INTRODUCTION

REFORM AND INNOVATION IN ADMINISTRATIVE PROCEDURE

Javier Barnes

INDEX

The editor would like to thank William Saindon for his commendable assistance in the translation and editing of this book.

My thanks to Professor Michael Nimetz for reading the first draft of this article.

THIS introduction argues for the necessity of a wide-sweeping reform of traditional statutes on administrative procedure. Many national procedural laws are out of date, as they fail to recognize the new modes and methods of governance, and are still based on an antiquated approach to procedure akin to traditional "courtroom" processes. More importantly, they do not reflect current administrative activities: they either lack any provisions for rule-making, or the provisions that do exist are incomplete or superannuated. Furthermore, the first-generation statutes on administrative procedure say little or nothing about *informal*, *international*, or *private* actions of the administration.

The new strategies of regulation and governance require new procedural mechanisms and rules that are much more collaborative, flexible, and informal than those now in use in traditional hierarchical models of regulation. Administrative procedures must promote openness, citizen and interagency participation, accountability, effectiveness, and coherence in governance. Furthermore, the proper development of constitutional requirements, particularly those derived from and necessary to democracy and the rule of law, must be embedded in these new methods of regulation.

Beyond these questions lies a more fundamental issue: the new face of administrative procedure should be understood as a system facilitating the exchange of information and communication between agencies and citizens, not merely a decision-making process or a tool of application and enforcement of the law.

I
ADMINISTRATIVE PROCEDURE IN TRANSFORMATION

A. ADMINISTRATIVE PROCEDURE, THE BACKBONE OF ADMINISTRATIVE LAW

Procedure, as an institution, embodies the status quo of public law in any given time or place. It shows where the citizen stands before the administration and how different public bodies interact among themselves. Procedure is one of the basic building blocks of today's

administrative law. It is the first to be affected in times of transition[1] becouse it is effectively "the way administrative law is made a reality."[2] As a result, an institution so fundamental must be subject to constant legislative and theoretical revision.

The importance of procedure has only increased with the advance of time. This is due to many factors, which include the following:

– Administrative procedure is the primary "conveyor belt" of the constitutional values and guarantees set forth by the principles of the rule of law, democracy, and efficacy in the interactions of the Administration and the citizen.[3]

– It establishes a mechanism of control and structural steering of the public Administration in the hands of the legislator.[4] Given that it is the legal framework that defines the procedure, this has multiple effects on how the administration makes future decisions and may indirectly determine what these decisions shall be.[5]

---

1. Javier Barnes, *Sobre el procedimiento administrativo: evolución y perspectiva* in INOVACIÓN Y REFORMA DE DERECHO ADMINISTRATIVO 277, 331 (J. Barnes, ed., 2006).

2. "*Verwiklichungsmodus des Verwaltungsrecht,*" as expressed in R. Wahl, *Verwaltungsverfahren zwischen Verwaltungseffizienz und Rechtsschutzauftrag* in 41 VVDStRL 151 *passim* (1983).

3. Thus, for example, procedure is the mechanism by which society guarantees control, transparency and accountability; the justification of administrative decisions; the democratic legitimacy of administrative actions; the balancing of complex interests and points of view from differing levels of government; public-private partnership; a reasonable administrative response time; a search for consensus; and so on.

4. *See generally* Matthew D. McCubbins, et al., *Administrative Procedures as Instrument of Political Control*, 3 J. L. ECON & ORG. 243 (1987) (providing a positive political theory perspective); Eberhard Schmidt-Aßmann, DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE 203, 305 (2004) (examining this question through the lens of administrative law, particularly steering and efficiency).

5. For example, a legislator cannot foresee what may be necessary in every possible case concerning sustainable development. Nevertheless, he can decide what the administrative procedure used to resolve the issue is to be, and, to this end, calculate the weight to be given to the input received from the scientific community, the general public, the affected agencies within the Administration as a whole, etc., in order to determine the most environmentally sound solution. The relative weight given to each of these sources of information may well affect the outcome of the process.

– It compensates for the lack of legal standards in many laws via public participation;[6] thus conferring greater *democratic legitimacy* on administrative actions.

– It is the manner by which the administration adopts its most relevant decisions. These decisions can take on a *formal* or *informal* character. Examples of formal decisions are individual resolutions or "administrative acts" (i.e., adjudications); rules (i.e., regulations or territorial planning); and the award process leading to the procurement of contracts. Informal decisions are those described as soft law: guides, recommendations, manuals, interpretations, and so on. In sum, administrative procedure is not solely a decision-making process, although this is one of its more traditional and transcendental aspects. It also extends into other areas and serves to establish the criteria that guide the private activities of Public Administration, transnational administrative actions, and standards of care and conduct regarding the provision of services or mediation.[7]

– It is an instrument for interagency relations that transcend national boundaries, *i.e.* at the European[8] or global level.[9]

B. THE SHORTCOMINGS OF TRADITIONAL ADMINISTRATIVE PROCEDURE LEGISLATION

Administrative procedure laws were introduced to regulate and standardize administrative procedure during a period of rapid administrative expansion, especially after World War II (*i.e.*, U.S. Administrative Procedure Act of 1945). The initial laws and their suc-

---

6. *See* E. Schmidt-Aßmann, *infra* Ch I, *and* H.C. Röhl, *infra* Ch II, *for examples concerning the environmental, food safety, and social sectors, etc., of the European Union. See also* J. Barnes, *supra* note 1, at 324.

