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## Administrative Procedure Acts in Europe: An Emerging “Common Core”?†

*This Article concerns the legislative regulation of administrative procedure in Europe. Two main themes are discussed. The first is the spread of administrative procedure legislation. The vast majority of the member states of the European Union, though not all, have adopted some type of code of administrative procedure. Arguably, this constitutes a significant change in the pattern of modern administrative law. The second theme concerns commonality and diversity in European laws. Both common and distinctive features are considered from a two-fold point of view: functional and structural. Functionally, attention is devoted to the rationales for such a legislative instrument, including procedural fairness and administrative efficiency. The structural features of administrative procedure acts (APAs) include, first, their size and scope and the nature of their provisions; second, their legal status, in particular whether some of them can be regarded as “super-statutes”; third, their provisions concerning the rights and duties of the individual. Interestingly, despite numerous differences between national APAs, deriving from both context and policy choices, there are certain basic requirements, such as the right to be heard and the duty to give reasons, which seem to prevail everywhere. The Article suggests that*

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*such common features depend on a mix of factors, including functional needs, prestige, and the influence of supranational legal orders.*

#### INTRODUCTION

This Article concerns the legislative regulation of administrative procedure in Europe, viewed from a comparative perspective. Two main themes will weave their way through the following pages. The first is the spread of administrative procedure legislation. This is of fundamental importance, because for a long period of time none of the major legal systems of Europe had a general law on administrative procedure. Consequently, administrative law was not codified, unlike private law which, in continental Europe, was characterized by the adoption of civil codes, starting with France in 1804 and followed by Austria in 1811. Things gradually changed during the twentieth century. In 1925, Austria adopted a general law on administrative procedure and was soon followed by some neighboring countries. In the second half of the century, many other legal systems adopted some kind of code of administrative procedure, especially after 1989,<sup>1</sup> and these legislative provisions are of great practical importance and raise interesting conceptual issues.<sup>2</sup>

The second theme concerns commonality and diversity in European administrative laws. In the past, according to Dicey, there was radical diversity between the legal systems of England and France, a divide captured by his bold assertion that “there exists in England no true *droit administratif*”;<sup>3</sup> although French administrative law was “nearer” to English law than German administrative law.<sup>4</sup> Nowadays, Germany and France, and the vast majority of the member states of the European Union, though not all, have administrative procedure legislation. There is thus a common trend. However, we cannot content ourselves with a simplistic correlation between the growth of this legislation and the so-called convergence between national administrative laws. Administrative procedure legislation seems to be characterized by a mixture of commonality and diversity, which makes a comparative investigation particularly interesting and fruitful.<sup>5</sup> Our conjecture is that there are not only several differences among European administrative laws, but also there are some common and

1. George A. Bermann, *Foreword to Codification of Administrative Procedure*, at v (Jean-Bernard Auby ed., 2014).

2. See Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMP. L. 859 (2011) (observing that the criteria of comparative studies are largely those of the twentieth century).

3. ALBERT V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 256 (10th ed. 1959).

4. *Id.* at 214.

5. Paul Craig, *Comparative Administrative Law and Political Structure*, 37 OXFORD J.L. STUD. 1 (2017).

connecting elements; that is, a common core, in the sense in which this phrase was intended by Rudolf Schlesinger.<sup>6</sup>

The Article thus addresses the interaction between commonality and diversity in European law from the perspective of administrative law, focusing on administrative procedure. This focus is justified by the fact that, similarly to what happened in the United States according to Kenneth Davis, there is a diminishing tendency of public lawyers to emphasize judicial review, while “procedural safeguards now hold the center of the stage.”<sup>7</sup> The Article is divided into five parts. Part I summarizes the movement towards administrative procedure legislation, with adequate emphasis on the Austrian legislation of 1925. Part II compares existing administrative procedure acts (APAs) from a functional perspective, centered on the various goals that legislators seek to achieve. Part III develops our comparison from a structural perspective, including, on the one hand, the size and scope of APAs and, on the other, the possibility to consider them as “super-statutes.” Part IV identifies citizens’ rights and duties under existing APAs. In Part V, we discuss commonality and diversity.

### I. THE AUSTRIAN APA: PLANTING THE SEED

In the nineteenth century, national administrative law remained largely uncoded, although an interesting attempt was made in Spain in 1889. However, it was the Austrian codification that really planted a seminal seed that would eventually germinate and spread far and wide across Europe. The analysis starts with a brief overview of the Austrian law of 1925. The focus then shifts to its impact on neighboring legal systems.

#### A. *Background: Uncodified Law*

To understand the importance of administrative procedure legislation, two preliminary points are crucial: First, we must qualify the observation made by Roscoe Pound and others that in Europe the era of the codes “reinforced the idea of law as a body of rules.”<sup>8</sup> This vision of the law does not apply to the field of administrative law, which in the period of its growth and consolidation, in the last decades of the nineteenth century, was uncoded.<sup>9</sup> There was a profound difference with

6. See Rudolf B. Schlesinger, *Introduction to FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS* 2, 3 (Rudolf B. Schlesinger ed., 1968). See also Giacinto della Cananea & Mauro Bussani, *The “Common Core” of Administrative Laws in Europe: A Framework for Analysis*, 26 MAASTRICHT J. EUR. & COMP. L. 217 (2019) (describing the comparative research project that underpins this Article).

7. Kenneth C. Davis, *Administrative Powers of Supervising, Prosecuting, Advising, Declaring and Informally Adjudicating*, 63 HARV. L. REV. 193 (1949).

8. Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TULANE L. REV. 475, 480 (1933).

9. See ADMINISTRATIVE JUSTICE FIN DE SIÈCLE: EARLY JUDICIAL STANDARDS OF ADMINISTRATIVE CONDUCT IN EUROPE (1890–1910) (Giacinto della Cananea & S. Mannoni eds., 2021) (focusing on general principles).

respect to private law, which was codified in France in 1804, followed by Austria in 1811, Italy in 1865, Spain in 1889, and Germany in 1900.<sup>10</sup>

Second, despite the significant influence of French law on other legal systems in terms of judicial review of administration,<sup>11</sup> Spain and Austria have emerged as leaders in the regulation of administrative procedure. In Spain, the same year that saw the approval of the Civil Code also witnessed the passage of a landmark piece of legislation by Parliament: the first act to regulate administrative procedure.<sup>12</sup> The so-called Ley de Azcárate's provisions dealt notably with the hearing of interested parties and the notification of administrative acts.<sup>13</sup> Although its effectiveness was undermined by each central department developing its own rules of procedure, leading to a "disordered body of rules,"<sup>14</sup> the Act laid ground for the 1958 legislation. No other national system had adopted a systematic body of legislation. This explains the significance of Austria's choice to adopt administrative procedure legislation in 1925.

#### B. *The Austrian Codification and Its Diffusion in Mitteleuropa*

The Austrian legislation of 1925<sup>15</sup> was particularly important, for two reasons. First, it was comprehensive and provided solutions to various problems faced by public authorities. Second, it exerted a strong influence on other legal systems.

The work of the Austrian administrative lawyer Friedrich Tezner is central to an adequate understanding of the foundations of codification. Tezner devoted considerable attention to the judicial decisions issued by the administrative court since its creation in 1875. An extended analysis of Tezner's intellectual legacy is beyond the scope of this Article. Suffice it to say that he was a pioneer for systematically studying the principles articulated and refined by the Austrian administrative court. Furthermore, he infused the term "administrative procedure" with innovative meaning.<sup>16</sup> In a narrow sense, the term

10. See Sigmund Samuel, *The Codification of Law*, 5 U. TORONTO L.J. 148, 150 (1943) (pointing out the differences between the French and Austrian Civil Codes).

