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Procedural Rights in Lithuanian Administrative Law – Resistance Fuelled by the Past?

Agnė Andrijauskaitė*

Research Associate at German Research Institute for Public Administration
PhD Student at German University for Administrative Sciences Speyer, Germany
and Vilnius University, Lithuania

Abstract

Despite the prevailing trend towards the codification of administrative procedures on the European plane – both on supranational and domestic levels –, the Lithuanian legal system stays immune to it. The purpose of this article is, hence, to explore the underlying reasons for the said resistance towards a clear enunciation of procedural rights on statutory level as well as its more practical implications in Lithuania. Namely, the main focus lies on the analysis of the said deficiencies as reflected by the administrative case law. In order to reach this goal, firstly, the (somewhat limited) notion of administrative procedure found in the legal framework of Lithuania is dissected and compared to respective notions found in few other legal systems of EU Member States boasting more comprehensive codifications of administrative procedure. Secondly, the relevant administrative case law in which the paradigmatic examples of procedural rights (such as the right to be heard and access to one's file) can be found is analysed. In the end, the reasons of the said resistance towards codification of procedural rights in the Lithuanian legal system are offered together with a reflection on whether that can still be justified in view of the results revealed by the case law analysis, or whether the time to innovate has come and the more coherent and logically-organized system of administrative procedure is needed.

1. Introduction

Administrative procedures and the individual rights stemming therefrom under European administrative law seem to be flourishing. A telling example of this is the fact that the European Union has managed to juridify them despite its supposed commitment to national procedural autonomy.[1] Nor has the European Court of Human Rights (ECtHR) stayed immune from eliciting certain important aspects (even if inconclusively) as to the proper way of

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1 For example, in EU competition law, the practice of claiming different procedural breaches has proliferated, as well as the judicial response thereto. See in general RD Kelemen, 'Adversarial legalism and administrative law in the European Union' in S Rose-Ackerman & PL Lindseth (eds), *Comparative Administrative Law* (1st edn, Edward Elgar 2010) 606, 606. For scholarship

conducting an administrative procedure,[2] whereas the Council of Europe (CoE) began to highlight its importance decades ago by undertaking standard-setting activities in this domain.[3] Another testimony to the evergreen significance of administrative procedures are the numerous academic and legislative projects dedicated to their codification.[4] Indeed, the codification of procedural administrative rights is often considered a clear and convenient way to transfer them into the minds and actions of both individuals and administrative authorities. With these trends in mind, one could say that the supranational 'normative' pressure to transplant administrative procedural rights into domestic legal systems continues to be strong.[5] Even if there are no 'hard' provisions on individual procedural rights that must be implemented or have been implemented by extraneous actors as, say, from EU directives into domestic law, and even if such provisions have a limited scope of application, the growing awareness and use of procedural rights in the European developments described above leads to a claim that these procedural rights may be perceived as legal transplants *lato sensu;* i.e., foreign techniques that become slowly acclimated into a legal

regarding procedural rights in EU law, see *inter alia*, J Mendes 'Administrative procedure, administrative democracy' in JB Auby & T Perroud (eds), *Droit comparé de la procédure administrative* (Bruylant 2016) 235-244; J Mendes, *Participation in EU Rule-Making* (Oxford University Press 2011); J Schwarze, *European Administrative Law* (Sweet and Maxwell 2006) 1173 et seq (ch 7); HP Nehl, *Principles of Administrative Procedure in EC Law* (Hart Publishing 1999).

2 See eg *Jehovah's Witnesses of Moscow v Russia* App no 302/02 (ECtHR, 10 June 2010) paras 174-175 on the duty to give reasons; *Rysovskyy v Ukraine* App no 29979/04 (ECtHR, 20 October 2011) para 73 on the right to be heard, etc. See more on the ECtHR 'slowly but surely' expanding its jurisdiction into the realm of administrative procedure in C Harlow & R Rawlings, 'National Administrative Procedures in a European Perspective: Pathways to a Slow Convergence' (2010) 2 Italian Journal of Public Law 215, 226-229.

3 See Council of Europe (CoE), *The protection of the individual in relation to acts of administrative authorities – An analytical survey of the rights of the individual in the administrative procedure and its remedies against administrative acts* (1975). See also CoE, Resolution (77)31 on the protection of the individual in relation to the acts of administrative authorities codifying individual rights vis-à-vis administrative authorities (adopted 28 September 1977 by the Committee of Ministers).

4 The ReNEUAL project aimed at developing a set of rules for administrative procedures, with the EU's legal framework being the most prominent one, even if it has not turned into a concrete piece of legislation. For academic works on the codification of administrative procedures see G della Cananea, *Due Process of Law Beyond the State* (Oxford University Press 2016) 23 et seq.; JB Auby, *Codification of Administrative Procedure* (Bruylant 2014); Auby & Perroud (n1). In fact, even legal systems known for their resistance to the codification of administrative procedures seem to have yielded to this general trend recently. The most notable example thereof is France, with its adoption of *Code des relations entre le public et l'administration* (Order no 2015-1341 of 23 October 2015, entry into force 01 January 2016).

