

CHAPTER I

STRUCTURES AND FUNCTIONS OF
ADMINISTRATIVE PROCEDURES IN GERMAN,
EUROPEAN AND INTERNATIONAL LAW

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I

ADMINISTRATIVE PROCEDURE: CHARACTERISTICS, FUNCTIONS, CONCEPTS

A. DEFINITION

ADMINISTRATIVE procedures are intertwined processes carried out by public bodies designed to gather, manage, and analyze information. Administrative procedures should increase the rationality of decision-making and service provision by agencies. Such procedures do not always result in a concrete, formal decision. Administrative services, internal administrative coordination, and periodic reporting duties can also be the goal of administrative procedures. The traditional and marked distinction between the decision-making process and the final decision dissolves even more when the relevance of information and communication between administrations, and between administrations and citizens, for the creation of a modern administrative law, is accentuated.¹ The decision becomes “proceduralized:”² that is to say, integrated into, as well as shaped by the procedure.³

This broad concept of administrative procedure stems from intensified administrative communication. Accordingly, legal provisions shaping the procedure are just as complex as the procedure itself. Administrative procedure law is made up of procedural rules which aim to provide a solution to a concrete situation (*situation-based* procedures), usually regulated by administrative procedure acts,

1. See also *VERWALTUNGSRECHT IN DER INFORMATIONSGESELLSCHAFT* (Wolfgang Hoffmann-Riem & Eberhard Schmidt-Aßmann, eds., 2000),

2. See ARNO SCHERZBERG, *DIE ÖFFENTLICHKEIT DER VERWALTUNG*, 126 *passim* (2000),

3. Cf. HERMANN HILL, *DAS FEHLERHAFTE VERWALTUNGSVERFAHREN UND SEINE FOLGEN IM VERWALTUNGSRECHT*, 1986, 193 *passim*.; HANS JULIUS WOLFF, ET AL., *VERWALTUNGSRECHT I*, § 58 para. 1 (12th. ed., 2007); 25 FRIEDRICH SCHOCH, *DER VERFAHRENSGEDANKE IM ALLGEMEINEN VERWALTUNGSRECHT*, DV, 21 *passim* (1992).

and rules on procedures independent of concrete occasions (*situation-independent* procedures), usually regulated by open government provisions on nondisclosure, data protection and access to information in general.

B. DIVERSITY OF FUNCTIONS

Administrative procedures fulfill several functions. They:

- ensure protection of individual rights,
- allow for participation,
- provide for balancing of interests,
- serve administrative transparency and clarity,
- make cooperation among various agencies and actors possible,
- enhance administrative efficacy.

Most procedures fulfill several functions (multi-functionality). The general concept of procedure is meant to secure the rationality of state action. It is about intelligent arrangements to enhance the transparency of decision-making, the quality of decisions reached, and the readiness of the authorities in charge to improve their performance. This is the case with environmental impact assessment procedure, for example, in which there is not only an “external” decision-making process, but also an “internal” one. In such proceedings, external participation—comments and involvement by the public and other agencies—is followed by an internal administrative process of careful assessment and consideration of the collected data, comments, and information, resulting in systematic collation of facts and balanced analysis of the impact on the environment. In a third step, the data, comments, and information must be thoroughly analyzed by the administration responsible for environmental issues (or “consultant administration”) under the varied and specific statutes involving environmental issues. As a whole, the environmental impact assessment

serves the purpose of gathering and managing information and knowledge by means of administrative procedure law.⁴

C. STRUCTURAL ELEMENTS AND ARRANGEMENTS

Procedures can be subdivided into several stages and consist of a combination of diverse elements:

- Public hearing, submission of data, consultation,
- Exchange of information, collecting evidence,
- Instruments or mechanisms for clarification, granting consent, and decision-making.

Administrative procedure law has modeled these elements into solid structures: public hearings, the right to access records and information, the obligation to give the reasons and motivations for administrative decisions, the obligation to provide inter-agency assistance and collaboration, and rules on preclusion. The correct inclusion of these structures within a certain administrative procedural function—the creation of procedural *arrangements*—is not accomplished through mechanical implementation or application. It is rather a skill possessed only by those who are able to combine experience in dealing with administrative procedure law with creativity.

Administrative procedures are part of the major tools that Administrative Law uses to steer and control the actions of agencies and administrations; such control constitutes *context-based direction*, as will be explained below. In a broader perspective involving not only national administrative law, but also European and international law, the rele-

4. Cf. Karl-Heinz Ladeur, *Privatisierung öffentlicher Aufgaben und die Notwendigkeit der Entwicklung eines neuen Informationsverwaltungsrechts* in *VERWALTUNGSRECHT IN DER INFORMATIONSGESELLSCHAFT* *supra* note 1, 225, 235.

vance of informal administrative procedure exceeds the relevance of the German doctrine on so called “formal instruments” in administrative law (that is, instruments that are governed by a set of rigid and formal rules: administrative decisions and adjudications, contracts, etc.). Administrative procedures and standards or criteria to be taken into account by the agency when taking action (e.g., protection against discrimination, principles of proportionality and good faith, legitimate confidence) are the two most important tools of administrative regulation.

D. ISSUES TO BE DISCUSSED

A broad concept of administrative procedure involving many other things than adjudications, the idea of multifunctionality of administrative procedure, and the centrality of procedure in administrative law is the basic cornerstone of the legal research of most modern administrative law scholars in Germany and Spain.⁵ Thus, the German-Spanish legal comparison is nowadays a *process of mutual and reciprocal learning*.⁶ This article, which I hope will contribute to this process, deals—as the heading suggests — with the *three levels* of German (Part II), European (Part III), and international administrative Law (Part IV) successively. In dealing with these *three levels*, the doctrine of administrative procedure law corresponds to modern doctrine on legal sources, which has also been extended beyond the national level to European and international law.⁷

5. Cf. Oriol Mir, *Das Verwaltungsverfahren in Spanien: Eine Einführung* in *DIE ÖFFENTLICHE VERWALTUNG* [DÖV] 841 *passim* (2006), ; JAVIER BARNES, *Sobre el procedimiento administrativo: evolución y perspectivas*, in *INNOVACIÓN Y REFORMA EN EL DERECHO ADMINISTRATIVO* 263 *passim* (Javier Barnes, ed., 2007).