11. Jean M. Galabert, *The Influence of the Conseil d'Etat Outside France*, 49 INT'L & COMP. L.Q. 700 (2000).

12. Ley de 19 octubre 1889 (Ley de Azcárate) (Spain).

13. Eduardo Garcia de Enterría, *Un punto de vista sobre la nueva ley de régimen jurídico de las administraciones públicas y de procedimiento administrativo común de 1992*, 43 REVISTA DE ADMINISTRACIÓN PÚBLICA 205 (1993). See similarly Georges Langrod, *A Few Problems of Non-litigious Administrative Procedure in Comparative Administrative Law Proposed Reforms and Trends of Opinion*, 32 INT'L REV. ADMIN. SCI. 41 (1959).

14. Luis Ortega, *A Comparison with the Spanish Regulation of Administrative Procedures*, 2 ITALIAN J. PUB. L. 296, 297 (2010).

15. ALLGEMEINES VERWALTUNGSVERFAHRENSGESETZ [AVG] [GENERAL ADMINISTRATIVE PROCEDURE ACT], BUNDESGESETZBLATT [BGBl.] No. 274/1925, [www.ris.bka.gv.at/Dokumente/Erw/ERV\\_1991\\_51/ERV\\_1991\\_51.pdf](http://www.ris.bka.gv.at/Dokumente/Erw/ERV_1991_51/ERV_1991_51.pdf) (Austria).

16. 2 FRIEDRICH TEZNER, DIE RECHTSBILDENDE FUNKTION DER ÖSTERREICHISCHEN VERWALTUNGSGERICHTLICHEN RECHTSPRECHUNG: DIE RECHTSQUELLEN DES ÖSTERREICHISCHEN VERWALTUNGSRECHTES (1925).

referred to the process conducted by a department or agency. In a broader sense, an administrative procedure involved some variable or fixed requirements considered essential for the legitimate exercise of power, notably including the need to follow certain phases or stages, closely mirroring the judicial process. This defined an administrative procedure aligned with the concept of *Rechtsstaat*, where governmental authority is constrained by the law. This vision had a deep influence on the nations that decided to follow Austria on the path towards the codification of administrative procedure.

It would not be accurate to say that the codification of administrative procedure was a natural development of the growth and systematization of general principles defined and refined by the court. This opinion was derived from the works of the first commentators of the 1925 codification. However, official documents, subsequently made public, reveal that the decision to streamline administrative procedures was driven partly by external pressures linked to Austria's application for an international loan. Recognizing administrative reform as a prerequisite for international financing challenges the silent assumptions that external influence marks only our present, while past policy choices were fully autonomous.<sup>17</sup>

The new legislation included four statutes: the first clarified which agencies would be subject to the other three statutes; the second was the Administrative Procedure Act (i.e., the APA, which is not a term of art, but rather a generic one, as will be clarified at a later stage); the third act regulated criminal administrative procedure; and the fourth the execution of administrative decisions. As regards the APA, the legislator proceeded on the assumption that the administration was part of the executive branch, but that its action could be regulated in a way similar to the machinery of judicial adjudication. Several consequences followed from this assumption, including the use of terms such as "parties" and "interest" and the possibility to make use of legal representatives. The principles set out by the new legislation included impartiality, the right to be heard, and the right to be able to appeal against both procedural and substantive illegality.<sup>18</sup> Almost a century after its enactment, the Austrian APA has proven to be durable. True, it has undergone one major substantive amendment in 1991. It cannot, therefore, be read today exactly in the same manner as when it was enacted in 1925. However, the main political choice underlying the APA, that is the assimilation of the administrative procedure to the judicial process, is unchanged.<sup>19</sup>

17. See THE AUSTRIAN CODIFICATION OF ADMINISTRATIVE PROCEDURE AND ITS INFLUENCE (Giacinto della Cananea, Angela Ferrari Zumbini & Otto Pfersmann eds., 2022).

18. See Rudolf M. Hernritt, *La nouvelle procédure administrative autrichienne*, 1932 ANNUAIRE DE L'INSTITUT INTERNATIONAL DE DROIT PUBLIC 251; Heinz Schäffer, *Administrative Procedure in Austria: 80 Years of Codified Procedure Law*, 17 EUR. REV. PUB. L. 871 (2005).

19. For an analysis of the U.S. APA, see William H. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235 (1986) (observing that the APA had three major amendments).

The other reason why the Austrian law is so important is its diffusion: it was adopted, with modifications, by some nations formerly part of the Habsburg Empire until 1919.<sup>20</sup> The governments of Czechoslovakia and Poland took up the principles and rules of the Austrian APA in 1928.<sup>21</sup> Yugoslavia adopted an act governing administrative procedure two years later, in 1930. The reasons behind these choices will have to be analyzed in more detail than is possible here, but what emerges from academic works and official reports which are already available is that there was a common concern for ensuring a uniform interpretation and application of the law in the new polities of what is known as *Mitteleuropa*, a German term for Central Europe.<sup>22</sup> Within this group of democracies, a diffusion of the Austrian model thus emerged, as distinct from a codification of national laws.<sup>23</sup>

In the same years, and for the first half of the twentieth century, although strains had begun to appear in the legal framework as to which administrative functions and powers should be discharged by public authorities, such framework was yet to be codified by the three major legal systems of continental Europe: France, Germany, and Italy. Various reasons account for this: the dominance of executive regulation of administrative action; a concern about parliamentary legislation, which was regarded as a sort of “*corset paralysant*” (a crippling corset);<sup>24</sup> and the notion that courts could devise appropriate solutions for the new problems that emerged. Things changed, however, after 1945. The following subsection succinctly charts how the various countries adopted APAs.<sup>25</sup>

### C. *The Aftermath of World War II*

The two decades that followed 1945 were characterized by distinct policy choices. One group of European countries followed the Austrian model, in the sense that they adopted administrative procedure

20. See ADMINISTRATIVE PROCEEDINGS IN THE HABSBURG SUCCESSION COUNTRIES (Zbigniew Kmiecik ed., 2020).

21. See S. Urbanowicz, *New Law of Administrative Procedure*, 1 REV. POLISH L. & ECON. 150 (1929) (discussing the common and distinctive elements with the Austrian APA). But see also Bojan Bugaric, *Administrative Law Developments in Post-Communist Slovenia: Between European Ideals and East European Realities*, 22 EUR. PUB. L. 25, 25 (2016) (affirming that the Yugoslav APA “was categorically modelled upon” the Austrian APA); Josef Staša & Michal Tomášek, *Codification of Administrative Procedure*, 2 LAW. Q. 59, 63 (2012) (affirming that the Czech Republic’s regulation of administrative procedure “stems directly” from the Austrian tradition).

22. GUY ISAAC, *LA PROCEDURE ADMINISTRATIVE NON CONTENTIEUSE* 109 (1968).

23. The literature on “diffusion” is vast: see, e.g., William Twining, *Social Science and Diffusion of Law*, 32 J.L. & SOC’Y 203 (2005) (distinguishing various variants of diffusion); ALAN WATSON, *LEGAL TRANSPLANTS* (2d ed. 1993) (arguing that, historically, imitation has been the main engine of legal change).

24. ISAAC, *supra* note 22, at 133.

25. Sabino Cassese, *Legislative Regulation of Adjudicative Procedures*, 3 EUR. REV. PUB. L. 15 (1993); Javier Barnes, *Administrative Procedure*, in THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW 831 (Peter Cane et al. eds., 2020).

legislation. Yet, unlike Austria and the United States, these countries were not liberal democracies. For example, the Spanish Act of July 17, 1958 entered into force when Spain was under the authoritarian regime of Francisco Franco. The same is true of the codes enacted by various Central and Eastern European countries, which were under Soviet rule.

