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The Evolution of Administrative Procedure Theory in 'New Governance' Key Point

Jorge Agudo González

Senior Lecturer of Administrative Law Autónoma University of Madrid

Abstract

The way in which administrative law reacts to common issues in all European countries is converging due to the so-called phenomenon of 'europeanisation' of administrative law. The theory of administrative procedure is no exception to the phenomenon. Those influences are the result, amongst others, of the CJEU case-law and of the 'proceduralisation' assumed in certain European policies such as the environment. 'Proceduralisation' reveals a shift in regulatory strategy, which confers a decisive role to administration. At same time EU law has integrated proceedings which go further than the traditional procedural guarantees derived from rule of law, and currently integrated in the good administration principle, assuming a procedural model based on the principles of new governance. The outcome is a convergence in the legal significance of decision-making processes toward a non-instrumental conception.

1 Introduction

The purpose of this paper is to analyse the legal relevance that administrative procedure has acquired in European law and its impact on the legal systems of the Member States. Unlike Otto Mayer's assertion on the contrast between the transitory nature of constitutional law and the continuity of administrative law,[1] administrative procedural law principles and rules have evolved and shifted, although constitutional principles have stayed almost the same since modern constitutions were approved throughout the twentieth century following the Second World War.[2]

There are several causes for this evolution. First of all, the development of decision-making procedures is connected to the new forms of administrative action which do not fit traditional administrative procedures, originally designed to make command-and-control decisions under structures more closely related to trial proceedings. Second, the birth of new forms of regulation and governance and their impact on modern administrative procedures is also significant.

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1 See M. Ruffert 2008a, p. 256 and S. Muñoz 2011, p. 192.

2 The categories and general concepts that make up the external system of our legal systems have evolved through an adaptive interpretation within the framework of the fundamental rights, values and constitutional principles that constitute the internal legal system. Related to the notions of external and internal system, see K. Larenz 2001 and C-W. Canaris 1998.

Considering the legal system as an open system, influences come mainly from other disciplines, largely based on social sciences – the so-called new governance. This poses a new administrative steering model based on renewed legal instruments, also related to procedural aspects.

Third, it is necessary to consider the reciprocal exchange processes between national administrative law and European law. This process has several manifestations. From the EU a number of trends can be identified in relation to the administrative procedures that deal with both the reinforcement of basic procedural guarantees, now integrated into the well-known principle of good administration, and also with the incorporation of procedural instruments reflecting the principles of new governance. The result is a process of Europeanisation of administrative law as part of a top-down process. However, it would be incorrect to say that the process only follows a downward path, given the important influence that some national laws have had on European law in a kind of earlier 'legal transplant'; that is, a bottom-up influence. This results in European law extending into national legal systems, exemplifying a drawing together of different legal conceptions that administrative procedure has gained from the two legal cultures prevalent in the EU. From the methodological point of view, this process highlights the renewed importance of the comparative method as a means to construct a European administrative law.[3]

The main result of this mixture of causes is the impossibility of understanding administrative procedure from just its incidental nature,[4] which has been the traditional instrumental view, based on making the right decisions[5] in accordance with the principle of legality.[6] This conception, still in force in many countries, does not necessarily explain all the types of administrative procedures.

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3 This method is the basis for the systematic construction of a European Administrative Law, see S. González-Varas 1996, p. 68. Following the work of J. Rivero 1978 or J. Schwarze 2006, in recent years there have been studies whose purpose is to show the importance of the comparative method; in this vein, G. della Cananea 2005 and R. Caranta 1997 & 2010a.

4 The incidental nature of the process has contributed to the absence of an autonomous legal-dogmatic treatment which conceives of administrative procedures as a substantive system of rules and guarantees distinguishable from the applicable substantive law, see F. López 1992, p. 40.

5 For J. Ponce 2005, p. 553 the functions of the instrumental conception of administrative procedure are: (1) The protection of rights and interests; (2) The promotion of good administration and good quality administrative decisions. E. Schmidt-Assmann 2003, p. 359, M. Schröder 2007, p. 119 et seq. and H. Maurer 2011, p. 522-523 confirm the traditional instrumental function of procedure in German law. A similar conclusion can be reached in the case of Italy: G. Corso 2010a, p. 215-216, L. Mazzarolli et al. 2005, p. 536 et seq. and R. Chieppa & R. Giovagnoli 2011, p. 371.

6 The centralization of the interests of Administrative Law in the control of legality has conferred on administrative procedure the function of articulating the application of the law. This approach has been conditioned by the 'fetishism' for the '*principe de légalité*', see S. Cassese 2004b.

This observation highlights the fact that this complex process of change and convergence must have as its main outcome the need to reconstruct the theory of administrative procedure by incorporating into it a non-instrumental[7] conception. This conception will give full substantial meaning to the theory of administrative procedure and give it an enriched legal significance with inputs from other disciplines. Administrative procedure, from this perspective, cannot be understood as only a guarantee of legal propriety and of the rights of concerned parties, but also as a source for sound and rational decisions, coordinated at different administrative levels, transparent, cooperative and deliberative, and which stands as a real means of control, acting as a complement to traditional judicial review mechanisms. This expresses the multi-functionalism of administrative procedure and the incorporation of various parameters determining administrative actions beyond pure legality, which helps to optimise the legitimacy of the administration.

The theory of administrative procedure is thus enriched because it emphasises the overcoming of a largely assumed conception: that the theory of administrative procedure is renewed by incorporating, in a non-exclusive manner,[8] a renewed conception which coexists with and confirms, but at the same time exceeds, the traditional instrumental view of administrative procedure.

To understand this statement, we will assume a methodological approach based on two elements. The first is the construction of a typology of procedures,[9] because as we try to emphasise, the evolution mentioned above cannot necessarily be extrapolated to any particular procedure but has its main application in what we may call 'complex procedures'. This methodological approach will allow us to show that convergence in national legal systems is taking place precisely in relation to types of procedure. Now this does not mean that in what we will call 'simple procedures' there are no movements towards that conception; nor does it mean that in all 'complex procedures' existing law has reflected with equal intensity the substantivisation and multidimensionality mentioned.

Second, to the extent that the final part of this study will focus on the procedures we have defined as complex, the study assumes a methodological approach based on the analysis of a 'reference sector': the environment. The use of reference sectors from the special part of administrative law allows one to deal with

7 J. Ponce 2005, p. 552-553 determines the non-instrumental functions as follows: (1) protection of personal dignity; (2) promotion of citizens' participation; (3) enhancing transparency and accountability; and (4) improvement of legitimacy.

8 H-P. Nehl 1999, p. 21 notes that instrumental and non-instrumental concepts are in place in all legal systems, although with different weights.

9 On the importance of 'type' as a methodological tool, see K. Larenz 2001, p. 451 et seq.

the institutions and concepts of the general part of administrative law in the light of the progress registered in those areas. Thus a complex process (inductive/deductive) of systematic construction is highlighted that allows one to examine the extent to which basic and fundamental legal concepts must be reconstructed or must take on an evolved interpretation while ensuring the function of simplifying and clarifying the legal materials and avoiding contradictory legal assessments within specific sectors.[10]

From this methodological basis, as we have proposed, environmental law will be the sector considered as reference sector in this study. This is nothing new, as environmental law has traditionally been considered a kind of legal laboratory, taking a leading role in the reform of administrative law.[11] Recalling the Europeanisation framework outlined above, it should be pointed out that environmental law is one of the branches of European law that has most strongly and in a more evolved manner incorporated procedural aspects,[12] especially given the proceduralisation undergone by EU Directives in recent decades.

2 The Europeanisation of Law and the Convergence of National Legal Systems

The Europeanisation of administrative law is a complex process of influence and exchange between European law and national laws,[13] the result of which is a progressive convergence of the various legal systems. Within this process there are two phases that do not develop entirely in step with each other but coexist to varying degrees, since the state of the Europeanisation process is different according to the area. A first phase would result from the implementation of EU law under the traditional dualism of direct and indirect implementation followed by the harmonisation of national legal systems. In recent years, new sources of convergence have been emerging through the establishment of cooperative mechanisms, which generate a growing permeability between legal systems. This phase is characterised by the assumption of a euro-transnational perspective related to the integrated implementation of EU law connected to the creation of a 'European Administrative Space'[14] for a

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10 See E. Schmidt-Assmann 2003, p. 128 et seq. and A. Vosskuhle 2007, p. 138-140. Taking as a reference the processes of Europeanisation of Administrative Law, the purpose is to put forward the dogmatic analysis precisely because of the current situation of the asystematicity of European Law as described by C. Franchini 2004, p. 187-188 and J. Ziller 2012, p. 99 et seq.