6. See Mariano Bacigalupo & Francisco Velasco, *Wirkungen der deutschen Verwaltungsrechtslehre nach außen – Am Beispiel Spaniens*, in *DÖV* 333 *passim* (2003); Barnes, *supra* note 5.

7. See Matthias Ruffert, *Rechtsquellen und Rechtsschichten*, in *GRUNDLAGEN DES VERWALTUNGSRECHTS I* [GVWR I] § 17 para. 8, 30, 121, 149, 171 (Wolfgang Hoffmann-Riem et al. eds., 2006).

II ON THE CHARACTERISTICS OF ADMINISTRATIVE PROCEDURE ACT IN GERMANY

ADMINISTRATIVE procedure law is characterized by the concept of procedure, the constitutional requirements of due process, and by relating procedure to the two major legal regimes of administrative law, public and private law. The concept of procedure will be dealt with in detail by Jens-Peter Schneider in this volume. This allows me to focus on (1) the constitutional requirements and (2) the questions of public and private procedural law.

A. CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS

Unlike the Spanish Constitution, the German Basic Law, or *Grundgesetz* (GG), does not contain specific provisions on administrative procedure. Nonetheless, its relevance in terms of administrative procedure law has been generally recognized.⁸ Traditionally, the principle of rule of law has been construed as the fundamental basis for administrative procedure.⁹ The right to be heard, the obligation to give reasons and motivate administrative decisions, and the duty to give notice and publish all administrative decisions follow from this principle. The same applies to matters of transparency of “composite procedures” or “staged procedures” (e.g., those carried out partly on the national level and partly on the EC level) and the obligation to administer a procedure in a way that does not render impossible or

8. See also Hermann Pünder, *Verwaltungsverfahren*, in 13 *ALLGEMEINES VERWALTUNGSRECHT* § 12 para. 10 *passim* (Uwe Erichsen & Dirk Ehlers, eds., 13th ed. 2006)

9. Eberhard Schmidt-Aßmann, *Der Rechtsstaat*, in 2 *HANDBUCH DES STAATSRECHTS* § 26 para. 76 *passim* (Josef Isensee & Paul Kirchhof, eds., 3d ed. 2004).

unreasonably impede subsequent judicial review. The values that underlie § 19.4 of the German Basic Law,¹⁰ although initially designed for judicial review, have also had a profound impact on administrative procedure. Moreover, democracy and welfare-state principles lend administrative procedure a specific character.¹¹ The *model of democratic legitimacy* is primarily a procedural one.¹² The *welfare-state principle* requires that administrative procedures account for the individual situation of the beneficiary and provide for all necessary care and assistance, but it also requires that the procedures take into account administrative efficiency. In short, there are a number of constitutional requirements, but as a rule they do not require a specific design or method of administrative procedure. Fundamental rights shall serve as an example.¹³

In German tradition, particular significance is attached to *fundamental rights* (“procedure as a means of fundamental rights protection”).

A judgment of the Federal Constitutional Court in the year 1969 stated: “According to the concept of the *Grundgesetz* (Basic Law), effective legal protection, securing the preservation of property, constitutes a significant element of the fundamental right as such.”¹⁴ Ever since, most of the substantive fundamen-

10. “Should any person’s right be violated by public authority, recourse to the court shall be open to him. If no other court has jurisdiction, recourse shall be to the ordinary courts.”

11. Cf. Peter J. Tettinger & Jens-Peter Schneider, *Verwaltungsrechtliche Instrumente des Sozialstaates*, in 64 VEROFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER [hereinafter VVDStRL] 199 *passim*, 238 *passim* (2005) (*in re* the procedural aspects of the social-welfare principle). THOMAS GROSS, *DAS KOLLEGIALPRINZIP IN DER VERWALTUNGSORGANISATION* 280 *passim* (1999); see also EBERHARD SCHMIDT-ASSMANN, *DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSDIEE*, ch. 2 para. 102 *passim* (2nd ed. 2004) (*in re* the principle of democracy).

12. See also HANS-HEINRICH TRUTE, *Die demokratische Legitimation der Verwaltung*, in GVwR I, *supra* note 7, § 6 para. 47 *passim*.

13. See Eberhard Schmidt-Aßmann, in *INNOVACIÓN Y REFORMA EN EL DERECHO ADMINISTRATIVO*, *supra* note 5, 15, 46 *passim* (*in re* the constitutionalization of administrative law).

14. *Bundesverfassungsgerichtsentscheidung* [Judgement of the German Federal Constitutional Court, hereinafter BVerfGE] 24, 367 (401).

tal rights have had to be assessed and researched in terms of their “procedural-organizational components.”¹⁵

The other German courts have accommodated this doctrine, which adds a procedural guarantee to the substantive content of fundamental rights. This view of procedure as tied to the nature of the underlying fundamental right certainly contains considerable productive potential, which can inspire a jurist’s creativity and imagination. For example, in the judgment of the Federal Administrative Court of 2 July 2003, the Court derived from the occupational freedom laid down in GG Article 12 (1),¹⁶ a constitutional right to information for any “potential participant in the procedure,” independent of his formal procedural position and standing.¹⁷

Analyzing the significance of administrative procedure for material fundamental rights has, admittedly, lead also to confusion and controversial disputes. For example, the formula of “best possible protection of basic rights”—used in a famous dissenting vote in the Mülheim-Kärlich Decision¹⁸—has turned out to be of little help in resolving these disputes. The term “best possible” bears many meanings. In some cases it has been far too easily construed as the “maximum” of administrative procedural requirements. However, in my opinion, the proper understanding of the “best possible protection of fundamental rights” formula is that it requires neither a specific model of administrative procedure to protect those substantive rights nor the most time-consuming procedure; the formula leaves room for legislative flexibility. Nonetheless, it often may be unclear where to draw the line between constitutional requirements and the freedom of parliament to design administrative procedural guarantees.

