



**PENN PROGRAM
ON REGULATION**
UNIVERSITY of PENNSYLVANIA

Administrative Procedure in Europe: National and Supranational Legislation

Giacinto della Cananea
Bocconi University

Penn Program on Regulation Research Paper Series
No. 22-02

October 2022

Administrative Procedure in Europe: National and Supranational Legislation

Giacinto della Cananea*

Administrative procedure legislation is increasingly important and interesting from a comparative perspective. There are two reasons for this. On the one hand, many national legal systems have adopted one type of administrative procedure legislation or another.¹ On the other hand, the adoption of a general framework on administrative procedure at national level is recommended by supranational and international institutions, such as the European Union (EU) and the Organization for Economic Co-operation and Development (OECD).² This constitutes a significant change in the pattern of modern administration. It opens up the field for new studies, not confined to the distinction between the legal systems which do not have general legislation on administrative procedure (notably the United Kingdom) and those which do have it (including Austria, France, Germany, Italy and Spain). It also includes consideration of similarities and differences among the latter group too, as far as their values, principles and rules are concerned.

In this short essay, general legislation on administrative procedure will be initially considered from a transatlantic perspective—comparing Europe and the United States. At first glance, there appear to be only differences across these procedural systems. In Europe, for example, there is no such thing as a federal Administrative Procedure Act (APA) as exists in the United States (US). However, the desirability of Europe having a general law on administrative procedure has been debated. Moreover, even a quick glance, national legal systems in Europe show the emergence of a vast movement towards the adoption of administrative procedure legislation. A comparative survey, therefore, can be fruitful. This will be followed by a discussion about administrative procedure at EU level, in light of a recent proposal to introduce an innovative codification. Next, the development of administrative procedure legislation within national legal systems will be examined on the basis of a recent comparative research, which focuses on their common and distinctive traits.³

* Professor of Administrative Law at the Bocconi University (Milan). This paper was presented at a workshop held at the University of Pennsylvania Carey Law School on June 10, 2022. I am grateful to Cary Coglianese and Neysun Mahboubi for the invitation, and to Francesca Bignami, Peter L. Lindseth, Fernanda G. Nicola, Susan Rose-Ackerman, Paul Verkuil and other participants for their helpful comments. The usual disclaimer applies.

¹ G.A. Bermann, *Foreword*, in J.B. Auby (ed.), *Codification of Administrative Procedure* (Bruylant, 2014), v.

² On the EU, see section 2; on the OECD, see J.E. Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 43 *George Washington International Law Review* 255 (2012).

³ This is the third of three articles. The previous two ones are G. della Cananea, *The Regulation of Administrative Procedure in Europe: A Historical and Comparative Perspective*, 32 *European Review of Public Law* 223 (2020) and G. della Cananea and L. Parona, *Administrative Procedure Acts in Europe: An Emerging "Common Core"?*, in *American J. Comp. L.* 2023 (forthcoming).

1. A Transatlantic Perspective

It must be stated at the outset that the differences of a historical, social, political and legal nature between Europe and the US are evident. These differences are both general and specific. The US is a federation with a unitary social basis; that is, there is a “people” of the US.⁴ Conversely, the Statute of London instituting the Council of Europe in 1949 presupposed the existence of a plurality of nations. Moreover, as early as in 1957 the Treaty of Rome established the intent to lay the foundations of an “ever closer union between the peoples of Europe,” a phrase which did not just recognize descriptively the existence of a plurality of nations, but attached legal relevance to it, while seeking to strengthen the ties between those peoples.⁵ More recently, the normative value of social pluralism, thus intended, has been confirmed by the preamble of the Charter of Fundamental Rights, which under Article 6 of the Treaty on European Union (TEU) has the same legal value of the treaties.⁶

The legislative regulation of administrative procedure, too, shows the diversity between the US and Europe. After the entry into force of the US APA in 1946, a state model APA has been adopted and subsequently revised. This has triggered new legislation within the states, two thirds of which have adopted one kind of APA or another. Legal scholarship has shed light on several interesting differences between these APAs, but it has also revealed some commonality, for example, with regard to the hearing of the individual within administrative procedure.⁷ In the European legal landscape, by way of contrast, there is no such thing as a quasi-federal APA. Until a few years, it could be said that we tended to think of administrative procedure legislation only in national terms.⁸ Still today, some commentators ask themselves whether certain constraints imposed on the exercise of power in, for example, rulemaking can be sensible and justified outside of a particular national context.

This attitude is neither right nor wrong in some absolute sense. However, it is limited both normatively and descriptively. Normatively, in contrast with the widespread but questionable opinion according to which the EU is undermined by different identities, Guido Calabresi has convincingly argued that, if the EU has resisted a unified identity for so many decades, it is

⁴ See B. Ackerman, *We the People: Foundations* (Cambridge, Harvard University Press, 1991) (for an analysis of the foundations of the US Constitution).

⁵ See M. Zuleeg, *What Holds a Nation Together? Cohesion and Democracy in the United States and in the European Union*, 45 Am. J. Comp. L. 505, 506 (1997) (pointing out the difference between the philosophies underlying the US Constitution and the EC Treaty) and G. della Cananea, *Differentiated Integration in Europe After Brexit: A Legal Analysis*, in I. Pernice and A.M. Guerra Martins (eds.), *Brexit and the Future of EU Politics. A Constitutional Law Perspective* (Nomos, 2019), 45 (discussing the interpretations of the Treaty of Rome Preamble’s clause about “an ever-closer union”).

⁶ The Charter’s preamble provides that “The *peoples of Europe*, in creating an ever-closer union among them, are resolved to share a peaceful future based on common values” (emphasis added).