Second, there was a group of countries where administrative procedure legislation was considered mainly, though not only, in the light of transparency during the 1960s and later.<sup>26</sup> This is the vision that marked administrative law in Scandinavian countries, such as Norway (1967) and Sweden (1986), which had a long-standing tradition of open government,<sup>27</sup> regardless of the fact that judicial review was either assigned to generalist or specialized courts, as was respectively the case in Norway and Sweden.<sup>28</sup>

Finally, the vast majority of European legal systems, including France, Germany, and Italy, lacked administrative procedure legislation.<sup>29</sup> This did not mean, however, that there was no academic or political debate. Germany was the first to adopt a general law on administrative procedure in 1976,<sup>30</sup> which exerted influence on other legal cultures, including Italy, which followed suit in 1990.<sup>31</sup> France laid down legislation concerning the giving reasons requirement in 1979, as did Belgium in 1991.<sup>32</sup>

#### D. Administrative Procedure Legislation After 1989

After 1989, the push for administrative procedure legislation swept across Europe, marking a significant transformation.<sup>33</sup> Italy adopted its APA in 1990; Portugal did so in 1991; the Netherlands

26. LA PROCEDURA AMMINISTRATIVA (Giorgio Pastori ed., 1964) (offering Italian translations of all existing APAs).

27. See TRYCKFRIHETSFÖRORDNINGEN [FREEDOM OF THE PRESS ACT] 1766 (Swed.) (establishing, among other things, citizens' right to freely seek information). See further Nils Herlitz, *Swedish Administrative Law*, 2 INT'L & COMP. L.Q. 224 (1953).

28. See Nils Herlitz, *Legal Remedies in Nordic Administrative Law*, 15 AM. J. COMP. L. 687 (1968).

29. See Otto Bachof, *German Administrative Law with Special Reference to the Latest Developments in the System of Legal Protection*, 2 INT'L & COMP. L.Q. 366, 370 (1953); Giovanni Miele, *Italian Administrative Law*, 3 INT'L & COMP. L.Q. 421, 427 (1954). On the first German projects, see Georges Langrod, *Le projet-modèle du code de procédure administrative non contentieuse en Allemagne occidentale*, 17 REVUE ADMINISTRATIVE 508 (1964).

30. Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], May 25, 1976, BGBL. I at 1253, § 102 (Ger.).

31. Giorgio Pastori, *The Origins of the Law N. 241/1990 and Foreign Models*, 2 ITALIAN J. PUB. L. 260 (2010).

32. Bernard Ducamin, *Recent Case Law of the French Conseil d'Etat*, 35 AM. J. COMP. L. 341, 348 (1987). On the unsuccessful first attempt made in Belgium, see Georges Langrod, *Projet de réforme législative de la procédure administrative non contentieuse en Belgique*, 10 REVUE ADMINISTRATIVE 430 (1957).

33. This phrase is borrowed from Bernard Schwartz, *The Model State Administrative Procedure*, 33 WASH. L. REV. & ST. B.J. 1 (1958).

followed in 1994; and Spain modified its legislation on administrative procedure in 1992.<sup>34</sup> Other EU member states adopted their APAs over the following years: for example, Greece in 1999 and Finland in 2003. With the collapse of “socialist democracies,” virtually all the countries of Central and Eastern Europe sooner or later enacted their APAs, often in the context of institutional reforms: Cyprus and Lithuania in 1999; Latvia and Estonia in 2001; Bosnia and Herzegovina in 2002; the Czech Republic in 2004; and Bulgaria in 2006.<sup>35</sup> Interestingly, after the dissolution of Yugoslavia, the newly independent nations adopted their own APAs. More recently, even France has joined the ranks of the states having general procedural norms (2015), and Hungary set out a new legislative framework in 2016. Ukraine and Moldova were the last to do so in 2018.

To quote George Bermann, “only a minority of States, it would appear, lack administrative procedure codes of one kind or another at the present time.”<sup>36</sup> Legislation concerning administrative procedure is increasingly the rule rather than the exception. The idea that those who govern have an obligation to reform not only the constitutional infrastructure, but also the rules governing the discharge of administrative functions and powers is gaining recognition. This type of legislation is adopted with the intent to render administrative action accountable, while at the same time seeking to ensure that its objectives are fulfilled. It is tempting, therefore, to say that a sort of *ius commune*, or common law, is emerging.<sup>37</sup> However, even a quick glance at APAs currently into force shows that there is a tremendous variety in the types and contents of their provisions.

Within the European Union, the vast majority of its twenty-seven member states, namely twenty-four, have adopted some type of code of administrative procedure. Our analysis covers the codes of all these countries, alongside Iceland and Norway—which form the European Free Trade Association (EFTA) and which are part of the European Economic Area set up by the Treaty of Oporto (entered into force in 1994)—as well as Switzerland, which has signed a set of distinct agreements with the European Union. Our analysis also includes Serbia, Bosnia and Herzegovina, and Albania in light of two facts: On the one hand, they show the relevance of APAs in the framework of the

34. Ortega, *supra* note 14, at 297 (for whom the new legislation brought real change). See similarly Santiago Munoz Machado, *General Principles of European Law and the Reform of the Spanish Law on Administrative Procedure*, 1 MAASTRICHT J. EUR. & COMP. L. 231 (1994).

35. See Malcolm Russel-Einhorn, Jeffrey Lubbers & Vedat Milor, *Strengthening Access to Information and Public Participation in Transition Countries: Latvia as a Case Study in Administrative Law Reform*, 54 ADMIN. L. REV. 459 (2002).

36. Bermann, *supra* note 1, at v.

37. Hermann Pünder, *German Administrative Procedure in a Comparative Perspective: Observations on the Path to a Transnational Ius Commune Proceduralis in Administrative Law*, 11 INT'L J. CONST. L. 940, 943 (2013).

reforms enacted within the pre-EU-accession process. On the other hand, they confirm the influence exerted by the Austrian APA. We have thus examined twenty-nine APAs. Twenty-six of them have been translated into an English;<sup>38</sup> while those of France, Luxembourg, and Portugal have been examined in their original languages. Naturally, the usual caveat concerning the relationship between law and language applies.

### *E. Living Without an APA*

Before discussing these APAs, it is necessary to mention states without such legislation. Within the European Union, Belgium, Ireland, and Romania have not adopted APAs, and outside the European Union, Russia and Turkey are among the group. The intellectual and institutional underpinnings vary significantly in each case and warrant individual consideration. However, two brief remarks are in order.

First, the rules governing administrative procedures in these jurisdictions may be not too different from those that exist in the jurisdictions that have adopted one kind of code or another.<sup>39</sup> For instance, there can be constitutional provisions defining basic requirements of procedural fairness and propriety. There can otherwise be specific requirements established by parliamentary legislation, as happened in France (1984) and Belgium (1991) for the duty to give reasons. There may alternatively be no express legislative mandate to adopt standards that are either legislative or regulatory in nature, but still the executive may issue guidance directed at public authorities, as the U.K. Cabinet has done with regard to consultation in the rulemaking process.<sup>40</sup>

Second, it is clear that an analysis of the “law on the books” concerning administrative procedure legislation does not suffice and that it must be completed and integrated by examining “law in action.”<sup>41</sup> This can be done in more than one way, in our case through a “factual analysis.”<sup>42</sup>

38. See COMMON CORE OF EUR. ADMIN. L., [www.coeal.it](http://www.coeal.it) (last visited Feb. 25, 2022). Translations of non-English materials are taken from this website, unless otherwise specified. For a table summarizing the European APAs, see the [online Appendix](https://academic.oup.com/ajcl/article-lookup/doi/10.1093/ajcl/avae016#supplementary-data) to this Article, available at <https://academic.oup.com/ajcl/article-lookup/doi/10.1093/ajcl/avae016#supplementary-data>.

