal approach, as it was said before, was successfully used by the Spanish administrative law developments of the 1960's. During this time, they developed a solid theory of the control of the administrative action, despite working within a non-democratic political system which lacked a constitutional basis for separated and independent powers.

For this reason, there existed an administrative rule of law in the areas of property right and legitimate interests concerning professional status, civil servant careers, public liability for damages, etc., but not in other areas of fundamental rights.

Nevertheless, there are very deep differences and a very distinct constitutional basis between the administrative procedure and the judicial review process. Even within administrative procedure there are distinct constitutional bases in the areas of: freedom and fundamental rights; relations of authority between the individual and the administration; and in the area of delivery of services and social protection aids.

[6] Different legislative models, in S. Cassese, La disciplina legislativa del procedimiento amministrativo. Una analisi comparata, F.I., V.27 (1993).

Still, the theory of administrative procedure has not been constructed under a global theory and different stripes of the historical evolution of the Administration can be found even contradicting each other[7].

Let's examine some of those contradictory approaches. On one hand, we could have an Administrative Procedure Theory anchored in an authority relationship with the citizen in which the object of administrative action is a single person, and in a framework of regulation mainly directed to give powers to the Administration. This Theory is radically opposed to a public service delivery relationship, involving a vast plurality of citizens and in a legal environment in which the regulation provides mainly rights to the citizens, slightly contradicting facts found in real life.

Another couple of contradictory theoretical extremes can be found by contrasting the notion of procedure as a regulation governing administrative activity with the notion of procedure as a an organizing principle within the public administration, which essentially guides the administration to perform public policies. In the first case, procedure relates to the formal legal action of the Administration, while in the second the material activity of the Administration, even if not formally regulated, is of great importance as well as evaluating the results in solving the problems (economic, social, cultural, environmental, sanitary, educational) that motivated the public policy.

Lastly, we can propose an Administrative Procedure theory as a theory of the legal will that expresses a unilateral decision within the legality principle and in a positive binding rule and in contrast a theory of the legal will as the expression of negotiated proposal within the democratic principle as in a negative, binding approach.

In truth, these three contradictory couples could be explained also in terms of complementary values and legal general principles, but at core of these, there is a fundamental option of the constitutional role of public administration in respect to the constitutional role of society and the individual. The

[7] M.S. Giannini, Diritto Amministrativo (1988, 2nd); A.M. Sandulli, Il procedimento amministrativo (1940); F. Benvenuti, Funzione amministrativa, procedimento, processo, R. T. D. Pubbl. 118 (1952).

relationship that can be constructed between those two poles is crucial to a theoretical definition of administrative procedure.

The relationship that can be constructed between those two poles is crucial to a theoretical definition of administrative procedure. When we are considering administrative action which impacts a freedom, the most important constitutional basis is freedom as a space to be defined just by individuals in their capacity as citizens, in the absence of public activity,. When we are considering administrative action which impacts a fundamental right, the administrative action is subject to a duty to protect that right and any breach of that duty must be immediately satisfied by expedited remedies.

That is why the Spanish ordinance contemplates the "amparo" process as a specific remedy for individuals even before the Constitutional Court. It is also why the Common Administrative Procedure Act of 1992, in 62 declares that decisions of the public administrations are null and void -as absolute nullity- when they infringe constitutionally protected rights and liberties.

Similarly, when we are considering administrative action which impacts relationships of authority, usually we have a single relationship with an individual whose sphere of interest is affected by a public single decision. However, when we are considering administrative action which impacts public service or social protection instrument, assigned target of the administrative action is a group of persons or a collective interest with the goal of providing or making effective an authoritative general policy.

Those examples allow us to point out the essential and different orientation of administrative procedures. These procedures can be conceived of as an ensemble of general legal principles regarding citizens guaranties for the scope of respect of the legality principle and of the judiciary function, or these procedures can be viewed as an instrument of the executive function in which what is relevant is the way in which the administrative activity is regulated to promote the policy objectives and public interest which are delegated to a given administrative body.

Apart from the principles of citizens' rights and interest guaranties, the principles governing administrative procedure include principles such as the following principles: preventive or

precautionary principles coming from environmental law and extending to all risky activity; principles and techniques circumscribing the material activity of the administration; principles governing organizational relationships as coordination, cooperation and hierarchy; and through specific rules restricting the power to command citizens and promote cooperative elements of the procedure.

Under this approach, the main constitutional element that conforms the role of the Administration is the articulation of different social interests under the concept of public or general interest, taking into account the legislative mandate to every piece of the organization, even those organizations working in politically decentralized countries of federal or regional constitutional structure.

This view of the administrative procedure, as a manifestation of the executive function of expressing public or general interest, insures that the general rules contained in any General or Common Administrative Procedure Act will have to be combined with or fulfilled by other specific rules. In fact, in the Spanish case, together with the Common Administrative Procedure Law, there are nearly 2.000 other special procedures dealing with such varied areas of administrative activities as diplomacy, health, building, environment, teaching, etc.

Also, the manifestation of the executive function may have itself a specific constitutional basis when the authority is acting in sectors requiring the establishment of a specific category of administrative body such as the independent authorities, which also requires the establishment of specific procedural rules. These specific rules will meet the requirements of the special functionality and legitimacy of such authorities such as the intensity, the proximity, the neutrality or the permanent and continuous administrative relation through information between the independent authority and the individuals or companies it regulates.

This approach of the relationship between administrative procedures and the goals or functions attributed to a certain administrative body or to a specific administrative activity may also be recognized in Community Law. This is the case in the area of Common Agriculture Policy, in the IPPC Directive on integrated environmental permits for main industrial installations

and also in the special use of the concept of effectiveness in the procedures of administrative sanctions in which the description of the misleading actions are not required to be expressed in a parliamentary Act in order to be punished[8].

This means that the organizational and functional peculiarities of Community Law can be expressed as procedural rules to make effective the larger complexity of this legal ordinance[9].

To be successful, this methodology of functional administrative procedure should replace the classical or more traditional approach to Community Law based in the "case Law", that aims to be descriptive and maintains a low critical profile. This will be aided by the study of the administrative positive procedural rules that are placed in Community Regulations and Directives[10].

3. Citizen's participation in administrative procedure, accountability, and transparency.

Returning to the idea of administrative procedures as an instrument for reinforcing the democratic legitimacy of administrative action, the procedures must use a keener set of instruments which combine the value of democratic legitimacy with other constitutional values such as the rule of law, pursuit of general interest, and satisfaction of citizens' social needs[11].

First of all, the constitutional position of public administration is based on its vicarious dependence on representative democracy: by submission to the Parliament's constitutional power to create Law and to control the political activity of the Government and Administrative Agencies. From

[8] E. Chiti, Decentralization and integration into the Community Administration: a new perspective on European Agencies, 10 European Law Journal 402 (2004).

[9] G. Della Cananea, The European Union´s mixed administrative proceedings, 68 Law and Contemporary Problems 197 (2004).

[10] L. Ortega & C. Plaza, On the transformations of the Spanish (procedural) Law under the inflñuence of European Law, in J. Schwarze (ed.), *Bestand und Perspektiven des europäischen Verwaltungsrechts* (2008).

[11] M. Sanchez Moron, La participación del ciudadano en la Administración Pública (1980); S. Fernandez Ramos, La información y participación ciudadana en la Administración local: Barcelona (2005).

this point of view, participatory democracy is oriented to a deeper manifestation of democracy itself and must be based on this deeper manifestation, but not to reverse the constitutional relationship between the Parliament and the executive branch. It is essential, from my point of view, to apply to participatory democracy some of the essential principles of democracy itself including accountability and transparency.

In this sense, there should be special rules providing information access regarding the workings of the civil organizations that play a participative role, in order to know their financial, or political relationship with public authorities or economic groups.

The social structure of the United States and the relations between Society, Market and State that take place over there are not the same relations that operate in certain European countries in which social organizations that collaborate with Administrative bodies have a minimum of autonomy.

In fact there are a great number of social non governmental organizations that are fully dependant economically on the public aids governed by the same Administration with whom they collaborate. That places this type of NGO's in a similar position to the trade unions that are in league with the bosses.

On some occasions, participatory democracy is a consequence of a preconceived plan of the Administration which uses the process to legitimate their policies. Again, it is not appropriate to compare Americans NGO's that do not participate in the delivering of social benefits, with the Europeans that do collaborate in this delivery.

Another issue that must be solved is to identify those areas where the level of participation is so complex that the such participation is structually impossible for all but a few citizens. In fact, a minimum cultural participatory level is required in many cases far higher that the cultural level for representative democracy. In such cases there should be a hard look on the transparency and the accountability of the participatory democracy, because it can create, in the end, a new form of oligarchic democracy.

Broad administrative participation is important to clearly express each sector of society's interest and to show pluralism of democratic society. However, the eventual agreement between

different social groups has to be formulated under the guarantee of the legal principles of equality and balance of power

4. Administrative procedures and new technologies

Now I want to turn to the implications of new computer and communications technologies on the development of new perspectives in the public administrative agencies and in Administrative Law, especially in administrative procedure[12].

First, perhaps the most important conceptual elements to consider are the evolving concepts of space and time. In fact, those technologies that allow a new connection between organizations and citizens and other organizations allow for instant bridging of vast distances in unlimited quantities[13].

We must consider the effects of this new technical reality for the theory of administrative procedure which assumed a need for spatial proximity of administrative bodies with the citizens.

Now, any administrative body can be reached from any computer. The administrative window is the screen of the computer. Therefore, administrative procedural concepts such as access to information, in either original or digital copies, are deeply implicated at its theoretical foundations[14].

The possibility of a full programmed automation of certificates or of the delivering of the information within the administrative archives, linked to the electronic signature, opens a debate on the legal expression of the administrative will and the subject of the level of responsibility needed, especially if we operate in a net administrative management system[15].

Again in the field of administrative procedure, new technologies allow significant improvements in areas of efficiency and effectiveness, but require us to always adequately guaranty that procedures avoid the digital gap and the digital divide. It should be required that Administrative agencies implement new

[12] G. Arena, E-Government y nuevos modelos de Administración, 1 Revista de Administraciòn Publica 413-430 (2004); J. Barnés, Una reflexión introductoria sobre el Derecho Administrativo y la Administración Pública en la Sociedad de la Información y el Conocimiento, 40 Revista Andaluza de Administración Pública 25-76 (2000).

[13] M. Castells, La era de la información (1996).

[14] J. Valero, El régimen jurídico de la e-Administración (2008).

[15] A. Masucci, L'atto administrativo informatico (1993).

technologies as normal process within public administration, but without developing a structural division of citizens according to their computer culture and allowing the digital divide to divide the field of legal guaranties before administrative bodies[16].

It must be also taken into account that while channelling the relationship between citizens and administration through new technologies, we reinforce fundamental rights such as protecting anonymous communications and the guaranty of privacy. In the same way, other rights such access to information and data protection have new dimensions unforeseen just a few years ago[17].

This is why any new administrative procedural law must include the rules for electronic administrative procedure, not as an exception or a peculiarity, but as an ordinary, alternative method of administrative action.

[16] G. Duni, Amministrazione Digitale (2008).
[17] S. Muñoz Machado, La regulación de la red (2003).

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PARTICIPATION INTO ADMINISTRATIVE PROCEDURES: ACHIEVEMENTS AND PROBLEMS

Roberto Caranta*

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1. Foreword

In the early '90s Italy belatedly awoke to the need for efficiency in administrative law.[1] The answer came in the guise of L. 7 agosto 1990, n. 241, on administrative procedure and right of access to the documents. Participation was one of a number of novelties in the new law. It is quite at ease with right of access, another development brought about by the 1990 statute, so relevant to have made it to its title. However, it sits uncomfortably with simplification, another main trend in the reform of Italian administrative law.[2]

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[1] Already in 1979 Massimo Severo Giannini, a leading scholar in administrative law then serving as a Minister, drafted a report lamenting the overall inefficiency of the Italian bureaucracy (published as M.S. Giannini, Rapporto sui principali problemi dell'amministrazione, F.I. 289/V (1979)). He was pressed into resignation and nothing was done.

[2] Both aspects were not present in the draft originally submitted by the expert commission set up by the Government and were brought in at later stage: see M. Nigro, Il procedimento amministrativo fra inerzia del legislatore e trasformazioni dell'amministrazione (a proposito di un recente disegno di legge), Dir. proc. amm. 8 (1989).