⁷ See B. Schwartz, *The Model State Administrative Procedure*, 33 Wash. L. Rev. & St. B. J. 1 (1958) (noting the different purposes pursued by the Federal APA and the Model State APA); M. Asimow, *The Fourth Reform: Introduction to the Administrative Law Review Symposium on State Administrative Law*, 53 Admin. L. Rev. 395 (2001) (for whom the model State APA is one of the three most significant reform movements); J. Rossi, *Politics, Institutions, and Administrative Procedure: What Exactly Do We Know from the Empirical Study of State Level APAs, and What More Can We Learn*, 58 Admin. L. Rev. 961 (2006).

⁸ For a different approach, see J-B. Auby (ed.), *Droit Comparé de la Procédure Administrative. Comparative Law of Administrative Procedure* (Bruylant, 2016).

precisely because “the value differences are remarkably limited.”⁹ Even in the context of what has been regarded as the most serious crisis concerning the values upon which the EU is founded—including democracy, liberty and respect for the rule of law and fundamental rights—the criticism raised by the Hungarian government took the form of a challenge to a certain interpretation of the rule of law, as distinct from a criticism of the value itself.¹⁰ Moreover, especially for an American audience, it might be interesting to add that the consolidated case law of the European Court of Justice (ECJ) has argued that the general principles of law which are common to the legal systems of a Member State constitute general principles of EU law, including legality, due process of law, proportionality, and transparency.¹¹ These principles are enforceable before EU courts, including national courts when they apply EU law. Finally, in some areas, such as public procurements, the directives enacted by the EU do not just define common principles, such as transparency and free competition, but also establish the types of procedure which can be used by national contracting authorities.¹² The underlying reason is that, without a set of common rules to guide them, the objectives of the single market and the advantages that it is susceptible to ensure would be at risk.

Portraying the law of administrative procedure as a sort of national enclave is, therefore, limiting. It is for this reason that an independent group of scholars has elaborated the proposal of an EU regulation aiming at codifying the administrative procedures across the EU, including those which are characterized as “mixed” because both EU and national authorities take part in them.¹³ Although such proposal has been readily accepted by the European Parliament, it has not yet reached the legislative process. This will be discussed in the next section.

Meanwhile, it can be observed that, although no formal comparative analysis between the US and America is pursued in this work, “lessons” may well be learned by considering the results achieved in the two legal areas.¹⁴ Public lawyers in Europe have much to gain by reflecting upon the rich and sophisticated body of constitutional jurisprudence on due process of law in the US, as well as from the consolidated codification of administrative procedure at both federal and state level. Moreover, those who advocate some kind of participatory democracy with regard to administrative rulemaking may gain from the discussion in the US about its advantages and disadvantages. Public lawyers in the US may also hopefully have something to learn from the European experience. The vast majority of the Member States of the EU have adopted

⁹ See, in particular, G. Calabresi and E.S. Fish, *Federalism and Moral Disagreement*, 101 Minnesota L.R. 1, at 14 (2016).

¹⁰ European Court of Justice, Case C-286/12, *Commission v. Hungary* (endorsing the Commission’s claim that Hungary had infringed judicial independence) and Case C-156/21, *Hungary v. European Parliament and Council* (in which the Court dismissed the action brought against the conditionality mechanism which makes of respect of the rule of law a condition for receiving the resources managed by EU funds). For further analysis on how the crisis evolved, see G. Hamai, *The Fall of the Rule of Law in Hungary and the Complicity of the EU*, 12 It. J. Public L. 205 (2020).

¹¹ J.A. Usher, *General Principles of EC Law* (Longman, 1998) and T. Tridimas, *The General Principles of EU Law* (OUP, 2017, 3rd ed.).

¹² For further analysis, see S. Arrowsmith, *The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?*, 35 Public Contract L.J. 337 (2006) (arguing that the regime has moved in the direction of a system of common rules).

¹³ The sources that regulate EU administrative procedure are examined by J. Schwarze, *Judicial Review of European Administrative Procedure*, 68 L. & Contemp. Probl. 83 at 89 (2004).

¹⁴ For further discussion, see H. Hofmann and R.L. Weaver (eds.), *Transatlantic Perspectives on Administrative Law* (Bruylant, 2011).

administrative procedure legislation, in one way or another. This can show how a commonality may emerge without a pre-determined model or prototype. On the other hand, the persistence of differences that characterize European administrative laws can be a useful corrective to the idea that the development of administrative procedure legislation should necessarily bear a certain connotation. The experience of the EU itself shows the dialectic relationship between judge-made law and legislation. This relationship will be examined in the next section.

2. Towards a Codification of EU Administrative Procedure?

The discussion in this section will begin by briefly analyzing the arguments used in favor and against codification between the adoption of the Treaty of Maastricht and entry into force of the Treaty of Lisbon in 2009. This will be followed by an examination of the new constitutional framework laid down by the latter Treaty. The argument that will be put forward is that, in the new framework, Article 298 of the Treaty on the Functioning of the European Union (TFEU) lays down a constitutional duty to regulate procedure. The focus will then shift on how such provision may be implemented by way of model rules based on current law in order to systematize, fill existing gaps, and make innovative proposals for the fields where there are no clear rules for the protection of citizens and businesses.¹⁵

A. *The Debate on Codification: From Maastricht to Lisbon*

After the Single European Act, adopted in 1984, and the adoption of the measures aiming at achieving the Single Market, both politicians and academics began to raise the question whether the time was ripe for a codification of administrative procedure within the EU, including both adjudication and rulemaking.