11 See W. Hoffmann-Riem 1993, K-H. Ladeur 2002, p. 3 and E. Schmidt-Assmann 2003, p. 130.

12 See B. Lozano & C. Plaza 2009.

13 See K-H. Ladeur 2000/2002, J. Schwarze 2000/2006; G. Falcon 2005; J.H. Jans et al. 2007; J-B. Auby 2010.

14 E. Schmidt-Assmann 2003, p. 384 and M. Chiti 2005, p. 380.

'European Administrative Union',[15] which is characterised by complex organisational and procedural forms of multilevel administrative proceedings.[16]

The sources of the influence between legal systems are multi-directional, originating in both European law and in national legal systems, although this is chronologically variable.[17] It is actually a complex process of multidirectional cross-fertilisation.[18] The Europeanisation of administrative law in this context is conceived as a process that is broad, dynamic and evolving towards the formation of a legal-administrative system that takes place in a European context where national legal systems are also in place; a process divided into several closely related and not mutually exclusive stages, resulting in the generation of a reformed and shared administrative law: a Europeanised administrative law.

The theory of administrative procedure is one of the areas most affected by this process as can be seen from both the proceduralisation (i.e. environmental Directives that will be analysed below), and the instrumentalisation of administrative proceedings in which the jurisprudence of the Court of Justice of the European Union (CJEU) has played a part as a means to ensure the *effet utile* of European law (i.e. the principles of equivalence and effectiveness). By means of procedural harmonisation and the jurisprudence of the CJEU, the administrative procedure has already been affected by different convergence processes, which are by no means strictly *top-down*. In fact, the origin of the legal parameters and categories assumed in European law in this area have, in many cases, a specific national legal basis,[19] leading to the generation of *legal transplants* between legal systems via European law.[20]

The systematic linking of *legal transplants* is the key legal question. The question is not only to determine the reasons why, where and when this legal 'importation' occurred but to know its effects. *Legal transplants* are traditionally a source of instability due to their mismatch with the receiving legal system.[21] Here, the dynamism characteristic of European law, related to the goal-oriented sense of

15 J-P. Schneider 2008a, p. 26 and M. Ruffert 2008b, p. 88.

16 See G. della Cananea 2004, M. Chiti 2004, S. Cassese 2004a, E. Chiti 2004 & 2005, E. Schmidt-Assmann 2006, p. 108 et seq., H.C.H. Hofmann & A.H. Türk 2006, J-P. Schneider 2007 & 2008a, M. Ruffert 2008b, A.M. Keessen 2009, H.C.H. Hofmann 2010, M. Fuertes 2012.

17 P. Craig 2011, p. 331 et seq. and J. Schwarze 2012, p. 30 have shown that the influence of national legal systems was greater in the first decades of community history.

18 E. Schmidt-Assmann 2003, p. 50, K-H. Ladeur 2000, p. 292, G. Falcon 2005, p. 11, E. Chiti 2005b, 69), J-B. Auby 2005, p. 365 and R. Caranta 2011, p. 160.

19 J. Schwarze 2006, p. clxxxii and J.H Jans et al. 2007, p. 5.

20 S. González-Varas 1996, p. 21-22 and J-B. Auby 2005, p. 365.

21 The challenge is to avoid imposing artificial uniformity on the basis of legal 'importation'. This, while not preventing the admission of legal transplants, is intended to emphasise the difficulties of proper integration of foreign legal instruments; see K-H Ladeur 2000, p. 293.

the principle of conferral of powers and the need for a constant succession of community measures to achieve European integration,[22] which clearly conflicts with the static nature of national legal systems.[23]

The effects of legal transplants also depend on the legal systems in question. There are legal systems, which, owing to their prestige, have had the opportunity to extend their area of influence,[24] resulting in a clear distinction between 'exporting' and 'importing' legal systems. For this reason, Member States whose administrative law has evolved under significant foreign influences ('importing' legal systems), would find themselves in a better position to accept future influences. However, those other states with strong legal traditions such as Germany, France and England, have traditionally acted as 'exporters' of laws and, therefore, have been more resistant to possible interference.[25]

The impact of the process of Europeanisation and convergence in the framework of the theory of administrative procedure on the EU Member States has been variable. This is highlighted in all comparative studies (*i.e.* Nehl, Ladeur, Schwarze, Woehrling, Sandulli, Auby, and so on). As we emphasise, it should be pointed out that regarding the acknowledgment of fundamental procedural guarantees, synthesised in the principle of good administration, it can be said that there have been no significant adjustments.

The most notable changes come from the effects of the harmonisation of national legal systems in areas such as the environment. In this domain two problems can be identified. The first is that generated by the sectorial approach. From this point of view, European law has been a source of many special procedures whose assessment has been problematic. In some cases these have been understood as processes, which, precisely because of their specialisation, should not necessarily be explained on the basis of common templates of general procedure. However, in other cases, there have been forced attempts to justify these specialties according to an approximation of general categories and concepts. In any case, both problems highlight an important lack of systematicity.

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22 The focus on efficiency that has dominated European law overcame the distortions caused in domestic legal systems: E. Schmidt-Assmann 2003, p. 42, J-P. Schneider 2008a, p. 45. This approach reinforced the trend toward homogenization by legal transplants from those legal systems that offered better solutions to achieve Community goals: P. Craig 2011, p. 333-334.

23 See S. González-Varas 1996, p. 37 et seq.

24 R. Caranta 1997, p. 232.

25 In any case, the particular resistance of Administrative Law to the comparative method as an expression of national characteristics has not prevented the hybridisation of administrative law regardless of the legal culture: J. Schwarze 2006, p. cciii & 2000, p. 171.

3 Types of Procedures. Towards a New Generation of Administrative Procedures

3.1 Typology of Procedures and Procedural Structure: Conceptions of Administrative Procedure

Different factors can be highlighted in the identification of types of administrative procedures: the administrative powers exercised, the administrations involved, the number of subjects and interests involved, the objectives of the procedures and their scope, the number of issues, and so on. The typology may be very important in relation to these or other elements. The intention of this paper is to establish common elements of convergence and propose the use of general criteria (which are not identified with the characteristics of any particular state) and which, in representing a common trend, enable a helpful comparative analysis.

From this point of view, all legal systems distinguish between two general types of procedures according to their complexity: 1) 'Simple procedures' characterised by a bureaucratic and legalistic decision-making, the maintaining of conditional programmes as a regulatory technique and the attribution of power to the administration that is exercised through procedures with individual recipients; in these procedures bilateral legal relationships are engaged in, without prejudicing the occasional massive scale nature of some of these procedures, and 2) 'Complex procedures', defined by the exercise of discretionary powers, regulatory strategies based on goal-oriented programmes, since the goals and interests at stake are not one dimensional, in the same way that it is possible that the administrations involved may not be either; all of which contributes to the fact that the recipients of these procedures are not singularisable (approval of general provisions and plans), hence giving rise to complex legal relationships, which may be triangular or multilateral.[26]

From the structural point of view, we can say that both types of processes are distributed in two phases: 1) The internal procedural phase, where the decision is reached,[27] and 2) The external phase of the administrative procedure, which

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26 This typology is transferable to English law through the distinction between procedures that are the common manifestation of the 'resolution' of administrative action (including the increasingly common *adjudicatory-type procedures*) and *rule-making procedures*. The same conclusion can be reached under German: H. Maurer 2011, p. 472 et seq.; Italian: L. Mazzarolli et al. 2005, p. 743 et seq.; and French law: R. Hostiou 2002, p. 112 et seq.

27 Linked with the principle of objectivity, a common principle governing administrative procedures is the principle of *complete investigation*: before making a decision, the administration must collect all relevant information. Another common principle (one not without nuances) is participation aimed at improving the understanding and acceptance of decisions, but also to help include information relevant to the case: J-M. Woehrling 2005, p. 6-7. Both principles are

relates to the result of the procedure. The coincidence of the phase structure of the process of administrative decision-making, however, does not correspond to the legal significance given to each phase depending on the type of procedure.[28]

Generally it can be said that the bilaterality of the procedural relationships (concerned party-administrative body) of the 'simple procedures' clearly indicates the greater importance of the procedure as understood as a guarantee of the legal correctness of the result. In these procedures the internal phase of the procedure reveals an instrumentality and incidental nature, which explains the traditional irrelevance of formal irregularities and their remediableness.[29] In this conclusion there is a certain homogeneity to the granting of a lesser legal significance to minor procedural errors,[30] consistent also with the informality that characterises certain legal orders.[31]

In this type of procedure it is obvious that the administration must also act objectively and impartially and, therefore, the decision-making is clearly also important; however, its main purpose is still to ensure proper implementation of the law while safeguarding the rights of the citizens affected.[32] In short, these procedures primarily respond to the instrumental conception of procedure where procedural safeguards related to rule of law remain fundamental. To a

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embodied in the internal phase of the procedure, whose objective is to get all the information necessary to weigh the interests involved and make a correct decision.

28 The various national legal systems have given different degrees of legal relevance to each of these phases with implications for both the validity of public legal acts, and the scope of judicial review. Notwithstanding the nuances, it is worth distinguishing between legal systems that have given greater importance to how decisions are made (England) and those that have focused their attention on what decision is taken (Germany).