5 The explicit impulse in this regard for Lithuania came from the SIGMA programme around the time when the country was preparing to join the EU. It was deemed that to build capacity for the public administration to effectively implement the *acquis communautaire,* 'procedural fairness' also had to be ensured in the candidate's country system. See more in SIGMA, 'European principles for public administration' (1999) Sigma Paper No. 27, CCNM/SIGMA/PUMA(99)44/REV1, 10-11. Similar conclusions appear in European Commission, Opinion on Lithuania's Application for Membership of the European Union (1997), DOC/97/15, 15th July 1997.

system in which they were not formerly recognized. Despite this, the 'procedural talk' in Lithuanian administrative law does not really seem to have taken root, and the enunciation of procedural rights at the statutory level remains very limited. More precisely, these rights are tied either to a specific type of administrative action, described below, or to the imposition of economic sanctions.[6] In the absence of specific legal provisions mandating their respect, procedural rights are not generally embedded in the relationships between the administration and citizens. They do not permeate the whole system of public administration *ex lege* and, hence, cannot be said to be adequately embedded in the daily workings of the administration. This lack of attention is regrettable because, firstly, procedural rights aim to protect significant 'dignitarian' interests; in fact, sometimes procedure can even be equated with justice itself.[7] Secondly, if taken seriously, procedural rights are able to facilitate administrative decision-making by providing the administration with an informational input that may be vital for the proper outcome. In other words, by vindicating procedural rights, individuals are able to efficiently communicate with the administration and ensure the 'rationality' of state action.[8] Hence, procedure impacts substance and *vice versa*.[9] Individual rights, in turn, may unburden the courts since administrative procedures are more accessible and 'user-friendly' than their judicial counterparts.[10] Attaching a broad range of rights to them has an incidental effect on fostering the legitimacy of administrative decisions or could at least speed up adjudication.

Against this backdrop, this article seeks to analyze the current state of the protection of procedural rights in Lithuania and to provide an assessment of the implications stemming therefrom. This will be done by first outlining the relevant regulatory framework as well as dissecting the concrete notion of administrative procedure found therein. This will be followed by comparing this notion with that of the EU Member States boasting more comprehensive codi-

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6 Article 36^8 (3) of the Lithuanian Law on Public Administration stipulates the right to be heard and access to one's file for business units before the imposition of an economic sanction. This provision was added to the LPA in 2010.

7 In this regard, an eloquent example provided by legal theorist Fuller can be referenced: the attempt in the former Soviet Union to retroactively increase the sentence for robbery, i.e. for those sentenced for this crime in the past. Despite being only 'procedural' and not 'substantive' in nature, this attempt provoked a strong reaction even in the Soviet Union, not known for its adherence to the rule of law, and was perceived as a matter of justice, see B Bix, 'Natural Law Theory' in D Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Blackwell Publishing 2010) 211, 220.

8 E Schmidt-Aßmann, 'Der Verfahrensgedanke im deutschen und europäischen Verwaltungsrecht' in W Hoffmann-Riem, E Schmidt-Aßmann & A Voßkuhle, *Grundlagen des Verwaltungsrechts (Band II)* (2nd edn, CH Beck 2012) 495, 498-499.

9 And, hence, the boundaries between the two remain fluid, see more in della Cannanea (n4) 7.

10 See for a common law approach C Harlow & R Rawlings, *Law and Administration* (3d edn, Cambridge University Press 2009) 42.

fications of administrative procedure, to show its conceptual insufficiency in the Lithuanian legal system. The comparison will be performed by using textual analysis and systemic methods. The German and Croatian legal systems were selected for the analysis because they both explicitly define the notion of an administrative procedure. Besides, the Croatian example is interesting because it is not the 'usual suspect' in European comparative law but at the same time (in terms of democratic development) can be said to be close to Lithuania.[11] Finally, Lithuanian case law will be examined with regard to procedural rights, i.e. the right to be heard and some elements of access to one's file.[12] Such a 'litmus test' should enable us to tackle the question of whether the resistance towards procedural rights in the Lithuanian legal system can still be justified in view of the empirical results and if the current level of procedural protection can be deemed adequate. Or, on the other hand, if the time to innovate has come and a more coherent and better-organized system of administrative procedure is due. Some normative suggestions will be made in that regard in the final part of this article.

2. Administrative procedure within the Lithuanian legal framework: some basics

The analysis must start with a brief *tour d'horizon* of the origins of the Lithuanian framework, the (overall) structure of the regulation on public administration within the Lithuanian legal framework, and the place of administrative procedures therein.

The Lithuanian Law on Public Administration was an intellectual product of the time of its adoption, in the late 1990s, after five decades of Lithuania being an (illegally annexed) part of the former USSR. This meant that before 1989 Lithuanian administrative law was 'socialist', for a lack of a better word. All in all, the former administrative law could be described as a mélange of the *nomenklatura* administrative tradition (in which a formalist approach to law was prevalent), the authoritarian regime of President Smetona in the interwar independent Lithuania, and the legacy of the empire of Russian tsars, to which

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11 A Andrijauskaitė, 'Creating Good Administration by Persuasion: A Case Study of the Recommendations of the Committee of Ministers of the Council of Europe' (2017) 15 International Public Administration Review 39, 41.

12 These rights can be labelled 'paradigmatic' because they are *expressis verbis* enshrined in Article 41 (2) a) and b) of the Charter of Fundamental Rights of the European Union alongside with a (more substantive) requirement to give reasons for administrative decisions. They are thus part of the EU's primary law. See European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, art 41(2)(a) and (b) (CFR).