Several arguments were brought in favor of a codification. Three of them will be briefly mentioned here. The first was the need of a better legal framework in order to protect individuals, social groups, and businesses. The second was that, while organized lobbyists and interest groups discretely influenced the contents of EC legislation and secondary rules, citizens' participation has been almost absent. The third was the need for a *legislative* codification, instead of leaving regulation to the courts.

These arguments, however, met criticism on various grounds. On the one hand, the advocates of judge-made law replied that judge-made law sufficed to protect individuals and businesses. Moreover, they argued that the courts could provide a more flexible adjustment, without the unnecessary uniformity which is an inevitable consequence of legislative regulation. On the other hand, whatever the desirability of a codification, there was not a proper legal basis for such legislation, which is necessary because the EU has enumerated domains of legislative competence.¹⁶

¹⁵ P. Craig *et al.*, *ReNEAUL Model Rules on EU Administrative Procedure* (Oxford University Press, 2017). The same text has been published in other languages, including French, German, Italian, Polish, Romanian and Spanish. The references made in the following footnotes to the Model Rules (MR) concern the English edition.

¹⁶ One of the first debates was held at the European University Institute in the mid 1990s. For the case for codification, see G. della Cananea, *From Judges to Legislators? The Codification of EC Administrative procedures in the Field of State Aid*, 5 *Rivista italiana di diritto pubblico comunitario* 967 (1995). For the case

Another counterargument was based on the institutional framework of the EU. While accepting in principle that the intervention of parliaments enhances democratic legitimacy, the counterargument was that this was not the case in the EU. The reason was that legislative authority was shared between the European Parliament and the Council of Ministers. It was wrong, however, to evaluate the Union on the basis of standards elaborated within national political systems.

At this stage of the analysis, it should be clear that the debate had many facets. Administrative action has grown increasingly different and more complex than it had been for some decades. Process rights had been enhanced in certain areas, but not in all. The courts have been facing new challenges as a result of the legislation aiming at protecting collective interests, such as a clean environment.¹⁷ The very success of the arguments in favor and against a codification of administrative procedure could not, and did not, depend only on the intrinsic soundness of those arguments. It was for political authorities to face old and new issues and decide whether or not legislation was needed and, if so, whether it ought to be defined either in broad, open-textured terms or in a detailed manner.

B. *After Lisbon: A Duty to Regulate Administrative Procedure*

The situation just described changed after 2009 due to the new constitutional settlement of the EU.¹⁸ Limits of space do not permit an analysis of the evolution of the EU's legal order. Suffice it to say, the Lisbon Treaty has recognized some changes; it has laid down a new constitutional imperative to regulate the conduct of EU administrative authorities; and, last but not least, it has introduced a new policy concerning administrative cooperation.

Constitutionally, the Treaty of Lisbon has not only reflected a much more differentiated membership than before due to the accession of ten new Member States. It has also strengthened the EU's democratic dimension, as is showed by the provisions concerning participatory democracy. It is precisely because the EU is a union of both States and peoples that the importance of the social element is recognized in the framework of the weight that is accorded to majorities in decision-making processes.¹⁹ Additionally, the Lisbon Treaty has given a new status to the Charter of Fundamental Rights of the European Union adopted at Nice in 2000. Article 6 (2) TEU gives to the Charter the same legal value of the treaties and it does so, significantly, in the context of a provision that recognizes the importance of both the European Convention on Human Rights and common constitutional traditions as sources of rights.²⁰ As a result, it is perfectly possible to

against codification, see C. Harlow, *Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Feet?*, 2 *European Law Review* 331 (1996).

¹⁷ On the Court's reluctance to give access to these interests, see C. Harlow, *Towards a Theory of Access for the European Court of Justice*, 12 *Yearbook of European Law* 213 (1992). On the variety of adjudicatory procedures, see M. Asimow and L. Dunlop, *The Many Faces of Adjudication in the European Union*, 61 *Admin. L. Rev.* 131 (2009) (pointing out that such procedures are often inquisitorial rather than adversarial, especially in the field of competition).

¹⁸ See P. Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford, Oxford University Press, 2013.

¹⁹ W. Van Gerwen, *The European Union: A Polity of States and Peoples*, Stanford University Press, Stanford, 2005.

²⁰ For further remarks, see P. Craig, *Constitutions, Constitutionalism and the European Union*, 7 *Eur. L. J.* 125 (2001) and I. Pernice, S. Griller and J. Ziller (eds.), *The Treaty of Lisbon and Fundamental Rights. EU Constitutionalism without a Constitutional Treaty?* (Springer, 2008) (examining its new legal status).

proffer systematic interpretations of the treaties based upon democracy and rights. It might, for example, be argued that we should foster fundamental rights, in the sense that without adequate procedural propriety and fairness those rights would remain on the paper. The “Model Rules” elaborated by ReNEUAL develop this argument by generalizing some existing institutions and proposing new ones for both individual decisions and contracts.²¹ It might, alternatively, be argued that if the EU has to be a participatory democracy, this does not concern only its political institutions, but also its administration. In this respect, the “Model Rules” go well beyond existing legal provisions. They delineate a general duty to consult the holders of the interests that can be affected by rulemaking, in its varieties of forms.