The main idea around participation (and right of access to the documents), was to move away from the traditional top-down Franco-Napoleonic pattern of public administration. The pattern highlighted the superiority of the administration over all other public powers and a fortiori over the citizens: «During the new era that began with the Revolution, the Executive became, in this administrative field, the only holder of public power and could freely exert all the prerogatives of this power, freely meaning without judicial control. It was at this point confirmed that France was, even under Revolutionary principles, and here opposed to the UK, neither a judicial nor a parliamentary State, but essentially an administrative State. Of course, Napoleon left an important legacy on the institutions that reinforce this fundamental feature».[3]

Unilaterally taken decisions were the tool of choice of the puissance publique: «like legislation and jurisdiction, administration, too, had its own decision-making functions and the Verwaltungsakt was vested with the task of declaring the law in concrete, individual case. In Germany, this concept became jus receptum, to the extent that it was codified by Article 35 of the general law on administrative procedures (Verwaltungsverfahrengesetz). Running along the same line of reasoning, French and Italian legal doctrine identified those particular administrative decision-making functions through which imperium was exercised (décisions administratives, provvedimenti amministrativi), thereby limiting rights and liberties. This expressed the supremacy of the administration vis-à-vis private citizens, in the sense that the former declares what the law

[3] E. Picard, The Public-Private Divide in French Law Through the History and Destiny of French Administrative Law, in M. Ruffert (ed.) The Public-Private Divide: Potential for Transformation? 28 (2009); the Author also point out that «the autonomy enjoyed by the absolute monarchy prior to the Revolution regarding administrative matters outlived the Revolution and came to be enjoyed by the new executive-with the strong support of the agents appointed to a large extent under the Ancient Regime and that the Consulate and Napoleon later reinforced in number and functions. The Executive, accompanied and supported by its administrative apparatus, inherited the ancient prerogative claimed by the king in administrative matters».

is for the latter, instead of being placed under the same legal rules».[4]

This model could do very well without participation, and procedural rules generally were little considered, so much so that French law does not really have a category for them and refers in the negative to administrative procedure as to the procédure administrative non-contentieuse: a way to point out that the only procedure that matters is the one leading up to the Conseil d'Etat.[5]

Early adoption of the Franco-Napoleonic model had considerably boosted the efficiency of the then Kingdom of Sardinia allowing it, along with deft diplomacy, to unify Italy under the Crown of Savoy.[6] By the time L. 7 agosto 1990, n. 241, was adopted, the original pattern had lost some of its shine (even if retained redoubtable partisans, first among them the Council of State which, asked an advice on the draft law, considerably

[4] G. della Cananea, Beyond the State: The Europeanisation and Globalisation of Procedural Administrative Law, Eur. Publ. L. 566 (2003); see also P. Gonod, «La réforme du droit administratif»: bref aperçus du système juridique français, in M. Ruffert (ed.), The Transformation of Administrative Law in Europe. La mutation du droit administratif en Europe 72 (2007): «Le droit administratif reconnaît en effet des pouvoirs importants aux autorité administratives (la puissance publique), qui leur permettent de satisfaire leur mission de satisfaction de l'intérêt général (le service publicque). C'est pourquoi, pour reprendre la formule du juge, il semble « impossible, en bonne raison et en bonne justice, d'assimiler l'Etat à un simple particulier » [Conclusions E.M. David sur T.C., 8 février 1873, Blanco, R. 61]. Le droit administratif se présent aussi comme un droit d'inégalité, un droit de prérogatives (parmi lesquelles le pouvoir d'action unilatérale, les pouvoir reconnus dans l'exécution des contrats administratifs, le pouvoir d' exécution forcée (...)».

[5] For this remark R. Caranta, Procedimento amministrativo in diritto comparato, in XI Digesto disc. pubbl. 608 (1996).

[6] The relevance of institution building was not lost on the contemporaries. In 1836 Pier Alessandro Paravia – an expatriate from Venice, then under Austrian domination – was charged with delivering a speech at the University to celebrate the namesake day of King Carlo Alberto: Orazione pel giorno onomastico di S.M. il Re Carlo Alberto (Torino, Tip. Chirio e Mina, MDCCXXXVI). Worried to overdo what was anyway a flattening exercise, he decided to leave facts do the talking («di lasciare che lodino CARLO ALBERTO gli stessi suoi fatti» at 9). The first fact listed to the King's merits is the establishment of a Council of State, the paramount institution of French administrative law («volle raunare al grand'uopo i più savii uomini de' suoi stati […]. Ed eccovi istituito con ciò il Reale Consiglio di Stato; utilissima istituzione […]» at 12 f).

watered down it).[7] Less State-centred and more bottom-up, market-friendly economies were proving themselves to be far more efficient than those which, like Italy, had seen the role of the State grow and grow. Private sector techniques and assumptions have made major inroads into government via the « new public management ». In formerly state-dominated polities like Italy (but the same holds true for France and Spain), «the autonomous institutions of civil society are being given more rein. Public-private partnerships, community-based partnerships and innovative forms of service delivery abound».[8] Possibly by no chance, those more performing legal systems shares a common law heritage. With it comes the idea of participation of those concerned by the decisions to be taken by public authorities, variously referred to as due process, audi alteram partem, or fair hearing.[9]

This tradition was foreign to Italy. In 1940 Aldo M. Sandulli wrote the leading text on administrative procedure.[10] The concern underlying the book was dogmatic, it was about giving a proper place to the procedure in the Begriffshimmel alongside the final decisions and the various occurrences taking part during the procedure itself.[11] Participation was not even mention in the index. The input of the concerned parties was briefly discussed, with some passing reference to German scholars, to voice the

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[7] Contrast the more advanced proposition put forward by the Chairman of the commission charged with drafting the bill: M. Nigro, Il procedimento amministrativo fra inerzia del legislatore e trasformazioni dell'amministrazione (a proposito di un recente disegno di legge), supra note 2, at 5.

[8] M. Keating, Europe's Changing Political Landscape: Territorial Restructuring and New Forms of Government, in P. Beaumont, C. Lyons & N. Walker (eds.) Convergence and Divergence in European Public Law 10 (2002).

[9] See G.F. Ferrari, Il procedimento amministrativo nell'esperienza anglo-americana, in Dir. proc. amm. 421 (1993); S. Rodriquez, Representative Democracy vs. Participative Democracy in the EU and the US, in R. Caranta (ed.), Interest Representation in Administrative Proceedings 112 (2008).

[10] A.M. Sandulli, Il procedimento amministrativo (1940); the book was reprinted without any amendment in 1959 and 1964; the Author felt that his dogmatic work would lose its meaning when taken out of its proper historical context (at vii), which by itself is a remarkable acknowledgement as to the weakness of dogmatic.

[11] This was therefore a highly formalised construction: see, also for further references, D. Mastrangelo, La cultura del procedimento e il suo declino, in D. Mastrangelo (ed.), L'alta velocità nell'amministrazione 15 (2009).

opinion that parties involved in the proceedings are in the main making their wishes known to the decision-maker.[12]

That was to be the standard position in Italy. Even after L. 7 agosto 1990, n. 241, was adopted, the Constitutional Court reiterated that the due process principle could not to be read into the 1948 Constitution.[13] Today the constitutional standing of the 'due process' has not changed much. It was referred to in two important 2007 judgements concerning legislative provisions providing for the termination of existing contracts for executive officials with the public service. The Court found the provisions in conflict with the constitutional principle of efficiency and effectiveness which require a case by case examination of the results of the managing activities of each executive officer through procedures allowing the officer to represent his or her views. In this context, the participatory rules in L. 7 agosto 1990, n. 241, were recalled, the Court however stopping well before recognising constitutional role to the participation principle.[14]

Only a small group of scholars around Feliciano Benvenuti were ready to highlight the relevance of participation in the framework of a more bottom-up approach to administrative law.[15]

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[12] A.M. Sandulli, Il procedimento amministrativo, supra note 10, at 166.

[13] E.g. Corte cost., 31 maggio 1995, n. 210, Giur. Cost. 1586 (1995); Corte cost., 19 marzo 1993, n. 103, in Regioni 1671 (1993), with note by S. Staiano, Lo scioglimento dei Consigli comunali e provinciali nella lotta alla criminalità organizzata tra Corte costituzionale e giudice amministrativo; Corte cost., 20 luglio 1990, n. 344, Giur. cost. 2158 (1990); Corte cost., 19 ottobre 1988, n. 978, Giust. civ. , 2794/I (1988); critically U. Allegretti, Il valore della Costituzione nella cultura amministrativistica, Dir. pubbl. 790 (2006).

[14] Corte cost., 23 marzo 2007, n. 103, G.D.A. 1307 (2007), with note by A. Massera, Il difficile rapporto tra politica e amministrazione: la Corte costituzionale alla ricerca di un punto di equilibrio; see also F. Merloni, Organizzazione amministrativa e garanzia dell'imparzialità. Funzioni amministrative e funzionari alla luce del principio di distinzione tra politica e amministrazione, Dir. pubbl. 86 (2009).

[15] First and foremost F. Benvenuti, Per un diritto amministrativo paritario, in Studi in memoria di E. Guicciardi (1975); the approach was fully developed in F. Benvenuti, Il nuovo cittadino (1994) at 28, and shared by few other scholars, such as G. Pastori, La procedura amministrativa (1964), and more recently Interesse pubblico e interessi privati fra procedimento, accordo e autoamministrazione, in Scritti in onore di P. Virga, vol. II, 1303 (1994) ff, and U. Allegretti, Il valore della Costituzione nella cultura amministrativistica, in D. Pubbl. 790 (2006). See also the (diverging) analysis by A. Romano Tassone, Il «Nuovo cittadino» di Feliciano Benvenuti tra diritto ed utopia, in Dir. amm. 319 (2008); R. Caranta, La tutela dell'interessato nel diritto amministrativo paritario di Feliciano Benvenuti, in Ritorno

The panorama has to some extent changed after the entry into force of L. 7 agosto 1990, n. 241. The top-down model still has its partisans, pretending that participation mainly serves the needs of the public authority by providing it with information as to the interests that will be affected by the administrative action.[16] Some weakness in the way participation was written into the law, and some more recent efficiency-oriented reforms may be called to substantiate this position. Other reforms – both specific and of general constitutional relevance – which have been passed in the past twenty years, however, point to another direction, towards giving a bigger place to civil society in the overall governance system, a system where participation is one of the key instruments of democracy.[17]

This paper will first analyse the provisions on participation originally brought about by L. 7 agosto 1990, n. 241, also focusing on their main shortcomings. The changes introduced into the 1990 statute in the past twenty years will then be introduced, with some new trends concerning participation being covered as well. Conclusions will be drawn with reference to some more general development taking place in Italy.

2. The Rules on Participation Laid down at Art. 7 ff. L. 7 agosto 1990, n. 241.

L. 7 agosto 1990, n. 241, marks the start of a shift from a procedure which is centred on the public authority supposed to be vested with the knowledge as to where the general interest lays, to

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al diritto 49 (2008); F. Merusi, Diritti fondamentali e amministrazione (o della «demarchia» secondo Feliciano Benvenuti), in Dir. Amm. 541 (2006); A. Andreani, Funzione amministrativa, procedimento e partecipazione nella l. 241/90 (quarant'anni dopo la prolusione di F. Benvenuti), in Dir. proc. amm. 655 (1992).

[16] E.g. A. Crosetti and F. Fracchia (ed.), Procedimento amministrativo e partecipazione - problemi, prospettive ed esperienze (2002).