Lithuania belonged in the nineteenth century.[13] So-called 'state estrangement' in Lithuania was prevalent[14] and interaction with public authorities was predominantly perceived through an 'antagonistic prism'. After the fall of the Berlin Wall, Lithuania quickly became independent, a constitution was adopted and a new administrative system set up thanks to an 'unflinching' desire to join the EU, as well as 'foreign' consultations, including SIGMA papers. In fact, there was very little time to shed one system of administrative law and transition into another. This means that part of the modern administrative law retains some of the features that had underpinned the administrative law of the country's communist past. In particular, modern Lithuanian administrative law and the academic discussions pertaining to the tasks of the administration vis-à-vis the individual started to develop very late due to these historical reasons, i.e. later than said law was adopted.[15]

Returning to the modern-day Lithuanian legal framework, it should be underscored that the level of codification of administrative procedures in Lithuanian law can be described as inchoate and blended at best.[16] This is because there is no separate act on administrative procedures in the Lithuanian legal system in the strict sense. Instead, the notion of administrative procedure (as a sub-category of administrative services) is stipulated by the Law on Public Administration (*Viešojo administravimo įstatymas* No. VIII-1234 of 17 June 1999, henceforth 'LPA') that regulates the organization of the system of public administration in broad strokes.

This law was adopted in 1999 together with the establishment of administrative courts and has been through multiple revisions ever since. These revisions include reframing the cornerstone notion of public administration and its modalities, i.e. the concrete actions by administrative authorities that it may entail, as well as the introduction of pre-trial administrative proceedings, to name but a few. The law is generally intended to implement the constitutional

13 S Pivoras, 'Post-Communist Public Administration in Lithuania' in S Lieber, SE Condrey & D Goncharov (eds), *Public Administration in Post-Communist Countries* (Taylor & Francis Group 2013) 135, 137.

14 ibid 137.

15 The first book on administrative law in Lithuania appeared as late as 2004, ie the year Lithuania joined the EU. Lithuanian administrative law during the interwar period was rudimentary and underdeveloped: basic 'administrative law terminology' was missing in the scholarship, European impulses on national administrative law appeared to be fragmented and no single act covering basic administrative law matters was adopted, see more in I Deviatnikovaitė, 'Administracinės teisės samprata ir mokslas tarpukario Lietuvoje [The Concept and Science of Administrative Law in the Interwar Period in Lithuania]' (2018) Teisė No. 106, 80-98. Hence, the country did not really have an administrative law tradition to fall back on and, as mentioned above, had to prepare its Law on Public Administration in haste to join the EU.

16 For different models of regulation of administrative procedure see X Arzoz, 'Administrative Procedures' in R Grot, F Lachenmann & R Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press 2017), para 11. Lithuania's path can be attributed to 'brief frame regulation'.

provision that 'State institutions shall serve the people' (Art. 5 (3) of the Lithuanian Constitution)[17] – a point of departure for many developments under public law since it is one of the few constitutional norms loaded with direct and explicit content relevant to administrative law. For example, the establishment of national ombudspersons was based on this provision.[18] Moreover, the principle of the rule of law and good administration are also usually derived from Article 5 of the Constitution in the case law because (save for the preamble) there are no other constitutional provisions enunciating these concepts in explicit terms. The LPA encompasses a rather broad and scattered range of issues, including the principles of public administration, the activities of public administration, the system of its organs, the basics of administrative procedure, the right to appeal against administrative decisions or inaction by public authorities, the right to have one's complaints and pleas examined, and other rights and duties related to public administration (Art. 1 LPA).[19] Thematically, it is arranged into six sections that deal with general provisions such as definitions used in this law and the principles of public administration (Section I), public administration, including its various declinations and the adoption of administrative acts (Section II), administrative procedure (Section III), supervision of activities of economic entities (Section IV), terms and conditions of institutional assistance (Section V) and final provisions (Section VI).

Thus, the scope of the LPA can be characterized as rather broad even if some crucial parts, such as rules on state liability, administrative discretion or the revocation of administrative decisions, are missing.[20] Administrative procedure, for its part, has a separate section in the LPA which would *prima facie* imply its saliency. However, it is also integrated into a wider category of 'administrative services'[21] in terms of the structure of this law, and the relevant wording reveals that its notion and scope are rather limited:

'the administrative procedure shall comprise of mandatory actions performed pursuant to this Law by an entity of public administration while considering a person's

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17 Lithuanian Constitution, art 5(3).

18 See more in J Paužaitė-Kulvinskienė & A Andrijauskaitė, 'The Pan-European General Principles of Good Administration in Lithuania – A Success Story with Caveats' in U Stelkens & A Andrijauskaitė (eds), *Good Administration and the Council of Europe: Law, Principles and Effectiveness* (Oxford University Press 2020) 559-582.

19 LPA, art 1.

20 The duty to make good damage caused by public authorities is only rudimentarily enshrined in Article 39 LPA. The legal conditions for state liability, for their part, are laid down in the Civil Code of Lithuania.