39. See Jean-Bernard Auby, *General Report*, in CODIFICATION OF ADMINISTRATIVE PROCEDURE, *supra* note 1, at 27.

40. Paul Craig, *Perspectives on Process: Common Law, Statutory and Political*, 55 PUB. L. 275, 293 (2010).

41. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

42. See TORT LIABILITIES OF PUBLIC AUTHORITIES IN EUROPEAN LAWS (Giacinto della Cananea & Roberto Caranta eds., 2020); JUDICIAL REVIEW OF ADMINISTRATION IN EUROPE: PROCEDURAL FAIRNESS AND PROPRIETY (Giacinto della Cananea & Mads Andenas eds., 2021); ADMINISTRATIVE LIMITATIONS OF PROPERTY RIGHTS IN EUROPE (Martina Conticelli & Thomas Perroud eds., 2022).

## II. A FUNCTIONAL ANALYSIS: THE PURPOSES OF ADMINISTRATIVE PROCEDURE LEGISLATION

The existing literature emphasizes the goals legislators seek to achieve.<sup>43</sup> First, parliaments often seek to promote change by defining priorities and strategies; and administrative procedure legislation can be part of such strategies, sometimes in conjunction with reforms of the civil service or of judicial review. Second, almost invariably, the adoption of administrative procedure legislation is preceded by long debates, where both political and technical aspects are discussed. Third, these debates are characterized by some recurrent themes, including the achievement of constitutional values, the pursuit of procedural fairness, the promotion of the efficacious discharge of governmental policies, and the redistribution of powers between the three branches. This Part will address these themes in turn.

### A. Procedural Fairness and Propriety

Modern legal systems recognize and safeguard the rights of the individual, including procedural rights. Courts are tasked, whenever possible, with interpreting laws to ensure that discretionary powers respect these rights. They must strive to align the application of laws, and the discretion these laws permit, with fundamental rights, often through judicial doctrines that assume legislation should only encroach on such rights explicitly and for a specific public interest. Yet, in many sectors of administrative law, such as issuing permits and licenses, courts have been reluctant to affirm these rights, even when the personal stakes are just as significant as traditional property and trade rights. In these instances, legislatures may step in to enact administrative procedure legislation. For example, in the United States, after the spread of legislation on social welfare, licensing, and trade regulation in the New Deal era, the federal APA of 1946 provided procedural protections with regard to both adjudication and rulemaking.<sup>44</sup>

In Europe, following the fall of authoritarian regimes in the 1970s, the constitutions of Greece, Portugal, and Spain were established, delineating procedural safeguards against public authorities. Article 20 of the Greek Constitution, for example, guarantees that “the right of a person to a prior hearing also applies in any administrative action or measure adopted at the expense of his rights or interests.”<sup>45</sup> Although this right is broadly defined, allowing courts to annul not only infringing administrative actions but also

43. Cassese, *supra* note 25, at 16.

44. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1669 (1975) (examining the judicial development of participation).

45. 1975 SYNTAGMA [SYN.] [CONSTITUTION] art. 20 (Greece).

primary legislation that contradicts it,<sup>46</sup> administrative procedure legislation was still enacted in 1994. Both Iberian constitutions protect the right to be heard and to access documentation held by public authorities.<sup>47</sup> The Spanish Constitution goes a step further by mandating that parliament pass an APA to safeguard specific procedural rights. Consequently, the legislative framework in place since 1958 underwent revisions in 1992 and again more recently. Similarly, Portugal has adopted administrative procedure legislation. A quick glance at other European constitutions shows that the majority enshrine and defend procedural rights against public authorities.<sup>48</sup> This goal is achieved by administrative procedure legislation that defines canons of conduct, including the right to be heard, the right to access documentation held by public authorities, and their duty to give reasons.

These standards of conduct can be justified both instrumentally and non-instrumentally.<sup>49</sup> Instrumentally, they clarify the necessary steps to achieve a specific goal, thus simplifying the process for government officers, practicing lawyers, and citizens.<sup>50</sup> APAs also relieve the legislator from having to define procedural rules for every sector, helping to avoid an “unworkable government,” to borrow Martin Shapiro’s phrase.<sup>51</sup> The second rationale is non-instrumental: Without a clear framework governing the exercise of discretionary powers,

46. See Epaminondas Spiliotopoulos, *Judicial Review of Legislative Acts in Greece*, 56 TEMPLE L.Q. 463 (1983).

47. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.] art. 267(5), translation available at <https://dre.pt/constitution-of-the-portuguese-republic>; C.E., B.O.E. n. 311, art. 105, Dec. 29, 1978 (Spain).

48. See 1998 KUSHTETUTA E REPUBLIKËS SE SHQIPËSË [CONSTITUTION OF THE REPUBLIC OF ALBANIA] art. 23; KONSTITOOTZIYA NA RYEPOOBLIKA BĬ LGUARIYA [KONST. RB] [CONSTITUTION OF THE REPUBLIC OF BULGARIA] SG No. 56/1991, art. 41; 1990 USTAV REPUBLIKE HRVATSKE [CONSTITUTION OF THE REPUBLIC OF CROATIA], No. 56/90, art. 38; Ústavní zákon č. 1/1993 Sb., ÚSTAVA ČESKÉ REPUBLIKY [CONSTITUTION OF THE CZECH REPUBLIC] art. 17; EESTI VABARIIGI PÕHISEADUS [CONSTITUTION OF THE REPUBLIC OF ESTONIA] RT 1992, 26, 349, art. 44; 1999 SUOMEN PERUSTUSLAKI [CONSTITUTION] art. 12 (Fin.); 1975 SYN. arts. 5A, 20(2) (Greece); MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, art. 61; 1922 SATVERSME [CONSTITUTION] arts. 100, 104, 115 (Lat.); STATUUT NED [CHARTER] art. 110 (Neth.); GRUNNLOVEN [GRL] [CONSTITUTION OF THE KINGDOM OF NORWAY] art. 100; 1997 KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KONSTYTUCJA RP] [CONSTITUTION OF THE REPUBLIC OF POLAND] art. 61; 2006 USTAV REPUBLIKE SRBIJE [CONSTITUTION OF THE REPUBLIC OF SERBIA] art. 10; 1992 ÚSTAVA SLOVENSKEJ REPUBLIKY [CONSTITUTION OF THE SLOVAK REPUBLIC] arts. 26, 45; 1991 USTAVA REPUBLIKE SLOVENIJE [SLOVENE CONSTITUTION] arts. 22, 39, 44; C.E. art. 20.1.d (Spain); CONSTITUTION FÉDÉRALE [Cst] [CONSTITUTION] Apr. 18, 1999, RO 101, arts. 16, 29 (Switz.).

49. For this distinction, see Paul Craig, *Procedures and Administrative Decisionmaking: A Common Law Perspective*, 5 EUR. REV. PUB. L. (SPECIAL ISSUE) 55, 58 (1993).

50. For this remark, see Edward J. Eberle, *The West German Administrative Procedure Act: A Study in Administrative Decision Making*, 3 PENN ST. INT’L L. REV. 67, 70 (1984).

51. Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447 (1986).

individuals may find themselves in a Kafkaesque predicament,<sup>52</sup> undermining their autonomy and dignity.<sup>53</sup>

### B. *Administrative Efficiency*

As noted earlier, one of the arguments against the adoption of an APA is that it may result in decreased administrative efficiency, because it makes administrative action too rigid or sets out requirements that are too costly or time-consuming. The counterargument is that an APA promotes administrative efficiency, because, among other things, it encourages and stabilizes routine work. This opinion challenges the widespread idea that APAs mainly, if not exclusively, ensure that the due process of law is faithfully observed, by suggesting that administrative procedure may contribute to other purposes as well.<sup>54</sup>

Legislative provisions aim to enhance the effective implementation of regulatory policies in various ways. First, efficiency and effectiveness of administrative action are often included within the general purposes of APAs.<sup>55</sup> There are also provisions that seek to devise pragmatic solutions to both organizational and procedural problems that arise in the daily discharge of administrative functions and powers, for example by clarifying which officers have to deal with certain procedures and within which deadlines. Second, since the Austrian APA of 1925, a constant concern of legislators has been simplification. It is sometimes included within the general objectives of administrative action, in the sense that those who steer administrative agencies must generally improve procedures without hampering the agencies in the discharge of their functions and powers. It is also associated

52. The reference is to FRANZ KAFKA, *THE TRIAL* (Willa Muir & Edwin Muir trans., Victor Gollancz 1992). On process values, see Robert S. Summers, *Evaluating and Improving Legal Processes: A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974).