The Lisbon Treaty also contains an innovative and important norm, Article 298 TFEU.²² It has an innovative character because, on the one hand, it refers for the first time to the European administration, considered as a whole, including the agencies that have proliferated after 1991. Although such provision has not immediately received attention by many commentators, it is potentially very important. On the other hand, not only does Article 298 determine the principles guiding the European administration, in the sense that it must be independent, efficient and open, but it also individuates the means for implementing such principles and thus making them effective. It accords the primary responsibility to the Council and Parliament, which together constitute the dual legislator of the EU. They are entrusted with the power to enact regulations. The argument against codification based on the absence of a proper legal basis has thus lost much of its force, although the contours and contents of those regulations are far from being wholly clear.²³ That said, the language of Article 298 is mandatory (“shall establish provisions”) and it creates a clear relationship between ends and means. We will see in the next section what implications follow from this.

Meanwhile, it should be observed that administration—functionally intended—is of increasing relevance for EU law. For some countries of Central and Eastern Europe, the adoption of an APA has been part of the so-called strategy of pre-accession, with a view to obtaining EU membership. As a result, although the EU did not impose any obligation on its members to adopt an APA, its principles exerted considerable influence on would-be members. Membership is not, therefore, without consequences. It is even more so after the change brought by the Treaty of Lisbon. Article 197 (1) TFEU now provides that “effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.” Even the fact that this provision excludes “any harmonization of the laws and the regulations of the Member States”²⁴ serves to clarify that what is excluded is only harmonization,

²¹ Consider, for example, MR III-25 (2) on consultation of the interested public, according to which the “public authority may choose to consult through a public hearing. This hearing must be notified through public announcement, which must be posted on an official website... A public hearing must be held in sufficient time before the decision is made”.

²² Article 298 TFEU provides that: “1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration. 2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.”

²³ See P. Craig, *A General Law on Administrative Procedure, Legislative Competence and Judicial Competence*, 19 *European Public Law* 503 (2013).

²⁴ Article 197 (2) TFEU.

not approximation of national laws. There is, therefore, an intensified interest in the regulation of the administrative procedure of national agencies.

C. *Three Pathways for “Model Rules”*

Model rules may be accomplished in more than one way. Three pathways will be briefly considered here: (1) the adoption of a regulation or a set of regulations; (2) judicial enforcement; and (3) national legislation or government guidance.

A regulation or a set of regulations under Article 298 is, obviously, the optimal way to legislate on the administrative procedure of the EU. Operationally, model rules would work as a “boilerplate” to be supplemented with sector specific norms in the various areas. On the one hand, adequate flexibility would thus be provided by the *lex generalis–lex specialis* relationship. On the other hand, sector-specific norms would have to be interpreted in coherence with the general rules.²⁵ For this reason, the European Parliament has adopted various resolutions under Article 225 TFEU requesting the Commission to elaborate and submit a legislative proposal. However, thus far the Commission has refrained from so doing on two grounds: (1) there is no need of general legislation, because some sector specific adjustments will suffice, and (2) there is not an adequate legal basis.²⁶ The considerations made above show the weakness of the first argument. As regards the second one, it is clearly a political decision. Whatever its intrinsic soundness, whether or not it was a politically legitimate decision, it is for the Parliament to judge, especially for the new one which took office in 2019.

The second pathway to model rules is the judicial one. In the absence of legislation implementing the duty set out by Article 298, it would be for the courts to consider whether model rules may be helpful when the courts decide on the appropriate procedural and substantive principles that public authorities must respect. Agency action that infringes the general principles of EU law, as specified by model rules, would thus be unlawful. There is, in this sense, nothing odd or strange about a set of rules that are explicitly derived from the general principles of EU administrative law to be used when one of those principles is invoked before an EU court. This is indeed the paradigm when advocates general cite the jurisprudence of other courts or the works of learned experts. It has indeed been the case in the opinion delivered by Advocate General (AG) Campos Sanchez-Bordona in a recent case concerning an EU mixed administrative procedure—that is, a procedure in which both EU and national authorities intervene.²⁷ AG Kokott, too, has referred to model rules in another context, that of contracts concluded by the EU administration. She has observed that Member States have different ideas concerning the administration’s power to act as a public authority and, thus, to terminate a contract. As a result of this, she has argued that “the Commission’s power to adopt enforcement decisions in order to recover debts arising under a contract also cannot be rejected by reference to general principles of contract law.” The reason is that “such principles simply do not apply in such a general way to contracts of public

²⁵ See ReNEAUL’s *Model Rules*, Book I-2 (2).

²⁶ Answer given by the Commission’s Vice-President Dombrovskis to a parliamentary question on the law of administrative procedure of the EU.

²⁷ Opinion of AG Campos Sanchez-Bordona delivered on 27 June 2018, in case C-219/17, *Berlusconi v. IVASS*, fn. 21.

authorities.”²⁸ It is in this sense that another principle, allowing the administration to act unilaterally, emerges. Time will tell if the Court of Justice decides to follow its AG.

Another scenario builds upon the Member States in the following way: model rules could largely draw on the general principles of public law that are common to national legal systems. National legislators may thus take model rules into account because they deem them more satisfactory than national law. A Member State may either draw inspiration from model rules or formally refer to them with a view to reforming its procedural rules or adopting new ones.²⁹ The possibility of collective action should also be considered, for the sake of completeness. A group of Member States, for example in the framework of an enhanced cooperation, may decide to do so for non-instrumental or instrumental reasons. They may thus use as model rules the standards set out by Books V and VI concerning mutual assistance and information management, respectively.

The conjecture just made should not be considered as weakening the validity of the remark previously made—that is, that a regulation issued under Article 298 TFEU is the best option for achieving the goals of openness and transparency. However, we should be mindful of the difficulties that the adoption of such regulation can pose in an EU of twenty-seven Member States, each with differing administrative cultures.