21 Art 15(1)(6) LPA. Other administrative services include: issuance of authorisations and licences, issuance of documents confirming particular legal facts, acceptance and processing of declarations, provision of consultations to persons on the issues of the competence of a public administration entity, submission to persons of information stipulated in laws and available to an entity of public administration.

complaint about a violation, allegedly committed by acts, omissions or administrative decisions of the entity of public administration, of the rights and legitimate interests of the person referred to in the complaint and adopting a decision on administrative procedure' (Article 19 (1) LPA).[22]

Article 2 (15) LPA, for its part, enshrines the following definition of a 'complaint', which is a central element of an administrative procedure:

'Complaint shall mean a person's written application to an entity of public administration where it is indicated that his rights or legitimate interests have been violated and it is requested to defend them.'[23]

Article 20 (1) LPA, for its part, lays down a list of procedural rights that may be invoked by either the applicant or a third person.[24] However, a precondition to invoke these rights is the existence of a violation of rights or legitimate interests by the actions, omissions, or administrative decisions of an entity of the public administration regarding either the applicant or the third person. If a complaint is received, then the head of an entity of public administration or an official or a civil servant authorised shall initiate an administrative procedure with respect to the person's claim or notification.

This catalogue of rights, among other things, includes access to one's file, the right to supply additional information and provide explanations, to call for the removal of an official entrusted with carrying out the procedure or the civil servant or employee that carries out the administrative procedure, to have an interpreter, to participate when checking the factual data on site, to express one's opinion on issues arising during the administrative procedure, to request that a public administration entity which has initiated the administrative procedure terminate it, to receive a decision on the administrative procedure, to appeal against an adopted decision, and to have a representative.

These provisions indicate a number of things. Firstly, an administrative procedure in Lithuanian law is, for lack of a better word, 'rigid'[25] in that it is perceived as a series of *mandatory* actions to be taken by an administrative authority while dealing with a particular (narrowly constructed) type of situation, i.e., the handling of a complaint involving an alleged violation of rights and legitimate interests by public authorities. In fact, relevant *travaux préparatoires*

22 Art 19(1) LPA.

23 Art 2(15) LPA.

24 Art 20(1) LPA.

25 The narrow interpretation of an administrative procedure is also confirmed by administrative case law: it has been *expressis verbis* highlighted that this institute is reserved for dealing with complaints about alleged violations of rights. Thus, administrative services, such as consultation cannot be equated therewith, see SACL, Decision of 26 March 2012 – Case No. A602-1252-2012.

of the LPA reveal that 'an alleged violation of rights *by public authorities*' and not 'any kind of violations of rights' was always an element quintessential for the perception of an administrative procedure in Lithuanian administrative law.[26] The term 'violation of rights', however, remains unspecified, most likely because it may have many guises. Overall, the said enunciation denotes a heavily 'adversarial' character for an administrative procedure, marked by its conceptual kinship with Article 33 of the Constitution enshrining the right to criticise the work of state institutions or their officials and to appeal against their decisions.[27]

Such a limited notion of administrative procedure furthermore excludes from its scope many other types of administrative action which may not be 'adversarial' *per se* but should be regarded as no less important in that their outcome may have detrimental effects for the individual, such as the (non)-issuance of a licence or (not) acquiring other administrative services. The handling of such types of pleas or requests which are not connected with a violation of rights falls under sub-statutory level, only with no discernible emphasis on procedural rights.[28] Moreover, the provision regulating administrative procedure prescribes only one possible outcome – the adoption of a decision.[29] Finally, it must be noted that the remaining types of administrative interaction are still subject to the requirements applicable for the adoption of an administrative act found elsewhere in the LPA[30] but are not *ex lege* tied to any of the procedural rights explicitly enumerated in Article 20 (1) LPA. So, for example, there is no individual right to be heard when an administrative decision bearing negative consequences is adopted that does not fit into the narrow definition of 'administrative procedure' as a sequence of mandatory actions aimed at investigating a possible violation of the rights enshrined in the LPA.

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26 See the Explanatory Memorandum on the Amendments on LPA of 2002 November 6 No. IXP-1223. Tracking down the evolution of the regulation of an administrative procedure in the LPA also shows that it has only occurred through 'cosmetic surgery', intended to reduce the administrative burden by including the possibility of initiating an administrative procedure via electronic means, without ever straying from this conceptual core.

27 Constitution of Lithuania, art 33.

28 Regulations for Examination of Requests of Persons and for their Servicing at Public Administration Authorities, Institutions and Other Entities of Public Administration approved by Resolution No. 875 of the Government of the Republic of Lithuania of 22 August 2007 (as amended by Resolution No. 2017-18411 of 11 November 2017).

29 Whereas other European systems, such as the Italian, Spanish or German ones, accept that an administrative procedure may end with something other than a decision, eg an agreement, see Auby (n4) 14, 21.

30 Namely, art 8 LPA that forms the core of the LPA. It stipulates, among other things, the duty to state reasons in an administrative act as well as the duty to notify of its adoption.