53. See further JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 179–80 (1986); DENIS J. GALLIGAN, *DUE PROCESS AND FAIR PROCEDURES: A STUDY OF ADMINISTRATIVE PROCEDURES* (1999).

54. See MASHAW, *supra* note 53, at 41 (explaining how due process is intended, among other things, to “inform effective public action”); Cassese, *supra* note 25, at 15 (arguing that administrative “procedure is essential in order to allocate power and establish cooperation among agencies”); Craig, *supra* note 49, at 57 (discussing the utilitarian origin of the instrumental rationale).

55. See, e.g., KODI I PROCEDURAVE ADMINISTRATIVE [CODE OF ADMINISTRATIVE PROCEDURES] 2015, LIGJ No. 8485, art. 18 (Alb.); Zakon o upravnom postupku [Law on Administrative Procedure], No. 29/02, art. 11 (Bosn. & Herz.); Zakon o općem upravnom postupku [General Administrative Procedure Act], No. 47/2009, art. 10 (Croat.); Haldusmenetluse seadus [Administrative Procedure Act], Riigi Teataja [RT] I 2001, 58, 354, § 5(2) (Est.); Legge 7 agosto 1990, n.241, G.U. Aug. 18, 1990, n.192, art. 1(1) (It.) (“New Rules on Administrative Procedure and on the Right of Access to Administrative Documents”); Zakon o opštem upravnom postupku [ZUP] [Law on General Administrative Procedure], No. 18/2016, art. 7 (Serb.); Zákon o správnom konaní [Act on Administrative Procedure], No. 71/1967, § 3(2) (Slovk.); Zakon o splošnem upravnem postopku [ZUP] [General Administrative Procedure Act], No. 80/1999, art. 7 (Slovn.).

with some specific requirements, for example concerning opinions and technical expertise. Such provisions are of increasing importance because in many respects administrative law favors government by experts, with the resulting risk of tunnel vision.<sup>56</sup>

Third, various APAs set out provisions establishing that a public body owes a general duty of loyal cooperation pursuant to the discharge of public functions and powers. Other pieces of legislation provide the foundation for specific duties imposed upon public bodies. Some legislative provisions thus emphasize that public bodies must make data and information easily accessible.<sup>57</sup> Others require public bodies, when either an opinion or technical expertise is requested, to gather it without delay.<sup>58</sup> In a few cases, the respect of these prescriptions is strengthened by the provision of disciplinary measures to be adopted in the event of unjustified inaction; that is, inertia.<sup>59</sup> However, these duties are not without limits. A public authority can be dispensed from providing assistance if someone else could do so for lesser costs or if assistance is likely to bring “disproportionate costs.” This is yet another manifestation of the balancing activity that legislators perform.

### C. *Balance of Powers*

The third reason why APAs have become increasingly relevant concerns their institutional impact. Almost thirty years ago, Sabino Cassese observed that “administrative procedure can be self-regulated by administrative agencies . . . or determined by judicial review. The source of the regulation is more than important, it is crucial.”<sup>60</sup> Some scholars claim that procedural principles should be defined by

56. See MASHAW, *supra* note 53, at 21; TOM NICHOLS, *THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS* (2017) (criticizing the increasing rejection of experts).

57. See *Zakon o upravnom postupku*, No. 29/02, art. 6 (Bosn. & Herz.); ADMINISTRATIVNO-PROTSESUALEN KODEKS [APK] [ADMINISTRATIVE PROCEDURE CODE], SG No. 30/2006, art. 12(2) (Bulg.); *Zakon o općem upravnom postupku*, No. 47/2009, art. 11(1) (Croat.); *Verwaltungsverfahrensgesetz* [VwVfG] [Administrative Procedure Act], May 25, 1976, BGBL. I at 1253, §§ 29, 71(c) (Ger.); *Administratīvā procesa likums* [Administrative Procedure Law] 2001, No. 164, § 54 (Lat.); *Law on the Common Administrative Procedure of the Public Administrations* art. 13(d) (B.O.E. 2015, 236) (Spain).

58. See ALLGEMEINES VERWALTUNGSVERFAHRENSGESETZ [AVG] [GENERAL ADMINISTRATIVE PROCEDURE ACT] BGBL No. 51/1991, § 13, [www.ris.bka.gv.at/Dokumente/Erw/ERV\\_1991\\_51/ERV\\_1991\\_51.pdf](http://www.ris.bka.gv.at/Dokumente/Erw/ERV_1991_51/ERV_1991_51.pdf) (Austria); *Stjórnssýslulög* [Administrative Procedure Act], No. 37/1993, art. 9 (Ice.); *Zakona o upravnom postupku* [Law on Administrative Procedure], No. 056/14, arts. 114–115 (Montenegro); *KODEKS POSTĘPOWANIA ADMINISTRACYJNEGO* [KPA] [CODE OF ADMINISTRATIVE PROCEDURE], Dz. U. 1960, No. 30 poz. 168, arts. 35–38 (Pol.).

59. See *Zakon o upravnom postupku*, No. 29/02, art. 284 (Bosn. & Herz.); *KPA* art. 38 (Pol.); *ZUP* art. 286 (Serb.). For a recent comparative analysis on this specific issue, see *THE SOUND OF SILENCE IN EUROPEAN ADMINISTRATIVE LAW* (Dacian C. Dragos et al. eds., 2020).

60. Cassese, *supra* note 25, at 16.

parliaments, because lawmakers can collate and articulate the interests of society and decide on principles that are fundamental to good governance.<sup>61</sup> Others assert that parliaments should leave considerable latitude to the executive which has a better knowledge of what is necessary to make public policies work and may more easily adjust existing rules, if necessary.<sup>62</sup> Yet another point of view holds that courts are in a better position to define and refine the principles governing the exercise of power by public authorities. The counterargument is that judicial lawmaking is limited, especially in some sectors, and lacks coherence.<sup>63</sup>

This interesting debate is part of a more general discussion on the pros and the cons of codification and judge-made law.<sup>64</sup> However, it has certain weaknesses. First, this debate tends to equate legislation with democracy, while the reality is more complex, as observed earlier with regard to Spain and Hungary in the late 1950s. Second, the debate is a little abstract. In particular, the argument according to which parliamentary legislation serves to circumscribe executive self-regulation neglects the importance of delegation. The French case is a case in point since it was the executive branch that defined the rules on the basis of a parliamentary authorization, and those rules were drafted by experts who codified the established case law of the administrative courts. Thus, there was more continuity than there appeared to be.<sup>65</sup> Third, the debate undervalues another important dimension of APAs: Primary legislation has sometimes been used to limit the powers of state or regional authorities, thus centralizing the regulation of process rights. APAs were initially adopted by federal countries, such as Austria, as well as by countries characterized by different administrative traditions, such as Poland, or by the presence of several nationalities, such as Czechoslovakia and Yugoslavia. More recently, as APAs have been adopted by states, such as Italy and

61. Joana Mendes, *Administrative Procedure, Administrative Democracy*, in *DROIT COMPARÉ DE LA PROCEDURE ADMINISTRATIVE/COMPARATIVE LAW OF ADMINISTRATIVE PROCEDURE* 235 (Jean-Bernard Auby ed., 2016).