3. National Legislation on Administrative Procedure: Commonality and Diversity

The emergence of administrative procedure legislation in Europe is intriguing for more than one reason. A first question that arises is why such legislation, which was initially adopted well before the US (for example, Spain adopted legislation in 1889 and Austria in 1925), has subsequently developed almost in all corners of Europe. Another question is whether between the various types of general legislation of administrative procedure there are not only differences but also some common elements—and not just in the guise of generic idealities, but in that of standards governing administrative action. Both aspects will be addressed, in turn, in the following pages.

A. The Development of Administrative Procedure Legislation (1925-2022)

As a first step, the process of statutory law change is interesting to chart. Although France codified its private law at the beginning of the nineteenth century (1804), in the field of public law the dominating strand of thought has held that a codification of administrative procedure was neither necessary nor helpful. Consequently, for all the importance of French administrative law for other legal cultures as far as judicial review of administration is concerned, two other European countries took the leadership regarding the regulation of administrative procedure—namely, Spain and Austria.

In Spain, a piece of legislation was approved by Parliament in the same year as the Civil Code (1889). The act laid down few general provisions concerning administrative procedure, in

²⁸ Opinion of AG Kokott delivered on 7 November 2019, case C-584/17 P, *ADR Center v. European Commission*, § 84 (the reference to the ‘Model Rules’ can be found in fn. 65).

²⁹ For further remarks, see G. della Cananea, *A Law on EU Administrative Procedures: Implications for National Legal Orders*, in G. Balazs, L. Berkès, A. Varga (eds.), *Current Issues of the National and EU Administrative Procedures (the RENEUAL Model Rules)* (Pazmany Press, 2015), 283.

particular with regard to the hearing of interested parties and the notification of administrative acts. This was an important precedent for the codification of 1958. However, its effectiveness was undermined by the fact that each central department developed its own rules of procedure, with the result that a “disordered body of rules” emerged.³⁰ Moreover, this legislation was unknown elsewhere, unlike the Austrian codification of 1925, which had a twofold influence. There was a direct influence on some nations of the peoples which had been included within the old Habsburg Empire, collapsed in 1918. Those peoples followed the new Austrian legislation: Czechoslovakia and Poland did so in 1928, and Yugoslavia followed in 1930.³¹ There was an indirect influence on other legal systems, including that of Italy, where legal scholarship gradually recognized the growing importance of administrative *procedure*, as distinct from administrative actions and decisions.

This first wave of administrative procedure legislation was followed by another. In the years that followed the adoption of the APA in the US (1946), there was a group of European countries that followed the Austrian model, in the sense that they adopted general legislation on administrative procedure. However, unlike Austria and the US, these countries were not liberal democracies. For example, Spain adopted its new legislation in 1958, when it was under the authoritarian regime of Francisco Franco. In Central and Eastern Europe, when Hungary produced for the first time a general legislation on administrative procedure, it was after the Soviet army had repressed the countrywide revolution (1956). Similarly, after the Polish protests in 1956, that country changed its general legislation. There is another group of states, in this case liberal democracies, which adopted general legislation on administrative procedure after the mid 1960s, including Norway (1967), Germany (1976), Denmark (1985), and Sweden (1986). Nordic countries tended to cluster in their adoption, with several common and significant elements. But it was the German codification which was most influential on other legal cultures.³² It prompted debate elsewhere, including in Italy.³³

At this stage of analysis, two brief comments would seem to be appropriate. First, the purposes of administrative procedure legislation can be, and have been, different. There is the legislative intent to strengthen the protection of the individual’s rights. But there is also the intent to enhance the efficacious discharge of administrative functions and powers. There is still another reason underlying administrative procedure legislation: to enhance transparency and citizens participation. These differing reasons have had force in different contexts. While the Austrian model or prototype has accentuated the first dimension, authoritarian governments have paid less attention to process rights, although not a negligible decrease, probably because those rights could compensate for the absence of political rights.

Second, until 1989, the year of the fall of the Berlin Wall, the legal systems where administrative procedure legislation was absent consisted not only of the UK (unlike the US), for

³⁰ L. Ortega, *A Comparison with the Spanish Regulation of Administrative Procedures*, 2 Italian J. Pub. L. 296, at 297 (2010).

³¹ On the spread of Austrian ideas and norms, see G. della Cananea, A. Ferrari Zumbini and O. Pfersmann (eds.), *The Austrian Codification of Administrative Procedure: Diffusion and Oblivion* (Oxford University Press, 2023, forthcoming).

³² *Verwaltungsverfahrensgesetz* of 25 May 1976

³³ G. Pastori, ‘The Origins of the Law n. 241/1990 and Foreign Models’, 2 It. J. Public L. 260 (2010).

its traditional reluctance to adopt codes, but also France, Italy, and the Netherlands, countries with an established tradition of codification in the field of private law. Diversity thus cut across those countries that were conventionally regarded as the two ‘legal families’ of the Western legal tradition.

Things changed dramatically after 1990, when the “movement for administrative procedure legislation” spread throughout Europe.³⁴ Italy adopted its first APA in that year; Portugal did so in 1991 and the Netherlands in 1994, while Spain significantly modified its legislation on administrative procedure in 1992.³⁵ Other Member States of the EU adopted their APAs over the following years—for example, Portugal in 1996 and Finland in 2003.³⁶ In the same years, with the collapse of “socialist democracies,” as they were called, sooner or later virtually all the countries of Central and Eastern Europe enacted APAs, often in the context of institutional reforms: Lithuania in 1999, Latvia and Estonia in 2001, the Czech Republic in 2004, and Bulgaria in 2005. Hungary, too, set out a new legislative framework in 2016. After the dissolution of Yugoslavia, all the nations that gained independence from the old federation adopted an APA. Ukraine and Moldova were the last to do so. Relatively recently, even France has joined the ranks of the states having general procedural norms (2015), after a comparative survey made by the administrative judges of the *Conseil d’État*.