3. The notion of (Lithuanian) administrative procedure vs. administrative procedures in other legal systems

Having outlined the notion of an administrative procedure within the Lithuanian legal framework, it is now time to put it in a comparative perspective. Even if some European legal systems successfully forgo administrative codifications – such as Britain, where procedure has always been crucial without a broader systematization thereof,[31] or Belgium, where this need has been covered by the development of general principles of administrative law[32] – the prevailing trend points to the codification of administrative procedures, i.e., the enactment of legally binding rules creating concrete rights for the individual. Such codifications are usually marked by a broad scope of administrative procedure as a key factor. This trend is attested not only by a majority of systems with codifications in place but also by a modern understanding that administration needs codified and published rules to fetter the bureaucracy.[33] For the purposes of this article, European legal systems with comprehensive and well-established codification traditions have been chosen. It was deemed that – although the European approach is diverse – the Lithuanian legal system, that lacks authentic and fully-fledged traditions when it comes to administrative law, might learn from these systems. More precisely, the conceptions found therein – the modalities, scope and instrumentalization of procedural rights – are of particular interest. The first example worthy of consideration is the German one. It boasts a codification dating back to 1976 and was intended to provide the administration with a 'robust' working tool[34] whose formation was fuelled by solid academic discussion. This system defines an administrative procedure as follows:

'...administrative procedure shall be the activity of authorities having an external effect and directed to the examination of basic requirements, the preparation and

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31 See more on the British tradition of procedural fairness and reasonableness in DJ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press 1996) 165-185.

32 In a similar fashion, the right to be heard started to be recognised in case law in a range of legal systems, including in France: see Conseil d'Etat, 5 mai 1944, Dame Veuve Trompier-Gravier, Rec., 133; and commentary in M Long et al., *Les grands arrêts de la jurisprudence administrative* (22nd edn, Dalloz 2019) 322-329.

33 J Ziller, *Administrations Comparées: Les systèmes politico administratifs de l'Europe des douze* (Montchrestien 1993) 267 et seq.

34 See more in U Stelkens, 'Kodifikationssin, Kodifikationseignung und Kodifikationsgefahren im Verwaltungsverfahrensrecht' in H Hill et al., *35 Jahre Verwaltungsverfahrensgesetz – Bilanz und Perspektiven: Vorträge der 74. Staatswissenschaftlichen Fortbildungstagung vom 9. bis 11. Februar 2011 an der Deutschen Hochschule für Verwaltungswissenschaften Speyer* (Duncker & Humblot 2011) 271–295.

adoption of an administrative act or to the conclusion of an administrative agreement under public law; it shall include the adoption of the administrative act or the conclusion of the agreement under public law' (§ 9 of the German Administrative Procedural Act [Verwaltungsverfahrensgesetz]*).*[35]

As becomes evident from this definition, the German legal system conceptualizes an administrative procedure broadly, i.e., without contours,[36] as any activity by authorities having an external effect, and clearly highlights the preparation and adoption of an administrative act as its core. In contrast to the Lithuanian LPA, violation of the rights or legitimate interests of the applicant is not made into a characterising feature of an administrative action as an 'administrative procedure' for the purposes of the German APA. Hence, its scope is not limited to the 'adversarial' type of administrative action but goes so far as to include administrative agreements. The definition of an administrative procedure is furthermore put together under the same structural part ('Procedural principles') as §§ 28 and 29 of the German APA, enshrining two paradigmatic procedural rights – the right to be heard and access to one's file. These articles, as opposed to the Lithuanian 'catalogue' of procedural rights, are laid down in separate articles that purportedly result in higher visibility and accessibility for concerned individuals. This, together with Article 10 of the German APA enshrining the freedom of form of procedural means,[37] renders the whole concept of an administrative procedure much more flexible in comparison to the notion known in the Lithuanian legal system.

Another legal system in which the notion of an administrative procedure is well-pronounced and, hence, suitable for the purposes of this paper is the Croatian one. The tradition of codifying administrative procedure in Croatia has Austro-Hungarian underpinnings, with the first modern attempt to adopt the general administrative procedure act made as early as 1931.[38] Currently, these matters are regulated by the General Administrative Procedure Act adopted on 27 March 2009 ('GAPA').[39] Article 3(1) and (2) of the Croatian GAPA defining

35 The official translation taken from the website of the German Federal Ministry of the Interior, Building and Community <www.bmi.bund.de/SharedDocs/downloads/EN/gesetztestexte/VwVfg_en.html> accessed 02 March 2021.

36 However, the need to include 'novel' types of administrative action, not exclusively revolving around the adoption of an administrative act, such as notification procedure in planning law or decisions on public procurement matters, into its definition, is also sufficiently discussed in the scholarship, see more in U Stelkens, M Sachs & H Schmitz, *Verwaltungsverfahrensgesetz Kommentar* (9th edn, CH Beck 2018) 48 et seq.; See further Schmidt-Aßmann (n8) 505.

37 'The administrative procedure shall not be tied to specific forms when no legal provisions exist which specifically govern procedural form. It shall be carried out in an uncomplicated, appropriate and timely fashion' (art 10 of the German APA).