[17] This evolution has parallels and derive strength from synergic developments taking place at European level: see S. Rodriquez, Law Making and Policy Formulation: il ruolo della società civile nell'Unione europea, R. T. D. Pubbl. 125 (2010); see also L. Azoulai, Le principe de bonne administration, in J.M. Auby & J. Dutheil de la Rochère (eds.), Droit Administratif Européen 502 (2007), and from a more general perspective G. della Cananea, Beyond the State: The Europeanisation and Globalisation of Procedural Administrative Law, in Eur. Publ. L., 571 (2003).

a public administration which finds out those solutions which are more acceptable to the civil society involving concerned parties and interest groups into the procedure. Participation is ruled under Art. 7 to 13 of the 1990 Act.[18] In principle, all parties, from both the private and public sectors, whose interests might be affected by a decision to be taken at the end of a proceeding may take part into it. Under Art. 9, the same applies to public interest groups, provided that they have reached a minimal formal organisation.[19] Moreover, under Art. 7 of the Act, save in case of special urgency, the parties directly affected by the final decision, the parties whose participation is mandated by law, and, provided they are know or easily knowable to the decision maker, those parties which might be detrimentally affected by the final decision, all are to be served a notice as to the beginning of the proceedings.[20] The notice, to be served individually when practicable, is to drafted in compliance with the rules laid down in Art. 8. It must list the subject-matter of the proceedings, the term for its completion, the office and officer responsible, and where to ask to have access to the documents in the file. No doubt this provision is instrumental in allowing a real participation of the parties concerned: everyone concerned may participate, but those more directly involved are invited to take part into the proceedings[21].

Under Art. 10 participants enjoy two major rights, namely the right to have access to all the pieces in the file and the right to submit briefs and documents to the competent authority to be considered in taking the final decision. In keeping with the civil law high bureaucratic tradition – itself the heir of Roman and Canon law – the written word is the instrument for the

[18] For more details R. Caranta, L. Ferraris and S. Rodriquez, La partecipazione al procedimento amministrativo (2005, 2nd); reference to older case law and scholarly works in R. Caranta & M. Protto, 'Italy' in Comparative Analysis of Administrative Law, European Public Law Series – Bibliothèque de droit public européen, vol. XXIV 203 (2002).

[19] R. Caranta, L. Ferraris & S. Rodriquez, La partecipazione al procedimento amministrativo, supra note 18, at 172.

[20] Id. at 51 ff.

[21] C.E. Gallo, La partecipazione al procedimento, in P. Alberti et al. (eds.), Lezioni sul procedimento amministrativo 70 (1992).

conversation between the public administration and the interested parties.[22]

Under Art. 11, proposals submitted according to Art. 10 may be negotiated with and accepted by the decision maker, giving rise to an agreement (accordo) defining the content and, originally only if the law so provides, taking the place of the unilateral decision.[23]

One major shortcoming affects participation as ruled by L. 7 agosto 1990, n. 241. Under Art. 13, the provisions just sketched do not apply to rule-making and planning procedures. Older rules still apply instead. This means in essence that participation rules only apply to adjudication – individual decision making procedures – not to regulation in its different forms. The Government's bill diverged here from the draft proposed by the experts, who had envisaged a public enquiry procedure for those project having a wide impact.[24] Italy failed to follow a widespread pattern calling for the involvement of civil society in the most relevant decisions.[25] To these days, recourse to public enquiries is only had in environmental matters, where it is mandated by EU law in the framework of environmental impact assessment – EIA procedures.[26] Again with reference to the environmental matter, the general rule laid down in Art. 13 of the 1990 Act sits uncomfortably with the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, implemented, as far as participation is involved, by Directive 2003/35/EC.[27]

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[22] R. Caranta, L. Ferraris & S. Rodriquez, La partecipazione al procedimento amministrativo, supra note 18, at 200.

[23] G. Greco, Accordi amministrativi tra provvedimento e contratto, in F.G. Scoca, F.A. Roversi Monaco, G. Morbidelli (eds.), Sistema del diritto amministrativo italiano (2004).

[24] See M. Nigro, Il procedimento amministrativo, supra note 2, at 10.

[25] The 1976 Verwaltungsverfahrengesetz has specific provisions on planning procedures; this statute had been translated into Italian by A. Meloncelli and published in R. T. D. Pubbl. 293 (1978); it was also the object of scholarly work, such as A. Masucci, La codificazione del procedimento amministrativo nella Repubblica federale di Germania (1979).

[26] For remarks as to the strategic relevance of EIA procedures see S. Rodriquez, Representative Democracy, supra note 9, at 86.

[27] The Aarhus Convention itself was ratified in Italy with L. 16 marzo 2001, n. 108; Cons. St., Sez. IV, 22 luglio 2005, n. 3917, F.A. – CdS 2142 (2005), ruled out breach of the Convention since on the facts of the case the environmental NGOs

The limitation we are talking about is a major obstacle to participative democracy. It does not make much sense to allow NGOs and other public interest groups to take part into individual decision making procedure while excluding them when regulatory measures – including planning – are taken. It is plain that much more is at stake for the general interest in regulation.[28] Evidently, the Government in power at the time was much keen to maintain the monopoly of representative democracy institutions – shortly said, of the political parties – on interests representation when serious issues are at stake (and no other Government in the 20 years so far elapsed thought better).[29]

Even if the provisions recalled could be thought to be somewhat modest, the early life of the participation rules was not easy. Public administrations routinely forgot to serve the notice provided for under Art.7 L. 7 agosto 1990, n. 241. Administrative courts, faced with a rising tide of straight cases but worried to undo everything that had been done by decision makers around the country, started to introduce hors texte exceptions to the applicability of Art. 7, the major being that participation was useless in cases of bound competencies when no margin of discretion was left to the decision maker.[30] Therefore the failure to serve the notice of the opening of the procedure was condoned more often than not as it was in cases where, notwithstanding the failure, the interested parties had gained knowledge as to the existence or the procedure, or had anyway been provided with the opportunity to voice their concerns.[31]

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had indeed participated in the proceeding voicing their opinion on the relevant documents in the file.

[28] For a more nuanced take see S. Cassese, La partecipazione dei privati alle decisioni pubbliche. Saggio di diritto comparato, R. T. D. Pubbl. 15 (2007): «Non minori problemi suscita la partecipazione della società civile nelle decisioni pubbliche quando diventa un surrogato della democrazia. Può, infatti, un gruppo di privati (o, meglio, una somma di individui), per quanto ampio, prevalere rispetto ai funzionari pubblici, che rispondono, in ultima istanza, a chi rappresenta l'intera collettività? Perché alcune decisioni collettive dovrebbero essere sottoposte a osservazioni, commenti, inchieste, se chi le prende è responsabile rispetto al Parlamento?»

[29] R. Caranta, I procedimenti avanti alle autorità amministrative indipendenti, in V. Cerulli Irelli (ed.), Il procedimento amministrativo 173 (2007).

[30] E.g. Cons. St., Sez. V, 11 ottobre 1996, n. 1223, F.A. 2882 (1996).

[31] E.g. Cons. St., Sez. VI, 9 agosto 1996, n. 1000, 1 Giur. It. 224/III (1997), with note by S. Verzaro, In tema di comunicazione dell'avvio del procedimento

Taken in isolation, such trend could well be understood in the name of efficiency: focus on the substance rather than on procedural niceties. The full story told is that Italian administrative courts had never before developed anything akin to the French doctrine of violation de formes substantielles, each and any breach leading to the annulment of the challenged decision. And they had not because they – up to this day – very much resist reviewing the substance of the decision.[32]

In due time, however, the administrative courts reached more balanced solutions, holding that the failure to serve the notice due under Art. 7 might be condoned only in cases when the factual conditions and legal framework of a bound power decision were not disputed by the claimant and anyway no other decision was legally possible in the circumstances of the case.[33] Earlier judgements had indeed stressed that participation can be of some use even in cases of bound competence, since underlying every administrative proceedings are some material facts which are better ascertained and evaluated with the wider participation possible.[34]

Finally, administrative courts have applied the exclusion for cases of special urgency in a restrictive way, thus avoiding another possible inroad to the principle[35]; as a consequence derogation from Art. 7 has been mainly allowed either in case for security reasons,[36] when human health is at stake,[37] or following natural disasters such as earthquakes[38].

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amministrativo: l'art. 7 e la normativa previgente; the whole story is retold by R. Caranta, L. Ferraris and S. Rodriquez, La partecipazione al procedimento amministrativo, supra note 18, at 78.

[32] R. Caranta and B. Marchetti, Judicial Review of Regulatory Decisions in Italy; Changing the Formula and Keeping the Substance?, in O. Essens, A. Gerbrandy & S. Lavrijssen (eds.), National Courts and the Standard of Review in Competition Law and Economic Regulation 145 (2009).

[33] The leading case is Cons. St., Sez. V, 22 maggio 2001, n. 2823, F.A. 1204 (2001).

[34] See Cons. St., Sez. V, 13 novembre 1995, n. 1562, F.A. 2604 (1995).

[35] See Cons. St., Sez. IV, 25 marzo 1996, n. 368, 1 Giur. it. 542/III (1996): see also Cons. St., Sez. V, 14 aprile 1997, n. 354, F.A. 1090 (1997); Cons. St., Sez. V, 29 gennaio 1996, n. 111, F.A. 141 (1996); T.R.G.A. Trentino Alto Adige, Sez. Bolzano, 30 dicembre 1996, n. 378, T.A.R. 535/I (1997); but see T.A.R. Basilicata, 9 maggio 1995, n. 220, Rass. giur. Enel 511 (1996).

[36] Cons. St., Sez. VI, 21 aprile 2010, n. 2223, Giur. it. (2010).

3. Reforming the Reform: Conflicting Signals for Participation.

Until 2005, only one – apparently minimal – reform affected the provisions just discussed. Already in 1995, indent 1 bis was added to Art. 11 to the effect that, in order to make it easier to reach an agreement, the officer responsible for the proceeding has the power convene meeting with the interested parties (one by one or all together as he or she thinks fit). The departure from the tradition of a faceless bureaucracy which speaks only through the decisions it takes is impressive, but the power – which still is not a duty – we are talking about could have been easily construed from provisions already existing. The officer responsible for each procedures is under a duty by Art. 6 of the 1990 Act to take any measure instrumental to a rapid and satisfactory conclusion of the procedure.[39]

Other concerns have been preeminent in the minds of both the Parliament and the Government now under the full blow from two main shocks coming in the form of a (then) EC Commission starting to get serious about State aids – an indispensable lifeline for the inefficiently run public conglomerates which were the backbone of the Italian economy – and a desire to enter the (then) future monetary union, which brought about the need to finally curb the ballooning public budget deficit. At a more generally encompassing level, the belated completion of the single – and later internal – market inevitably exposed a weak economic system to ever growing challenges, making changes a life or death necessity. Speed and quality – or, to use just one word, efficiency – were values Italy could ignore no more.[40]

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[37] E.g. Cons. St., Sez. V, 14 novembre 1996, n. 1364, Cons. Stato 1729/I (1996), concerning an animal disease which can be transmitted to human beings.

[38] T.A.R. Campania, Sez. V, 21 novembre 1995, n. 368, T.A.R. 297/I (1996); it is fair to say however that the effects of earthquake on the application of administrative law lasts for decades after the seismic event has occurred.

[39] See generally M. Renna, Il responsabile del procedimento a (quasi) dieci anni dall'entrata in vigore della legge n. 241, Dir. proc. amm. 505 (2000), and Id., Il responsabile del procedimento nell'organizzazione amministrativa, Dir. Amm. 13 (1994).

[40] See the contributions collected in C. Franchini and L. Paganetto (ed.), Stato ed economia all'inizio del XXI secolo (2002), and G. Della Cananea and G. Napolitano (eds.), Per una nuova costituzione economica (1998); see also M. D'Alberti, Il diritto amministrativo fra imperativi economici e interessi pubblici, Dir. amm. 63 (2008).

Simplification has been the rallying cry for reform after reform affecting L. 7 agosto 1990, n. 241, starting already in 1993 and taking place almost on a yearly basis, with a succession of changes designed at strengthening those mechanisms which prods public authorities into fast action or – simply put – curb their power to stop private – and especially economic – activities from happening.

Concerning the first kind of measures, the provisions on conferenze di servizi (shortly put, an institutional arrangement requiring the different authorities involved in the same proceeding to take their decisions together) were changed so many times that the original Art. 14 has now been expanded all the way to Art. 14 quinquies.[41] This is a metastatic process extreme even by Italian standards. Something similar has happened to Art. 2, providing for the pre-fixation of the duration of each and any administrative proceeding, changed a number of times also to fight the tendency displayed by many public administrations to allow themselves fairly generous times for decision;[42] as recently as last year, Art. 2 bis has been grafted unto L. 7 agosto 1990, n. 241, by L. 18 giugno 2009, n. 69, providing those having applied for a decision with the right to sue the decisions maker for damages in case the deadline for taking a decision is not met.[43]

The same fate of never stopping recasting has befallen those provisions aimed at avoiding the possibility that the dynamic forces in the society are stalled by simple inaction on the part of the public administration. Art. 16 l. 7 agosto 1990, n. 241, on advices, and Art. 17, on technical expertise have been changed (the last time in 2009), to make it easier for the competent authority to decide notwithstanding the delays of other authorities. Art. 19 of l. 7 agosto 1990, n. 241 provides for denuncia – now dichiarazione – di

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[41] A reinforced form of cooperation between the different authorities involved is the società publica di progetto, a public-public institutional partnership now ruled by Art. 156 of D.lgs. 12 aprile 2006, n. 163, the new Code on public contracts, and charged with adopting any necessary measure, including expropriation and the award of contracts, on behalf of the authorities involved.