7. *Id.*

8. *Id.*

9. Actions beyond national boundaries require the establishment of decisive procedures that satisfy in every case the necessities of the inherent values found in the principles of democracy and the rule of law (transparency, participation, motivation, control, etc.). *See* J. Barnes, *supra* note 1, 279 *passim.*

cessors have been repeatedly reformed and updated as needed with the passage of time.[10]

Nonetheless, the vast majority of national administrative procedure laws dating from the second half of the twentieth century are now out of step with regard to their *content,* considered insufficient, their *conceptual basis*, for the most part obsolete, and their *regulatory method,* restricted to traditional patterns (See Tables 1 and 2). All this spurs the need for reform, that is, a complete renovation or transformation of these laws because:

– First and foremost, many relevant issues are not even dealt with.[11] In general, administrative procedure law is no longer representative of the activities of the contemporary administration.[12]

– Second, administrative procedure law was designed for situations more closely resembling trial proceedings rather than for the realities of current administrative action. This antiquated model includes a bilateral and adversarial procedure, a sequence of administrative actions geared toward a final decision, and a process designed to merely apply a solution dictated by a material law.[13] Administrative procedure laws follow a judicial schematic conceived to guarantee certain rights in determined conflicts, but have no bearing on many other scenarios,[14] much less so in situations where the administration carries out a creative or innovative function, *i.e.*, planning regulations or decisions of a technical or scientific nature that are not the simple result of the application of solutions or standards dictated by statutes. In these cases, the solution must be found within the mechanics of the procedure itself.[15]

---

10. *See, for example, the study of* US APA, E. Schmidt-Aßmann, *infra* Ch. I.

11. *See* Table 1.

12. *See* Table 1.

13. *See* J. Barnes, *supra* note 1, *for an in-depth analysis.*

14. For example, many administrative procedure laws have no bearing on the elaboration of regulations. *See* E. Rubin, *It's Time to Make the Administrative Procedure Administrative,* 89 CORNELL L. REV. 95, 135 (2002).

15. *See infra*, Table 1.

– Third, they do not represent any method of regulation, other than that *classically* defined by an administration in the form of a rigid, hierarchical pyramid that renders unilateral and binding decisions mandated by norms dictated by a superior central power (the "command and control" regulation).[16] There is no mention made of new forms of regulation and governance, nor of their impact on modern administrative procedure.[17]

In short, the institution of administrative procedure and its reform are faced with the following challenges:

– The insufficient or nonexistent representation of administrative activities at the legislative level,
– The obsolescence or inefficiency of the "courtroom" method in many cases,
– The lack of new administrative procedures governing the new models of regulation and governance.

C. THE NEGATIVE CONSEQUENCES OF INSUFFICIENT THEORETICAL AND LEGISLATIVE PROGRESS IN ADMINISTRATIVE PROCEDURE

The negative consequences of this triple challenge can be resumed in three problem sets:

– Legal insecurity and uncertainty, in that many relevant actions taken by the administration either lack any clear normative reference or have a normative reference unresponsive to the institutional dynamics of that action.

16. *See infra* Part III and Table 2.

17. Here we take regulation in its broadest sense, equivalent to the steering and governance of a given sector through the framework and instruments provided by the State.

– Inefficient and ineffectual results stemming from the use of outmoded models, techniques or instruments.[18]
– The relaxation of the principles of democracy and the rule of law, as a consequence of an insufficient understanding of the requirements these place on new and different types of procedures and regulatory mechanisms.

Rulemaking, one of the most formidable instruments of contemporary government, and one of the outstanding activities of contemporary administrations in the latter half of the twentieth century,[19] serves as a perfect example of these consequences in any kind of regulations: territorial and urban planning; technical norms concerning health, welfare, security or the environment; executive regulations; or independent agency regulations, among many others. These negative effects are most evident if:

– The legislator is unaware of or ignores the establishment of procedures concerning rulemaking,
– The legislator is unfamiliar with the diversity of regulatory models[20] and strategies[21] available to him, or
– The legislator acts in accordance with an archaic concept of the normative process.[22]

---

18. For example, a "linear" courtroom method is not appropriate in procedures designed as exchanges of information, round tables, group discussions, conferences, or other collaborative procedures. *See, e.g.,* J.P. Schneider, *infra* Ch. VIII, (discussing the "star-shaped" procedure in German legislation).

19. *See P. Strauss, infra* Ch. VII, Introduction.

20. Regulations of a technical or scientific character, for instance, may require the participation of experts to a different extent than those that concern territorial planning.