29 It usually happens with hearings, although in Germany also with consultation and reasoning.

30 See C. Cierco 2006 and J.A. Tardío 2006 for the Spanish case. E. Schmidt-Assmann 2003, p. 367 for Germany; G. della Cananea 2010, p. 213 and R. Caranta 2010b, p. 323-325 & 2002, p. 37 et seq. for Italy. J. Ziller 2010, p. 290 notes that the German and Italian cases are a 'bad translation' of the jurisprudence of the French *Conseil d'Etat*. The legal significance in English law of procedural irregularities (procedural impropriety) has not, however, prevented similar conclusions being reached. M. Künnecke 2007, p. 141-142 and S. Mirate 2011, p. 135 highlight the refusal of the Courts to overturn a decision based solely on procedural issues, demonstrating a long list of exceptions to one of the defining characteristics of *natural justice*, which is the right to be heard, and which coincides with those employed in the continental countries.

31 Article 10 of the German Federal Administrative Procedure Act establishes that the administration is not subject to the pursuance of a specific procedure, unless a law so requires. In the Spanish legal system similar conclusions can be reached, since the antiformalist principle has inspired administrative procedural legislation, as jurisprudence has recognised. The same conclusion can be made regarding the Italian legal system, especially after the entry into force of Act 241/1990 on Administrative Procedure: A. Masucci 1997, p. 316-317.

32 See J. Barnés 2006, p. 275.

large extent this is the model that matches the laws of procedure in most European countries.

However, for 'complex procedures' the result is different. The focus here is on the way in which the administration exercises its discretionary powers without neglecting the outcome of the procedure. Here should be noted the structural balance which substantiates the internal phase of decision-making and which, beyond the formality of procedure, gives full importance to the result of each of these procedural steps, linking them with the reasoning, legal correctness and acceptability of the decision.

This second type is comprised of varying procedures responsive to different models and which could be identified with second and third generation procedures, using J. Barnés' classification.[33] This suggests that many 'complex procedures' may paradoxically respond to a conception of procedure similar to 'simple procedures'. The Spanish case of Article 24 of Act 50/1997, of 27 November of the Government (Government Act), is a good example of a second generation 'complex procedure', except for the result and the procedural model emulated (the legislative model), significant changes compared to the general procedure Act (Act 30/1992, of 26 November, on Administrative Procedures) (LRJPAC) cannot be observed.[34]

Other 'complex procedures' serve as a bridge between the procedures for approval of regulations such as that regulated in the Government Act and third generation procedures governed by the principles of new governance. For instance, the urban planning decision-making processes have recently been incorporating substantivising elements, which in modern legislations places them among the latest generation procedures. In this evolution, modern environmental instruments incorporated into the processing of these plans as a result of the implementation of European Directives have been particularly relevant.

Finally, there are other procedures that internalise a model of procedure that is far from the classic instrumental conception. These procedures are characterised by their focus on how the decision-making process is developed, in order to make sound decisions transparent, rational, deliberative and coordinated at various administrative levels. In this case, principles such as democracy, objectivity, and the coordination and effectiveness of administrative action acquire greater significance. This relevance is consistent with the principles of new

33 See J. Barnés 2010. Briefly it can be said that the second generation would consist of procedures for the approval of regulatory norms, while the third generation is characterised as being based on new governance parameters.

34 Some critiques in M. Sánchez 2008, p. 207-208.

governance that govern European regulations such as those pertaining to the environment, and which give rise to a new generation of procedures.[35]

3.2 Two Models of Convergence for two Types and two Conceptions of Procedures

3.2.1 Preamble: Models of Convergence and Legal Integration

The influence that European law has on the regulatory systems of the Member States varies but is nevertheless relevant. Facing the generation of *legal transplants* between legal systems via European law as part of a regulatory approach aiming to standardise national legal systems, the Europeanisation process is now evolving towards integration. In the process of convergence in procedural matters an evolution in the way this approximation between legal systems is dealt with should be noted. Strictly speaking this process of convergence can be explained via a gradation of legal integration that can be specified on a scale of decreasing intensity and which is not exclusive:

a. By means of the establishment of legal solutions that are widely accepted by national legal systems, identifying those principles and rules compatible with the different legal systems (*negative convergence*). The best example would be the recognition of the procedural safeguards inherent in the rule of law (and *natural justice*) synthesised in the principle of good administration.

b. Through the necessity of safeguarding the internal coherence of legal systems, which means avoiding structural differences deriving from the application of EU law and national law (*convergence following the spillover model*).[36] In these situations we are dealing with indirect means of convergence attributable to the voluntary action of the Member States, assuming, for example, the application of the principle of good administration both for all administrative action within the EU and also for cases where the administration acts on purely domestic matters, avoiding in this way procedural double standards and inverse discrimination.

c. By harmonisation measures, where convergence is achieved by means of *positive convergence* mechanisms. An example of this can be found, among many, in the environmental Directives which will be analysed below. Facing

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35 See J. Barnés 2010, p. 349 et seq.

36 Member States may implement those European principles in strictly domestic areas by a voluntary adoption process (*spillover*). See J.H. Jans et al. 2007, p. 8, R. Caranta 1997, p. 234 and J. Schwarze 2006, p. clxxxviii & 2012, p. 31). E. Schmidt-Assmann 2003, p. 401-402 explains this reaction based on what he calls the 'thesis of parallelism': to avoid value differences between national and European Law, it is necessary to maintain a common standard of protection regardless of the law applicable.

uniform objectives, the challenge is to move towards a balanced and flexible positive convergence.

d. By respecting the legal solutions set forth in the various legal systems when a balanced positive convergence is not possible, provided that the common goals can be achieved by various means; this approach requires a different regulatory strategy based on an open and goal-oriented programme from a substantive perspective, which is incompatible with procedural harmonisation (goal-oriented *convergence*).[37]

3.2.2 Types of Procedures and Models of Convergence

The linking of one or another kind of procedure with a particular conception of the administrative procedure is also correlated with the way in which convergence towards shared conceptions of these types of procedures in different national legal systems occurs. Convergence in the 'simple procedures' has been achieved mainly through the imposition of minimum standards, such as those built into the principle of good administration (*negative convergence*). However, convergence in the 'complex procedures' has been mainly attained through the proceduralisation of the European Directives, as an example of a *positive convergence* process through the replacement of national procedural regulations.

3. 2. 2. 1Negative Convergence and 'Simple Procedures'

In a European context of convergence, this first type of procedure is reflected in the principles of good administration enshrined in Article 41 of the Charter of Fundamental Rights. This principle largely synthesises the 'first generation procedural rights'[38] that were recognised by the CJEU,[39] such as the right to be heard, the right of access to documents, the obligation to give reasons for administrative decisions. All of this was included under the umbrella of the general rights of European citizens that include the obligation of public authorities to handle public affairs with impartiality, fairness and within a reasonable time.

37 The use of the *Open Method of Coordination* would be a good example.

38 See F. Bignami 2004 & 2005.

39 The notes from the 'Praesidium' (Charte 4487/00 Convent 50) in relation to the Article 41(1) confirm this conclusion.

To develop this doctrine, the CJEU was based, although not exclusively,[40] on the common traditions of the different legal systems[41] to identify the procedural safeguards that are integrated in the principle of good administration. H.P. Nehl[42] states that these guarantees are derived from the values commonly recognised by any modern democratic legal system and constitute an inherent commitment to the rule of law,[43] constituting part of the common heritage of the legal systems of European public law.[44]

The relationship between the 'simple procedures', the principles and guarantees, the rule of law and the principle of good administration is confirmed in the light of the legal source of those guarantees. It is no coincidence that the CJEU modeled these procedural safeguards, with regards to actions of the Community institutions, within the framework of procedures in areas such as competition law, that is, procedures that can be integrated into the former kind. Regulation 17/1962, of 6th February promulgated to develop Articles 85 and 86 of the EECT, conferred substantial powers on the Commission and was noticeably limited regarding procedural aspects. Both the Commission and the CJEU were pressured to introduce rules of this kind along the lines of American antitrust procedures.[45] So, these procedural safeguards were progressively established in procedures whose purpose was to make individual decisions, being conceived in a similar way in the Member States, as first generation guarantees similar to the model of judicial proceedings (adjudication).

One consequence that can be detected in general terms is the modulation of the traditional relevance that the inquisitorial principle has acquired in European law. Procedural principles and safeguards incorporated into the principle of good administration, such as the duty of public authorities to handle public affairs impartially and fairly, but also the right to be heard and the right to have access to documentation, emphasise the provision of greater initiative to the parties involved in the administrative procedure, that is, the enhancement of

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40 The jurisprudence of the CJEU is also clearly determined by the goal-oriented character of the system of attribution of powers in the EU: Community competences are attributed in order to fulfill the objectives of the Treaties. The CJEU has tried to ensure the effectiveness of European Law by encouraging an instrumentalisation of administrative procedures.

41 J. Schwarze 2012, p. 29 calls this a process of 'evaluative comparative Law.'

42 See H-P. Nehl 1999, p. 17-20.

43 Despite the common origin of the principle of good administration, convergence in first generation guarantees has had a significant transforming impact in some countries. See C. Franchini 2004, p. 191, G. della Cananea 2011b, p. 13 and C. Harlow & R. Rawlings 2010, p. 241.