[42] E.g. Cons. St., Ad. gen., 9 febbraio 1995, n. 3, Cons. Stato 1728/I (1995).

[43] Damages actions for delay has been striken out by the case law: see Cons. Sr., Ad. plen., 15 settembre 2005, n. 7, Resp. civ. prev. 1397 (2006), with note by R. Caranta and G. Vecci, Inerzia, silenzio, ritardo: quale responsabilità per la pubblica amministrazione?, reprinted in V. Parisio (ed.), Silenzio e procedimento amministrativo in Europa: una comparazione tra diverse esperienze (2006) 15.

inizio attività (DIA). It is a system under which those who under rules formerly in force had to ask for an authorisation or permission to start an economic activity now only need to give notice to the competent administration of their intention. Over the time this has been transformed in a fairly general tool applicable every time no discretion is vested in the public administration.[44] The same may be said of silenzio assenso – implicit positive decision – which has become today a default rule of administrative licensing activity even when it is vested with margins of discretion.[45]

It should be plain from what has just been said that speed has been the paramount worry of the Italian legislation in the past twenty years.[46] Simplification measures have become stronger and stronger as the years passed, with DIA being introduced and silenzio assenso becoming a default option.[47] Few general interests only – the environment, urban planning, health, and of lately national security – have been granted a special status, and have not been much affected by the new trends to reduce the binding force of administrative law.[48]

Only in 2005 participation was again back at the centre of the stage, this time an awkward dancing partner with simplification.[49] On the one hand, a couple of measures indeed strengthened participation. New Art. 10 bis provides that before

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[44] The 1993 reform was analysed by A. Pajno, Gli artt. 19 e 20 della l. n. 241 prima e dopo la l. 24 dicembre 1993, n. 537, Dir. proc. amm. 40 (1994); on the most recent version see C. Di Gaetano, La dichiarazione di inizio attività, in D. Mastrangelo (ed.), L'alta velocità nell'amministrazione, supra note 11, at 57.

[45] See L. Giovagnoli, I silenzi della pubblica amministrazione dopo la legge 80/2005 (2005); M. Marinaro, Il silenzio assenso and F. Caricato, L'accelerazione della tutela avverso i silenzi dell'amministrazione, both in D. Mastrangelo (ed.), L'alta velocità nell'amministrazione, supra note 11, at 103 and 115; A. Cioffi, Dovere di provvedere e silenzio assenso della pubblica amministrazione dopo la legge 14 maggio 2005, n. 80, in Dir. amm. 99 (2006).

[46] E.g. D. Mastrangelo, La cultura del procedimento e il suo declino, in D. Mastrangelo (ed.), L'alta velocità nell'amministrazione, supra note 11, at 19.

[47] See G. Forlenza, Un'enfatizzazione del principio di efficacia a scapito delle garanzie di tutela dei cttadini, in 10 Guida dir. 42 (2005).

[48] See M.A. Sandulli, Semplificazione e garanzia, in Scritti in onore di E. Casetta, 585/II (2001).

[49] It is however worth noticing that the father of the 1990 reform saw accordi as a form of simplification M. Nigro, Il procedimento amministrativo, supra note 3, at 10.

rejecting any application, the decision maker must serve the applicant with a statement of the reasons against granting the benefit sought. The applicant has then time to submit (further) documents and briefs. The provision aims at making it easier to come to a mutually satisfactory agreement.[50] This new participation phase entails extended decision times, and as such it has been denounced by the traditionalists.[51] The introduction of new Art. 10 bis, however, is coupled with, and makes sense together, the amended Art. 11 widening to the scope for accordi. Since specific legal authorisation is no longer needed, it is today generally possible to have an agreement taking the place of a unilateral measure.[52] Accordi have a mixed public-private law regime. They are submitted to the same controls as administrative unilateral decisions and they can be unilaterally terminated by the public administration, the private party being entitled to a compensation. Apart for this, the rules governing accordi has to be found in the principles of the Civil code on the law of obligations provided that these are consistent with their peculiar nature.[53]

On the other hand, efficiency – and time saving – needs can still lead the dance with participation. Under new Art. 21 octies of L. 7 agosto 1990, n. 241, added in 2005, procedural breaches does not need to cause the annulment of the decision taken. Annulment is ruled out in cases of bound competence if the decision taken appears to be the right one on its substance; the same with the failure to give the notice provided under Art. 7, and even in case of discretionary powers, provided that the defendant authority can show that no other decision could have been taken on the

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[50] See R. Caranta, L. Ferraris and S. Rodriquez, La partecipazione al procedimento amministrativo, supra note 18, at 376, and A. Bonomo, L'accelerazione dell'attività amministrativa e gli oneri di comunicazione agli interessati, in D. Mastrangelo (ed.), L'alta velocità nell'amministrazione, supra note 11, at 93.

[51] E.g. C. Videtta, Note a margine del nuovo art. 10 bis della l. n. 241 del 1990, F.A. - TAR 837 (2006).

[52] See, with an eye to the reform process then in progress, F. Merusi, Il diritto privato della pubblica amministrazione alla luce degli studi di Salvatore Romano, Dir. Amm. 649 (2004), e F. Trimarchi Banfi, Il diritto privato dell'amministrazione pubblica, Dir. amm. 661 (2004); V. Cerulli Irelli, Note critiche in tema di attività amministrativa secondo modelli negoziali, Dir. amm. 244 (2003).

[53] G. Greco, Accordi amministrativi tra provvedimento e contratto, in F.G. Scoca, F.A. Roversi Monaco, G. Morbidelli (eds.), Sistema del diritto amministrativo italiano (2004).

given circumstances and that therefore the breach had no effect on the outcome of procedure.[54]

The provision in Art. 21 octies went farther than the case law already discussed and was casted along the lines of § 46 of the German Verwaltungsverfahren Gesetz. That provision makes indeed sense in Germany, where courts are more than ready to step into the shoes of the decision maker. In Italy, as it was already remarked, administrative courts stop well before going into the merits, and this – rather than an improbable sudden love for participation – goes a long way towards explaining the prudence they have so far displayed in the application of the new rule found in Art. 21 octies.[55] The 2005 reform can be said to have had a very limited effect on the case law. Courts are ready to condone breaches of participation rules in cases of bound competence if they are satisfied the competent official has reached the correct decision, while they invariably strike down discretionary decisions when participation rules have been violated.[56]

4. Conclusions: The Wider Picture and the Way Forward.

Participation can be seen as an instrument of legitimacy under many respects. Participation of the potential addressee of a decisions infringing his/her property is different from participation as consultation of stakeholders[57], which in turns is deeply different from taking part into the decision process and being able to negotiate its outcome.[58] Defense, consultation, and

[54] See R. Caranta, L. Ferraris and S. Rodriquez, La partecipazione al procedimento amministrativo, supra note 18, at 163.

[55] See for references A Bonomo, L'accelerazione dell'attività amministrativa e gli oneri di comunicazione agli interessati, supra note 50, at 91.

[56] For a recent case see Cons. St., Sez. IV, 21 maggio 2010, n. 3224, Giur .it. (2010), quashing the decision by a military panel to dismiss a military police recruit having stolen a SIM card from a colleague because the recruit was not really given the opportunity to mount a defence.

[57] L. Azoulai, Le principe de bonne administration', supra note 14, at 502.

[58] F. Merusi, Diritti fondamentali e amministrazione, supra note 15, at 543; participation is at times equated with consultation (e.g. C. Möllers, European Governance: Meaning and Value of a Concept, C.M.L.Rev. (2006) 321), but it is not necessarily so; the latter kind of participation could be considered 'strong' participation, quite close to self- or direct government.

negotiation leading to co-regulation or co-decision[59] are three very different kinds of participation indeed.[60]

Seen through this framework participation in Italy seems very much to hang in balance. Its future will very much depend on more general trend in the national, regional, and global legal orders.[61]

Italian legislation to a large extent vindicates participation as a defence right which is now part of global administrative law.[62] It seems safe to assume that Italy will not resist forever the push to abandon the traditional top-down approach to public administration in favour of a different bottom-up take geared at stimulating – rather than stopping – entrepreneurial and other forces present in the civil society.[63]

The reasons are many. It is difficult to escape the conclusion that the traditional administrative law model was appropriate for fairly authoritarian government systems quite unlike present day ones.[64] European principles like proportionality and legitimate expectations run counter the idea of an omnipotent public

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[59] According to P. Verbruggen, Does Co-Regulation Strengthen EU Legitimacy?, Eur. L. Journ. 425 (2009), 'In general terms, co-regulation can be described as a regulation method that includes the participation of both private and public actors in the regulation of specific interests and objectives. As such, co-regulation brings together private and public actors in the different stages of the regulation process'.

[60] As to the difference between consultation and negotiation see L. Betten, The Democratic Deficit of Participatory Democracy in Community Social Policy, Eur. L. Rev. 29 (1998).

[61] I have tried to provide some elements for an answer in Introduction. The Future of Participation, in R. Caranta (ed.), Interest Representation in Administrative Proceedings, supra note 9, at 19.

[62] Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat Int. Foundation, ECR (2008), attracted wide attention in Italy: see the commentaries in G.D.A., 1088 (2008) by A. Sandulli, Caso Kadi: tre percorsi a confronto; S. Cassese, Ordine comunitario e ordine globale; E. Chiti, I diritti di difesa e di proprietà nell'ordinamento europeo; M. Savino, Il principio del contraddittorio e le fasi comunitarie di procedimenti globali and G. della Cananea, Un nuovo nomos per l'ordine globale; see also G. della Cananea, Global Security and procedural Due Process of Law between the United Nations and the European Union, 15 Columbia Journ. Eur. Law 516 (2009).

[63] R. Caranta, The Fall from Fundamentalism in Italian Administrative Law, in M. Ruffert (ed.), The Public-Private Law Divide: Potential for Transformation? 114 (2009).

[64] B.G. Mattarella, Il rapporto autorità-libertà e il diritto amministrativo europeo, R. T. D. Pubbl. (2006) 910.

administration crushing citizens' interests in the blind pursuance of the common good.[65]

Moreover, «Europeanisation stimulates the search for more consensual forms of accomodation between legal systems and their principal actors, [and] facilitates the mobilisation of a third-level of territorial claims at the sub-state level, [and] encourages the articulation and regulatory involvement of new voices within the spheres of civil society and the economy».[66] Indeed the distance of the 'general' interest from the 'individual' is much shorter when competences are transferred from the national to the regional or local level; not by chance «territorial decentralisation is accompanied by functional decentralisation and a shifting of the boundaries between the government, the market and civil society».[67]

Finally, recourse to independent administrative authorities undermines at the foundations the top-down approach which was strengthened by its marriage with representative democracy institutions distilling the general interest which necessarily prevails over individual interests. Italian independent administrative authorities are now increasingly turning to notice-and-comment regulation patterns.[68] Indeed, the role of participation is much strengthened with reference to these authorities which operates at the margins when not outside the circle of democratic legitimacy.[69]

Participation in Italy could be seen tentatively evolving beyond the right of concerned parties to be heard before and individual decision is taken and towards a power given to

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[65] Generally A. Massera, I principi generali dell'azione amministrativa tra ordinamento nazionale e ordinamento comunitario, Dir. Amm. 707 (2005).

[66] 'Preface' to P. Beaumont, C. Lyons & N. Walker (eds.), Convergence and Divergence in European Public Law (2002).

[67] M. Keating, Europe's Changing Political Landscape, supra note 5, at 10.

[68] Eg., with reference to the insurance market regulator, R. Caranta, Assicurazioni (vigilanza sulle), in S. Cassese (ed.), Dizionario di diritto pubblico, vol. I, 458 (2006).