21. For example, regulatory strategies based on the achievement of a consensus and on public-private cooperation (agreements and accords, negotiated regulations, etc.) require an alternative to the strategy often found in traditional adversarial, bilateral procedures. In more abstract terms, it is one thing to negotiate, and quite another to argue. Each function requires a very distinct procedural framework.

22. For example, this is the theory upheld by E. Rubin regarding the rulemaking procedures of the APA, which, in his opinion, are excessively influenced by procedural elements. *See,* E. Rubin, *supra* note 14, at 95–110. *See also*, P. Strauss, *infra* VII, Introduction and Part III.

D. THE SCOPE AND EXTENT OF REFORM OF ADMINISTRATIVE PROCEDURE

In this context, we will not consider a conventional evolution placed on traditional concepts and methodologies. If one could measure the reform of administrative procedure by using an idealized scale representing the various levels of reform according to the degree and depth of change necessary, one would reach the following conclusions:

– First, the present need for change cannot be met by a piecemeal revision of traditional procedures or of their final "product," be it adjudication, a contract or a regulation.

– Moreover, it cannot be fully resolved by merely creating a patchwork of regulations for new situations[23] or procedures,[24] although this is a crucial element.

– The legislator must design an administrative procedure, broadly understood as a *tool* to construct a heterogeneous reality in which procedure exists as a medium of exchange of information between the administration and the citizen, and between the various administrations themselves.[25] The growing exchange of information provided by administrative procedure can be considered a hallmark of our times. As opposed to the old concept with emphasis on the final resolution, that is to say the formal product of an essentially bilateral procedure (adjudication, regulation, etc.), the most recent doctrine contemplates an informative dimension, wherein the exchange of information and communication between all parties involved is as important as a final result, if not more so.[26]

---

23. One example is the elaboration of the instruments of indicative or "soft" law, such as recommendations, guidelines, interpretations, etc.

24. *I.e.*, transboundary administrative action, both within the EC and internationally, eGovernment, etc.

25. *See* E. Schmidt-Aßmann, *infra* Ch. I, *and* J.P. Schneider, *infra* Ch. VIII. *See also* J. Barnes, *supra* note 1.

26. *See* H. Hill, Das fehlerhafte Verfahren und seine Folgen im Verwaltungsrecht (1986), F. Hufen, Fehler im Verwaltungsverfahren (2nd ed., 1991), F. Schoch, *Der Verfahrensgedanke im allgemeinen Verwaltungsrecht*, in 25 DV (1992).

– At the highest level, reforms must take into account emergent methods of regulation, steering, and governance in order to reflect these new models and their impact on new administrative procedures.[27]

In short, the current legal regime needs a profound renovation of its provisions and underlying conceptions, and a new, up-to-date and all-inclusive "blueprint." This is the basic premise of this book.

27. *See infra* Part III.

II
OUR OBJECTIVE

As stated above, all the studies in this volume arise from the following assertion: traditional administrative procedure legislation and the theories that sustain it are no longer sufficient. Today's complex reality has surpassed the limits of classic administrative procedure.

Classic administrative procedure legislation is silent in the face of a rapid succession and interrelation of phenomena of wide scope and impact, such as the globalization and transnationalization of inter-administrative relations, or the collaboration of the public and private sectors. Each of these cases gives rise to new forms of regulation, steering and governance.

If we look closely at this question, we realize that the *administrative space* of national administrations no longer stops at national boundaries, but enters a regional (*i.e.*, European) or international area.[28] At the same time, the relationship state-society or administration-citizen has clearly changed, not only because the division between the two has already undergone a notable shift, as demonstrated by the disappearance of state monopolies or the emergence of self-regulation, but also, and more importantly, because the entire vision of a rigid, equidistant, and formal division between the two spheres is being gradually displaced by a new concept of increased interaction and cooperation.[29] Administrative law, as a whole, and not only administrative procedure in particular, must admit two decisive transitions: one, from that of a nationally focused state administration to a *transnational* administration and, two, that of an Administration as a service provider to one that becomes the acting guarantor of services and public-private cooperation.[30]

---

28. *See* E. Schmidt-Aßmann, *infra* Ch. I.

29. *See* H.C. Röhl, *infra* Ch. II.

30. This two-fold transitional process is further discussed in H.C. Röhl, *supra* note 29, *and* E. Schmidt-Aßmann, *supra* note 28.