44 See E. Schmidt-Assmann 2006, p. 113-118, J-P. Schneider 2008a, p. 45-46, M. Ruffert 2011, p. 358-359 and F. Bignami 2005, p. 15 et seq. For a view of the implications of the rule of law in the European legal system, see J. Schwarze 2006, p. 1173 et seq.

45 In this evolution both C. Harlow & R. Rawlings 2010, p. 221 et seq., as well as F. Bignami 2005, p. 64 et seq. emphasise the influence of English law.

the adversarial principle.[46] In terms of protection both principles have disadvantages, given that the inquisitorial principle creates the risk of bias in the relevant administration, the adversarial principle can offer an advantage to the more skilled, though less legally deserving. However, it cannot be said that some legal systems have a general advantage over others.[47] The differences between legal systems are overcome because no system governs its procedures without consideration to a greater or lesser extent of both principles,[48] as well as because the safeguard of fundamental procedural guarantees derived from the rule of law and from natural justice are two sides of the same coin.[49]

3. 2. 2. 2'Complex Procedures' and Positive Convergence

The European Directives promote the incorporation and adaptation of national laws through the obligation to implement or enforce European Directives and Regulations (*positive convergence*). This form of convergence is typical within the 'complex procedures', but obviously is not unique to this type. The disadvantages of this form of convergence have to do with the sectorial approach of European law.

European law has given rise to multiple special procedures. This concept has served in national legal systems as a 'mixed bag', a heterogeneous and unsystematic amalgam of procedures. This is where the clash between the dynamism of European law and the static nature of national legal systems is fully evident. As the general theory of administrative procedure lacks a systematic analysis concerning the transformations that special procedures incorporate into the theory of administrative procedure, it is normal to justify administrative procedure reforms with the idea that special procedures that respond to specific regulations do not necessarily have to conform to the templates of general procedures. Fragmentation and lack of systematicity thus occur in exchange for keeping safe the basic structures underlying the general internal categories. However, the lengthy sectorial procedural legislation and its unsystematic character has clear consequences for the types of procedure established in the general provisions on administrative procedure: if there are many procedures which are clearly distinct from the common general procedure, the general

46 J. Ponce 2010, p. 126 states that due diligence and administrative fairness require procedural rules based on the adversarial principle.

47 See C. Harlow & R. Rawlings 2010, p. 258.

48 Legal systems such as the Spanish or German are based on the inquisitorial principle, but incorporate requirements that allow compliance with the adversarial principle. Italian law runs along similar lines. Notwithstanding, R. Chieppa & R. Giovagnoli 2011, p. 336 and L. Mazzarolli et al. 2005, p. 575 highlight the importance of the influence of European Law in the promotion of the adversarial principle and in the safeguarding of the principle *audi alteram partem*.

49 J. Ziller 2012, p. 105.

rules on administrative procedures 'can become a kind of symbolic document with few practical implications'.[50]

Perhaps for this reason, paradoxically, it has not been uncommon that procedural specialties attempt to explain common legal parameters through the redirecting of legal innovations to safeguard the internal coherence of the legal system. Thus, the instrumental conception of the administrative procedure that has shaped the general theory on the subject has acted as the basis to explain those specific procedures. This has helped procedural innovations to be passed through the filter of key legal issues and to be formally accounted for in the light of the general procedure. This formal assimilation, though not substantive, justifies that the effects of European law in the theory of administrative procedure have not been properly assimilated and understood in all their aspects. The problem here, of course, is the incorrect implementation of EU law.

3.2.3 Types of Procedures: Criteria for a Systematic Treatment

The reductionist approach built around a dominant conception of administrative procedures and the duality between common procedure and special procedures, give rise to the need for a systematic integrating analysis. This analysis should serve to incorporate a renewed conception of procedures that can refine principles and rules in a flexible way based on the type of procedure. This approach also has to specify the legal terms that govern the relations between those conceptions. In relation to these issues several points should be noted:

1. The systematisation advocated is not necessarily synonymous with standardisation, but it is for clarification, increasing legal certainty and internal consistency, removing gaps, incorporating new features and determining the roles of the administrative procedure. Systematisation must be a combination of standardisation of minimums and flexibility, so that the structural bases of the system serve as a support for the inevitable sectorial development that adjusts to the needs of the procedure in each case.
2. The preeminent position, enjoyed in all legal systems, of the first generation procedural safeguards integrated into the principle of good administration cannot be ignored. As such, these safeguards should be understood as minimum standards that must be respected, with the nuances that will be suggested below, by the procedural standards integrated into the instruments of positive convergence.[51]

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50 J. Ziller 2012, p. 113.

51 These guarantees act as limits that cannot be infringed because of their special significance within the rule of law. That relevance must be extrapolated to other principles such as the principles of equivalence and effectiveness, to the extent that they are key parameters from the perspective of the effectiveness of European law. These principles act in two ways: 1) As a double prohibition, that is, a prohibition on discrimination based on the principle of equivalence and

3. This standardisation of minimums has to be adapted to the type of procedure. This means that the protection of due process must be variable according to the predominant functions of each type of procedure.
4. Related to the above point, there is no sharp distinction between types and concepts of procedure and the principles that govern them.[52] Depending on the type of procedure it will be necessary to weigh the importance of the strict safeguarding of procedural guarantees with other requirements arising from principles that also affect administrative actions such as the principle of effectiveness.

These conclusions have implications both in terms of validity and efficiency, according to the type of procedure. One should recall that the primary role of the 'simple procedures' remains largely to ensure legality and the rights of the person concerned. Now, the defining characteristics of these procedures demand that the logic of the administrative effectiveness-efficiency balances the logic of the procedure understood as a guarantee. The principle of proportionality is a useful methodological tool for determining the appropriateness and necessity of the processes, as is considering whether the safeguarding of these formal guarantees should prevail over the need to make decisions quickly and effectively.

From this point of view, it is no coincidence that in several European countries consolidated trends in relation to the simplification[53] and speeding up of administrative procedures can be observed.[54] However, far from establishing general

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a preventive prohibition based on the principle of effectiveness; and 2) As a mandate to Member States to observe the procedural safeguards built into the principle of good administration.

52 It is evident that there are elements of continuity between the principle of good administration and those of new governance. Some of the contents of the principle of good governance, such as the principles of fairness and impartiality, found in Article 41 of the Charter and the principle of due diligence outlined by the CJEU. This principle incorporates a double rationale. On the one hand, it is clearly linked to an instrumental perception of the administrative procedure, imposing an obligation of proper consideration of all relevant factors to making sound decisions. This dimension, linked directly with the obligation of objectivity (Article 19 of the Code of Good Practice), connects with the obligation of transparency and real and effective participation, but also with the effectiveness of the administrative actions. In other words, due diligence operates as a connection between the instrumental conception and new conceptions of administrative procedure.

53 However, simplification can also serve to introduce guarantee mechanisms: J. Tornos 2000, p. 66.

54 This would be the case of the *Beschleunigung* in Germany, following the amendment of the Administrative Procedure Act in 1996, or the continuing demand for *semplificazione* of the Italian Administrative Procedure Act from 1993 onwards, as well as in the Spanish case the modification of the LRJPAC of 1999. On this issue in Germany, France, Italy and Spain, see J-P. Schneider 2008b, R. Caballero 1998, V. Cerulli 1997, G. Vesperini 1998, C. Cierco 2000, G. Corso 2010b, M. Clarich 1998 and J. Tornos 2000. This does not mean that the EU has made no progress in this direction. However, as J. Ziller 2012, p. 101 claims, it is necessary to

solutions to these problems, legislative mandates are generally limited to the requirements of certain efficient conducts, for example, where the individual and repeated character (in the number of interested parties and issues) would justify effective and efficient administrative action (mass procedures),[55] it is also worth noting regulations which show that it is unreasonable to assume that all procedural regulations must be met with the same level of exigency in all types of procedures,[56] and finally, there are also approaches related to control mechanisms.[57]

Similar considerations can be made from the perspective of validity. The secondary importance attributed to procedural errors and their possibility for remedy, are directly related to the parameters of efficacy governing administrative activity: if a decision is lawful from a material perspective, provided it had not been made without proper procedures or creating defenselessness, it would be understood that its legal correctness was not affected by the procedural errors committed, especially if they are remedied *a posteriori* (judicial economy). Consequently, the possibility of invalidity based on formal grounds must be secondary.[58]

Concerns regarding the effectiveness and efficiency of the administrative decisions are common regardless of the type of procedure. However, *a priori* the

address a process of rationalisation in and improvement of those structures and methodology that promote simplification.

55 In this sense can be highlighted Articles 17 and 18 of the German Administrative Procedure Act, referring to the simultaneous treatment of a number of identical requests or a group of interested parties who are in the same situation by means of a single representative.