[69] E.g. Cons. St., Sez. VI, 1° ottobre 2002, n. 5105, in Giur. it. 1266 (2003), con nota di S. Rodriquez, Il rapporto tra la L. 7 agosto 1990, n. 241 come legge di principi generali e le forme di partecipazione previste da disposizioni speciali; Cons. St., Sez. VI, 27 dicembre 2006, n. 7972, Resp. civ. prev. 1139 (2007), with note by M. Poto, Autorità amministrative indipendenti e partecipazione al procedimento amministrativo; see also S.A. Frego Luppi, Il principio di con sensualità dell'agire amministrativo alla luce della legislazione e della giurisprudenza più recenti, Dir. Amm. 695 (2008).

individuals and public interest organisations to act as a co-decider. An outcome which would have pleased Feliciano Benvenuti.[70]

[70] **F. Merusi,** ***Diritti fondamentali e amministrazione, supra*** **note 9, at 543.**

Vol 2 No 2/2010

PARTICIPATION IN ADMINISTRATIVE PROCEDURES: LESSONS FROM THE SPANISH EXPERIENCE

Oriol Mir Puigpelat*

Abstract

This papers examines the legislative regulation of administrative procedures in Spain and Italy. It focuses on citizens' intervention in administrative procedures. Although the Italian and Spanish administrative systems have several common features, due to the influence of the French model of administration, they differ with regard to both the right to be heard in individual procedures and participation in rulemaking procedures. From the first point of view, the Spanish legislation is not only less recent, but it also makes different choices, to the extent to that it protects less the interests of those who are not formally involved by the procedure, but provides a specific instrument, the "informacion publica". The main difference, however, regards rulemaking procedures. Unlike in Italy, these procedures are characterized by participatory tools, as a consequence of a political choice made by the Constitution and confirmed by both legislation and institutional practice. This does not imply, however, that participation in administrative procedures is always connected with the democratic principle. Rather, it is often connected with the Rule of law, though a clear-cut distinction may not be drawn easily.

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I. Introduction

In discussing Prof. Caranta's excellent paper and presentation, I will try to stimulate dialogue on one of its central points: whether participation in administrative procedures is always connected with the democratic principle? A number of discussion questions come to mind. Does participation always reflect, using his words, a "less State-centered" and a "more bottom-up," market-friendly approach to administrative law, which gives "a bigger place to civil society in the overall governance" system? [1] Is not participation typically just a requirement of the principle of the rule of law (Rechtsstaat)? When is participation related to democracy and when to the rule of law?

From my point of view, the Spanish experience suggests answers to these questions.

In my short presentation I will first make a brief comparison of the Spanish and the Italian regulation on participation in administrative procedures. After that, I will focus on the discussion questions and will make some general remarks on the main functions of procedural participation.

II. Main differences between the Spanish and the Italian regulation on participation in administrative procedures

Spanish and Italian Administrative law have many things in common, since both of them have been historically strongly influenced by the French system – by what Prof. Caranta called, "the traditional top-down Franco-Napoleonic pattern of public administration." [2] However, these systems present significant differences with regard to the participation of citizens in administrative procedures. Particularly different are the historical evolution of the right to be heard in individual decision-making procedures and the current regulation of participation in rulemaking procedures. I will consider these aspects separately.

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[1] R. Caranta, Participation in administrative procedures: achievements and problems, in this volume, at 1-3 of the draft version.

[2] R. Caranta, Participation in administrative procedures: achievements and problems, cit. at 1, 1.

1. The right to be heard in individual decision-making procedures

The right of interested parties to be heard in individual decision-making procedures that might affect them seems to have a longer tradition in Spanish administrative law. The old Administrative Procedure Act of 1958 (LPA)[3], under General Franco's dictatorship, already recognised this right to holders of subjective rights and even to holders of individual interests that might be affected by the decision. [4]

Twenty years later, after Franco's death, Art. 105.c of the Spanish democratic Constitution of 1978 reinforced this right when it stipulated – at the highest normative level – that:

"The law shall regulate:

c) the procedures for the taking of administrative action, guaranteeing the hearing of interested parties when appropriate." [5]

Enacted in 1992 and still in force today, the new Common Administrative Procedure Act (LRJPAC)[6] adopted the regulation of the right to be heard contained in the old LPA and improved it in some aspects. Its major improvement was to extend explicitly the right to be heard to the holders of collective interests[7]. Although there are many technical and terminological differences between the regulation of participation contained in this Act and in the Italian Act on Administrative Procedure[8], they both lead to similar practical results.

[3] Ley de procedimiento administrativo of 17 July 1958.
[4] Art. 23, 83 and 91 LPA.
[5] According to the official translation of the Spanish Constitution available at http://85.62.99.51/Lists/constPDF/ConstitucionINGLES.pdf (last visited: 31 May 2010). Although the Spanish original version refers to "administrative acts" and not to "administrative action": "La ley regulará: "c) El procedimiento a través del cual deben producirse los actos administrativos, garantizando, cuando proceda, la audiencia del interesado."
[6] Ley 30/1992 de régimen jurídico de las Administraciones públicas y del procedimiento administrativo común of 26 November 1992.
[7] Art. 31 LRJPAC.
[8] Act Nr. 241 of 7 August 1990 (Legge 7 agosto 1990, n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi).

In my opinion, the main differences from a practical point of view are the following three.

While the Spanish Act only obliges the acting administration to communicate the existence of the procedure to the holders of subjective rights that might be affected by it and to the holders of affected interests who are identified in the administrative record, [9] the Italian Act Nr. 241 extends this obligation of communication to all "easily identifiable parties." [10] Moreover, the Spanish Act allows that this personal communication takes place only as a substitute when the existence of the procedure has not been published. [11] The Italian solution better protects holders of affected interests without putting administrative efficiency at risk[12].

Unlike the Italian Act, the Spanish Common Administrative Procedure Act specifically envisions a second mode of citizens' participation which is open not only to interested parties, but to everybody: the so-called "public information" (información pública). In contrast to the hearing (audiencia)[13] of interested parties, its activation is usually left to the discretion of an administrative agency except in some sector-specific procedures, where it is compulsory. Información pública does not invite individuals to participate in making a decision, but does require that the public have: a public notice; rights to access the complete record (or just a

[9] Art. 34 LRJPAC.

[10] Art. 7 of Act Nr. 241 (in the English translation by Catharine de Rienzo distributed among the participants in the workshop).

[11] Art. 8.3 of Act Nr. 241 only allows that the personal communication is substituted by general publication when the first is impossible or particularly onerous on account of the number of addressees. This aspect of Art. 34 LRJPAC is widely criticized (see e.g. C. Cierco Seira, La participación de los interesados en el procedimiento administrativo (2002) at 179 ff.; J. González Pérez; F. González Navarro, Comentarios a la Ley de régimen jurídico de las Administraciones públicas y procedimiento administrativo común, I, (2007) at 975.

[12] C. Cierco Seira, La participación de los interesados en el procedimiento administrativo, cit. at 11, 179.

[13] Which is not really a "hearing," since it takes place in writing and doesn't entail oral mechanisms of participation. The right to be "heard" is then devaluated into a right to comment or a right to be "read.." Public meetings are only envisioned in some isolated provisions and are very rare. Something similar happens in Italy (G. della Cananea, Administrative procedures and rights in Italy: a comparative approach, in this volume, p. 4 of the draft version; R. Caranta, Participation in administrative procedures: achievements and problems, cit. at 1, 4.

part of it), rights to make comments [14] in a period not shorter than twenty days and the right to receive a reasoned answer. [15] According to its nature, información pública cannot substitute the hearing of the affected parties, but just complement it. This traditional notice and comment participation instrument becomes of interest particularly when it is carried out by electronic means.

A third major difference between the Spanish and the Italian regulation on participation concerns procedural agreements. [16] One of the most relevant novelties of the 1992 LRJPAC was that it admitted the possibility that Spanish administrative agencies make agreements with the interested parties about the issues discussed in the procedure. The agreement may even replace the unilateral decision of the procedure by the administration. However, the Spanish legislature has been less brave than the Italian[17] or the German[18] and Art. 88 LRJPAC allows such agreements only when sector-specific legislation admits them. [19]

2. Participation in rulemaking procedures

But where the gap between the Italian and the Spanish regulation is bigger is in the field of rulemaking procedures.

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[14] This legal expression is therefore also misleading: the public "information" is not just an information instrument, but also allows the public to make comments on the proposed regulation.

[15] Art. 86 LRJPAC.

[16] Due to the influence of the Italian scholarship and of Act Nr. 241, in Spain procedural agreements are also usually seen as a participation instrument (F. Delgado Piqueras, La terminación convencional del procedimiento administrativo (1995) at 160; A. Huergo Lora, Los contratos sobre los actos y las potestades administrativas (1998) at 90 ff.).

[17] Art. 11 of Act Nr. 241.

[18] § 54 ff. of the German Administrative Procedure Act of 25 May 1976 (Verwaltungsverfahrensgesetz).

[19] Á. Menéndez Rexach, Procedimientos administrativos: finalización y ejecución, in J. Leguina Villa, M. Sánchez Morón (eds.), La nueva Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común, (1993) at 261 ff.; A. Gallego Anabitarte (et al.), Acto y procedimiento administrativo (2001) at 165-166; E. García de Enterría, T.R. Fernández Rodríguez, Curso de Derecho Administrativo, II, 11th ed., (2008) at 523; J.A. Santamaría Pastor, Principios de Derecho Administrativo General, II, 2nd ed., (2009) at 85; M. Sánchez Morón, Derecho Administrativo. Parte General, 5th ed., (2009) at 507-508. A different opinion is held by F. Delgado Piqueras, La terminación convencional, cit. at 16, 186 ff.; L. Parejo Alfonso, Derecho Administrativo (2003) at 948-949.

According to Prof. Caranta, [20] one major shortcoming of Act Nr. 241 is that its participation provisions do not apply to rulemaking procedures. [21]

This is not unusual in a comparative law perspective. Other relevant democracies such as Germany, France or even the "less State-centred" and "more bottom-up"[22] United Kingdom does not generally recognise the right of affected parties to be heard in rulemaking procedures. Innovative consultation mechanisms recently adopted by the European Commission are also contained only in non-binding, soft law instruments[23].

But Spain does so and such participation is even guaranteed by the Spanish Constitution in Art. 105.a. This article stipulates that:

> "The law shall regulate:
> a) the hearing of citizens directly, or through the organisations and associations recognized by law, in the process of drawing up the administrative provisions which affect them"[24].

The central Government Act[25], the Local Authorities Act[26] and several regional Acts have developed this constitutional provision granting the right to affected parties to be heard in administrative rulemaking procedures.

At the local level and in some sector-specific procedures even the consultation of the general public via información pública is compulsory.

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[20] R. Caranta, Participation in administrative procedures: achievements and problems, cit. at 1, at 4-5; see also G. della Cananea, Administrative procedures and rights in Italy: a comparative approach, cit. at 13, 4-5.

[21] Art. 13.

[22] In Prof. Caranta's words (cit. at 1).

[23] Communication from the Commission, Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 final, 11 December 2002. Art. 41.2.a of the Charter of Fundamental Rights only grants the right to be heard with regard to individual measures.

[24] "La Ley regulará: a) La audiencia de los ciudadanos, directamente o a través de las organisaciones y asociaciones reconocidas por la ley, en el procedimiento de elaboración de las disposiciones administrativas que les afecten."

[25] Ley 50/1997 del Gobierno of 27 November 1997, Art. 24.

[26] Ley 7/1985 reguladora de las bases del régimen local of 2 April 1985, Art. 49.

This duty to hear affected parties is usually fulfilled in practice by Spanish administrative agencies before passing new regulations. For practical reasons, affected citizens are rarely heard directly, but through organisations and associations that represent them.