62. Eberhard Schmidt-Aßmann, *Structures and Functions of Administrative Procedures in German, European and International Law*, in *TRANSFORMING ADMINISTRATIVE PROCEDURE* 43 (Javier Barnes ed., 2008).

63. Reginald Parker, *Administrative Procedure in Austria*, 14 *AM. J. COMP. L.* 322, 325 (1965).

64. Leslie G. Scarman, *Codification and Judge-Made Law: A Problem of Coexistence*, 42 *IND. L.J.* 355 (1967) (stating that the problem of the coexistence between codified law and judicial decisions must be faced even where an extensive codification is approved).

65. See Dominique Custos, *The 2015 French Code of Administrative Procedure: An Assessment*, in *COMPARATIVE ADMINISTRATIVE LAW* 284 (Susan Rose-Ackerman, Peter Lindseth & Blake Emerson eds., 2d ed. 2017); M. De Donno, *The French Code "Des Relations Entre le Public et l'Administration": A New European Era for Administrative Procedure?*, 9 *ITALIAN J. PUB. L.* 220 (2017) (both pointing out the innovative character of the APA as a legislative product).

Spain, which entrust regional authorities with legislative powers, these have been required to comply with the principles laid down by national legislation, which leaves a margin of appreciation to the courts in case of conflict. An important difference thus emerges with respect to the United States, where the federal APA does not apply to individual states, which follow a model state APA.

### III. STRUCTURAL ANALYSIS: SCOPE, TYPES, AND STATUS OF PROCEDURAL NORMS

This Part offers a general overview of the scope and size of APAs, as well as of their legal status and impact on the rest of legislation.

#### A. *Variety of APAs: Denomination and Size*

As anticipated, the term “APA” is not used here as a term of art, but rather in a more general manner, and it is preferred to “code,” since the latter is but one species of administrative procedure legislation. Although the drafters of an APA will normally examine both the existing legislative requirements and the principles defined and refined by the courts, the elaboration of a general (as opposed to sector-specific) legislative framework will inevitably entail a number of changes. The scope and relevance of these changes will become evident only when the new legislative prescriptions are implemented by administrative agencies, under the control of the courts.

Primary legislation concerning administrative procedure is known by various names. “Codes” of administrative procedure, general laws on administrative procedure, and broader legislation concerning public administration are all among the acts we have reviewed. The names used for procedural legislation should not be seen as definitive indicators of their nature and contents. For simplicity and to align with international terminology, we will use the term “APA,” reflecting the U.S. tradition. Still, a brief discussion on the types of legislation is warranted. From a legal standpoint, primary legislation passed by parliaments tends to be the most important. Yet, the legislation might also be drafted by the executive branch, often with the assistance of a commission of experts. Additionally, the executive or specific ministers may have the authority to modify primary legislation and also issue regulations, bylaws, directives, and other forms of guidance.<sup>66</sup> Consistent with existing scholarship in this area,<sup>67</sup> the focus of this Article is on the presence of primary legislation concerning administrative procedure. Accordingly, we will examine legislation enacted by parliaments and delegated legislation, such as the recent French

66. For a general, albeit slightly outdated, analysis of the United Kingdom, see ROBERT BALDWIN, *RULES AND GOVERNMENT* (1995).

67. See Cassese, *supra* note 25, at 15; Auby, *supra* note 39.

APA, classified as an *ordonnance*. This approach is justified because such norms achieve legitimacy through legislative consent and share the same legal standing, including publication requirements. Furthermore, they typically undergo judicial review similar to that of parliamentary legislation.

The plethora of executive rules concerning administrative procedure, instead, will not be examined. This is not to deny the important role that is played by the executive when it gives guidance to administrative agencies. Where there is no primary legislation, as in the case of the United Kingdom, executive regulations or guidelines are the only instrument for ensuring coherence in administrative action. Studying them is not easy, because there is a tremendous variety in the types of such rules. In addition to regulations, guidelines, codes, circulars and instructions are all to be found within a legal landscape which is complex, because their labels are not standard terms. Moreover, the existence of rules that do not form part of legislation poses different problems about how their judicial control is to be accomplished. In sum, the problems which arise in this latter context are distinctive and require separate treatment.

The size of APAs, thus intended, reveals a remarkable diversity. In some cases, the legislative intent is to adopt a comprehensive code of fair and efficient administrative procedure. In other cases, statutes lay down a general framework rather than a detailed code. The majority of APAs self-qualify themselves as laws concerning administrative procedure or procedures, while few are defined as “codes.”<sup>68</sup> While these “codes” of administrative procedure differ significantly from the civil and criminal codes that are prevalent in many continental legal systems, it’s important to acknowledge this distinction as it highlights the legislator’s intent towards a more systematic approach.

Some APAs are, or purport to be, a comprehensive framework for *the* administrative procedure *tout court*, that is, in principle, any administrative procedure. In contrast, other APAs set out only general requirements. For example, it can be observed that the content of APAs ranges from several hundred provisions<sup>69</sup> to fewer than forty,<sup>70</sup> with a majority falling somewhere in between. The size or length of a statute is of relatively minor significance, as it relates solely to the legislation’s extrinsic and formal characteristics. But it may be relevant as an indicator of the overall constraints the legislator intends to

68. This is especially, but not exclusively, the case in Eastern European countries. Codes of administrative procedure are in force in Albania, Bulgaria, Czech Republic, France, Hungary, Poland, Portugal, and Slovakia. The Greek law governing administrative procedure is also formally termed a “code”; yet it does not exhibit the usual features of such legislation, being a concise document that outlines general principles of administrative action.

69. This is the case of France, the Netherlands, Latvia, Slovenia, Bosnia and Herzegovina, Serbia, and Poland.

70. For example, Denmark, Greece, Iceland, Italy, Norway, and Sweden.

place on administrative activities or even the political control it intends to exert over bureaucracies.<sup>71</sup> In this sense, a broader, more systematic, and detailed APA might help to curb the procedural leeway of public administrations. Finally, it is interesting to note that the differences in size among the APAs have grown over the last century. While the older APAs, including some adopted in the early 1990s<sup>72</sup>—with the notable exception of the German APA—tend to be short, the more recent APAs—i.e., those adopted within the past twenty years—are lengthy and detailed, generally comprising over one hundred provisions. The latter APAs are shaped in this manner both when they are adopted for the first time<sup>73</sup> and when they replace previous statutes.<sup>74</sup>

### B. *The Contents of APAs and Their Definitions*

APAs also differ in content. While some regulate rulemaking, others focus on large-scale procedures and planning. Another group of APAs contain provisions concerning public contracts and agreements. The following account is by necessity a sketch, designed to bring out the other relevant features of APAs. For this purpose, European APAs can be divided into three groups, viewed in an “ascending order”—i.e., starting from those having a more limited scope of application and continuing with those characterized by a broader one.<sup>75</sup>

A first and relatively small group of European APAs limit themselves to regulating adjudicatory proceedings and establishing the legal regime of administrative acts, in terms of essential features, validity and entry into force. For example, Bosnia and Herzegovina, Latvia, Slovakia, Slovenia, Switzerland, and Iceland<sup>76</sup> only establish

71. Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

72. Denmark in 1985; Greece in 1999; Iceland in 1993; Italy in 1990; Norway in 1967; and Sweden in 1986.

73. See, e.g., Ordonnance n. 2015-1341 du 23 octobre 2015 relative aux dispositions législatives du code des relations entre le public et l'administration [Executive Order No. 2015-1341 of October 23, 2015, on the Legislative Provisions of the Code of Relations Between the Public and the Administration], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 25, 2015, No. 0248.