56 Again the German system is the most interesting. Article 28.2 of the German Administrative Procedure Act refers to cases in which the hearing may be omitted, either through an agreement to a fixed deadline for the resolution, or because the decision is not unfavourable to the interested party on the basis of the facts that he had provided, or when generally applicable settlements or numerous identical settlements or settlements by automatic means were dictated. Similar solutions are foreseen in Article 39.2 in relation to the omission of reason, including, among others, cases where the recipient of the settlement already knows the criterion of the Administration regarding the legal and factual situation of the case, or when that criterion could be easily understood even without reasoning or, equally, when many similar settlements are dictated automatically.

57 Comparative analysis allows us to observe several options: 1) Those which are strictly technical, like those on the use of e-administration and e-justice; 2) Resort to technical legal mechanisms such as those promoting the effectiveness of administrative action together with the acceptance of the decision, for example, the advance consent of sanctions; 3) Incorporate experiences on the implementation of mechanisms of *alternative dispute resolution*. Of course, these instruments do not have to be exclusive to 'simple procedures'.

58 Here the full sense of Article 46 of the German Administrative Procedure Act is seen, under which 'the breach of the rules related to the procedure, form or territorial jurisdiction is not sufficient grounds for the annulment of an administrative act which is not completely invalid under Article 44, *if it is evident that the violation has not affected the essence of the decision*.' Article 21 *octies* of the Italian Act 241/90 on Administrative Procedures says effectively the same thing.

renewed relevance acquired by the decision-making process itself would contradict the possibility of eliminating proceedings, unless they were clearly unnecessary or irrelevant. Overall it should be emphasised that the trend should be the rationalisation and collecting together of procedures, provided this does not reduce their substantive significance within the overall procedure. Within the 'complex procedures' solutions are demanded above all to streamline consultations[59] and participation.[60]

From the viewpoint of validity, we must bear in mind that in the 'complex procedures' the administration plays a 'creative' role in the application of the law, which is far from a purely logical-deductive task, where assessment and weighing of the facts are crucial for the correct application of the regulations. Here, there is a close relationship between questions of fact and questions of law. Correctly applied law involves a proper assessment of the facts. Put another way, when the regulations 'delegate' the administration to judge a specific case, it is necessarily obliged to take into account the factual circumstances of the case.

The change of the regulatory model – with a lower density of substantive contents – and the transfer of focus towards the decision-making process, help to confirm the asymmetry that occurs between the goal-oriented programming of the administrative action and parameters – and their intensity – that the judiciary use to review that action. This refers to the distinction between norms of conduct (*Verhaltensnormen*) and norms of control (*Kontrollnormen*), which emerge in the debate over the control of administrative discretion. The norms of conduct are those that regulate certain administrative activity by means of rules and principles; in turn, norms of control determine those control parameters that the judiciary employs, as well as their reach. When there is no symmetry between the two types of norms, as occurs in the context of the complex decisions that we have been discussing, it is necessary to isolate decision-making areas that correspond only to the administration.[61]

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59 Some examples of rationalisation of consultations are, in Germany, the *Sternverfahren* or 'star procedure', and in Italy, the so-called *conferenza di servicio*. However, the experience of Italy shows that sometimes the rationalisation measures end up becoming complex procedures that create new inefficiencies.

60 In matters such as the environment such claims would be constrained under the requirements of the demands of Directive 2003/35/EC 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending regard to public participation and access to justice. However, Article 2 of the Directive grants Member States a significant degree of discretion as to who will take part in the process of participation and how.

61 The doctrine of the 'attribution rules of powers to take the final decision' (*normative Ermächtigungslehre, Letztentscheidungsermächtigung*) requires that the attribution to the Administration is expressly provided – or that it can be derived by interpretation – and that the consequent limitation of judicial review is justified thanks to a constitutionally protected right or interest. See E. Schmidt-Assmann 2003, p. 229 et seq. and M. Bacigalupo 1997, p. 61 et seq.

The extent to which in such cases the norms refer the final decision to the administration, judicial review should be limited: if the administration must show that its decision is the 'best possible' and to this end follow a process of rational and reasonable action, in these circumstances the content of the decision is not amenable to control, precisely because the substantive lawfulness of the decision would be supported by a decision determined in a reasonable manner. Thus, control should focus on the internal phase of the process of administrative decision-making. The balancing of interests and the principle of proportionality provide the methodological tools essential for the execution of that control.

In these cases, precisely because the focus of attention is on how the administration makes its decisions, procedural irregularities become more important and the potential for rectification decreases. Legal indifference regarding procedural rules is inconsistent with the legal relevance that is acquired by the internal phase of the process of decision-making in the 'complex procedures'. Now, the proper development of the internal phase depends not so much on strict compliance with the formal process, as on the fact that the process evolves in conformity with parameters and methodological structures that streamline the adoption of the decision: the obligation for the administration to be objective prevents the methodological inadequacy of the internal decision-making process. In other words, it does not matter so much that a mandatory report is required or a consultation of the public is held, but rather that the outcome of these proceedings be assessed properly and thus be reflected in the reasoning. Otherwise, the resulting invalidity from the procedural stage will affect the substantive validity of the decision, as the correction of the legal outcome will materially be bound not by the strict compliance with all formal procedures, but by the observance of a proper internal decision-making process.[62]

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62 Here can be noticed a trend of convergence towards the English model of *judicial review*. A complete overview is presented in K-H. Ladeur 2002, M. Künnecke 2007 and R. Caranta 2008. However, this model is also undergoing transformations. C. Harlow 2002, p. 48 et seq. emphasises that the right to reasons (*give adequate reasons*) or the principle of proportionality are generating important consequences in determining the limits of *judicial review*, to the extent that they can be used to review the *merits* of the case.

4 Positive Convergence Processes and Proceduralisation of Environmental Directives: Their Relationship with the Principles of new Governance and Their Significance in the Legitimacy of Administrative Action

4.1 Origin and Scope of the Process

European environmental policy has over the last twenty years followed a trend towards overcoming the classic *Community Method*, explicitly stated in the White Paper on European Governance,[63] whose main purpose was the adoption of binding measures to impose uniform standards for all Member States. The White Paper is a turning point towards a less rigid approach. However, it is important to recognise that at this stage we cannot speak of a sharp separation, but rather a complement to the traditional *Community Method*[64] with new forms of action dominated by the principles of new governance.

The less rigid regulatory model confers greater flexibility on the way in which Member States must comply with their obligations. Recourse to so-called framework Directives, based on the principle of proportionality, as well as on generally less complex substantive provisions, has given more leeway to Member States for the purpose of implementing the new Directives. Together with a decrease in substantive content, the new regulatory approach is characterised by a notable increase in procedural regulations, as the need for these is in direct proportion to the lack of substantive regulatory provisions.[65]

The phenomenon of proceduralisation is not new in Europe. In fact, it is a reflection of what has happened in modern constitutional states with the move from the liberal state to the welfare state. The expanded role of the state and the need to achieve a high level of information and knowledge management to enable efficient administration, gave rise a replacement of the traditional regulatory model with a model based on an operational perspective oriented towards problems.[66] The phenomenon of the 'law crisis' represents in fact the ineffect-

63 Communication from the Commission, from the 25th of July 2001, 'European Governance. A White Paper' [COM (2001) 428 final].

64 A separation from the classic Community Method model, which would integrate environmental policy, is the so-called 'new, old governance', which would show elements of continuity combined with significant deviations: J. Scott & D.M. Trubek 2002, p. 3.

65 See J. Barnés 2010, p. 342.

66 A. Vosskuhle 2007, p. 105.

iveness of the law as a tool in the management of modern administration. The law now reveals its legally binding nature through different steering models, replacing the conditional programming of administrative action with a goal-oriented programming that incorporates a growing proceduralisation, directing decision-making without sacrificing a creative response to meet the objectives set.

The same factors identified in this process have occurred in European law, although in this case the EU's idiosyncrasies have also had a leading role: the regulatory solutions of a procedural nature are best suited to a system of shared competencies based on the idea of the effectiveness of European law. It is clear that European law uses regulatory procedural solutions because it is easier to reach agreement on such matters than on substantive contents. This is even more evident as far as the environment is concerned, for two reasons: 1) In a European context of 27 Member States and a growing legal heterogeneity, it is recommendable to employ a strategy based on results rather than on material programmes due to the difficulty of finding common substantive solutions; 2) The increasing complexity and uncertainty of environmental risks make it unadvisable *a priori* to propose uniform solutions; one could say that the heterogeneity of environmental problems requires the provision of some flexibility within the common framework and the overall objectives.

4.2 Environmental Directives and the principles of new governance

4.2.1 Proceduralisation and Forms of 'new' and 'old' Governance

Administrative procedures are another tool for developing a specific steering model. Opting for a marked proceduralisation is not in itself a virtue but if it is combined with appropriate values of procedural governance, it may certainly be considered a regulatory strength. The major drawback from the lawyer's viewpoint is that the new governance does not yet have a clearly defined profile in law. However, it cannot be ignored in the debate on administrative law reform.