15. See Johannes Masing, *Der Rechtsstatus des Einzelnen im Verwaltungsrecht*, in *GVwR I*, *supra* note 5 § 7 para. 53 *passim* (*in re* evidence on the current stage).

16. “All Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.”

17. *Bundesverwaltungsgerichtentscheidung* [Federal Administrative Court of Germany Decision, hereinafter BVerwGE] 118, 270 *passim*.

a) Uncertainty as to what the constitution requires stems from, first, the openness and indeterminate nature of the respective constitutional guarantees of each fundamental right. These guarantees are limited to substantive statements and do not indicate *what* procedural safeguards are considered necessary for their effective enforcement. The difficulties resulting from this lack of concrete procedural provisions are considerably increased by the procedure itself. Procedures consist of a number of actions and interactions that evolve in a flexible way according to their internal dynamics. This evolution is often unpredictable. Procedures have proven to be variable arrangements. Their elements and schemes are not determined from the very beginning, but instead change during pursuit of the stated goals as well as during their incorporation into different and broader contexts. A complaints procedure must be necessarily structured in a different way than a local town planning procedure designed to create a balance between all relevant interests. Administrative procedure as a means of social direction and political control of agencies becomes reality through direction of an entire “context.”¹⁹

b) Secondly, the ambiguities are often rooted in the existence of several dialectical tensions:

- This applies, for example, to so-called *multi-polar or multilateral legal relations*, which are characterized by the opposing and adversarial interests of the parties, who – as neighbors or competitors – invoke their respective fundamental rights. The procedural possibilities constitute here a kind of system of communicating vessels. What brings profit to the *one* puts a burden on the *other*. More often, administrative procedures do not have a bipolar structure, but include a variety of interests. The Federal Constitutional Court has pointed out the special characteristics of these procedures and, in recent cases, has derived from them distinctive restrictions related to judicial review in public procurement procedures.²⁰
- Finally, functionality and effectiveness of agencies also are relevant for the Constitution. Procedures are to be implemented in an easy, appropriate

18. BVerfGE 53, 30 (75) (HELMUT SIMON, H & HEUSSNER, H, dissenting).

19. Cf. Wolfgang Hoffmann-Riem, *Verwaltungsverfahren und Verwaltungsverfahrensgesetz – Einleitende Problemskizze*, in *VERWALTUNGSVERFAHREN UND VERWALTUNGSVERFAHRENSGESETZ* 9, 38 *passim* (Hoffmann-Riem & Schmidt-Aßmann, eds., 2002).

20. BVerfGE 116, 135 *passim*; also BVerfGE 111, 1 *passim*.

and timely fashion. The requirement of timeliness follows not only from the goal of efficacy, but also from the Constitution itself.²¹ During the last ten years, the legislature has focused on shortening the procedure. There is a remarkable gap between what has been written by legal scholars on the procedural dimension of fundamental rights and the pragmatic approach applied by the legislature.

B. MAIN QUESTIONS ABOUT PUBLIC AND PRIVATE PROCEDURE LAW

In discussing administrative procedure, we usually think of procedures regulated by public law, and carried out by public bodies. Procedures implemented by private persons under private law do not fall into the category of administrative procedure. However, several relationships may be discerned among the two main types of procedure that are also of some interest in respect to administrative law.

In the first place, it must be noted that private law comprises a whole range of rich procedural experience. Procedural law is not exclusive to public law. For example, some procedural rules of corporate law, mainly rules regarding stocks and shares, are very interesting; they provide a starting point for an analysis of procedural balancing of private interests, and sometimes include procedural balancing with public interests. Balancing can be achieved by procedural rules. The range of procedure in private experience is, however, not what I plan to discuss. I am instead going to focus on two spheres in which the interactions between procedures under public and private law are significant:

21. Efficacy (*effet utile*) also constitutes a requirement set by EC law to the procedures executed by the Member States. The German and EC concepts of efficacy have, however, different points of reference and they also differ in their consequences.

- Procedures in which public administrations or agencies act under private law (A),
- So-called private procedures in a narrow sense (B).

1. PUBLIC BODIES ACTING IN PROCEDURES ACCORDING TO PRIVATE LAW

There is a gap in the literature on the interaction of public and private in administrative law; only a few authors have addressed this interaction.²² The basic presumption must be that public bodies acting under private law must abide by the procedural rules of private law. If there are no private rules, the question then becomes whether one can draw an analogy to the rules of “standard procedure” under the Administrative Procedures Act. Some possible analogies may involve rules on conflict of interest, on the obligation of the authorities to investigate the facts of a case *ex officio*, and, presumably, also on the right of an individual to access records and information. In addition, rules on situation-independent procedures such as data protection and general rights to access information apply to both public-law and private-law activities undertaken by the administration. That is to say, nowadays there is considerable emphasis on procedural law binding on the Administration in *all* its actions – under both public and private law.

During the last ten years, *public procurement law* has gained even greater importance. According to traditional German understanding, a public procurement procedure consists of concluding a contract under private law, after a procedure belonging to administrative law (i.e., state budget law). This first procedural stage subject to administrative law comprises a variety of procedural provisions, but it has been traditionally regarded as *internal law* that, according to prevailing opinion, does not bestow any subjective rights on the other bidders. This traditional understanding has been shattered by the European Directive on public procurement. Today, we still do not have a statute on public procurement in

22. See also ULRICH STELKENS, *VERWALTUNGSPRIVATRECHT 1015 passim* (2005).

Germany. Nonetheless, anti-trust law provides in detail for the level of legal protection available to the bidders both during the procedure and during any later challenge contesting the results. On the other hand, these specific procedures also guarantee that due allowance is made for the interests of the administration in acting in an efficient manner. For example, in Germany, as a rule, adjudication procedures and judicial review suspend decisions taken by agencies. This principle is of limited validity here, because such European Directives on public procurement aim to avoid delay in reaching a final decision. But the new procurement law is only applicable to projects that reach the thresholds set by EC law.