The existence of general legislation concerning administrative procedure, therefore, is increasingly the rule rather than the exception.³⁷ It is tempting, therefore, to say that a sort of *ius commune*, or common law, is emerging.³⁸ However, we cannot content ourselves with observing the spread of administrative procedure legislation. We need to ascertain the respective importance of both commonality and diversity.

B. *Heterogeneity of Administrative Procedure Legislation*

The heterogeneity of administrative procedure legislation soon becomes evident when considering its size and the nature of its provisions.

The size or length of a statute is, *per se*, of relatively marginal importance, given the fact that it pertains exclusively to an extrinsic and formal aspect. Nonetheless, it can be relevant and significant in its role of indicator of the overall number of general constraints that legislators intend to place on administrative activities—and as a means of political control over bureaucracies. In this sense, a wider, more systematic and detailed legislative framework may be considered as an instrument to limit the procedural leeway of public administrative entities. In some cases, particularly in Eastern European countries, the legislative intent is to adopt a comprehensive code of fair and efficient administrative procedure. In other cases, statutes lay down only some general principles. To give a rough idea of the extent to which the size of general legislation differs, it can

³⁴ The phrase is borrowed from B Schwartz, note 5, 2.

³⁵ Ortega, note 28, 297 (for whom the new legislation brought real change).

³⁶ S. Cassese, *Legislative regulation of adjudicative procedures*, 3 Eur. Review of Public Law 15 (1993).

³⁷ J. Barnès, ‘Administrative Procedure’, in P. Cane, H. Hofmann, P. Lindseth and E.C. Ip (eds.), *The Oxford Handbook of Comparative Administrative Law* (OUP, 2020), 831.

³⁸ H. Pünder, *German Administrative Procedure in a Comparative Perspective: Observations on the Path to a Transnational Ius Commune Proceduralis in Administrative Law*, 11 *Int’l J. Const. L.* 940 (2013) esp. 943 ff.

be observed that it ranges from several hundred provisions (for example, in Bosnia and Herzegovina, Latvia, Poland, Serbia and Slovenia) to less than forty (for example, in Scandinavian countries such as Denmark, Iceland, Norway, and Sweden, as well as in Greece and Italy). A significant portion of them lie somewhere between these two extremes. Additionally, it can be interesting to note that the range of differences in size has developed over the last century or so. While less recent administrative procedure legislation tended to be short, the majority of recent legislative frameworks tend to be lengthy and detailed, being generally composed of more than one hundred provisions.

The diversity in the size of administrative procedure legislation implies a difference concerning the nature of its provisions. There are national provisions laying down general principles, as exemplified by the initial article of the Italian Act of 1990. On the one hand, it lays down the principles of legality, efficiency, impartiality, and transparency. On the other hand, it establishes a *renvoi* to the principles underpinning the legal order of the EU. The other provisions of the Act implement these principles in more than one way, such as by imposing the adoption of deadlines and more specific standards of conduct. In this sense, general legislation presupposes not only government regulations but also administrative rules. On the other side of the spectrum there is the Latvian legislation which spans over one-hundred pages and includes almost four hundred articles going into great detail by defining the content of both general concepts (e.g., the administrative act) and principles such as equality, the rule of law and proportionality.³⁹ Detailed provisions concern also the interpretation of legal norms and analogy.⁴⁰ Another interesting example of a detailed procedural law is that of Serbia, which spans over seventy pages, includes almost three hundred articles, and contains detailed provisions concerning not only the various phases of administrative procedure and the documents that can be used therein, but also the amendment or annulment of administrative measures initially adopted by a public authority.⁴¹

C. *The Closest Things to Invariants: Hearings and Reasons*

It was noted in section 1 of this paper that the ECJ has defined and refined a sophisticated corpus of general principles of administrative law. For this purpose, it has largely drawn on national administrative laws. Our purpose here is to note that between these laws there are not only differences but also some common and connecting elements. Three such elements will be considered: the concept of administration, the right to be heard, and the duty to give reasons.

The existence of an area of agreement between national provisions concerning administrative procedure emerges, on the one hand, from the ways in which general legislation delimits its ambit or scope of application. It does so by way of both exclusions and inclusions. Most national legislative provisions exclude the functions that pertain to the other branches of government, that is, legislation and judicial adjudication. For example, both the Dutch and the German legislation excludes parliamentary and judicial bodies.⁴² Inclusions are of even greater relevance and significance. The baseline in each national legislation is the necessity to ensure that it applies to administrative authorities. It is for this purpose that several laws, including the Dutch and the

³⁹ Latvian Administrative Procedure Law (2003), sections 1 (3), 6, 7 and 13.

⁴⁰ *Id.*, section 17.

⁴¹ Serbian APA (2016), articles 155-171 and 251-260.

⁴² Dutch APA (1994), Section 1:1(a); German APA, Article 1.1.