The reason that this claim is usually rejected is related to the stagnation of the legal systems and a paradoxical fact: the absence of categories that 'translate' extralegal concepts or, conversely, the existence of these concepts understood in a particular way. Indeed, legal systems reject foreign elements that may fracture the systemic organisation and are therefore considered unnecessary or disruptive to an established legal structure. In other cases there are legal categories and concepts that may resemble those of the principles of new governance; here the problem is the attempt to interpret those principles based on others, as if they were in fact equivalent.

The idea of providing an adequate 'legal translation' of the principles of governance is methodologically important considering the influence that the social sciences have on legal science as a way to open administrative law to the reality of administrative practice.[67] In this sense, the theoreticians of steering theory (*Steuerungstheorie*) (E. Schmidt-Assmann, W. Hoffmann-Riem, M. Ruffert or A. Vosskuhle) understand that the science of administrative law should guide the construction and interpretation of legal concepts and categories taking the real conditions of administrative decision-making into account, assuming as relevant those circumstances that increase its effectiveness. Thus, an interdisciplinary effort is warranted to assess how administrative law should provide tools to ensure its effective implementation.

The concept of governance is a useful 'descriptive formula' that serves to highlight the multiplicity of models that coexist not only at the national and supranational levels, but also in the relationship between public authorities and private individuals.[68] Governance has the value of summarising in a single concept the notion of 'division of responsibilities' between the different administrations, but also between different social actors and the public, that is, the distribution of duties and functions within the social sphere and within the public sphere.[69] Governance contributes, therefore, to overcoming the public monopoly in determining what should be considered as general interest, thus contributing to the re-legitimacy of the administration.

The principles of new governance also provide 'key terms' to adapt administrative action and the legal categories which articulate it to the practical scenarios of modern administrative action.[70] This does not mean that the concepts based on non-legal sciences should replace the law as a system but that they should help open up the legal system. In this methodological framework, the concept of governance allows the synthesising of several key concepts known in law – such as participation, accountability, access to information (transparency) and effectiveness – which also contribute to strengthening different benchmarks of administrative activity in the legal discourse.[71]

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67 E. Schmidt-Assmann 2006, p. 137 et seq., M. Ruffert 2007, p. 47, A. Vosskuhle 2007, p. 115 et seq. and W. Hoffmann-Riem 2007, p. 203 et seq.

68 E. Schmidt-Assmann 2006, p. 4 and W. Hoffmann-Riem 2007, p. 215-216.

69 E. Schmidt-Assmann 2006, p. 43.

70 The methodological use of 'key terms' – *Schlüsselbegriffe* – has been emphasised by E. Schmidt-Assmann 2006, p. 150-152 and A. Vosskuhle 2007, p. 134-138.

71 The 'theory of benchmarks' of E. Schmidt-Assmann 2003, p. 347 *et.seq*. puts forward an administrative law based on real administrative action parameters, going beyond the classic standards of action based on the lawfulness of administrative action. Some of those parameters are legal ones (proportionality principle, legal certainty...); others mix both a legal and another perspective (efficiency); finally, others cannot be translated into legal standards, but are relevant for administrative action (governance...). Although this last group goes beyond administrative law, law

These concepts express fundamental ideas that are necessary to reformulate and improve the repertoire of legal categories and regulatory models in changing scenarios. Many of these concepts are just workarounds to define complex situations with weak legal content. For this reason, they cannot be integrated into legal doctrine without an analysis that allows their legal 'translation', thus avoiding foreign elements in the legal system. However, the *key terms* can provide an explanatory basis and a means of adapting legal concepts and categories. This can be done through the interpretation of legal principles such as the principle of democracy and the principles of objectivity, coordination and administrative efficiency. Thus, the influence of the new governance would allow a strengthening of the legal significance of parameters directing administrative actions such as effectiveness, efficiency, transparency and participation.

Such considerations are also transferrable to procedural matters, emphasising the concern for how administrative decisions must be taken, mainly in areas specific to the 'complex procedures'.[72] This renewed awareness on the administrative procedure would enable reaching two results: 1) The equalising of the legal significance of the procedural requirements arising from the rule of law (the defensive side of proceedings and its consideration as a channel to make correct legal decisions) with those derived from the principles of objectivity, coordination and effectiveness,[73] 2) The consequent requirement of a fresh interpretation of the formalities of administrative procedure, whose legal understanding cannot be based on a simple transposition of the traditional categories.

422 Some Characteristics Attributable to the Principles of new Governance

An analysis of the Directives and Regulations on environmental matters shows how their procedural provisions are a realisation of the principles of new governance. It is true that there are different views about the degree of integration of the new procedural model,[74] but what is noteworthy is that all opinions show an evolution towards this dimension of the procedure.

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must establish procedures which facilitate its development and application, as well as allowing exchange amongst the legal order to generate learning processes.

72 The proceduralisation of environmental Directives highlights this aspect, to the extent that it has been formulated based on the Directive potential of procedures in order to achieve objectives such as increased transparency, participation, exchange and improvement of information, and so on: E. Schmidt-Assmann 2008, p. 62.

73 With a basis on those principles commonly recognized by national laws such as the democratic principle or that of objectivity and/or administrative efficiency: J. Ponce 2010, p. 120 et seq.

74 There are those who say that such regulations are near that goal: J. Barnés 2010, p. 350; but also those who think that purpose is still only a tendency: H-P. Nehl 1999, p. 25, M. Shapiro 2001, p. 376-377 & 2002, p. 21-22, K-H. Ladeur 2002, p. 108-111; while others suggest that there is still a long way to go: J. Scott 2000, p. 274 et seq.

Below we will try to demonstrate the parallel between examples provided by European standards and principles of new governance. To this end examples from Spanish law will be used, though obviously similar examples could be obtained from almost any other legal system. Before performing the analysis, we must take two points into account:

1. As a basis for the comparison we will use the LRJPAC and the Government Act. This is for purposes of comparing 'type procedures' or models of representative procedures; in the terminology of J. Barnés,[75] both administrative norms would represent two different generations of procedures and, following the typology initially presented in this paper, would respond to two types of different procedures.[76]
2. It goes without saying that the criticisms against both Acts could be overcome under the internal rules that implement the European Directives. However, the LRJPAC and the Government Act are not compared with the special norms which implement the European Directives precisely because of various consequences: a) The obvious fact that the administrative procedure evolves and must adapt to meet European law (Europeanisation of the procedure); b) The fact that a special rule incorporates a high degree of procedural content shows that the procedure does not adapt to the procedural model required by European law, hence the need to create special rules which do not fit into the general system (fragmentation and lack of systematicity); and c) That a conception of administrative procedure different from than which comes from general rules can be deduced from European law (and the rules that are passed into our legal systems to implement it).

4. 2. 2. 1Procedural Determination Relating to the Structure, Development and Legal Significance of the Administrative Procedure

Unilateral *versus* multilevel, coordinated and collaborative decisions. The procedure that the LRJPAC regulates is characterised by a unilateral perception, in the sense that it does not incorporate all the relevance and expressions into the procedure which inter-administrative relations of collaboration and cooperation have, not only at national level but also at the European context. Beyond the stage of consultation with other administrations that Articles 82 and 83 of the LRJPAC regulate, the cooperative procedural, organisational and information transmission structures are very small.[77]

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75 See J. Barnés 2010, p. 346-348.

76 While the LRJPAC is identified with first generation 'simple procedures', the process of approval of the regulations of Government Act would be considered, though not without nuances, somewhere within the area of second generation 'complex procedures'.

77 Something similar is clear from Article 24.1°. B) of the Government Act.

However, the European Directives provide not only consultative intervention of other national or European authorities, but also integrated, shared or mixed procedures, both vertically (European and national level[78]) and horizontally (among national authorities[79] or between different domestic authorities at state, regional or local levels[80]) with complex proceedings and decisions at various administrative levels[81]. This is something that also occurs in relation to the approval of planning instruments.[82]

Overcoming the traditional dichotomy between direct and indirect implementation of European law, the Directives impose combined action on both European administration and the relevant national authorities.[83] A package of measures which confront the challenges that the new institutionalism seeks to address from a model of state networking by meeting the requirements arising from the obligation of cooperation between national and European authorities, not only regarding procedure, but also in the information and institutional spheres.[84]

Although closely related to the above, it should be noted that the LRJPAC type procedure was designed to make decisions within a hierarchical and materially compartmentalised administration. It is, in short, a procedure designed to make determinations uniquely within the area of a specific competence without regard to other related decisions, especially if they are within the competence of another administration. However, the European Directives, which have regulated 'complex procedures' require simplifying solutions by integrating decisions, even if they come from various domestic administrations with jurisdiction in the matter.[85]

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78 *I.e.* Article 4 of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, providing a multilayered procedure foreseen for designating protected areas. Similarly Directive 2011/18/EC regarding the deliberate release into the environment of genetically modified organisms.

79 *I.e.* Regulation 259/93/EEC on the supervision and control of shipments of waste within, into and out of the European Community.

80 *I.e.* Article 7 of IPPC Directive: 'MS shall take the measures necessary to ensure that the conditions of, and procedure for the grant of, the permit are fully coordinated where more than one competent authority is involved, in order to guarantee an effective integrated approach by all authorities competent for this procedure'.