Interestingly enough, the changes EC procurement law has induced in procedural requirements for projects above EC thresholds have also led to questioning of the commensurability of traditional German procurement law in the sphere below EC thresholds. EC law has once again shown its capability to trigger “*spillover effects*.” Some administrative courts have tried to model the procurement procedures in the sphere below EC thresholds following a *Two-Step Solution*.²³ According to this solution, an authority first selects a bidder under public law in the form of an administrative act (a formal administrative decision). This decision can be challenged by filing an action for annulment. The private contract is concluded between the chosen bidder and the agency in the second step, which releases the procedure from issues of competitor protection. By applying this solution to the “below-threshold” projects, which are of lesser importance in economic terms, these projects are furnished with more effective legal protection than those above the thresholds, since an action filed with an administrative court has, as a rule, the ability to suspend the decision, following VwGO § 80 (1) (the Code of Administrative Court Proceedings, concerning judicial review). Two recent judgments by supreme courts carry forward the distinction established between the legal protection standards applicable to procedures on projects *below* and *above* the EC thresholds:

– First, the Federal Constitutional Court held on June 13, 2006, that differentiation based on the EC thresholds does not infringe upon the principle of equality²⁴ under GG Article 3 (1).²⁵ The Court stated that public procurement

23. *Oberverwaltungsgericht* [Higher Administrative Court, hereinafter OVG] Rheinland-Pfalz, Judgment of 25 May 2005 (DVBl 2005) 988 *passim*; OVG Nordrhein-Westfalen, Judgment of 11 August 2006, (VergabeR 2006) 771.

24. BVerfGE 116, 135 (149 *passim*).

25. GG § 3 (1) “All persons shall be equal before the law.”

serves the aim of effective distribution of public funds in terms of economics; that the constitutional right of occupational freedom (GG Article 12 (1)) does not bestow on the participants in a tender a right to be chosen, and that a negative decision affects an unsuccessful bidder's prospective profit, but not his personal legal position. Therefore, the Federal Constitutional Court concludes that usually statutes are not bound to provide, in the sphere below EC thresholds, the same level of "primary legal protection" as applies to projects above the thresholds, where decisions may be challenged by filing an action for annulment of the selection of a bidder. Effectiveness and economic rationality in reaching a procurement decision is in the eyes of the Court a sufficient reason for declining to follow the EC example. In that context, the Federal Constitutional Court underlines the potential risk of improper use or even misuse of legal protection rights by unsuccessful bidders – an aspect that has so far incorrectly received little attention in other areas, such as stock corporation law.

– The Federal Administrative Court has adopted this doctrine and, in its judgment of 2 May 2007, overruled the Two-Step-Solution referred to above.²⁶ Public procurement in the sphere below the EC thresholds in future will be considered following the rules of contract under private law, irrespective of the applicability of specific public law provisions in the same procedure. However, the Federal Administrative Court has notably emphasized the right to proper legal protection (judicial review) that is to be granted to unsuccessful bidders in projects that fall below the thresholds. Future developments in these areas remain uncertain. In view of the fundamental right to effective judicial review,²⁷ it shall be important to inform all bidders of the intended selection decision in time, to enable them to apply for interim measures in civil courts. This is ultimately an improvement owing to the "spillover effect." Nonetheless, these recent judgments have not assessed properly the overall significance of public procurement procedures for administrative law.²⁸

26. BVerwGE (NVwZ) 820 *passim* (2007).

27. GG § 19.IV "Should any person's right be violated by public authority, recourse to the court shall be open to him. If no other court has jurisdiction, recourse shall be to the ordinary courts."

28. See Martin Burgi, Von der Zweistufenlehre zur Dreiteilung des Rechtsschutzes im Vergaberecht, in NVwZ 737 *passim* (2007).

2. “PRIVATE PROCEDURES”

Private procedures are procedures enforced by private persons. They are of interest under administrative law insofar as they influence or control administrative decisions.

– This happens when procedures or at least parts of procedures that traditionally have been subject to administrative law are conferred to private parties. *Privatization of procedure*, that is, outsourcing of some procedural elements or pieces such as gathering of information or investigation of any facts, is intended to remove the strain from public authorities and to allow for use of external knowledge. Examples can be found in Europe in local town planning and environment laws.

– *Vice versa*, the category of private procedures also contains procedures that initially belonged solely to the private sector and the results of which have been subsequently adopted by the state. This applies, for example, to procedures on product safety (certification and accreditation) that were previously only subject to liability according to private law. Procedures of technical standardization also fall into this category. *Publification of previously private procedures requires solving some problems.*

The problems that arise in the field of private procedure concern a new model of state cooperation with civil society (public-private partnership), enforced self-regulation (publicly-supervised industry self-regulation), and a new division of responsibilities between administration and citizens.²⁹ In this collaborative relationship between society and state, the essentials of public and private law must be preserved. It is important on the one hand to preserve creativity, expertise, and rationality of autonomous action by private legal persons. To make them part of the public administration would not be an appro-

29. Martin Eifert, *Regulierungsstrategien in GVwR I*, *supra* note 5, § 19 para. 52; Martin Burgi, *Rechtsregime in id.* § 18 para. 79 *passim.*; Schmidt-Aßmann *in BARNES*, *supra* note 5, 15, 69 *passim.*

priate solution. Principles applicable to public administration, namely the requirements of democratic legitimacy and the rule of law, cannot be simply and directly extended to private procedures.