The essays in this book share a common goal: to elaborate as well as inspire a more ample and integrated understanding of administrative procedure, based on a multiform sectoral regulation at a national, supranational, and international level; and to suggest a precise, well-developed systematization and understanding of the diversity of procedural structures, objectives, models and types. The contents of this volume comprise a debate that is far-reaching in both time and substance. Herein we address the procedures of scientific and technological "uncertainty management" that characterize the "risk society,"[31] the consequences of the information society on procedure,[32] the provision of health services as an example of the new procedural model,[33] the role of administrative procedure in European Law,[34] the requirements procedure places on inter-administrative cooperation at a national level,[35] the extensive experience of the United States in rule-making and forms of soft law,[36] and the much-needed expansion of the scope of national administrative procedure legislation, with the cases of Spain and Germany as examples.[37]

---

31. Borja López-Jurado, *infra* Ch. III.

32. R. García Macho, *infra* Ch. IV, and W. Kluth, *infra* Ch. X.

33. J.Mª Rodríguez de Santiago, *infra* Ch. VI.

34. E. Schmidt-Aßmann, *supra* note 28 and H.C. Röhl, *supra* note 29.

35. J. Barnes, *infra* Ch. V.

36. P. Strauss, *infra* Ch. VII.

37. J.-P. Schneider, *infra* Ch. VII, and L. Parejo, *infra* Ch. IX.

III
THE MODEL OF REGULATION, STEERING, AND GOVERNANCE AS A CONCEPTUAL FRAMEWORK FOR ADMINISTRATIVE LAW

A. THE TRADITIONAL METHOD OF REGULATION AND CLASSIC ADMINISTRATIVE LAW

The regulation model has long been monopolized by the traditional method, known in Anglo-American literature as "command and control regulation." The rules and laws are based on positive legal commands and prohibitions, and the Administration implements, enforces and controls the application of these by means of coercive sanctions.

Classical administrative law evolved under these conditions. The characteristic legal institutions and techniques of traditional administrative law as we know them today are a result of this framework and were conceived as instruments for its design and maintenance. It consists of binding laws that take everything into account, programming and steering all administrative action down to the smallest detail. It is a pyramidal administrative hierarchy, whose procedures are merely tools to apply the law, as part of a centralized top-down regulatory process.

The validity of this model is indisputable; not so, however, its monopoly. The administrative law developed after the nineteenth century was based fundamentally on the model or method of "command and control." The administrative law of the twenty-first century finds a new basis in a multiplicity of models, instruments, and regulatory strategies: public-private and inter-agency cooperation, "soft law" mechanisms, and so on. As a rule, these are hybrids which complement the classical system, at times merely isolated instruments or strategies inserted when necessary into the traditional framework. A single public policy (water, environment, parental leave, part-time work, etc.) can combine various elements from different models: bind-

ing laws passed down from a higher, central authority *and* forms of soft law, coercive sanctions *and* mechanisms of decentralized cooperation and consensus to facilitate development and implementation,[38] etc.

The adoption of innovative methods of steering and governance demands, as a matter of course, a rethinking of the traditional institutions of administrative law.[39] The administrative law that adjudicates or prohibits is now only part of the reality. There is also an administrative law of cooperative action and voluntary compliance, of economic and fiscal incentives, and of information regulation, among many others.[40]

Once this hypothesis is accepted, administrative procedure, like so many other techniques, tools, and categories of traditional administrative law, can be molded and adapted in as many ways as there are models or methods of steering and governance. The need to investigate how and how much these new models modify the structure, relation and function of administrative procedure should be apparent by now.

---

38. *See, i.e.*, Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy. By means of this Framework Directive, the EU provides for the management of inland surface water, groundwater, transitional waters and coastal waters in order to prevent and reduce pollution, promote sustainable water use, protect the aquatic environment, improve the status of aquatic ecosystems and mitigate the effects of floods and droughts. "Designed to replace a series of centralized and traditional command and control directives that dealt separately with groundwater, surface water, drinking water etc, the WFD mixes classic top-down regulatory modes and legally binding requirements with decentralized, bottom-up, participatory and deliberative processes; iterative planning; horizontal networks; stakeholder participation; information pooling; sharing of best practices; and non-binding guidance." *See* David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539 (2007). *See also* C.F. Sabel & J. Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union,* in European Governance Papers (EUROGOV), No. C-07-02, 42 *passim*, at http://www.connex-network.org/eurogov/pdf/egp-connex-C-07-02.pdf.

Council Directives on parental leave or on part-time work are other examples. *See* O. Treib, H. Bähr, G. Falkner, *Modes of Governance: Towards Conceptual Clarification*, in Eurogov, N-05—02, 7 at www.connex-network.org/eurogov/pdf/legp-newgov-N-05-02.pdf.

39. Richard B. Stewart, *Administrative Law in the Twenty-First Century*, in 78 N.Y.U. L. REV. 437, 454 (2003).

40. *See* E. Schmidt-Aßmann, *supra* note 4.

B. FROM A TRADITIONAL MONOPOLY TO A PLURALITY AND FUSION OF SYSTEMS.

The shortcomings and deficits of traditional methods of government, firmly entrenched in the old legal framework of prohibitions, commands and enforcement tools, have given way to other deeply interconnected *models*, *mechanisms*, and *instruments* that complement one another and have become one of the hallmarks of our times in many areas.

The interaction that exists today between the administration and the citizen, working together as associates in the interest of reaching the common good, is just one of these signs. Another important example can be found in the cooperation and coordination of all administrations implicated in an issue, on all levels of government: domestic, supranational, or international. We can also include: "regulated self-regulation," private self-regulation, privatization, the active participation of a well-informed public, the simplification of the administrative burden stemming from reduced regulatory requirements, principles and practices designed to create better regulation of intrinsically complex or uncertain scenarios, laws that establish general objectives while leaving to the discretion of the administration a decision as to the most suitable means to achieve them, decisions conceived from their outset to be of the most efficient application possible, forms of soft law, impact assessments, new paths of transparency and accountability, and a long list of etceteras.