38 JSD Dario-Derda, 'Chapter 4. Republic of Croatia' in Auby (n4) 107, 108.

39 Translation into English accessible at <www.legislationline.org/documents/id/16474> accessed 02 March 2021.

the notion of an administrative procedure includes all 'administrative matters' as well as the conclusion of administrative agreements within its scope, save for those exceptions regulated by a separate law. Article 2(1) of the Croatian GAPA, for its part, stipulates that

'administrative matters are matters in which public law authorities in administrative proceedings decide on the rights, obligations and legal interests of natural or legal persons or other parties ... pursuant to the direct application of laws and other regulations and general acts governing the appropriate administrative field'[40]

In contrast to the German notion of administrative procedure, the Croatian one does not make the preparation of the administrative act its main focus but rather emphasizes 'direct application' of laws. However, both notions (despite the modalities) appear to be 'shoreless', i.e. very broad and (rather tautologically) encompassing any matters (including the conclusion of administrative agreements) that necessitate a decision on rights, obligations and legal interests by public authorities based on the general rationale of administrative law, i.e. applying statutory laws. However, no nexus to the (alleged) violation of rights of the applicant by public authorities is required by this definition, in contrast to the Lithuanian notion of an administrative procedure. Instead, the 'qualifying criterion' is based on the 'direct effect' of administrative matters (cf. with the 'external effect' stipulated by the German APA) on the rights, obligations and legal interests of the applicant. This allows a very broad range of administrative matters to be subjected to the procedural safeguards enshrined in the subsequent parts of the Croatian GAPA. Namely, to Article 11 of the GAPA stipulating, among other things, the obligation on public law authorities to provide parties with access to the necessary data and to Article 30 (1) of the GAPA furnishing applicants with the right to be heard.[41] ('In the course of proceedings parties must be given the opportunity to make a statement on all circumstances, facts and legal issues which are important for resolving the administrative matter'.)[42]

4. Procedural rights in action

The case law analysis performed for the purposes of this paper has revealed that the right to be heard – as a litmus test for procedural rights – is upheld by Lithuanian administrative courts as a general tendency, regardless of the narrow definition of administrative procedure. The most prominent ex-

40 ibid art 2(1).
41 ibid art 11 and 30(1).
42 Article 30 (1) of GAPA.

amples thereof are found in cases concerning immigration issues, EU subsidies, and land restitution disputes as well as tax, civil service and social security laws. Considering that this right is not stipulated by an overarching provision of the LPA (as demonstrated above) it comes as no surprise that its protection does not happen in a neatly organized but rather in a haphazard manner. Three main strands of the case law may be distinguished in this context: 1) deriving the right to be heard from *legi speciali* which stipulate certain procedural rules on the participation of the applicants (eg the Lithuanian Law on Tax Administration or Lithuanian Law on Competition); 2) deriving the right to be heard from supranational and constitutional sources of law and by invoking the method of systematic interpretation of laws or accepting it as a 'general principle of administrative procedure'; and/or 3) expanding the scope of application of Section III of the LPA to those situations which do not seem to match the definition of an administrative procedure (Article 19(1) LPA). Whereas the first example is relatively clear,[43] although limited since not all laws in special fields of administrative law enshrine this right, the latter two deserve a short discussion in their own right.

4.1. Reliance on supranational/constitutional sources systematically construed

The first example from the case law in which recourse to supranational sources was taken concerned the question of whether the Lithuanian migration authorities had lawfully withdrawn subsidiary protection given to an asylum seeker without providing him with a possibility to be heard.[44] The right to be heard in a procedure for subsidiary protection was not enshrined in any *legi speciali*. Thus, the Supreme Administrative Court of Lithuania ('SACL') had to turn to constitutional provisions and supranational sources of law to resolve the case. The right to be heard was derived from a multitude of sources – firstly, from the relevant EU directives enshrining the need to ensure efficient protection for asylum seekers and carry out examinations of their requests on an individual basis.[45] Their transposition into Lithuanian law was deemed to

43 See to this effect eg SACL, Decision of 25 November 2013 – Case No. A520-1831/2013, in which Art. 126 (3) of the Lithuanian Law on Tax Administration stipulates that 'The taxpayer shall have the right in the course of a tax inspection and the approval of its results to submit comments and statements concerning the object of inspection and other circumstances related to the inspection' was used for protecting the applicant's right to be heard in the particular dispute. See further SACL, Decision of 1 July 2020 – Case No. eA-2586-629/2020 in which the right to be heard was upheld following the Lithuanian Law on Product Safety; or SACL, Decision of 17 May 2019 – Case No. eA-1316-1062/2019 in which the said right was granted before a professional sanction on a newspaper could have been imposed.

44 See SACL, Decision of 8 December 2010 – Case No. A756-686/2010.

45 Article 4(3) of the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

be deficient. Secondly, it was derived from the already-quoted Article 5(3) of the Lithuanian Constitution providing that 'State institutions shall serve the people' as (implicitly) encapsulating the principle of good administration.[46] Thirdly, from Article 41 of the Charter of Fundamental Rights of the European Union ('CFR') enshrining the corresponding principle of good administration and the right of every person to be heard before any individual measure which would affect him or her adversely is taken as a component.[47] Finally, from Article 14 of the Council of Europe's Recommendation CM/Rec(2007)7 on good administration stipulating that an opportunity to express views must be given to private persons before issuing any measure which may adversely affect their rights.[48] The systematic interpretation of all these acts allowed the SACL to come to the conclusion that the national migration authorities were also obliged to furnish an asylum seeker with the possibility of being heard before withdrawing subsidiary protection, regardless of the fact that the national law did not explicitly grant such a right. The reliance on so many legal provisions by the SACL ('provision overkill') might be explained precisely by the latter circumstance, i.e., by the need to normatively justify the creative application of the right to be heard.