On the other hand, the incorporation of certain aspects of private procedure brings social welfare into a broader administrative context. By adopting the results of private procedures into administrative decision-making, issues of social welfare come into play and the public interest must be duly considered. This guarantee of consideration of the public interest is provided by the administration in collaboration with society. The administration thus must guarantee a legitimate decision-making in the whole process, even though it is carried out by private persons.³⁰ An administration must examine whether neutrality, parity of interests, transparency, and competence are also characteristic of private participants in the private procedure. The extent to which issues of public interest, traditionally protected by public law, will be taken into account depends on the degree to which input from the private procedure is central to administrative decision-making. Liability risks can be covered by requiring the private participant in the procedure to have liability insurance. Public procurement law regarding the selection of private partners for administrative cooperation has become crucial in the service sector.

30. Cf. Ruffert, *Rechtsquellen und Rechtsschichten*, in *GVWR I*, *supra* note 7, § 17 para. 93.

III EUROPEAN DIMENSIONS OF ADMINISTRATIVE PROCEDURE LAW

IN discussing the European dimensions of administrative procedure, we must not restrict our view just to the European Union, although the most relevant issue for us is certainly European Union law (within its legal jurisdiction), and particularly European Community law, always allowing for supranational competence.

– A second European dimension of administrative procedural law has been shaped within the framework of the *Council of Europe*, especially under the Convention for the Protection of Human Rights and Fundamental Freedoms. Of particular importance have been the right to file a complaint under ECHR Article 13, the jurisdiction of the ECHR on procedural aspects of Article 2 (right to life) and Article 8 (right to privacy),³¹ as well as several resolutions by the Committee of Ministers of the Council of Europe.

– The third dimension represents a pool of procedural guarantees to be found in the legal orders of all European countries. They can be traced back to principles valid under Roman law, such as *audiatur et altera pars* and *nemo iudex in causa sua* and constitute the basic stock of a “common European administrative law.”³²

A. SIX COMPONENTS OF EC ADMINISTRATIVE PROCEDURE LAW

EC procedural law, which we shall now focus on, consists of six major components:

31. Judgment of 8 July 2003 “Hatton and others vs. UK” *Europäische Grundrechte-Zeitung* [hereinafter *EUGRZ*] 584 *passim* (2005).

32. See also RUFFERT, *Rechtsquellen und Rechtsschichten*, *GVwR I*, *supra* note 7, § 17 para. 143 *passim*.

(a) First, there is the procedural law applicable to organizational units within the administration (see below 2): *Procedural law of direct administration*.

(b) A second type represents the *uniform procedural* law to be observed by all national administrations. Some examples of uniform procedural law are the Customs Code (Regulation No. 2913/92) and the Schengen Borders Code (Regulation No. 562/2006). National procedural laws have been completely replaced by these legal acts.

(c) In other policy spheres, such as in internal market and environmental protection policies, a *harmonization of procedure* has been carried out under EC law. EC directives provide for regulation of the structure of national administrative law in order to enhance the implementation of the substantive aims pursued by EC law. This regulation is based on the concept of a particular steering potential of procedure in terms of reaching substantive targets such as the creation of market transparency, enhancement of use of resources, and establishment of mutual political confidence.

(d) Where no uniform procedural laws apply (b) and harmonization of national law has not yet taken place (c), EC law must at least provide minimum standards for implementation by national administrations. Whenever national public authorities implement substantive EC law applying their own procedural rules, they act, as is said, in “organizational and procedural autonomy.” Nonetheless, this autonomy is restricted and national rules are synchronized with the rules of other nations by the imperatives of equivalence and effectiveness.³³ Following this doctrine based on the *effet utile* principle, the ECJ has in many cases interfered substantially, but often in a quite unsystematic manner, with long established doctrines of national law. For example, the ECJ has in the past interfered with national statutes of limitations. This phenomenon has been referred to as *instrumentalization* of national procedural law (*Scheuing*).

(e) A fifth component is represented by *common procedural standards*, applicable to the EC direct administration and to national administrations whenever they implement EC law. These are elementary legal guarantees like the right to be heard, the right to a fair procedure, the principle of impartiality, the right to a timely decision, and the right to contest adverse administrative deci-

33. Pünder, *Verwaltungsverfahren*, in *ALLGEMEINES VERWALTUNGSRECHT* § 12 para. 18 *passim* (Erichsen & Ehlers ed., 2007) Jörg Gundel, *Verwaltung*, in *EUROPARECHT* § 3 para. 194 *passim* (Reiner et al., eds., 2006).

sions. Taken together, these rights and principles constitute the core of the *right to good administration*.³⁴

(f) Lastly, cooperation between EC administrative authorities and national administrations must be provided with procedural frames in their horizontal and vertical dimensions. The processes of comitology, mutual administrative assistance, supervision, and creation of networks are major cornerstones of the European composite administration (made up of the EC and the national administrations and their mutual interrelations).

The issues of the European composite administration will be dealt with in detail by Hans Christian Röhl in this volume. I will focus on the procedural law of EC direct administration (in Part III.B) and make some comments on common European procedural standards (in Part III.C).

B. ADMINISTRATIVE PROCEDURE LAW OF EC DIRECT ADMINISTRATION

The procedures used by the direct administration have not yet been *codified*, although the EC has the legislative authority to do so. Some requirements are entailed in the *EC Treaty*, e.g., the obligation to state reasons (Art. 253), to publish (Art. 254), to enforce the decisions of the Council or the Commission (Art. 256). These have been supplemented by rules on data protection (Art. 286) and general access to records (Art. 255). Further procedural law has been derived from the general legal standards mentioned above (see Part III.). Some examples of such derivation include the right to be heard and the right to legal privilege, which follow from the notion of defense rights and become relevant in adversarial procedures.