81 Such an exposition can be further complicated if we consider the 'organisational solutions' which complete this complex web of procedures. A good example is the Regulation 1210/1990/EEC on the establishment of the European Environment Agency (EEA) and the European Environment Information and Observation Network (EEION).

82 *I.e.* according to Article 13 of Water Framework Directive (WFD), in international river basin districts, MS can coordinate to create a single international river basin management plan.

83 From this point of view, environmental policy would include the entire European regulatory procedural framework systematised by E. Chiti 2005a, p. 7 et seq.

84 E. Schmidt-Assmann 2006, p. 109.

85 *I.e.* according to Article 4.2 of SEA Directive 'the requirements of this Directive shall either be integrated into existing procedures in MS for the adoption of plans and programmes or incorporated in procedures established to comply with this Directive'. *Idem* Article 2.2 of EIA Directive and similarly Article 7 of IPPC Directive.

From this point of view, the traditional conception of the procedure as a succession of steps that is instrumentalised so that a single administrative decision may be issued unilaterally suffers from a reductionist interpretation. All the provisions of environmental Directives highlighted are an example of flexibility in processing and procedural implementation, directly related to the need to give the corresponding weight to each of the administrations involved (accountability and coherence in terms of new governance) and the need for simplification and for decisions to be taken at the most appropriate level (effectiveness).

Inquisitorial approach *versus* cooperative instruction. Hand in hand with the traditional one-sidedness of the administrative procedure, Articles 74 and 78 of the LRJPAC (and of course, the Government Act) provide that administrative procedures are promoted officially at each step of the process. In other words, the inquisitorial principle rejects the notion that the procedure may be instigated by private individuals.

Given this, the Directives on environmental matters include provisions that strengthen and equip the adversarial principle with new content: they provide innovative regulations which give the concerned party the responsibility and the opportunity to add to the file the information needed to resolve the issue, replacing traditional administrative investigatory powers; similarly, certain steps or procedures may be conducted by private agents. These examples highlight at least a partial 'privatisation' of procedures.[86]

Attempting to give an explanation in terms of governance to the procedural provisions of the Directives, it can be said that the European statutes encourage the sharing of responsibilities (public-private), promoting decision-making processes, which are shared and consensual.[87] The participation of private individuals in the instruction of the procedure contributes to the idea already alluded to above of 'distribution of responsibilities', with an impact on the principle of accountability. Likewise, that involvement has effects in terms of efficiency, since increased participation leads to a greater acceptance of the results.

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86 E. Schmidt-Assmann 2008, p. 59-60. The best example is Article 5.1 of EIA Directive: 'MS shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV'. According to the Regulation 66/2010/EC 25 November 2009 on the EU eco-label, and the Regulation 1221/2009/EC 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme, it is even possible to talk about a total 'privatisation' of the decision-making process.

87 According to the possibilities highlighted in Communication from the Commission on Environmental Agreements 27 November 1996 [COM (96) 561 final] and in Communication from the Commission on Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment [COM (2002) 412 final].

Formalism *versus* the substantiation of the procedure. Consistent with the design of a procedure that is unilateral, formally driven, and oriented towards decision-making according to law, it is possible to understand the formalism of certain steps, whose end result is the incorporation into the file of information necessary to make a decision, such as the regulation of the process of consultation with other administrations (Articles 82 and 83 of the LRJPAC) or public participation (Article 86). Both are good examples of how the regulation focuses more on the empowered administration's compliance with procedure (basically its mandatory nature), than in any other circumstance. From this perspective, what matters is whether or not the procedure should be carried out, and if so, how it should be carried out, rather than how the information obtained in such proceedings should be taken into account.[88] As for the public participation, also Article 86.3.II of the LRJPAC shows the importance for legislature to recognise the right to obtain a response, but nothing is said of how such participation should be incorporated into the decision-making process.[89]

However, this does not mean that the general rules do not demand proper consideration of the outcome of the proceedings. This is something that can be understood as indisputable, logical and ultimately implicit. What one might wish to highlight is that these provisions clearly emphasise the formal regulation of proceedings above the undeniable and logical need to properly consider the results of each proceeding: namely formalism over substance. Logically, this has clear implications for administrative practice.

However, environmental Directives give greater importance to the substantive aspect of the information obtained in the process of decision-making, for example, through participation and consultation procedures.[90] Under the mere formalism of fulfilling the proceedings underlie substantive issues which European law brings to light. Without prejudice to the mandatory nature of these procedures and the binding nature of their results, European law emphasises the need for the information or the knowledge contributed by another State (e.g., in the case of trans-boundary consultations) to be evaluated and properly taken into account by the competent authority. That is, beneath the mandatory nature of a process, regardless of its binding character, is the idea of gathering the information necessary to make reasonable and sound decisions, to the extent that without such information it would be impossible to properly weigh the interests at stake.

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88 See J. Agudo 2006 & 2009.

89 In the same vein the Article 24 of the Government Act.

90 Article 8 of EIA Directive: 'The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure'. In the same vein see Article 8 of SEA Directive.

So then, the mandatory nature is not synonymous with merely requesting a report or holding public consultation, but with adequate consideration of the data contained in this report or the allegations made, which is essential to make rational and correct decisions. So, the information gathered, the participation, the queries that were made, which parts of all these data have been considered (as part of the fact-finding process), become data that are not simply a formality, but are determinant in a deliberative, cooperative, and weighted decision.

This conclusion can also be 'translated' into terms of new governance. Principles such as participation and transparency demand to be taken into account, and relevant information obtained by the different channels should be sufficiently valued. Similarly, the principles of accountability and coherence require that the different relevant authorities' interventions are reasonable in relation to the powers they exercise and in relation to their, presumably, better knowledge of the matters over which they exercise their powers.

The decision *versus* the process, the monitoring and review of the result. If anything characterises the regulation of procedure in the LRJPAC it is that it is a formal process with a decision-making purpose.[91] The regulation of Articles 42 and 89, among others, indicates this. However, the Directives incorporate provisions that give the administrative procedure a legal significance that goes beyond their understanding as a sequence of steps leading to the adoption of a decision on a particular issue. In fact, many of these determinations are not decisions, since their purpose is to conduct a follow-up (monitoring) of the decision to allow its revision through learning processes in the light of new information and new experiences.[92]

The new regulatory approach adopts a steering model that assumes a dynamic interaction between the development and adoption of regulations and their enforcement: procedures designed to achieve objectives in which implementation is a process of adjustment to revise methods and solutions and make better decisions in specific cases. Ultimately, the proceduralisation assumed in European environmental policy overcomes the traditional compartmentalised

91 The same result characterizes the procedure of Article 24 of Government Act.

92 Monitoring decisions is a common tool foreseen in environmental Directives. *i.e.* Article 10 of SEA Directive, Article 9.5 of IPPC Directive. Another example is the revision process of river basin management plans according to Article 13 paragraph 7 of WFD. Nor can we ignore the fact that similar mechanisms in the framework of *soft law* also play a significant role. Good examples are: 1) the work of the Institute for Prospective Technological Studies (IPTS) for elaborating the so-called *Best Available Techniques Reference Documents* or BREF; 2) the guidance prepared in the frame of the Common Implementation Strategy developed to fulfill with the WFD.

division between approval of regulations and execution[93] by using revisability techniques, understood as an expression of adaptive efficiency aiming to improving the solutions adopted.[94]

4. 2. 2. 2Provisions Ensuring Procedural Guarantees that allow the Elaboration of new Forms of Control, but also of Administrative Legitimacy

Access to documents of proceedings and access to information. Beyond the right recognised in Article 35.h) of the LRJPAC and its development in Article 37, the right of access to files and records has been characterised by its severe limitations. However, access to information by both the public and by concerned parties[95] has an important role to play within EU Directives. The importance of obtaining information held by administrative authorities not only pertains to the procedure itself, but access to information is expected even in the stages prior to formal initiation of the administrative procedure.[96]

Participation and the right to be heard *versus* deliberative, consensual and duly considered participation. The LRJPAC regulates public participation with the same reticence with which participatory public intervention has traditionally been considered in administrative proceedings. Article 24.1.c) and e) of the Government Act provides the possibility for the public inquiry to be held, but the emphasis of the hearing is still from a defensive perspective.

However, participation understood as a mechanism for maintaining a collaborative dialogue, in which the public and interested parties can contribute to the adoption of administrative decisions with information that in many cases is only in their possession, is the perspective supported by the European Directives.[97] This perception of participation connects the principles of new govern-

93 J. Barnés 2010, p. 338.

94 The uncertainty inherent in areas of activity such as the environment also requires new ways to channel proper decision-making. It is therefore necessary to make provisions for processes of new knowledge generation and increase flexibility that allows administrative practice to adjust to new experiences: J-P. Schneider 2007, p. 313.

95 In all environmental Directives are mandatory provisions concerning this question in accordance with Directive 2003/4/EC on public access to environmental information.