74. This is mainly the case of the Spanish Law on the Common Administrative Procedure of the Public Administrations (B.O.E. 2015, 236) which fully replaced the former one (1992). An exception is represented by the Swedish Public Administration Act of 2017, which repealed and substituted the previous 1986 APA maintaining nonetheless its brief structure. See FÖRVALTNINGSLAG (Svensk författningssamling [SFS] 2017:900).

75. Such a categorization, far from having any prescriptive value, has a mainly explanatory function. Pünder, *supra* note 37, at 943.

76. Zakon o upravnem postopku [Law on Administrative Procedure], No. 29/02, art. 1(1) (Bosn. & Herz.); Administratīvā procesa likums [Administrative Procedure Law] 2001, No. 164, § 1(3) (Lat.); Zákon o správnom konaní [Act on Administrative Procedure], No. 71/1967, § 1(1) (Slovk.); Zakon o splošnem upravnem postopku [ZUP] [General Administrative Procedure Act], No. 80/1999, art. 1 (Slovn.); Loi fédérale sur la procédure administrative [PA] [Federal Act on Administrative Procedure], Dec. 20, 1968, RO 757, art. 5(B)(1) (Switz.); Stjórnssýslulög [Administrative Procedure Act], No. 37/1993, art. 1 (Ice.).

rules for unilateral procedures, whereby an administrative body decides—on its own motion, or upon application of a party—on the issuance of an individual decision, which requires the application of legal rules to a specific case. Italy and Croatia could as well be added to this group, except for the fact that their APAs also regulate agreements with private parties aimed at substituting or integrating administrative acts, therefore envisioning an alternative conclusion of the procedure.<sup>77</sup> A second group of APAs is characterized by the presence of rules on administrative rulemaking activities. This is the case of Bulgaria, Norway, Spain,<sup>78</sup> and France. The French APA, for example, applies to both individual acts and *actes réglementaires*, or regulatory acts.<sup>79</sup>

The majority of European APAs can be grouped under a third and heterogeneous category of laws, whose scope of application is significantly broader than those listed above. In fact, in addition to regulating administrative adjudication and rulemaking, most APAs also address a variety of other subjects, such as contracts entered into by public administrations and governed by public law,<sup>80</sup> mass or

77. Legge 7 agosto 1990, n.241, G.U. Aug. 18, 1990, n.192, art. 11 (It.). See also *Zakon o općem upravnom postupku* [General Administrative Procedure Act], No. 47/2009, arts. 50–154 (Croat.); Dario Derda, *Republic of Croatia*, in CODIFICATION OF ADMINISTRATIVE PROCEDURE, *supra* note 1, at 107.

78. ADMINISTRATIVNO-PROTSESUALEN KODEKS [APK] [ADMINISTRATIVE PROCEDURE CODE], SG No. 30/2006, art. 21 (Bulg.); Lov om behandlingsmåten i forvaltningssaker (forvaltningsloven) [Act Relating to Procedure in Cases Concerning the Public Administration (Public Administration Act)], LOV-1967-02-10, § 2(a)–(c) (Nor.) (including both individual decisions and regulations); Law on the Common Administrative Procedure of the Public Administrations art. 1(1) (Spain).

79. Code des relations entre le public et l'administration [CRPA] [Code of Relations Between the Public and the Administration] art. L200-1 (Fr.). On its impact on the notion of administrative act as developed down the years by French scholarship, see Fabrice Mellaray, *Les apports du CRPA à la théorie de l'acte administratif unilatéral*, in L'ACTUALITÉ JURIDIQUE: DROIT ADMINISTRATIF 2491 (2015); Pierre Delvolvé, *La définition des actes administratifs*, 1 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 35 (2016).

80. See KODI I PROCEDURAVE ADMINISTRATIVE [CODE OF ADMINISTRATIVE PROCEDURES] 2015, LIGJ No. 8485, arts. 2(1)(b), 119–125 (Alb.); ZÁKON SPRÁVNÍ RÁD [CODE OF ADMINISTRATIVE PROCEDURE], Zákon č. 500/2004 Sb., §§ 159–170 (Czech.); Haldusmenetluse seadus [Administrative Procedure Act] RT I 2001, 58, 354, §§ 95–105 (Est.); Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], May 25, 1976, BGBL. I at 1253, §§ 54–62 (Ger.); KODIKAS DIOIKITIKES DIADIKASIAS [K.D.DIAD.] [ADMINISTRATIVE PROCEDURE CODE] arts. 22–23 (Greece) (which, however, only prescribe the written form and a tender or direct-assignment procedure for its conclusion); ÁLTALÁNOS KÖZIGAZGATÁSI RENDTARTÁSRÓL [ÁKR] [CODE OF GENERAL ADMINISTRATIVE PROCEDURE] 2016, §§ 92–93 (Hung.); Zakona o upravnom postupku [Law on Administrative Procedure] 2014, No. 056/14, arts. 3, 27–30 (Montenegro); KODEKS POSTĘPOWANIA ADMINISTRACYJNEGO [KPA] [CODE OF ADMINISTRATIVE PROCEDURE], Dz. U. 1960, No. 30 poz. 168, arts. 114–122 (Pol.); CÓDIGO DO PROCEDIMENTO ADMINISTRATIVO [CPA] [CODE OF ADMINISTRATIVE PROCEDURE], arts. 200–202 (Port.); L. n.241/1990, art. 11 (It.); Hallintolaki/Förvaltningslag [Administrative Procedure Act], No. 434/2003, § 3 (Fin.) (referring to good administration with regard to administrative contracts). See DROIT COMPARÉ DES CONTRATS PUBLICS/COMPARATIVE LAW ON PUBLIC CONTRACTS (Rozen Noguellou & Ulrich Stelkens eds., 2010); SUE ARROWSMITH, JOHN LINARELLI & DON WALLACE, JR., REGULATING PUBLIC PROCUREMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES (2000). For a pioneering work on this topic, see Georges Langrod, *Administrative Contracts. A Comparative Study*, 4 AM. J. COMP. L. 325 (1955).

large-scale proceedings,<sup>81</sup> planning approval procedures,<sup>82</sup> and public services.<sup>83</sup> Differences, however, abound within this latter group. On the one hand, the extension and precision of the legislative disciplines regarding the aforementioned additional subjects contained in these general laws vary significantly. For example, provisions on public contracts and agreements range from the mere prescription of observing general principles of good administration and protecting parties' rights<sup>84</sup> to a full-fledged regime.<sup>85</sup> On the other hand, certain APAs reveal peculiarities when considering that some include additional provisions referring to investigation procedures<sup>86</sup> and administrative fines,<sup>87</sup> which lack analogies in other laws.

Another important aspect of APAs is the relationship between administrative procedure and both judicial and non-judicial remedies. Some APAs contain general provisions requiring public decisionmakers to provide information about the judicial remedies available against their acts or measures. Others offer a comprehensive discipline of judicial means of protection against administrative action.<sup>88</sup> In this respect, at least two APAs deserve specific mention. The Dutch APA defines general principles concerning administrative remedies.<sup>89</sup> The Latvian APA provides a detailed discipline of administrative procedure in court, thus combining within the same piece of legislation a complete set of rules concerning both administrative and judicial procedures involving administration.<sup>90</sup>

81. On large-scale proceedings, see ALLGEMEINES VERWALTUNGSVERFAHRENSGESETZ [AVG] [GENERAL ADMINISTRATIVE PROCEDURE ACT] BGBl. No. 274/1925, §§ 44a–44g, [www.ris.bka.gv.at/Dokumente/Erw/ERV\\_1991\\_51/ERV\\_1991\\_51.pdf](http://www.ris.bka.gv.at/Dokumente/Erw/ERV_1991_51/ERV_1991_51.pdf) (Austria). See also Zákon č. 500/2004 Sb., §§ 140–146 (Czech.); Josef Staša & Michal Tomášek, *Czech Republic, in CODIFICATION OF ADMINISTRATIVE PROCEDURE*, *supra* note 1, at 123. Similar procedures in the field of subsidies and social security are also regulated by Algemene wet bestuursrecht [AwB] [General Administrative Law Act] 1994, arts. 4:21–4:80 (Neth.); KPA arts. 180–181 (Pol.).