The 'heavy' reliance on supranational sources to derive procedural rights is further discernible in cases concerning EU subsidies.[49] For example, in one case, the applicant was ordered to return payments received from the National Paying Agency under a direct support scheme for farmers. This was ordered after it was established that the applicant had inaccurately declared the size of a plot of land relevant for the payments at issue – a fact that transpired during an administrative check-up. It was highlighted in the case that the applicant was neither informed of this procedure nor had the possibility to present his arguments as to the accuracy of the size of the plot of land that bore relevance for the payments received. Here again, together with the relevant EU regulations

(L304/12, 2004); Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (L326/13, 2005).

46 In other cases the right to be heard was also derived from art 30 (1) of the Constitution providing that 'The person whose constitutional rights or freedoms are violated shall have the right to apply to court'; hence, was deemed to be a part of the defence rights at the level of administration, see eg SACL, Decision of 7 January 2020 – Case No. eA-859-602/2019; SACL, Decision of 11 December 2019 – Case No. eA-2473-1062/2019.

47 CFR (n12) art 41.

48 CoE, Recommendation CM/Rec(2007)11 of the Committee of Ministers to member states on promoting freedom of expression and information in the new information and communications environment (adopted 26 September 2007 by the Committee of Ministers).

49 See SACL, Decision of 11 September 2014 – Case No. A438-1102/2014. See, *mutatis mutandis*, SACL, Decision of 12 March 2014 – Case No. A261-214/2014 in which similar reasoning was invoked although without finding a violation of *audiatur et altera pars* in the imposition of a financial correction.

laying down rules for the legal relationship at issue,[50] the SACL derived the right to be heard from Article 41 of the CFR, also fortifying its reasoning with the relevant case law of the Court of Justice of the European Union, which expands upon the scope of this right.[51] The combined and open method of systematic interpretation of various sources of law allowed the SACL to grant the protection of – what were termed as – the 'defence rights' of the applicant during the administrative procedure and annul the order to return payments on that basis.

4.2. No clear normative basis and a 'flexible' approach to administrative procedure

Whereas the foregoing cases had a clear 'EU law touch' and, thus, a discernible supranational normative base to fall back on, the following cases involved issues of a more 'domestic' nature and, thus, the SACL employed another type of reasoning to safeguard procedural rights. For example, in a case concerning land restitution,[52] the impugned administrative act refusing to restore the applicant's right to property was deemed to be deficient. This was because the administrative authority had failed to inform the applicant about the possibility of establishing the (fact of) ownership at the time of nationalization by means of civil procedure, as well as failing to inform her of the consequences of not doing so. This would have enabled the administrative authority to adopt an administrative decision based on the objective facts, i.e., to restore property rights to the applicant or not, contingent on the fact of ownership at the time of nationalization. While coming to this conclusion the SACL referred to Article 8 LPA, laying down the substantive requirements of an administrative act.[53] It furthermore denoted the right to be heard as a 'general principle of administrative procedure', without providing any explicit basis in positive law. This case shows two things quite clearly: firstly, how disregard for procedural rules may incapacitate the adoption of an administrative decision altogether (and, hence, impact its substance) and, secondly, that in cases where no clear procedural rules can be discerned from the relevant legal framework, the judiciary is left

50 Among other things, the Commission Regulation (EC) No. 795/2004 of 21 April 2004 laying down detailed rules for the implementation of the single payment scheme provided for in the Council Regulation (EC) No. 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers (OJ L 141, 2004).

51 i.e. the jurisprudential precept that 'the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views', see Case C-395/00 *Distillerie Fratelli Cipriani SpAv Ministero delle Finanze* [2002] ECLI:EU:C:2002:751.

52 See SACL, Decision of 25 April 2013 – Case No. A261-604/2013.

53 Article 8(1) LPA stipulates that "an individual administrative act must be based on objective data (facts) and the norms of legal acts, and the sanctions applied must be reasoned."

to 'divine them from the ether'; for example, in the guise of a general administrative law principle.

Another case that, for lack of a better word, can be classified as 'bizarre', but shows the flexible approach aimed at bringing procedural rights into life given by the SACL, concerned social security law.[54] More precisely, the Lithuanian State Social Insurance Fund Board (the 'Board') required the applicant, as inheritor, to return a widow's pension unduly received following the death of a relative. The curious aspect of this case is the fact that the impugned administrative act was adopted after the death of the testator, when the Board carried out a random audit as to the validity of data submitted by the testator. Again, there were no discernible procedural rules in positive law for establishing the guilt that was a necessary precondition for requesting the repayment of an unduly received widow's pension. The SACL (once again) turned to Article 8 LPA, laying down the substantive requirements for the adoption of an administrative act, and highlighted that, in order to adopt reasonable administrative acts, adherence to the procedural rules is also necessary, including those enshrined in Section III of the LPA.[55] According to the reasoning of the SACL, total disregard for the procedural rights of the concerned individuals renders an administrative procedure 'meaningless'. Bearing in mind the fact that in this case the testator was dead by the time the administrative decision was adopted, and that it had direct implications on the inheritor – this requires no further comment. The administrative act was consequently quashed and the requirement to repay the unduly received pension was held to be unlawful.