Along with the more traditional methods, there have arisen new forms of governance, based on decentralized, participative, deliberative, bottom-up processes. These include the constant monitoring and revision of plans and programs; horizontal administrative networks; shared information, experiences and good practices manuals; non-binding recommendations and guidelines, etc.[41] As a result, new public and private actors have come into being, along with continuous experimentation regarding regulatory models and strategies. Within

41. *See* Table 3.

these new confines, the state must first renounce the use of hierarchic, and binding instruments as the only means of action and, second, cease to function as a self-contained, self-sufficient entity.[42]

Briefly, both state and administration have undergone tremendous changes since the last decades of the twentieth century, resulting in new methods of steering and governance. These new methods are the product of a fusion of regulatory reform movements and revolutionary new tendencies such as globalization, deregulation, privatization, and the knowledge-based society.

C. SOME EXAMPLES OF PROCEDURAL ADAPTATION WITHIN THE CONTEXT OF REGULATORY STRATEGIES AND MODELS

1. The Privatization of Procedure

Citizen participation in the investigation of facts in the context of administrative procedure - a stage dominated until recently by the administration - is an example of privatization. This participation occurs, for example, when the citizen is required to present environmental impact assessments while applying for a permit.[43] The private party assumes the costs of investigation and elaboration of this impact assessment. The administration need only verify the integrity, reliability, and quality of the information generated, processed, and submitted by the applicant. In this sense, privatization represents *a transition from one model of steering and regulation to another*. This privatization is borne of a new regulatory strategy - the transference of transaction costs to the private sector and a shared responsibility between state and society in the promotion of the public interest,

---

42. *Id.*

43. *I.e.,* Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, article 5.

while the ultimate control of the final result remains in the hands of the administration.[44]

More to the point, the new investigation principle, which transfers the gathering and processing of information, as well as their costs, to the citizens, must implement these new strategies and abandon the traditional model, which is now seriously outdated. This posits the incorporation of other elements and a framework more suitable to contemporary demands. Thus, laws must establish a more open, decentralized and transparent procedure, where the information gathering and processing will be subject to greater debate and control by all interested parties, including the public at large.[45]

2. Rulemaking in the Context of Scientific and Technical Issues

In the face of so many challenges with respect to the regulation of scientific or technological issues, characterized by uncertainty, vertiginous changes and innovations, one possible solution is to formulate complex administrative procedures designed to establish a rulemaking process akin to the scientific method. The scientific community defines the threshold that differentiates accepted and proven facts from what is unknown or uncertain through investigation and study, the promotion of transparency and consensus when dealing with doubtful situations, and the use of hypotheses or models to prove or disprove possible theories and solutions. The object of the scientific method is to investigate data and facts that are by their very nature debatable or disputed. This is an obvious and radical departure from the legal processes that serve as a means of exercising political will.

Thus, in questions that require regulations of a scientific or technical nature, such as those concerning tolerable levels of ozone expo-

---

44. *See* G. F. Schuppert, Verwaltungswissenschaft, Verwaltung, Verwaltungsrecht, Verwaltungslehre 805-22 (2002)

45. *See infra* Tables 1 and 3.

sure, food safety, emission limits, or pharmaceutical product approvals, the structure and organization of the decision-making procedure should be analogous to the scientific method.[46] It needs to follow a process of investigation, transparent debate, and the search for an expert consensus in risk management, including all doubts and uncertainties. This administrative procedure is one of broad-based, active participation, based on the publication of all pertinent and available scientific facts, analyses, studies, expert opinions, evaluations, etc.[47], in an easily accessible and comprehensible manner to facilitate public discussion and accountability.[48]

3. Administrative Governance in the European Union

Among other issues, there is a need to improve the procedures of comitology systems,[49] those carried out entirely within a given agency, or those that follow the open method of communication[50] by means of

---

46. *See infra* Chapter VII Part 2.b (discussing US Rulemaking,).

47. *See* M. Shapiro, *The Globalization of Law* in 1 Ind. J. Global Legal Stud. 37, 48 (1993).

48. *Id.*

49. Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (28 June 1999). Amended by Council Decision 2006/512/EC. The participation of experts in committees, for example, requires specific forms of transparency. Thus, to ensure debate and discussion, the method by which the experts' opinions are selected, unified, evaluated, etc. must be made public, as should the actual list of participating experts. *See* Alexandra Gatto, *Governance in the European Union: a Legal Perspective* in 12 Colum. J. Eur. L. 487, 501 (2006), *for a general introduction.*

50. C.F. Sabel & J. Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU* in 14 Colum. J. Eur. L. 3, 271-327 (2008) *at h*ttp://papers.ssrn.com/sol3/papers.cfm?abstract_id=1106732.