But even if the Spanish regulation of administrative rulemaking procedures encourages participation more than others in Europe, it is far from being a model to be exported. Ideal regulation should require both the publicity of rulemaking procedures and the transparency of the consultations held. Spanish courts should also be less restrictive when interpreting the existing legal requirements and less permissive with those administrative agencies that – too often – don't take public participation and the aroused comments as seriously as they should. Spanish legislators, courts and administrative agencies still have a lot to learn from more open systems – such as the United States Administrative Procedure Act's notice and comment procedures.[27]

III. Participation, democracy and the rule of law

This comparison shows, in my opinion, that participation in administrative procedures is not always connected with the democratic principle. Rather, the Spanish experience demonstrates that participation is often only related to the principle of the rule of law. In 1958, when the Spanish LPA recognised the right of affected individuals to be heard in administrative procedures, Spain was far from being a democracy. Under that authoritarian regime, individual's participation only served to extend the rule of law [28] to cover the administrative agency's action, without any democratic connotation.

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[27] On participation in Spanish administrative rulemaking procedures see in recent years G. Doménech Pascual, La invalidez de los reglamentos (2002); M. Fernández Salmerón, El control jurisdiccional de los reglamentos 263 (2002); J. Ponce Solé, Deber de buena administración y derecho al procedimiento administrativo debido 310 (2001); M.I. Jiménez Plaza, El tratamiento jurisprudencial del trámite de audiencia 23 (2004); M. Sánchez Morón, Derecho Administrativo, cit. at 19, 209 ff.; S. Muñoz Machado, Tratado de Derecho administrativo y Derecho público general, II, 968 (2006) ff., with further references.

[28] Just a peculiar and very limited version of the rule of law (pseudo rule of law), of course, since a real rule of law requires nowadays democracy and

Not by chance, under General Franco's regime the right to be heard was only recognised to individuals, and not to organised groups. The right to be heard was also applied only in adjudication procedures, and not in rulemaking ones. Groups, rather than individuals, can be an effective counter-power, and administrative regulations implicate a much stronger political dimension than individual decisions. The right to be heard was extended to groups and to rulemaking procedures only after Spain became a democracy.

So, when is participation only an instrument of the rule of law and when does it also reinforce the democratic principle? Where is the dividing line between both functions of participation?

From my point of view, two key elements are the range of the decision (the number of persons affected) and the recognition of administrative discretion.

When an administrative agency withdraws a dangerous product from the market or sanctions a driver who has exceeded the speed limit or who has drunk too much, it seems clear that the right to be heard of the affected company or individual has nothing to do with democracy. Participation here is only related to the rule of law: participation gives affected parties the opportunity to defend themselves and to make sure that their rights , the rights conferred by the legal system, are respected. In these examples, participation has just a defensive nature, resembling defence rights in judicial procedures.

Participation is instead directly connected to democracy when it takes place in administrative procedures that requiring administrative agencies to exercise discretion on decision that might affect many people, as happens, for example, in rulemaking

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fundamental rights protection. However, under Franco's dictatorship, the right of individuals to be heard was effectively granted by Spanish administrative agencies and courts. Even if authoritarian and non democratic the rule of law governed administrative agencies' actions, at least with regard to administrative decisions without political connotation. Otherwise hadn't Franco's regime lasted almost forty years. Many scholars still believe today that Spanish Administrative law had its golden age in the second half – 1954-1975 – of that dictatorship (S. Martín-Retortillo Baquer, Instituciones de Derecho Administrativo 67 (2007); J.A. Santamaría Pastor, Wissenschaft des Verwaltungsrechts. § 68 Spanien, in A. von Bogdandy; P.M. Huber; S. Cassese, Ius Publicum Europaeum, IV, par. 66 ff, in press).

and planning procedures or in certain authorisation procedures, such as those regarding the authorisation of nuclear plants.

In this second group of cases, the final decision is not predetermined by the legislator (by the institutions of the representative democracy), and it is left to the discretion of the administrative agency. Democracy demands then that all interested parties and citizens, not only the more influential ones participate in the decision-making procedure; hence, representative democracy is complemented and enriched by participatory democracy. Participation in these types of decision is not just a defensive nature; but it also contributes to grant quality and soundness to the drafted regulation or decision where participants contribute to define and to represent the public interest.

Participation has obviously this democratic dimension when it is carried out through información pública and other consultation modalities addressed to the general public – to the citizens as such, uti cives – and not only to the affected parties. But even the hearing of affected parties has a democratic connotation in such a wide range of discretionary procedures. This is shown by the fact that in rulemaking procedures not all affected parties – and not even all existing associations and organisations that represent them – shall be heard: it is enough that some representative associations and organisations of all affected interests are consulted. Such participants are selected by an administrative agency not in consideration of the concrete individuals they represent, but based upon the interests they embody. What really matters is that all diverging interests are considered by the administration.

Affected parties try obviously to defend their interests, but when doing so they reflect , at least to some extent, the pluralism existing in the society and introduce a democratic input into the rulemaking procedure. On the other hand, interested parties may make comments on the whole drafted regulation and not only on the concrete aspects that may affect them more directly. However, the best way to avoid the risk of neo-corporatism and to strengthen procedural democracy and the equality principle is to

encourage the participation of the general public and not only of the more influential and well organised interested parties. [29]

Both types of participation in administrative procedures should be distinguished clearly. To do so, some authors consider that the term "participation," in a narrow sense, should be reserved to refer only to that connected to democracy. [30]

Of course, citizen's participation doesn't only serve to extend the rule of law and to reinforce democratic legitimacy of administrative action. Participation also satisfies other important functions linked to administration's effectiveness and efficiency, [31] such as the gathering of relevant information, the increase of the acceptance of administrative decisions and the reduction of litigation.

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[29] F.J. Rodríguez Pontón, Participación ciudadana en los reglamentos y reserva de ley: algunas consideraciones, 21 Autonomies 283 (1996).

[30] M. Sánchez Morón, Derecho Administrativo, cit. at 19, 466. Very skeptical about the concept of participation, due to its ambiguity, J.A. Santamaría Pastor, Fundamentos de Derecho Administrativo, 247-248 (1988) (now in Principios de Derecho Administrativo General, I, 2nd ed., 88 (2009). On the general debate on participation that took place in Spanish Administrative law after the Constitution of 1978 was passed see S. Muñoz Machado, Las concepciones del Derecho Administrativo y la idea de participación en la Administración, Revista de Administración Pública 84 (1977); M. Sánchez Morón, La participación del ciudadano en la Administración pública (1980); Id., Participación, neocorporativismo y administración económica, in S. Martín-Retortillo Baquer (ed.), Estudios sobre la Constitución española. Homenaje al Profesor Eduardo García de Enterría, vol. 5, (1991); T. Font Y Llovet, Algunas funciones de la idea de participación, Revista Española de Derecho Administrativo 45 (1985); A. Pérez Moreno, Crisis de la participación administrativa, Revista de Administración Pública 119 (1989), with further references.

[31] Spanish Administrative Law scholarship usually bases the principles of administration's effectiveness and efficiency on the social state clause (Sozialstaat), the third structural principle of the Spanish state along with the democratic principle and the principle of the rule of law (Art. 1.1 of the Spanish Constitution). See L. Parejo Alfonso, Derecho Administrativo, cit. at 19), 141 ff.; J.A. Santamaría Pastor, Principios de Derecho Administrativo General, I, cit. at 30, 67 ff.

ITALIAN JOURNAL PUBLIC LAW

Vol 2 No 2/2010

PARTICIPATION IN RULEMAKING IN ITALY

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Abstract

In Italian law there are no general statutory provisions requiring participation by interested parties in rulemaking procedures. However, specific provisions requiring various forms of participation for certain kinds of procedures or authorities are increasing in number. After describing some relevant features of the Italian legal system and accounting for the legal regime of rulemaking, this paper provides a short overview of the relevant law, and considers the reasons for the lack of general statutory provisions and for the rise in participation practice. In conclusion, it focuses on some recent developments that could restrict or jeopardize participation in rulemaking.

TABLE OF CONTENTS:

1. The administrative nature of rulemaking.

As in other European countries, the principle of division of powers is not fully operational in the Italian legal system. As for rulemaking, however, its inferences are quite relevant, as they produce two clear-cut distinctions: the first is the distinction between statutory law and administrative acts; the second is the

This paper is the revised version of the report presented at the Workshop "Participation in Rulemaking in Europe", Osnabrück, February 12th, 2010. I wish to thank Lorenzo Casini for his comments on a previous version of the paper.

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one between judicial functions and administrative functions. On both distinctions, administrative rulemaking lies entirely on the administrative side. Firstly, regulations issued by administrative bodies (including the Government itself) are deemed to be administrative in nature, unlike the acts issued by the Parliament and by the Government in their exercise of legislative powers. Secondly, the Constitution firmly states that the judicial review of any act of a public agency may never be prevented nor limited: public agencies decide, courts review their decisions.

These features produce important effects on rulemaking. On the one hand, the legal framework of administrative regulations is the one provided by the law for administrative acts, although with some important variations. On the other hand, such regulations are subject to judicial review like any other administrative act, with a few procedural peculiarities arising from the structure of the administrative court procedure. Courts are bound by legislative acts, but they may void administrative acts, including regulations issued by agencies. Remarkably, as administrative procedures are conceived as being different in nature from legislative and judicial ones, their general rules reflect neither democratic concerns, typical of legislative activity, nor the adversarial design of judicial proceedings.

Two further remarks are necessary. Firstly, however strict the distinction between legislation and administration may be, rulemaking questions the distinction between lawmaking and law enforcement. The difference between "regolamenti" (regulations) and "atti amministrativi generali" (general administrative acts) is meaningful in this regard. The former are considered "atti normativi" (regulatory provisions) and are included among the sources of law, they thus participate in the corresponding legal framework: they must be complied with by other administrative acts, their infringement is a breach of law, the court is required to know them. The latter are simple administrative acts, even if they are addressed to many people or to all citizens. The difference between the two types is often very uncertain or left to the decision of the issuing authority, which may often freely select the procedure to be followed.

Secondly, Italian public law is quite "court-oriented". Unlike other countries, where the principle of the division of powers gives rise to limitations to court powers on administrative

decisions, the Constitution establishes the courts as the paramount, if not only, instrument for the protection of individuals from the administrations. The protection of individual rights, which can be granted by administrative authorities – including independent ones – is never deemed to be enough: in opposition to their decision, one can always ask for judicial review. Moreover, the Constitution prohibits the establishment of special courts different from those envisaged by the Constitution itself. Therefore, the distinction between judicial authorities and administrative ones is very strict. As for rulemaking, this means that there are no limits to the scope of judicial review of regulations and general administrative acts.

2. Participation in rulemaking: an overview.

Apart from the said provisions, the Italian Constitution does not say much about administrative action. Issued in 1948, when the principles of administrative procedures were not very "trendy" in Europe, the Constitution does not state any as such and does not regulate administrative rulemaking either. The only relevant provision, introduced in 2001, concerns the distribution of the power to issue "regolamenti" (the regulations that are legal sources) among national, regional and local authorities.

With the lack of constitutional provisions, one has to refer to the ordinary legislation. As opposed to the original project that produced it in 1990, the general statute on administrative procedure does not provide for participation in rulemaking procedures. In fact, it does put forward a number of provisions concerning participation by interested parties: they have to be informed when the procedure begins, have the right to access files, and may submit written statements and documents. However, the statute explicitly excludes the procedures for the issue of regulations and general acts from the scope of these provisions. Therefore, in general terms, participation is granted in adjudication and not in rulemaking. This exclusion is meaningful in terms of the concept of participation embraced by the general statute: participation is a tool for the protection of individuals and also a channel for the cooperation of citizens in the actions of agencies, but it is not an instrument of democracy, nor a way for citizens to take part in administrative decisions.

Participation in rulemaking is therefore not a general principle of the Italian law. It is, however, a general principle adopted by a number of Italian regions, which have their own general statutes on administrative procedures. Moreover, in national law, participation is the rule for some types of rulemaking procedures and for specific sectors – forms of participation are established both in statutes issued before 1990 and in statutes issued later.

As for regional law, after the constitutional reform of 2001, it is still unclear to what extent Parliament may set out general rules on administrative procedures and to what extent regional parliaments may set out different rules. It is not disputed, however, that regions may provide a general statute and that the latter can provide for increased protection of interested parties, even in terms of increased participation; some regional statutes do, with provisions contained either in their general statutes on administrative procedure, or in other statutes. The main example is the Tuscan statute issued in 2007, which both recognizes in broad terms the right to participation in regional policymaking, establishes a regional authority for the protection and promotion of these rights, requires a public debate for important projects, and sets general rules for regional rulemaking and planning.