However, important procedural provisions for administrative action have been created in the first place in *secondary law*, e.g., in antitrust and merger control law. Numerous provisions are included in legal acts establishing European

34. Cf. PAUL CRAIG, EU ADMINISTRATIVE LAW Chs 10 - 11 (2006).

agencies, e.g., the Aviation Safety Agency (Regulation No 1592/2002) and the Food Standards Agency (Regulation No 178/2002). Also interesting in this context are the provisions on the general budget of the European Communities (Regulation No 1605/2002), on public procurement procedures (Art. 91 *passim*), and on EC funding procedures (Art. 108 *passim*). Outside Germany, this procedural law is, quite rightly, not considered to be purely internal administrative law.

The applicability of most procedural provisions is restricted to a certain policy field. *Provisions of more general applicability* are laid out in Regulation 1049/2001 regarding public access to documents of Community organs and Regulation 45/2001 on the protection of personal data by Community institutions and bodies. Procedural standards detailed in these legal acts recall those imposed by the EC on the Member States in the field of environmental protection. The establishment of parallel standards expressly provided for in EC Art. 286 (1) pays homage to the fact that procedural law of the European Union must enact the same principles on all levels. Administrative procedure is a footprint of administrative culture, and culture is not divisible.

A third source of procedural law is represented by the *codes of good practice* issued by the EC organs and the Ombudsman. These codes contain a large variety of provisions: recognized legal standards, recent rules on citizen-friendly administration, but occasionally also banalities. The doctrinal relevance of such codes is difficult to assess. They represent a combination of case-law and soft law. The “right to good administration” under Art. 41 of the EU Basic Rights Charter offers a “gateway” to this pool of rules, the passing of which could transform individual, not yet legally recognized rules into binding legal provisions.

The variety of procedural rules certainly bars any general conclusions on the role of administrative procedural law within the EC legal system. Administrative procedural law certainly constitutes an important means of integration. However, we must keep away from a procedural euphoria or a system based purely on procedural justice. This is reflected in the various methods of remedying procedural irregularities. It is true that the remedies for procedural irregularities are more restricted under EC than under German law. Nonetheless, even in EC law a procedural irregularity must rise to the level of a violation of ‘substantial’ procedural rules to provide a basis for an action for

annulment under EC Art. 230 (2). Thus far, participation rights, the rights to be heard, and the obligation to provide reasons have been considered ‘substantial’ procedural rules. There is also a harmless error rule: When it is established that the outcome of a certain procedure would have been the same even if a hearing had taken place, then its omission does not result in the nullification of the administrative decision.³⁵ In general, the European Courts flexibly construe the relevant procedural provisions—such as the obligation to state reasons or the right to access records—in favor of the Administration, so as to find no procedural irregularity.³⁶

C. COMMON EUROPEAN LAW ON ADMINISTRATIVE PROCEDURE

Some resolutions and recommendations of the Committee of Ministers of the European Council deal with major procedural issues:

The foundation was laid on 28 September 1977 when the Resolution (77)31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities³⁷ was adopted. Other examples followed: recommendations about the exercise of discretionary powers by public bodies (1980), administrative procedures affecting a large number of persons (1987), provisional court protection in administrative matters (1989), and administrative sanctions (1991).³⁸ Among the more recent recommendations, particularly significant are the recommendations on alternatives to litigation (2001), on the execution of administrative and

35. ECR 1990, I-307 para. 31.

36. ECJ, judgment of 1 February 2007, EuGRZ, *supra* note 1 173 para. 64 *passim* (2007).

37. *Verwaltungsverfahrensgesetz* [hereinafter VwVfG] app. 7 (Stelkens et al. eds., 2008) (The five principles construed as procedural rights are: public hearing, access to records, legal assistance, statement of reasons, remedies.)

38. Rec (80)2E of 11 March 1980, concerning the exercise of discretionary powers by administrative authorities; Rec(87)16E of 17 September 1987, on administrative procedures affecting a large number of persons; Rec(89)8E of 13 September 1989, on provisional court protection in administrative matters; Rec(91)E1 of 13 February 1991, on administrative sanctions; downloadable at the webpage of the Committee of Ministers www.coe.int/t/cm/home-en.asp.

judicial decisions (2003), and on judicial review of administrative acts (2004).³⁹ A semi-official survey initiated by the Swedish government contains a list of ten principles of good administration that are recognized in most member States of the Union through constitutional and/or sub-constitutional legal provisions.⁴⁰

Even though a uniform “procedural philosophy” has not yet emerged and legal orders of the European states and EU law differ in their assessment of the relevance of procedural law (e.g., regarding procedural violations or irregularities), the idea of procedure constitutes basic expression of a common European administrative law.^{41,42} The convergences will grow primarily in the sphere of influence of EU law: “In the integration-oriented European Community, the diverse national legal orders are in a constant and close interaction mediated by European legislative and jurisprudential institutions.”⁴³

39. Rec (2001)9E of 13 February 2003, on alternatives to litigation between administrative authorities and private parties; Rec (2003)16E of 9 September 2003, on the execution of administrative and judicial decisions in the field of administrative law; Rec (2004)20E of 15 December 2004, on judicial review of administrative acts; see www.coe.int/t/cm/home-en.asp.

40. *STATSKONTORET*, PRINCIPLES OF GOOD ADMINISTRATION 71 *passim* (2005).

41. JÜRGEN SCHWARZE, *EUROPÄISCHES VERWALTUNGSRECHT* 1135 *passim* (1993).

42. See also *The Procedure of Administrative Acts*, in *EUROPEAN REVIEW OF PUBLIC LAW* (Supp. 1993).

43. Rainer Wahl, *Das Verhältnis von Verwaltungsverfahren und Verwaltungsprozeßrecht in europäischer Sicht*, in *EUROPÄISCHES VERWALTUNGSVERFAHRENSRECHT* 357, 381 (Hermann Hill & Rainer Pitschas eds., 2004); see also Matthias Schmidt-Preuß, *Gegenwart und Zukunft des Verfahrensrechts*, in *NvWZ* 489, 493 (2005); Pünder, *Verwaltungsverfahren*, in *ALLGEMEINES VERWALTUNGSRECHT* § 12 ¶ 26 (Erichsen & Ehler eds., 2007).