I.e., the European Medicines Agency (EMEA) is a decentralized body of the European Union. The EMEA is responsible for the scientific evaluation of applications for the European marketing authorization of medicinal products (centralized procedure). Under the centralized procedure, companies submit a single marketing authorization application to the EMEA. The Agency brings together the scientific resources of some 40 national authorities in 30 EU and EEA/EFTA countries in a network of over 4.000 European experts. It contributes to the European Union's international activities through its work with the European Pharmacopoeia, the World Health Organization, and the ICH and VICH trilateral (EU, Japan and US) conferences on harmonization, among other international organizations and initiatives

incorporating new patterns of procedural transparency, control, participation and efficacy, while safeguarding the flexibility and informality characteristic of these procedures.[51] The principles guiding the procedure are relevant to public involvement, interest groups and experts at all stages of the policy cycle.

4. Participation and Transparency in the Interest Representation Model and Expertise Model

The method used as a basis for rulemaking procedures, be this the "interest representation model"[52] or a model based on expert opinion[53] to cite two examples, produces very different modes of participation and transparency. In either case, this participation aims to steer *and rationalize* the exercise of an administration's discretionary powers, especially in rulemaking. Increasingly, the interplay between policy-makers, interested parties and the public is part of policy-making, and

---

(http://www.emea.europa.eu/htms/aboutus/emeaoverview.htm). *See* article 30 *passim* of Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorization and supervision of medicinal products.

51. The "open method of cooperation" has enhanced the transparency and participation of all the actors, both public and private, in the design, application and control of the public policies that employ the method (social welfare and security, employment, etc.). In its initial stages it was an opaque and technocratic method. *See* David M. Trubek & James S. Mosher, *New Governance, Employment Policy, and the European Social Model* in Governing Work and Welfare in a New Economy: European and American Experiments 33, 38-41 (Jonathan Zeitlin & David M. Trubek, eds., 2003). The procedure varies in each sector (*in re:* structure, instruments, duties, etc.) *Id.* 551.

52. Administrative procedure legislation must define, for example, those participating (interest groups, public opinion, agencies, etc.) and must indicate how to assure participation from the outset of the plan, program norm or public policy, *i.e.*, by means of sufficient notice and publication, open channels of participation, etc. *See* R. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975) and *Administrative Law in the Twenty-First Century*, 78 N. Y. U. L. Review 437(2003), *for examples of U.S. Law.*

53. *See, for example,* Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002, laying down the general principles and requirements of food law, establishing the European Food Safety Authority and setting procedures in matters of food safety.

our attention must focus not just on the outcome of policy, but also on the process and procedures undertaken.[54]

D. FINAL CONSIDERATIONS

1. Procedure as a Control and Steering Tool of Discretion

For more than two centuries, the "command and control" method has ruled as a complete monopoly. During its long reign, the procedure as law-applying tool, the "courtroom-style" procedure, and the standard procedure for adjudication[55] were the only protagonists in both *legislation* and the *general theory of administrative procedure.* In less than two decades, this method has been forced to co-exist with an ample variety of new models of steering, regulation, and governance. The administrative procedure of these new models does not mesh with the traditional method and, to avoid spurious imitation or contamination, cannot be constructed from the traditional premises.

For many decades, classic administrative procedure has taken a *defensive* attitude towards abuses of power and arbitrary actions. Its aim, in these cases, has been to protect the citizen by emphasizing control of its discretionary powers, mainly through judicial review. More recently, administrative procedure has also assumed *affirmative* tasks (as has administrative law in general[56]). Henceforth, discretionary power will be exercised not only according to the minimal material or procedural legal standards, when and if they exist, but will take into account the complex economic and social circumstances involved as well, in order to reach the best possible decision. Logically, then,

---

54. *See Better Regulation*, European Commission at http://ec.europa.eu/governance/better_regulation/expertise_en.htm

55. *See infra* Table 1.

56. *See* Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. Rev. 2, 437 (2003).

administrative law must also implement an efficient steering of the administration's discretionary powers to achieve the highest standard of services for citizen and society.

In other terms, it is not enough to prevent or *control* the legality of ever increasing discretionary powers of the public administration. This is the defensive view and only constitutes a first step. The second step demands that administrative law also steer and rationalize these discretionary powers in the name of a more productive and efficient administrative action. This is the affirmative view. In this context, as significant a central tool as administrative procedure must help achieve the affirmative tasks required by new methods of governance.

2. The Administrative Nature of Procedure

Administrative procedure in the *context of the new forms of governance* can no longer emulate "courtroom procedure," as in the case of adjudication, nor "legislative procedure," as seen in traditional executive regulations.[57] Contemporary administrative procedure is searching for its own identity in the legal world, evolving into a cyclical unity, a process without a clear beginning or end. As a result, administrative procedure begins in the preliminary phases[58] and continues during the activity in question, whether it be rulemaking, decision-making or any other, until it reaches its eventual effects or consequences.[59] The new administrative procedure legislation must acquire a marked "administrative" nature, as opposed to a "judicial" or "legislative" one. It must be capable of representing the peculiarities of the new forms of governance, and encompass the *entire cycle* of public policy. The new regu-

---

57. The first is merely a system of application; the second only concerns itself with the creative process.

58. See *infra* Ch. 8.

59. The concern here is reaching goal, and to this end, includes control and supervision of the decision, its modification and revision, etc.

latory methods, in many cases, have made obsolete the traditional separation between establishing a regulation or a law and its implementation.