As for pre-1990 statutes, the main example is the land planning act, issued in 1942. It entitles all citizens to access planning projects and to submit written statements, and allows for stronger forms of participation by interested parties. As an example, the provisional urban development plan of a town has to be published, and anybody may submit "observations"; similarly, real estate owners may submit "oppositions" against the provisional detailed plan for their area. Of course, these provisions appeared very modern in 1942, but show their limits today: participation may only take place in written form and is allowed only at a very advanced stage of the procedure, thus it is quite unlikely to substantially affect the administrations' decisions. These flaws are however corrected by the statutes of many regions, which use their legislative power in this field in order to introduce different instruments of participation, such as: "planning conferences" in which private parties are admitted; the publication of early projects, open to citizen contribution; statement of reasons, in which the agency must account for the

agreement or rejection of the proposals of interested parties; and various forms of agreements between the proceeding agency and the interested parties. Moreover, local authorities often adopt further mechanisms of participation, which are regulated by specific regulations (this happens for example in the largest cities, such as Rome).

As for post-1990 statutes, participation in rulemaking is largely the outcome of the influence of global or European law. This is the case, for example, in environmental law, where former Italian statutes provided for access to information, but not for participation in administrative procedures. Many recent statutes, on the contrary, offer many forms of participation in such procedures: a good example concerns strategic environmental assessment. However, these forms of participation are often simply mentioned by legislation, without any specific rules or procedures, and they are not mandatory (this is the case, for instance, for public enquiries).

The main field of participation in rulemaking, however, involves the regulatory powers of independent regulatory authorities, which in the last decades spread across Italy as well as other European countries. Some of them – especially the ones established lately – have almost spontaneously set quite good rules on participation. For example, on the basis of a vague provision of a wide-ranging statute on public utilities, the two existing authorities (one for energy, one for telecommunications) developed sound rules of procedure, which make intensive use of the notice and comment format, distinguish the proceeding office and the decision-making one, and allow for hearings with the interested parties. Other independent authorities – mainly the older ones supervising financial markets – did not initially embrace the principle of participation and the other principles of good administration. Some of them even managed to be legally exempted by the general statute on administrative procedure: this is the case for the Bank of Italy and for the securities market Commission (Consob), to which that statute used to apply only "as far as compatible". These provisions, however, have been repealed, and these authorities were forced to implement those principles by a 2005 statute, which set quite strong rules on participation: transparency, regulatory impact assessment, consultation of the representatives of regulated industries and consumers unions.

Overall, regulation in some of the most important sectors of the economy is now subject to rules of participation which often take the form of the notice and comment process: the rulemaking authority is asked to publish a project, any interested party may submit observations, and the authority is required to take them into account. Any interested party may challenge a regulation or general act in front of an administrative court. If this happens, the court will review compliance with procedural law and examine the statement of reasons, in order to check that all the relevant contributions have been considered.

Apart from these special provisions, however, rulemaking does not yet require participation. There are no participation requirements in Government rulemaking, including in those areas intensively affecting citizens such as health care; nor for central public bodies, such as those operating in the social security sector; nor for local government bodies, which have relevant regulatory powers. Very important regulations, such as the general regulation on public procurement and the one on local utilities are going to be issued in the coming months, without any chance for participation by private parties.

The picture, however, is not yet complete, as it shows only the law in theory. The law in practice is quite different and shows many different forms of participation, which is however often very informal and scarcely regulated. It is the consequence of the pervious nature of the Italian administration, which was very open to the influence of interested parties and organizations. Many important administrative decisions, often regulatory in nature, are made after informal but intensive negotiations with the regulated industry or professional workers trade unions. Relations between agencies operating in specific sectors and the corresponding regulated industry unions have always been intense. As an example, the Government would not make a decision concerning state aids to carmakers without a thorough consultation of the main national producers. Similarly, the Mayor of Rome would never make a decision concerning taxi licences or taxi fares without having previously secured consent from drivers. Of course, an informal and unregulated participation brings about a greater danger of corruption and the risk of disproportionate interest representation. Both risks are relatively strong in the Italian administration.

The reality of the Italian administrative system, furthermore, also manifests other forms of participation by interested parties, other than procedural participation. In the seventies, scholars used to distinguish between procedural and "organic" participation, the latter being the appointment of interest representatives as members of public bodies, charged with administrative tasks linked with corresponding interests: for example, professors and students in bodies operating in the Ministry of Education and in the universities, industry representatives in bodies operating in the public works sector, trade union officers in bodies operating in several areas of the economy. In some cases, the whole public body entrusted with administrative tasks in a certain area, is composed of interest representatives: this is common, for example, for many public bodies operating in the social security sector. In other cases, administrative tasks are assigned to ruling bodies composed of representatives elected by the professionals: this is the case of many professional associations (lawyers, doctors, engineers and many more), to whom the law grants important regulatory powers. In all these cases, procedural participation would be redundant.

These other forms of participation undoubtedly have flaws as well. Firstly, they are permitted only for selected categories, such as those practising the most esteemed professions: this explains the origin of the corresponding public professional associations, which are the most ancient and powerful. Secondly, when professional bodies are charged with the pursuit of public interests, it is always possible that they may be biased towards professional interest rather than public interest: many people are of the advice that this happens frequently with public professional associations. Nevertheless, this diversified participation has often largely compensated for the lack of procedural participation and has altogether secured good channels of communication between public authorities and civil society.

The environment arising from the absence of general rules, from the variety of specific ones, and from the availability of several informal and alternative instruments of participation, is a mixed one. This environment reflects the general attitude of Italian legislation towards participation, which is an ambiguous one. This attitude displays a tension between the principle of impartiality,

which requires administrative neutrality and opposes interest representation, and a concern for democracy, which requires a greater participation by concerned citizens in procedures affecting their interests. One could say that despite the absence of general rules, there is much participation in administrative rulemaking. However, this participation is usually directed at defensive purposes and at collaborative ones, but not at democratic purposes: interest representatives are allowed and encouraged to express their point of view, in order to both protect professional or class interests and provide useful information to the administration. But their role is not usually conceived as a way for citizens to take part in the performance of administrative tasks and to contribute to the pursuit of public interest.

One last remark – what has been reported so far shows a frequent gap between theory and practice in participation. In some cases, the law has provided certain forms of participation in rulemaking and has introduced new mechanisms, such as the public inquiry, but these provisions were not implemented because of political and bureaucratic opposition and because of the fear of impartial procedures and independent officers. In other cases, the law did not provide for participation, but local authorities and national agencies however laid down solid rules of participation (as in the land planning sector). This difference between statute provisions and administrative reality is quite typical of the "Italian style": in theory Parliament can do anything, but in practice the administrations' autonomy is great.

3. Arguments for and against.

A certain hostility towards participation can be traced back not only to the principle of impartiality, but – more generally – to the traditional way of conceiving democracy, administration, and relations between citizens and public authorities.

Participation in rulemaking procedures is an instrument of "direct democracy", a channel for communication between public administration and society. This kind of democracy has never been paramount in the Italian law, not even when the Fascist regime established the corporative system, intended as a tool for confrontation and synthesis of the interests of diverse professional categories. It was the outcome of an intense cultural debate on the

inadequacy of the political system and on the need for more representation of interest. The present Constitution carries a reminder of that system in the provision of the National Council on Economy and Labour, a body that has always suffered substantial irrelevance within the institutional landscape. In fact, the Constitution and the political and scholarly mainstreams have given much more importance to indirect democracy and to political representation: politicians were conceived as the necessary intermediaries between the administration and citizens, because they can legislate on administration and because ministers can address the action of the agencies.

One of the consequences of the emphasis on political representation is the intrusiveness of the law: parliamentary bills and governmental law decrees, constituting primary law and being mandatory on administrations, have often been used to establish very detailed regulations, even in technical matters. This reduces the scope of administrative rulemaking and therefore scales down the problem of participation. In fact, participation is still ensured, but at lawmaking level and in a very informal fashion: ministerial cabinets and parliamentary commissions are excellent venues for negotiations. This system, of course, does not ensure transparency in participation and also fuels legislative inflation, which is very high in Italy.

Another consequence of the emphasis on political representation is the concentration of rulemaking powers in the hands of the national Government and regional governments. Even when the rules are set at administrative level, this is often the highest administrative level, as regulatory powers are conferred to Government as a whole or to one or more Ministers: these are too high-ranked, too far from citizens, and too closely incorporated in the political circuit to be open to participation by interested parties different from powerful industries.

Consistent with this concept of democracy is the concept of administration that has long prevailed in research and in institutional thinking. Public administration was conceived as a mechanical instrument for the execution of the law and of political decisions. In accordance with this view, the duty of secrecy was considered a general principle and there was little room for transparency, which is a prerequisite for participation. There was an unrealistic faith in the ability of administrative agencies to

obtain all relevant information without consulting the regulated parties. The authoritarian attitude of administrative law, which held sway for a large part of the twentieth century, offered a bilateral, adversarial view of relations between agencies and citizens. Finally, in harmony with the said concepts of democracy and administration, and as a consequence of the strict separation between judicial authorities and administrative ones, the protection of individuals was always conceived mainly as judicial protection.

The history of the national statute on administrative procedure provides further evidence of these tendencies. The statute, issued in 1990, was later amended several times, but Parliament never considered introducing instruments of participation for rulemaking. It has strived to adjust and improve other parts of the statute, but not the ones concerning participation. Among the provisions that were more frequently amended there are those relating to the "conferenza di servizi" ("services conference"), an instrument aimed at forcing the different authorities involved in the same procedure to come to a decision. This shows that the main concern of Parliament is coordination of public parties rather than participation by private parties.

Participation in rulemaking has also been hindered by some factors of a less theoretical nature. One is the question of time and money. The urban development plan of Rome is a good example: it was preliminarily published in 2003, interested parties brought 10,000 observations, it took three years to assess these observations, the plan was finally issued in 2008, and this was only the beginning of the judicial review process.

Another practical reason against participation is peculiar to the Italian administration, and it is its resemblance to a weak giant. It is often weak in its relations with political bodies and also with private organizations. But it is large, it performs many functions, and it is accustomed to performing even more of them as public bodies and public companies were the main or exclusive providers of many services of general economic interest, such as energy, telecommunications and air transport. In these areas, there was no need for participation by regulated industry in rulemaking, simply because there was no regulated industry separate from the State: the regulators and the regulated were the same subjects. In this situation, consumer participation was not promoted either, as

relations between consumers and providers were one and only with relations between citizens and the State: political bodies were the ones expected to protect consumers from public utilities, and were entrusted with regulatory powers. Furthermore, consumer participation was also frustrated by the lack of adequate consumer associations, which developed late and slow. Only business associations and trade unions had an early development and were frequently involved in rulemaking procedures.

Both theoretical and practical reasons against participation are however losing ground. The concepts of democracy and administration have evolved. Representative democracy is still paramount, but various forms of direct democracy have been introduced and are considered a necessary completion and correction of the political circuit. Mainstream political and legal thinking recognize that democracy has to do not only with counting preferences, but also with debating and transforming preferences.

As for the concept of administration, the authoritarian attitude of administrative law has given way to its liberal attitude, which emphasizes the instruments for the protection of individuals. Non-judicial instruments of protection, and dispute resolution, have developed. Recognition of the plurality of the administrative system and appreciation for public-private cooperation brought about a less adversarial concept of administrative law. Law scholars recognize that the administration represents not only the execution of law, but also decision-making and interest assessment. Transparency is more and more a general principle of administrative law. Awareness that agencies are open to the influence of interested parties advocates for general rules on open participation.

Rulemaking, in particular, has changed in several ways. First, it is less and less centralized and assigned to the national Government. A constitutional provision, as mentioned before, establishes regional governments and administrations as ordinary rulemaking bodies. As explained before, in many sectors such as services of general economic interest and financial markets, rulemaking powers are assigned to independent regulatory commissions. These regulatory commissions, which are not politically accountable and have an open-ended mission, often foster the participation of interested parties in order to consolidate

their legitimacy and to strengthen their position within the institutional system. In many fields, regulatory powers grow in scope and nature, sometimes taking the place of adjudication (for example, for general authorisations in the field of telecommunications), as well as in complexity, making it all the more important to obtain information and preferences from interested parties. Rulemaking procedures evolve too: regulatory impact assessment is more and more required by the law, calling for more accurate preliminary examinations.