IV PROCEDURAL ASPECTS OF INTERNATIONAL ADMINISTRATIVE LAW

A. THE NOTION OF INTERNATIONAL ADMINISTRATIVE LAW

THE international law requirements for administrative procedures are extremely difficult to define. While legal provisions and concepts of national administrative law are for the most part clearly defined and a conception of the scope and contents of European administrative law has developed over the last two decades, it is still uncertain what the scope of international administrative law is or should be.⁴⁴

– By “international administrative law” many scholars mean the administrative law of international organizations. So far, international administrative law is composed mainly of organizational law, the law on civil servants, and budgetary law; despite being assigned to international law, it has been somewhat depreciatively referred to as “internal law.”

– Second, prevailing doctrine in Germany has, quite differently, defined international administrative law in analogy to international private law as conflict of laws principles. According to this doctrine, international administrative law is in its substance national administrative law that determines when a particular state’s substantive administrative provisions are applicable.

The two definitions, as well as the concepts they are based upon are insufficient, though. The international-law notion is based on the right presumption: international administrative law is *international*, not national law. The definition of internal law is, however, too narrow to cover all the relevant legal provisions and legal issues concerning international organizations and international administrative

44. See also Ruffert, *supra* note 7, § 17 para. 169 *passim*.

cooperation. The notion based on conflict of laws is fundamentally flawed. There is no parallel to international private law since national administrations, unlike private legal persons, do not enjoy the freedom of choice of law that is characteristic of international private law. This does not mean that issues of conflict of laws cannot play a role in public law. On the contrary, their role has been constantly increasing. These rules should be, however, referred to as public conflict laws⁴⁵ rather than as – in a mistaken analogy to international private law – international administrative law.

This essay uses the term “international administrative law” to designate *all rules on typically administrative regulatory structures of international intercourse*. “Administrative law” stands for the actions and activities of administrations as well as legal provisions applicable to them. This “administrative law” is “international” since it goes beyond national jurisdictions.

B. THE SPECIFICS OF INTERNATIONAL ADMINISTRATIVE LAW

Any attempt to develop a concept that can encompass these manifold legal norms, administrative activities, and organizational structures and to establish a system of international administrative law as a third pillar of a universal administrative legal order – next to national and European administrative law – must take into account the specific characteristics of the international administrative regulatory structures discussed above. There are enormous differences between, on the one hand, the intensified administrative relations on the *national* and more recently on the *European* levels, and, on the other hand, the administrative structures on the *international* level. These differen-

45. Cf. CHRISTOPH OHLER, *DIE KOLLISIONSORDNUNG DES ALLGEMEINEN VERWALTUNGSRECHTS* 2 *passim* (2005).

ces make it impossible to simply transfer our traditional administrative legal doctrine to the novel third pillar. I shall point out three of them:

– First, the relevant *sector-specific* legal sources are to a high degree *fragmented*. Each of them is restricted to a specific field of action, whether fishing, emissions trading, or social security systems. Comprehensive legal regulations typical of administrative action have been rare thus far; they can be discerned, if at all, in the sphere of human rights protection.

– Second, there is also *spatial or regional* fragmentation. Administrative regulatory structures concern various areas: cooperative organizations of neighboring states, treaties tailored to certain regions, or subjects of global scope. Many treaties have their origins in the common legal and cultural traditions of the parties involved. Other treaties try to accommodate deeply divergent concepts of the law, and what is to be accomplished by means of law. International Administrative Law is not applicable to only one homogeneous *administrative space*, as is National or European administrative law.

– Third and last, international administrative law lacks any type of unifying jurisdiction that could provide a basic foundation of law and create progress in times of stagnation. There might be a whole range of courts and court-like institutions on the international level, but these far from constitute a juridical system to compare with the Union’s Courts in Luxembourg and national administrative courts. In particular, the difference in the ability to influence administrative law enjoyed by the International Court of Justice and the European Courts could not be greater.

International Administrative Law, understood as something more than application of respective relevant legal acts, at first will evolve slowly and without centralization, and will be fragmented into various fields. A great variety of administrative structures and an enormous amount of legal sources have yet to be analyzed. Nonetheless, “international administrative law as a research task” according to Ruffert seems to be a very promising endeavor.⁴⁶ Two

46. See also *INTERNATIONALES VERWALTUNGSRECHT* (Christoph Möllers et al. eds., 2007).

developments in international law have made this multifaceted field of law a uniform research object:⁴⁷ For one thing, there is the evolution from a law of coordination to a law of cooperation, followed by a dramatic increase in cooperation between national administrations and administrative activities of international organizations. In addition, the increasing importance of both the international protection of human rights and the international protection of common goods has led to the creation of administrative structures. International administrative law has in this way become an “implementation tool” of the law of nations in a more universal understanding such as was advanced by the classic school of Salamanca.⁴⁸ Systematic scholarly work in a field of such complexity is both possible and desirable. It will have positive effects on the practical issues of treaty interpretation under international law and on the evolution of customary international law.⁴⁹

C. CONCEPT OF THREE FUNCTIONAL SPHERES

In an earlier paper, I attempted to assign the structures of international administrative law to three functional spheres.⁵⁰ Here, I will continue this approach and will draw on the development and structure of European administrative law. In doing so, this section highlights the above differences between European and international

47. ANGELIKA EMMERICH-FRITSCH, *VOM VÖLKERRECHT ZUM WELTRECHT*, 686 *passim* (2007)

48. Cf. ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT*, §§ 10 and *passim* (3d ed. 1984) (*Bonum commune generis humani* as a target pursued by international law by Vitoria and Suarez).