In sum, it is clear that the reform of administrative procedure legislation, along with the subsequent modernization of its theoretical underpinning, cannot be found in the complete codification of existing administrative procedure laws, or in the simple addition of new procedures to the traditional laws, or, even less, in an extension of the sphere of classic administrative procedure statutes into new areas such as public-private collaboration, self-regulation, or administrative activities subject to private law.[60] On the contrary, there is a crucial need to elaborate criteria or principles of procedure suited to these new situations, and to include qualitatively distinct procedures or characteristic actions that more faithfully represent today's administrative reality. One must fit these new administrative procedures into the puzzle that makes up the framework of today's regulatory architecture.

60. *See infra* Ch. 1 II.2, and J. Barnes, *supra* note 1.

TABLE 1

CHARACTERISTICS AND DEFICITS OF TRADITIONAL ADMINISTRATIVE PROCEDURAL LAWS

CHARACTERISTICS OF TRADITIONAL ADMINISTRATIVE LAW	SOME EXAMPLES OF SHORTCOMINGS AND SOLUTIONS
The scope of administrative procedure laws refers only to the administration when exercising public powers, and therefore subject to administrative law.	Legislation does not contemplate principles and standards for the administration and agencies when acting as private entities subject to private law.
Administrative procedure is a decision-centered process. - Adjudication - Contracts - Rules and Regulations	Legislation does not consider procedures that are not decision-making in nature, such as those involving information gathering and processing. - Control of Administrative Funds and State Aid - Drafting of Environmental Maps
Procedure is a formal process. The law only contemplates administrative actions subject to a formalized procedure and which end in a formal decision, *i.e.*: - Contract - Regulations - Adjudication	Legislation excludes administrative activities that are not formalized, *i.e.*: - Preliminary Negotiations - Consultation - Counseling Non-binding rules and other forms of soft law are also excluded in many countries, *i.e.*: - Recommendations - Interpretations - Guidelines - Good Practice Manuals
The standard result of procedure is an individualized administrative decision, especially in adjudication.	Rulemaking is often relegated to a second level of importance, with the notable exception of the U.S. APA.
Administrative procedure is a tool for the proper application and implementation of substantive rules and standards. It fulfils a secondary or auxiliary function in relation to substantive law.	Procedures that do not implement substantive law, such as those designed to create rules, plans, programs, etc. or to investigate the best available decisions are often not considered standard procedure and are excluded from general legislation, *i.e.*: - Urban Planning Procedure - Strategic Environmental Assessment

The application and implementation of law are accomplished through limited enforcement tools. Creation and application are seen as two strictly separate stages.	Legislation disdains many other relevant channels to achieve effective application and implementation of the law, *i.e.*: - Public-private cooperation: Agreement, Mutual Learning, etc. - Voluntary compliance mechanisms - Incentives - Monitoring, Control and Revision of the Decision to ensure Efficacy
Administrative procedure legislation concerns itself with domestic administration and its relationships within the state.	Administrative procedure legislation has little concern for interagency relationships at the supranational and international levels.
The procedure establishes rigid and limited channels of communication exchange between the administration and the citizenry. - The citizen's participatory duties and rights are formalized and strictly defined. - The administration alone establishes common interests and needs. - Investigation and information gathering is carried out *ex officio*.	Investigation and information gathering done by the private sector is not deemed worthy of consideration in traditional administrative procedure law.
The principle of separation of powers is expressed as a system of *rivalry*. According to this view, the executive (government and administration) limits itself to the execution and administration of the law and thus does not form public policy. As a consequence, administrative procedure only works as an *application tool* resembling courtroom procedure (*i.e.*, U.S. "due process," English "natural justice," or French "rights of defense"). Procedure is not considered an instrument that can be used in all stages of public policy.	The three functions of public power are not *complementary*, as contemporary administrative procedure requires. The new forms of steering and governance call for a new understanding of administrative procedure that encompasses *all aspects of public policy*.
Classic administrative procedure is seen as a *defense* mechanism against incidental abuses of power and arbitrary action. It aspires to guarantee decisions that are: - Impartial, - Adopted according to the system of the allocation of powers,	Administrative procedure does not fulfill affirmative tasks that guarantee a correct and efficient exercise of discretionary power. It should guarantee: - The best decision available, - Decisions made within the framework of broad participation and transparency,