5. Conclusion

The foregoing analysis has shown that the notion of administrative procedure and its attendant rights (especially the right to be heard) in Lithuanian (statutory) administrative law is conceived very narrowly compared to the selected European legal systems. This leads to a claim that 'transplanting' its full potential is still resisted by the legislator. Instead, the notion of an administrative procedure is anchored to *an alleged violation of rights or legitimate interests by public authorities* as a precondition for its commencement and the triggering of said rights. The (general) adoption of an administrative act, for its part, is not covered by the notion of an administrative procedure *stricto sensu,* let alone the conclusion of administrative agreements in positive law. It remains unclear why the Lithuanian legislator chose to tailor administrative procedure

54 See SACL, Decision of 24 October 2019 – Case No. eA-243-822/2019.

55 The SACL also included elements stemming from the case law of the Court of Justice of the European Union on access to one's file in its reasoning.

in such a fashion. However, one can speculate that this is a kind of 'mental leftover' from the *nomenklatura* time, that may be difficult to shake off.[56] The reference to Article 33 (2) of the Lithuanian Constitution enshrining citizens' right to criticise the work of state institutions or their officials and to appeal against their decisions in the relevant *travaux préparatoires* seems to corroborate this claim. It is plausible that only the aforesaid 'adversarial' or 'antagonistic' type of interaction with the public authorities hinting at a violation of rights was deemed worthy of 'enhanced' procedural protection regulated in a formalized and meticulous manner.[57] At the end of the day, administrative procedural law is nothing but a reflection of a particular administrative culture.[58] Moreover, due to the aforementioned historical reasons, there was simply no time to develop procedural standards in an 'organic' way, i.e., by the judiciary pressurizing the administration to follow a certain set of procedures through its case law. This appears to have been a standard route before any codifications took place in other European jurisdictions.[59] However, such a narrow conception of administrative procedure is regrettable from a contemporary perspective because it leaves out (too) many other types of administrative action that, if performed deficiently, could also account for prospective violations of rights. Besides, where the legislator does not take the lead, judges need to be creative and find solutions to consecrate procedural rights.

This, among other things, manifests in the judiciary having to derive some 'classical' procedural rights from either supranational or constitutional sources or by means of simply expanding the purview of Section III of the LPA, in which the notion of an administrative procedure and its accompanying rights is stipulated, to a broader range of administrative action, or by having recourse to the general principles of law. Although the tendency of administrative courts to funnel constitutional standards into practice in the guise of procedural rights is laudable, the judicial path may not be the optimal solution, since the legal clarity and accessibility that are constitutional values *per se* might be undermined. The experience of the legal systems chosen for the purposes of analysis (German and Croatian) militates for another type of solution: laying broad contours of the notion of administrative procedure into law and annexing procedural rights thereto. The vigorous developments in EU law, for their part, only strengthen this claim, as the utility of codifying administrative procedures has long been

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56 Cf AJG Verheijen, 'Public Administration in Post-Communist States' in BG Peters & J Pierre (eds), *The Handbook of Public Administration* (2nd edn, SAGE Publications 2007) 311, 311 & 315. See also Stelkens & Andrijauskaitė (n18), MN. 31.44 claiming that an undemocratic past clearly leads to a general distrust towards the administration in society.

57 LPA, art 36(3) connecting procedural rights with the imposition of sanctions (although enacted much later) replicates this logic.

58 Schmidt-Aßmann (n8) 504.

59 See W Rusch, 'Administrative Procedures in EU Member States' (2009) SIGMA Paper [available online], para 30. See also Arzoz (n16), para 48.

understood. It furthermore goes without saying that it is easier for public authorities to become accustomed to requirements stemming from statutory law than it is for them to comb through and 'learn' from the heaps of judge-made case law. Furthermore, by turning procedural rights into clear, across-the-board legal provisions, the administration will be additionally motivated to follow them due to state liability concerns.[60] The same logic applies to citizens – clearly enunciated and accessible procedural rules shape their (behavioural) expectations with regard to administration. This is especially important in 'sensitive' fields of administrative action, such as social security lacking fall-back supranational provisions, as has been demonstrated above. Another flaw in the administrative courts taking centre stage in developing procedural guarantees is the fact that this may be done in a rather sporadic way, i.e., contingent on the succession of proceedings initiated against public administration.[61]

Hence, a re-evaluation of the system is very much needed (hopefully fuelled by academic discussions or – at the very least – by drawing inspiration from comparative law in legal systems that have refined their administrative procedural laws over long periods of time). The Lithuanian legislator should find a way to integrate the current 'state-of-the-art' procedural standards (among other things, as developed in the case law) into positive law, make the notion of administrative procedure more flexible by expanding its scope and laying more emphasis 'on the administrative behaviour (functioning), and not only focus on the outcome of administrative action (result)'.[62] This is not only important for precluding arbitrary action by public authorities, upholding the dual rationale of administrative procedures outlined in the introduction, and turning 'good administration rhetoric' into practice, but also for equipping national agencies with efficient and responsive procedural tools for dealing with urgent matters within the framework of EU law.[63] This would, among other things, enable the creation of the European intra-administrative trust that is one of the factors ensuring that Member States do not stray from creating 'an ever closer Union'.

60 Because, according to well-established case law, in order to prove state liability it is necessary to establish 'which legal provisions regulating the activities of a public authority have been violated', see eg SACL, Decision of 28 October 2005 – Case No. A11-1642/2005.

61 J Ziller, 'The Continental System of Administrative Legality' in Peters & Pierre (n56) 167, 173.

62 T Fortsakis, 'Principles Governing Good Administration' (2005) 11 European Public Law 207, 217.

63 Harlow & Rawlings (n2) 244.