96 The EIA and the SEA Directives foresee previous phases of information through consultation, which allow knowing whether a project, planning or program must be submitted to EIA or SEA (*screening*).

97 It is remarkable the Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending regard to public participation and access to justice. On the other hand, the Article 14 of WFD is a very good example of how participation is intended to become a constant key element, proceeding along the production procedure of river basin management plans.

ance with the doctrine of deliberation, based on a practical approach.[98] In this sense, the principles of new governance incorporate a standard which complements the standards of justice with direct implications for the legitimacy of the administrative activity,[99] centered on citizens as an assessable source of knowledge and values, associating participation with problem resolution. This does not signify, as such, neither a scrupulous respect for pluralism, nor the systematic exclusion of pressure groups but rather, represents an understanding that the problems can be best solved by considering how citizens can contribute to those decisions.[100] The principle of proportionality provides the methodological tools necessary to weigh the degree of the openness of participation to ensure the effectiveness of administrative action.

As for the perception of these European Directive provisions in terms of new governance, they would clearly be linked to principles such as accountability, transparency and participation, although the principle of effectiveness would also clearly be involved.

The function of control of administrative procedure. Protection traditionally has focused at the level, which according to the basis of a legal system centered on the rights of citizens against any unlawfulness of administrative action, should be considered as the basic level of control, that is, the protection of lawfulness by the judiciary. However, participation and transparency are not conceived only as a form of cooperation, but also as a form of control of administrative action, since a deliberative and cooperative administration is founded on discussion and debate.[101] To be more precise, it would be right to say that both the strengthening of public participation, as well as transparency and access to information,[102] strengthen the function of the control of administrative procedure that enables it to be conceived as a mechanism of 'multiform variety of administrative controls'[103] contributing to achieving an adequate degree of control, which is not necessarily identified with the maximum control monopolised by the courts.

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98 J. Steele 2001 identifies two models of deliberation, a legitimizing model and the other application-oriented. Of these we are interested only in the second, since it is the one that focuses on decision-making rather than on the adoption of legal standards as the basis for a legitimate legislative process.

99 O. Mir 2010, p. 336-338 establishes as a criterion for determining when participation responds to the democratic principle, and not to the defensive vision of the rule of law itself, the following: *'the range of the decision (the number of persons affected) and the recognition of administrative discretion'*.

100 See J. Steele 2001, p. 430-435.

101 E. Schmidt-Assmann 2003, p. 369.

102 That relationship is not exhaustive, since it should add the control attributable to instruments of cost-benefit analysis, the mechanisms of alternative dispute resolution, and so on.

103 See E. Schmidt-Assmann 2006, p. 84-85.

This clearly demonstrates how European law has helped to reinforce a ladder view of control mechanisms of legal systems. The idea of administrative procedure as a control mechanism helps to establish a basic level of protection (primary level), articulated through variable means which are largely incorporated via European law such as public participation, transparency and access to information or tracking administrative decisions (revisability). These control mechanisms allow the limiting (not impeding) of the recourse to judicial review of 'important matters' (secondary level[104]), in the same way that access to the Constitutional Courts should only be available with reference to the most gross violations of fundamental rights (third level).

4.3 Relations between Proceduralisation and Complementary Modes of Legitimacy

Rationality in the decision-making process (including participation, consultation, technical reports, and so on) (1) favours reasonable deliberation (2) which guarantees making the best possible decision, and (3) achieving greater efficiency through prior acceptance of the decision (4). This sequence allows different parameters to be identified which determine administrative action and which affect different stages of the process of forming and adopting decisions with implications well beyond the formal termination of the procedure. Some of these elements are related to the procedure in itself (information gathering and public-private collaboration, deliberation); others have to do with the outcome of the procedure (lawfulness of decisions); and finally, others are related to the execution of the decision (effectiveness). This sequence highlights a gradual optimisation of the legitimacy of the actions of the administration[105] that manifests itself during the administrative procedure.

Various trends in different doctrines have conceded to these stages a variable significance according to strictly legitimising effects. While theorists of deliberation give greater importance to the internal procedural legitimacy (*input legitimacy*)[106] (the rationality afforded by transparency, the obtaining all relevant information and the participation that contributes to the quality of decisions and,

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104 From this perspective, administrative procedure operates as a real alternative to avoid legal conflicts: M. Chiti 2002, p. 239.

105 See J. Ponce 2010, p. 90 et seq. 2011 *in toto*, A. Vosskuhle 2007, p. 115 et seq., R. Caranta 2011, p. 177 et seq. and C. Donnelly 2011, p. 251 et seq. Related to the idea of complementarity of the sources of legitimacy, see E. Schmidt-Assmann 2011, p. 53 et seq. for Germany, P. Gonod 2011, p. 4 for France, G. della Cananea 2011a, p. 62 et seq. for Italy, and F. Velasco 2011, p. 92 et seq. for Spain. For the special case of England, see C. Donnelly 2011 and A. Le Sueur 2011.

106 This term is commonly associated with legitimacy theory by means of the procedures of N. Luhmann. Here this concept is used related to the aforementioned model of deliberation oriented to the implementation and resolution of cases.

in turn, to democratic re-legitimacy[107]), the doctrine of control theory focuses on the outcome of the procedure (*output legitimacy*) (effectiveness and efficiency).

However, input legitimacy also involves an orientation towards outcomes, as rational procedures favour the best outcomes.[108] Similarly, the nature of the outcome involves procedural guidance articulated through various mechanisms such as participatory and collaborative mechanisms, which lead to the conclusion that decisions may be effective because the expected outcome derives from the prior consideration of the interests revealed by the interested parties, rather than from the imposition by the administration. In other words, both *input* and *output legitimacy* are not mutually exclusive modes of legitimacy and they bring together different parameters of administrative action which cumulatively are added to the principle of legality. Both orientations are combined and integrated throughout the entire policy cycle,[109] although there are phases where some types of legitimacy stand out above the rest.

These complementary means reinforce the legitimacy of administrative action in view of its weaker association with the law, understood as the primary source of democratic legitimacy. Administrative legitimacy is not a one-dimensional concept, but multiple and scalar. Although some connection with the law must always exist to provide a minimum level of legitimacy (attribution of powers), the greater the 'distance' between administrative action and the legal standards which programme its proceedings (expanding the discretionary powers and 'creative' ability of the administration) exactly that which is characteristic of 'complex procedures', the greater is the need to justify administration activity under new legitimacy parameters.[110]

This optimisation of legitimacy transcends individual cases. The constitutional principles that protect the various legitimising parameters (the rule of law, the democratic principle, the principles of objectivity and effectiveness) act as a 'transmission chain' that requires the optimisation of legitimacy in each administrative procedure. That is to say, the legitimacy of administrative action already has a foundation in *input* and *output* terms at the highest legal level.

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107 In this vein, in Spain see S. Muñoz 1977, p. 529 et seq. and M. Sánchez 1979, p. 178; in France, J. Rivero 1965, p. 821 et seq.; in Germany, W. Hoffman-Riem 1993, p. 39. However, for Italy, G. della Cananea 2011b, p. 13 et seq. states the following: '*The question thus arises whether the widespread opinion according to which the Act of 1990 creates at least the preconditions for administrative or deliberative democracy* (...) *is, therefore, simply wishful thinking*'. Equally, R. Caranta 2010b.

108 M. Shapiro 2002, p. 19.

109 H.C.H. Hofmann & A.H. Türk 2006, p. 587 and A. Le Sueur 2011, p. 41.

110 See O. Mir 2010, p. 337-338 and J. Ponce 2002, p. 1508.

5 Conclusion

The process of the Europeanisation of Administrative Law emphasises different forms of convergence, which, without being exclusive, predominantly occur depending on the type of procedure. Behind this convergence process two conceptions of administrative procedure can be identified which, far from opposing each other, operate to varying extents in types of procedures with different purposes and functions. In the face of the traditional instrumentalisation of procedures linked to the principle of legality prevailing in what we have called 'simple procedures', the multifunctionality that characterises administrative procedures is reflected in all its intensity in the 'complex procedures', holding them up as a guarantee with multiple objectives which coincide with the 'simple procedures' only in some levels.

From this point of view, the following conclusions and suggestions can be made: 1) Administrative procedure guarantees that the decision shall comply with the law (guarantee of lawfulness); 2) Administrative procedure guarantees the rights and interests of citizens participating in the procedure (guarantee of defense); 3) Related to the previous point, it also guarantees the obtaining of all the relevant information for a decision to be made (guarantee of rationality); 4) It also guarantees transparency (access to information, reasoning, and so on) and deliberation through participation (guarantee of cooperation); 5) It likewise guarantees multilevel coordination and collaboration among all the administrations involved (guarantee of collaboration); 6) It also guarantees reaching the decision that best satisfies the interests and rights at stake (guarantee of reasonableness); 7) In the same way, administrative procedure guarantees the monitoring of administrative action (guarantee of control); and 8) Precisely because of the above, the procedure guarantees the acceptance of the administrative decision and, therefore, is the source of the administration's legitimacy (guarantee of acceptance).

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