- Respectful of the rights of private parties. Administrative procedure is a tool to *control* power.	- Decisions that balance the rights and interests of all participants. Administrative procedure should be seen as a *steering* tool of discretionary power.
Administrative procedural requirements are *rigid* and *hard*. They establish fixed requirements regarding: - Who may participate, and when, - The means and channels of information exchange, - The ways and methods of decision-making.	Administrative procedures lack *flexibility* and *softness*. Their requirements should contemplate: - Open communication, - Fluid participation, - A deliberative process based on the exchange of experiences and good practices, leading to consensus.
Administrative procedure, in the context of the classic division between the *creation of law* and its *implementation*, is designed as an instrument in the service of the latter.	Administrative law has no procedures that consider public policy as a continuous cycle, beyond the traditionally strict dichotomy between *creation of the law* and its *implementation*. Unlike the traditional model, the governance model does not insist that legislation, implementation, enforcement, and adjudication are separate stages. Instead, it seeks to form dynamic interactions among these processes.

TABLE 2

THE ADMINISTRATION AS REFLECTED IN ADMINISTRATIVE PROCEDURE LAW

ADMINISTRATION MODEL IN TRADITIONAL LEGISLATION OF ADMINISTRATIVE PROCEDURE	SOME EXAMPLES OF MODELS AND FORMS OF ADMINISTRATION NOT CONSIDERED IN TRADITIONAL LEGISLATION
The administration that emerges from traditional legislation has a "command and control" nature.	Other forms and models of administration are ignored, for example those administrations: - Acting in cooperation with the private sector, - Working at the transnational or international level with other administrations, - Providing services, - Guaranteeing the activities and services of self-regulating providers.
The administration is structured as a hierarchical, closed pyramid, designed to transmit commands and information from the top down.	Network administration and its horizontal collaborative relationships with other administrations are not regulated.
The administration is a public organization that makes binding decisions and enforces them.	Traditional administrative procedure law does not consider the administration when: - It produces "soft law" (guidelines, manuals, interpretations, etc) - It engages in informal activities (provision of services, etc.), - It negotiates (i.e., negotiated rule-making, agreements, etc.), - It gives pre-procedural advice.
The flow of information within the internal structure of the administration is of little interest to the law. Interagency collaborative procedures are isolated exceptions in the system. The participation of other administrations in the procedure is infrequent and not of primary importance.	Inter-agency gathering, processing, and exchange of information are not sufficiently regulated in traditional administrative procedure law, particularly in supranational and international relationships between administrations. Because of this, administrative procedure law does not involve itself in situations such as constant system-wide cooperation, as in the case of composite administration in the EU.

The administration is "state-centered" and does not act beyond national boundaries.	The contemporary reality of transnational and international administrative actions is not sufficiently developed in traditional administrative procedure law.

TABLE 3

FROM TRADITIONAL REGULATION TO GOVERNANCE

	TRADITIONAL REGULATORY MODEL	NEW GOVERNANCE MODEL
NATURE OF LAW	- Centered - Substantive - Centralized - Command-and-Control - Rigid and Fixed - Uniform rules Generalized	De-centered and Proliferated Procedural Reflexive Decentralized Coordination and Orchestration Flexible and Adaptable Diversity Contextualized Variances
INSTITUTIONAL ORGANIZATION	Top-down Hierarchy Formal	Horizontal Network Informal
CENTRAL ACTORS	State National level Public	- Multiple levels of government (local, + transnational + international) - Multiple public and private participation - Decentralization and Principle of Subsidiarity
MODES OF ACTION	Formal avenues of activism	Proliferation of modes of activism
LAW-MAKING PROCESS	Static, One-shot Ossified, Entrenched	Dynamic, Iterative, Repeat learning, Experimental, Promotes innovation
MOTIVATOR FOR PRIVATE ACTION	Liability (Fear)	Reform Problem-solving Improvement
FORM OF ENGAGEMENT	Discrete actions, Distinct cases, Separate fields of law	Holistic, systemic approach Integration of policy domains

ROLE OF PRIVATE ACTORS	Individuals are the object of regulation--can comply or not	Individuals are norm-generating, Active citizenship
USE OF KNOWLEDGE AND INFORMATION	Information is selective for fear of liability	Integrated approach: All information should be considered over a long period of time and shared, Regularized continuous reflection
PROCEDURAL FRAME	Reactive Defensive Ex post	Proactive Ex ante
ADJUDICATIVE APPROACH	Before and after the fact judgment	Ongoing Benchmarking
SOURCE OF NORMS	Legal regime as primary source of norms	Legal regime as part of a range of factors that are considered together--economic, ethical, customary
POWER OF LAW	"Hard" Coercive Rules Mandatory Sanctioned	"Soft" Aspirational Guidance Voluntary Structured but unsanctioned
ROLE OF LAWYER	Professionalized Operates in legal arena	Multi-disciplinary engagement Operates in diverse social arenas
CONCEPTUAL FRAMEWORK	Haves/have-nots struggle for a share of the static pie Law asks: how to divide the pie	Win-win framework Law asks: how to enlarge the pie

THIRD TABLE REPRODUCED FROM: Orly Lobel, The Renew Deal: the Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, 89 Minn. L. Rev. 342 (2004).