German ones, do not refer simply to the existence of an authority or body but instead specify that it must have been “established under public law.”⁴³ Likewise, Greek legislation extends its application not only to the state and local authorities but to “other legal entities of public law” as well, and the Finnish law applies to central and local authorities as well as to “institutions governed by public law.”⁴⁴ All these legislative provisions are based on the traditional element of administrative law—that is, the existence of a public administration or authority.⁴⁵ Others establish that administrative procedure legislation applies to private bodies when they are vested with public authority⁴⁶ or carry out activities that are mainly funded by public finances.⁴⁷ A functional conception of administration thus emerges, as distinct from one centered on public institutions and bodies. Such a functional conception is coherent with EU law, where there is a consolidated concept of “body governed by public law,” notably in the directives concerning public procurements.⁴⁸

There is, moreover, a common concern in administrative law regarding the process by which an agency reaches a decision. It can be interesting to begin with a quick reference to Article 41 (1) of the EU Charter, according to which the right to a good administration includes, among other things, the “right of every person to be heard, before any individual measure which would affect him or her adversely is taken.” Many national laws, more or less literally, reproduce the maxim *audi alteram partem*. The German law, for example, states that “before an administrative act affecting the right of a participant may be executed, the latter must be given the opportunity of commenting on the facts relevant to the decision”—a provision that is similar to the Charter, except that it does not apply only to the acts and measures which are susceptible to give rise to effects that unfavorable either to their addressees or to other persons. Moreover, it provides some exceptions. Other national provisions express the same concern with similar words, if not the very same words. Thus, for example, Article 9 of the Serbian APA provides that “before adopting a decision, the parties must be allowed to make a statement concerning the facts and circumstances of relevance for decision-making.” Article 10 of the Bosnian APA establishes that “prior to taking a decision, a party must be given an opportunity to provide his position on all the facts and circumstances important for taking a decision.” And Article 6 (1) of the Greek Administrative Procedure Code requires administrative authorities to invite interested parties to express their opinions, but with regard to all issues, not only those of fact. The Dutch legislation, in section 3.13, does not require the hearing, but it does ensure that the parties may state their views on the draft administrative decision or determination. The laws of Nordic countries, too, put the emphasis on rights. The Swedish law, revised in 2017, in particular conceives the right to be heard as the foundation for a number of process rights, such as access to documents and legal assistance.⁴⁹

The fact that the requirement that is established for the right to be heard is higher than the minimum requirement established by the EU Charter may also be appreciated with respect to other

⁴³ Dutch APA, Section 1:1(a); German APA, § 1.1.

⁴⁴ Greek APA (1999), Article 1; Finnish APA (2013), section 2.

⁴⁵ M Shapiro, ‘Administrative Law Unbounded: Reflections on Government and Governance’, 8 *Ind. J. Global Legal Stud.* 369 (2000).

⁴⁶ Spanish APA (1992), Article 2(2); Dutch APA, Article 1: 1 (1) (a).

⁴⁷ Danish APA (1985), section 1(2) (referring to activities mainly covered by public funds).

⁴⁸ See M.P. Chiti, *The EC Notion of Public Administration: The Case of the Bodies Governed by Public Law*, 8 *European Public Law*, 473 (2002).

⁴⁹ Swedish APA (2017), Sections 9 and 14.

norms. French legislation provides an enlightening example, because the requirement of a hearing applies not only the issuance of individual decisions that must be motivated because they either adversely affect an individual's interest or derogate from general rules, but also to any decisions that concern an individual.⁵⁰ The above shows that a common standard exists, although with a lower threshold than that which is defined by the Charter.

The other closest thing to an invariant feature of administrative procedure is the duty to give reasons in the context of administrative adjudication. As a starting point it can be helpful to refer to EU norms. Article 190 of the Treaty of Rome laid down a requirement to give reasons, which has attracted the interest of American scholars, including Jerry Mashaw and Martin Shapiro.⁵¹ The reason is that the requirement was shaped in very broad terms. Its scope of application included not only decisions adversely affecting individual rights or interests, as was then the case, for example, within the French and Italian administrative laws, but all decisions. Moreover, that requirement applied not only to individual decisions, but also to regulations and directives—that is, to acts laying down rules. In this respect, the requirement laid down by Article 41 of the Charter of Fundamental Rights has a narrower scope, as it refers to decisions alone.⁵²

To provide a more specific idea of the scope and content of national provisions, it is helpful to compare three of them which can be regarded as representative of a more general pattern. The first is the French legislative provision, which does not contain a general duty to give reasons. The historical origins of the norm can be found in the case law of French administrative judges, and it diverges somewhat from the norm that has constantly been applied for the judiciary, as some statement of reasons was required within judgments rendered by the courts.⁵³ The underlying assumption is that the administration should not be overburdened by a general reason-giving duty. The opposite choice can be exemplified by a second example: the Dutch general legislation. Its Section 4 (16) provides that “a decision shall be based on proper reason.” As observed by Shapiro, this converts the requirement to give reasons, which is regarded as a procedural constraint on the public authority, into a substantive requirement.⁵⁴ Finally, a somewhat intermediate position can be found where there is a general requirement but one that is subject to exceptions. This is exemplified by Article 39 of the German APA, which requires public authorities to state the grounds for any written administrative act but with various exceptions.

Two brief comments follow from this analysis. First, there is clearly commonality at the level of general principles, such as *audi alteram partem* and the reason-giving requirement. There are further important similarities in the way to define administration, functionally intended. But there is also diversity, as the relationship between rule and exception differs from one legal system to another. As observed by Rudolf Schlesinger in his pioneer study on the common core of national legal systems, it is evident that “the areas of agreement and disagreement are interlaced, often in

⁵⁰ French law (2016), Article L122-1.

⁵¹ See M. Shapiro, *The Giving Reasons Requirement*, 1 *U. Chi. Legal F.* 179 (1992) and J.L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 *George Wa. L Rev.* 99 (2007).

⁵² Article 41 includes “the obligation of the administration to give reasons for its decisions”.

⁵³ See G. Bergholtz, *Ratio et Auctoritas: A Comparative Study of the Significance of Reasoned Decisions with Special Reference to Civil Cases*, in V. Gessner and C. Varga (eds.), *European Legal Cultures* (Aldershot, 1997) 123 (tracing the development of the duty to give reasons).