49. See KLAUS FERDINAND GÄRDITZ, *UNGESCHRIEBENES VÖLKERRECHT DURCH SYSTEMBILDUNG* (AVR 2007).

50. Eberhard Schmidt-Aßmann, *Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen*, in *DER STAAT* 315 *passim* (2006), also in *REVISTA DE ADMINISTRACIÓN PÚBLICA* 7 *passim* (Oriol Mir, trans., 2006).

administrative law resulting from the initial status quo. The three functional spheres are “law of action,” “law of determination,” and “law on cooperation.”

a) *Law of action* is international administrative law applicable to the actions of international actors, particularly international organizations. It covers *internal* administrative law, which governs traditional matters such as civil servants and budget law. The rules on internal administrative decision making, usually laid down in the organizations’ statutes and in internal organizational law, also belong in this category. As in the law of EC direct administration, law of action has been dramatically evolving into a law of external administrative relations vis-à-vis other actors (states, enterprises and private persons). Official Development Assistance, particularly in the World Bank and the United Nations Development Program (UNDP),⁵¹ (ODA) is a prime example which typically exemplifies the use of structural elements of national and European subsidy law in international law: program schemes, project assessment, contracts, and conflict resolution schemes. Law of action only partly originates in international treaties. The secondary legislation of respective international organizations is also an important source, as are, in a broader sense of “law,” their recommendations and guidelines, published in manuals. Having recourse to these instruments of “soft law” is characteristic of international law of action.

b) *Law of determination* is that part of international administrative law that sets standards for national administrative law. Again, a parallel to EC law can be drawn, although there are no supranational legal instruments like EC directives in the international context. Law of determination originates mainly in international treaties, for example, in global and regional covenants on human rights or in the Geneva Refugee Convention. In the sphere of environmental protection, the Aarhus Convention is of particular note. It obliges the signatory states to provide public access to environmental information, environmental impact assessments, and the right to file a class action. Beyond the use of administrative law in treaties, some general principles of international law now incorporate elements of the traditional content and meaning of administrative law.

c) Finally, international administrative law is to a considerable extent *law on administrative cooperation*. As a result, the relevance of international administrative conflict rules has been constantly dropping behind that of transnational

51. Philipp Dann, *Grundfragen eines Entwicklungsverwaltungsrechts*, in *INTERNATIONALES VERWALTUNGSRECHT*, *supra* note 7, 7 *passim*.

administrative cooperation.⁵² The meaning of agency cooperation and problems associated with these specific issues are also dealt with in European law. Rules on agency cooperation can be found in law of action as well as in law of determination. The notion of law on cooperation does not introduce a new or independent branch of law, but points to a particular problem with the issues of efficacy and transparency that emerge at the intersections of spheres of agency action. Any form of cooperation generates its own particular questions and problems apart from the common issues present in the law of action and the law of determination.

Cooperation takes place *vertically*, between international organizations and states, and *horizontally*, between two or more states or agencies. The parties involved act, as long as they do not resort to private law, under different legal regimes: international organizations according to international public law, and national administrations according to their respective national law that may in some cases have been harmonized by the international law of determination. Thus, legal sources of cooperation law diverge. The term “administrative cooperation law” should, with regard to legal sources, remain restricted to legal acts of international law. Of decisive importance will be interrelation and coordination between the two legal regimes in both their procedural and substantive aspects. Whether transnational cooperation law will evolve into an autonomous regime equivalent to national and international administrative law remains to be seen.

D. ADMINISTRATIVE PROCEDURES UNDER INTERNATIONAL LAW

Procedures are extraordinarily important instruments for the control and direction of organizations, particularly with regard to international administrative law. This applies especially to the direct administration of international organizations and to cooperation law. The distinction between rules of diplomatic and administrative intercourse is hardly possible at times. For instance, the lines are blurred in the area of information-provision and reporting duties of states under

52. See Matthias Ruffert, *Rechtsquellen und Rechtsschichten*, *supra* note 7, § 17 para. 170.

international treaty regimes that focus on monitoring state behavior. Overall, an increase in typically administrative elements can be discerned. On the other hand, procedural law on rule-making by international bodies (secondary legislation) is regarded, as always, as classical diplomatic international law.

Administrative procedures in international law aim to achieve the goals and functions entrusted to them. *International mutual assistance* constitutes the basic type of procedure under international administrative law. In national administrative law, public hearing procedure is the most basic type of procedure. The reasons for this difference between the two levels are hidden in their respective histories: national administrative law has acquired its current shape thanks to judicial review by the courts that secured civil rights. Procedures of international administrative law have their origins in the need for administrative cooperation. Hence, *effet utile* or efficacy is the dominant feature. Accordingly, the idea of procedure at each level leads to a different function: citizen protection, at the national level, and inter-agency cooperation, at the international level.

Nonetheless, there have also been harmonizing tendencies. In national administrative law, the significance of effective administration has been recognized by accepting the so-called “double function” of administrative law (protection of the interests of the individual and effective administrative performance). Similarly, protection of the individual has become more important in international administrative law. Nowadays, schemes of mutual assistance, as in social, tax and police law, involve, as a rule, provisions on data protection. This applies even to the politically highly sensitive issues of repatriation and readmission agreements in migration law.

The Court of First Instance of the EU discussed exactly this issue in its judgment in the *Yusuf* case, while applying elementary standards of legal protection to the administrative actions of the UN Security Council and considering these standards to be current *ius cogens*.⁵³

53. EuGRZ 592 *passim* (2005).

International human rights protection, long ago incorporated into law of determination and transformed into procedural standards to be observed by national administrations, must, in the same way, be valid under the law of action applicable to international organizations. The law of administrative procedure is an expression of administrative culture, and that culture may at last be understood as indivisible, regardless of the numerous differences between the states and regions of the world.