Finally, the practical reasons that used to hinder participation in rulemaking are also vanishing. Simpler participation rules may now be introduced for the most complicated procedures. Sectors previously subject to public monopolies are now open to free competition, public utilities were privatised and now require regulation by public authorities, while consumers need to be protected and to have a voice in regulation. Consumers associations have spread and grown.

4. The evolving scope of rulemaking.

All these developments encourage procedural participation in rulemaking, which is actually spreading in various fields. Still, further developments may restrict or jeopardize its spread. These developments are connected both with the attitude of legislation and with the evolution of administration. At both levels, a tendency to escape the ordinary legal framework may be detected.

As for legislation, the balance between statutory law, which binds administrations, and administrative regulations issued by the administrations, is always insecure. Many decisions are made through statutes, exactly to avoid complex administrative procedures that would grant participation and effective controls. A fair example is the recent approval of the agreements between motorway management companies and the public body in charge of their supervision. These contracts, which regulate very important issues such as tolls and improvement works required from the companies, should be approved by specific government bodies. When the proposed agreements were rejected, they were then approved by Parliament through a statute: the law was used in breach of the law. Drivers had no chance of expressing their views.

Another way to escape the ordinary legal framework that was very common in the past months is the use of emergency powers. Since ordinary procedures are regarded as slow and intricate, extraordinary powers are used in many situations that are not at all alarming, nor unpredictable. The number of "ordinanze di urgenza" (emergency orders) issued by the Government has dramatically risen. The national Agency for civil protection, in charge of emergencies, is entrusted weekly with new powers: therefore, many more decisions are made, and much more money is spent, through quick and simplified procedures that do not allow for participation.

The emergency model is spreading also across the administrative organization. A very recent statute has established a civil protection company, owned by the government, set to support the Civil Protection Agency. Of course, it will act as a private company and will not be bound by the administrative procedure statute. Publicly-owned companies were sometimes established in order to organize important events, such as Olympic or football games.

More generally, among the main trends in present administrative law, the use of private law models for public administrations and the assignment of public functions to private subjects should be mentioned. These trends certainly have positive aspects, but they make it more difficult to ensure participation, although the law and the courts often require these private subjects to apply the general principles of administrative procedure, including the principle of participation.

Overall, participation in rulemaking is expanding in the Italian public administration, but the public administration affected is somehow shrinking.

LEGISLATIVE REGULATION OF ADMINISTRATIVE PROCEDURES: THE ROLE OF THE BUND AND THE LÄNDER IN GERMANY

Diana-Urania Galetta*

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1. Subsidiarity principle and competence to adopt rules in Germany's administrative procedure

Germany has a strong tradition of regional government dating back to the founding of the German Empire in 1871. Since unification in 1990, the Federal Republic has consisted of 16 Länder: the 10 Länder of the former West Germany, the 5 new Länder of the former East Germany, and Berlin.

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In this federation of 16 "Länder" each Land has its own government and administration and its own legislation regarding administrative procedure. In Germany we therefore have an administrative procedure law in every federal state (Land), as well as a general law on administrative procedure at federal level (Bund): the well known "Verwaltungsverfahrensgesetz" of 1976 (in the version re-published on 23/01/2003, in BGBl. I, p. 102 and last modified by article 10 of the Law of 17/12/2008, in BGBl. I, p. 2586 and art. 2 par. 1 of the Law of 14/9/2009, in BGBl. I, p. 2827)

At federal level, there aren't many state authorities besides the government. So, as a rule, the Länder implement federal law through their Länder-administration. In this regard, as far as the Grundgesetz is concerned, in article 74 GG concerning the subjects of concurrent legislation, there is no reference to administrative procedure, but only to "court procedure". This is why, following the general rules, competence in procedural matters should follow competence in substantial matters (principle of annexed competence - Annexkompetenz). But, as far as the so-called "Execution of federal laws in their own right" (landeseigener Vollzug) by the Länder is concerned, the new version of article 84 GG, as amended in 2006[1], clearly states that "Where the Länder execute federal laws in their own right, they shall regulate the establishment of the authorities and their administrative procedure", and that even if federal laws should provide otherwise it is only in exceptional cases, where there is a special need to adopt a uniform legislation for the entire territory of the Federation, that such a law, adopted with the consent of the Bundesrat, could exclude the possibility for the Länder to adopt a diverging legislation.

The situation is no different when the Länder execute federal legislation on behalf of the federal authorities (Auftragsverwaltung), since the Länder's general competence on administrative procedure has in any case been clearly admitted by article 1, par. 3 of the Federal Law on Administrative Procedure of 1976 (VwVfG), which states, more generally, that "This Act shall not apply to the execution of federal law by the Länder where the administrative activity of the authorities under public law is regulated by

[1] The Reform of 2006 is the most comprehensive reform of the Grundgesetz since its implementation in 1949.

a law on administrative procedure of the Länder". This provision is an application of the well known "subsidiarity principle" to the field of administrative procedure, and was introduced in the Federal Law on Administrative Procedure (VwVfG) only at the very end of the procedure for its approval, following a proposition by the Bundesrat. As a matter of fact, due to this provision and to the fact that every Land has adopted a law on administrative procedure, the scope of the Verwaltungsverfahrensgesetz is limited only to the "bundeseigene Verwaltung": i.e. administrative activities under public law of the Federal Government and public law entities, institutions and foundations operated directly by the Federal Government (article 1, para. 1, VwVfG).

Regarding the scope of the Verwaltungsverfahrensgesetz, it must also be stressed that, despite its unquestionable importance, administrative rulemaking is not included in it, since it concentrates on single administrative decisions (Verwaltungsakt) and administrative contracts (Verwaltungsvertrag). Consequently, Statutory Instruments (Rechtsverordnung), By-laws (Satzungen) and the different types of Circulars (Verwaltungsvorschriften) are all excluded from the scope of the Federal Law on administrative procedure (VwVfG).

2. The coordination process: simultaneous legislation (Simultangesetzgebung), static and dynamic reference (statische und dynamische Verweisung)

Even if in 1976 it was decided that, in compliance with the subsidiarity principle, the Länder should have the right to have their own rules on administrative procedure, at the same time it was clearly important for German citizens to have identical administrative procedure rules or at least very similar ones in the different Länder, in order to facilitate moving from one state to another or having commercial activities in several federal states. So, while deciding to leave the Länder free to adopt autonomous rules on administrative procedure, it was at the same time decided to try to coordinate the content of the laws on administrative procedure of the "Länder" with the content of the Law on administrative procedure (VwVfG) adopted at a federal level. In fact, as far back as February 1976 (the Law on administrative procedure of the Bund is of May 1976) the Ministries of Home

Affairs of the Länder made the unanimous decision that Länder should adopt laws on administrative procedure with a content identical to that of the Bund's administrative procedure law. This is the well-known "decision on simultaneous legislation" (Beschluss zur Simultangesetzgebung) with which the Governments of the Länder have till now - and despite all problems - complied.

The coordination process has not always been very easy. But, in as far as the main important topics are concerned, thanks to this agreement it has until now been possible to guarantee widespread consistency in the field of administrative procedure in the Federal Republic of Germany.

The principles of fairness and loyal cooperation have therefore been, so far, the essential guidelines in the field. From a technical point of view the solution chosen by most of the Länder (16 Länder) in order to guarantee consistency as agreed, has been that of adopting "full laws" (Vollgesezte) on administrative procedure, which reproduce more or less the content of the Law on administrative procedure of the Bund (Baden-Württemberg, Bayern, Brandenburg, Bremen, Hamburg, Hessen, Mecklenburg-Vorpommern, Nordrhein-Westfalen, Saarland, Sachsen-Anhalt, Schleswig-Holstein und Thüringen). However, some of them chose a different solution, which consists in adopting a law containing only a few provisions and then a static or even dynamic reference[2] to the Law on administrative procedure of the Bund (Berlin, Niedersachsen, Rheinland-Pfalz und Sachsen).

3. The provisions of article 29 of Italian Law nr. 241/90 on administrative procedure

According to par. 1 of article 29, as amended by Law 69/2009 (Law n. 69 of the 18th June 2009, laying down "Disposizioni per lo sviluppo economico, la semplificazione, la competitività nonché in

[2] On the possible unconstitutionality of dynamic reference to a Law of the Bund and its reasons, for example Bayerisches Verfassungsgerichtshof, 31/1/1989, in NVwZ (1989), 1053: "Eine dynamische Verweisung von einem Landesgesetz auf ein Bundesgesetz kann als "versteckte Verlagerung von Gesetzgebungsbefugnissen" unter dem Blickwinkel des Demokratieprinzips verfassungsrechtlich bedenklich sein, und zwar vor allen Dingen dann, wenn es sich um grundrechtsrelevante Regelungen handelt, bei denen der Gesetzesvorbehalt eine eigenverantwortliche Prüfung durch den zuständigen Gesetzgeber erfordert, oder wenn die verweisende und die in Bezug genommene Vorschrift zu ganz verschiedenen Rechtsbereichen gehören".

materia di processo civile", in Gazzetta Ufficiale n. 140 of 19/6/2009), of Italian Law 241/90 on administrative procedure, only the provisions contained in article 2-bis, 11, 15, 25 par. 5, 5-bis and 6, as well as those in chapter IV-bis, apply to all public administrations. Those provisions refer to the consequences of the administration's delayed conclusion of procedures (art. 2-bis), to agreements integrating or substituting an administrative act (art. 11), to agreements between public administrations (art. 15), to the right to appeal decisions concerning right to access to documents (art. 25 par. 5, 5-bis and 6), as well as to all provisions of Title IV-bis concerning effectiveness, invalidity, withdrawal and rescission of administrative acts.

For all the rest, according to article 29, par. 2 - which was already introduced by Law 15/2005, following the federal constitutional reform of 2001 - the Italian Regions shall themselves regulate the subject-matters governed by the law on administrative procedure. In so doing, they shall comply both with the constitutional system and with guarantees to citizens regarding administrative action, as defined by the principles contained in the law on administrative procedure.

As this last paragraph was far from clear in its content, Law 69/2009 introduced two new paragraphs in article 29: par. 1 specifies – as we have already seen – which provisions shall apply to all public administrations, including Regional ones; par. 2-bis and 2-ter specify which provisions are to be considered as pertaining to the basic level of benefits/services (livelli essenziali delle prestazioni) referred to in article 117 par. 2m of the Italian Constitution, and cannot therefore be derogated in peius. Which means that, on the contrary, the Regions shall have the power to provide for higher levels of protection.

Para. 2-bis specifically considers as pertaining to the basic level of benefits/services, provisions regarding the public administration's duties to guarantee participation by interested parties in procedures, to identify the person in charge of the procedure, to conclude procedures within the established timeframe and to guarantee access to administrative documentation, as well as the provisions relating to the maximum duration of procedures. Finally Par. 2-ter also adds provisions concerning the declaration of the beginning of an activity and the "silence-equals-consent" principle.

4. Conclusions: a paradox?

As we have seen, in Germany we have a law on administrative procedure in every federal state (Land), as well as a general law on administrative procedure at federal level (Bund). But this does not seem to affect the uniformity of rules on administrative procedure throughout the entire territory of the Bundestaat, thanks to the effort constantly made by the Länder to coordinate their legislations on administrative procedure. Therefore there has not until now been a need for the federal lawmaker to implement – which he could, in accordance with the provisions of art. 84 GG[3] – provisions preventing the Länder from implementing norms on administrative procedure diverging from the Federal Law on administrative procedure (VwVfG).

On the contrary, Italy seems to be moving in quite a different direction. With Law 69/2009 national lawmakers felt the need to specify which provisions of the general law on administrative procedure should apply to all public administrations, regional and local ones too. Furthermore Law 69/2009 specified which provisions of the general law on administrative procedure were to be considered as pertaining to the basic level of benefits/services to be provided equally for all Italian citizens. All this seems to confirm the national lawmakers' fear of fragmentation and differentiation in standards at regional and local level. A fear that is also manifested in the Constitutional Court's attitude in its latest judgements[4].

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[3] Art. 84 par. 1 GG states that "In exceptional cases, owing to a special need for uniform federal legislation, the Federation may regulate the administrative procedure with no possibility of separate Land legislation".

[4] On this point, see the paper presented by Raffaele Bifulco, in this issue of IJPL.

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