⁵⁴ Shapiro, note 50, 191.

subtle ways, and that it is quite impossible to accurately formulate an area of agreement without staking out its limits and thus demarcating an actual or potential area of disagreement.”⁵⁵ Second, overall the trend in the last thirty years regarding both hearings and reason-giving has been towards increased respect for individual rights. This may be interpreted as the development of a common standard—but by no means a complete development. Further tests are required, as will be suggested in the next paragraph.

D. *Beyond Legislation: A Factual Analysis*

As has been just observed, the overall trend has been to increase the protection of rights of the individual, as well as to enhance openness and transparency. This has been achieved via a combination of legislative provisions and a cross-fertilization between legal cultures. This is not to say that all goes for the best because we live in the best of all possible worlds.⁵⁶ There is a possibility, provided by various national legislative provisions, that not all procedural infringements give rise to invalidity, but only those which determine the final outcome. Individuals may, therefore, have to rely on other legal sources to ensure the protection of their rights, including constitutional provisions as well as EU law and the ECHR, where common values and principles are enshrined. This confirms the persistent importance of the courts and other institutions which control the discharge of administrative functions and powers by public authorities.

It also explains why, for a better understanding of the respective importance of commonality and diversity, it is important to go beyond the analysis of administrative procedure legislation. There are two reasons for this: one general, and the other specifically concerning administrative law. The general reason is that the importance of legislation should not be exaggerated. Indeed, it is trite wisdom, but still wisdom, that there is often a gulf between what legislation prescribes and what happens in the real world. The distance between description and prescription is even greater in the field of administrative law, because of the importance of governmental practices and uses as well as of the interpretations and policy statements issued by agencies. The main difference between the traditional approach to legal comparison and the methodology elaborated and conducted by Schlesinger in the 1960s is precisely this: instead of seeking to describe the legal institutions of a group of states, an attempt was made to understand how, within the legal systems selected, a certain set of problems would be solved. As a result of this, the problems “had to be stated in factual terms.”⁵⁷ Concretely, this implied that some hypothetical cases were formulated in order to see how they would be solved in each of the legal systems selected. And it turned out that those cases were formulated in terms that were understandable in all such legal systems. The excessive emphasis put on legislation is even more questionable in the field of administrative law, for not only in England but also in continental Europe it emerged and developed without any legislative framework that was comparable to the solid and wide-ranging architecture provided by civil codes. As a result of this, not only the formative period of administrative law but also the period of its consolidation was largely jurisprudential.

⁵⁵ R.B. Schlesinger, *Introduction*, in R.B. Schlesinger (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems* (Oceana, 1968), 39.

⁵⁶ Voltaire, *Candide* (1759).

⁵⁷ See M. Rheinstein, *Review of R. Schlesinger, Formation of Contracts: A Study of the Common Core of Legal Systems*, 36 Univ. Chicago L. Rev. 448, 449 (1969).

For these reasons, at the heart of a new comparative research concerning the “common core of European administrative laws” there is, first, the choice of an approach which seeks to individuate and explain both common and distinctive traits and, second, the choice of the factual methodology elaborated by Schlesinger and used in the context of the Trento seminars on the common core of European private law.⁵⁸ Some lines of research have already been developed, including expropriation and other limitations of property rights, judicial review of procedural propriety, and fairness and the liability of public authorities.⁵⁹ Others are in the course of preparation—for example, administrative rule-making and planning and the relationship between general principles and sector specific rules. There is thus an attempt to combine both more traditional issues, such as those that concern the control of procedures, and the issues that are related to the forms of administrative action that are more distant from the traditional paradigm of administrative adjudication. This is not, however, the place for all this.

Conclusion

Legal systems, as adumbrated at the outset, can choose between various options for the protection of individual and collective interests. However, in the European legal area, some shared principles of administrative law have emerged since the end of the nineteenth century and, after the creation of supranational institutions in the 1950s, have provided a common legal patrimony from which the ECJ has largely drawn. Moreover, the movement more recently towards administrative procedure legislation, which begun in Spain and Austria, has included the vast majority of the Member States of the EU, and has in some way affected the EU itself. This is not without consequences for the recognition of common principles of administrative conduct, including the right to be heard and the duty to give reasons, even though the choices made in this regard will often reflect underlying histories, constitutional structures, and legal cultures. These context factors serve to explicate the admixture of commonality and diversity which makes comparative legal studies both important and interesting, also from the transatlantic perspective outlined at the outset of this work.

⁵⁸ For further details, see G. della Cananea and M. Bussani, *The “Common Core” of Administrative Laws in Europe: A Framework for Analysis*, 30 Maastricht Journal of European and Comparative Law 254 (2019) and, on the earlier project concerning private law, M. Bussani and U. Mattei, *The Common Core Approach to European Private Law*, 3 Columbia J. Eur. L. 339 (1997-1998). But see also, for criticism on the latter project, G. Frankenberg, *How to Do Projects with Comparative Law: Notes of an Expedition to the Common Core*, 6 Global Jurist 3 (2006).

⁵⁹ See G. della Cananea and R. Caranta (eds.), *Tort Liability of Public Authorities in European Laws* (Oxford University Press, 2020); G. della Cananea and M. Andenas (eds.), *Judicial Review of Administration in Europe. Procedural Fairness and Propriety* (Oxford University Press, 2021); M. Conticelli and T. Perroud (eds.), *Procedural Requirements for Administrative Limits to Property Rights* (Oxford University Press, 2022, forthcoming).