82. VwVfG §§ 72–78 (Ger.).

83. KODI I PROCEDURAVE ADMINISTRATIVE 2015 art. 127 (Alb.); Zakon o općem upravnom postupku [General Administrative Procedure Act], No. 47/2009, arts. 157–158 (Croat.); Zakona o upravnom postupku, No. 056/14, art. 31 (Montenegro).

84. Hallintolaki/Förvaltningslag § 3 (Fin.).

85. Zákon č. 500/2004 Sb., §§ 159–170 (Czech.).

86. AVG §§ 37–39 (Austria).

87. AwB arts. 5:40–5:54 (Neth.) (including a comprehensive discipline of administrative fines).

88. Haldusmenetluse seadus §§ 71–86 (Est.) (concerning the right to appeal to an administrative court); ADMINISTRATIVNO-PROTSESUALEN KODEKS [APK] [ADMINISTRATIVE PROCEDURE CODE], SG No. 30/2006, art. 185 (Bulg.); ÁLTALÁNOS KÖZIGAZGATÁSI RENDTARTÁSRÓL [ÁKR] [CODE OF GENERAL ADMINISTRATIVE PROCEDURE] 2016, §§ 116–119 (Hung.). On appeals, see further Anita Boros & András Patyi, *Administrative Appeals and Other Forms of ADR in Hungary*, in *ALTERNATIVE DISPUTE RESOLUTION IN EUROPEAN ADMINISTRATIVE LAW* 279 (Dacian C. Dragos & Bogdana Neamtu eds., 2014).

89. AwB tit. 6, arts. 6:1–6:24 (Neth.).

90. Administratīvā procesa likums [Administrative Procedure Law] 2001, No. 164, §§ 102–357 (Lat.).

Finally, most APAs regulate administrative appeals, with the exception of Germany<sup>91</sup> and Italy.<sup>92</sup> In many countries, these mechanisms have developed as remedies for citizens who have an interest to protect or a claim to make. Thus, there is often a clause requiring the previous exhaustion of administrative remedies as a precondition to accessing judicial review of an administrative action, as is the case in Albania.<sup>93</sup> More generally, the standards governing internal appeals have found their way into the APAs of several countries, including Austria,<sup>94</sup> Bosnia and Herzegovina,<sup>95</sup> Croatia,<sup>96</sup> the Czech Republic,<sup>97</sup> Estonia,<sup>98</sup> Finland,<sup>99</sup> France,<sup>100</sup> Greece,<sup>101</sup>

91. *Verwaltungsverfahrensgesetz [VwVfG]* [Administrative Procedure Act], May 25, 1976, BGBl. I at 1253, § 79 (citing *Verwaltungsgerichtsordnung [VwGO]* [Code of Administrative Court Procedure], Jan. 21, 1960, BGBl. at 17) (Ger.). See further Ulrich Stelkens, *Administrative Appeals in Germany*, in *ALTERNATIVE DISPUTE RESOLUTION IN EUROPEAN ADMINISTRATIVE LAW*, *supra* note 88, at 3.

92. See Roberto Caranta, *Administrative Appeals in Italy*, in *DRIT COMPARÉ DE LA PROCEDURE ADMINISTRATIVE/COMPARATIVE LAW OF ADMINISTRATIVE PROCEDURE*, *supra* note 61, at 795.

93. See, e.g., *KODI I PROCEDURAVE ADMINISTRATIVE* [CODE OF ADMINISTRATIVE PROCEDURES] 2015, LIGJ No. 8485, art. 129 (Alb.).

94. *ALLGEMEINES VERWALTUNGSVERFAHRENSGESETZ [AVG]* [GENERAL ADMINISTRATIVE PROCEDURE ACT] BGBl. No. 274/1925, §§ 63–67h, [www.ris.bka.gv.at/Dokumente/Erw/ERV\\_1991\\_51/ERV\\_1991\\_51.pdf](http://www.ris.bka.gv.at/Dokumente/Erw/ERV_1991_51/ERV_1991_51.pdf) (Austria). See further Friederike Bundschuh-Rieseneder & Alexander Balthasar, *Administrative Justice in Austria in the Stage of Transition: From Administrative Appeals to Administrative Courts or the Final Stage of “Tribunalization” of Administrative Disputes*, in *ALTERNATIVE DISPUTE RESOLUTION IN EUROPEAN ADMINISTRATIVE LAW*, *supra* note 88, at 209.

95. See *Zakon o upravnom postupku* [Law on Administrative Procedure], No. 29/02, arts. 213–237 (Bosn. & Herz.) (establishing a general remedy, i.e., appeal); *id.* arts. 238–239 (establishing an extraordinary remedy, i.e., renewal of the procedure).

96. See *Zakon o općem upravnom postupku* [General Administrative Procedure Act], No. 47/2009, art. 12 (Croat.) (establishing a general right of appeal). The APA goes on to set an articulated array of remedies: appeals to a body of second instance (*id.* arts. 105–121); objections to the head of the body (*id.* art. 122); and the reopening of proceedings as an extraordinary remedy, available both at the parties’ request and *ex officio* (*id.* arts. 123–127).

97. See *ZÁKON SPRÁVNÍ RÁD* [CODE OF ADMINISTRATIVE PROCEDURE], *Zákon č. 500/2004 Sb.* (Czech.) (distinguishing between appeals, *id.* §§ 81–93, and *ex officio* reviews, *id.* §§ 94–99). Moreover, a party may request the resumption of the procedure according to sections 100–102 if previously unknown facts or evidence emerge, or if a decision that served as the basis for the procedure’s outcome has been revoked or altered. See Sona Skulová, Lukáš Potešil & David Hejč, *Administrative Appeals, Ombudsman, and Other ADR Tools in the Czech Administrative Law*, in *ALTERNATIVE DISPUTE RESOLUTION IN EUROPEAN ADMINISTRATIVE LAW*, *supra* note 88, at 393.

98. *Haldusmenetluse seadus* § 87 (Est.).

99. *Hallintolaki/Förvaltningslag* [Administrative Procedure Act], No. 434/2003, §§ 49a–g, 53a–d (Fin.) (dealing with administrative review and administrative complaint).

100. See *Code des relations entre le public et l’administration [CRPA]* [Code of Relations Between the Public and the Administration] arts. L410-1–L412-8, L421-1–L424-1, L432-1 (Fr.) (containing provisions concerning both internal appeals and other alternative dispute resolution mechanisms). See further Rhita Boustia & Arun Sagar, *Alternative Dispute Resolution in French Administrative Proceedings*, in *ALTERNATIVE DISPUTE RESOLUTION IN EUROPEAN ADMINISTRATIVE LAW*, *supra* note 88, at 57.

101. See *KODIKAS DIOIKITIKES DIADIKASIAS* [K.D.DIAD.] [ADMINISTRATIVE PROCEDURE CODE] arts. 24–27 (Greece) (regulating both appeals and complaints). See further Eugénie Prevedourou, *Les recours administratifs en Grèce*, in *DRIT COMPARÉ DE LA PROCEDURE ADMINISTRATIVE/COMPARATIVE LAW OF ADMINISTRATIVE PROCEDURE*, *supra* note 61, at 785.

Iceland,<sup>102</sup> Montenegro,<sup>103</sup> Norway,<sup>104</sup> Poland,<sup>105</sup> Serbia,<sup>106</sup> Slovakia,<sup>107</sup> Slovenia,<sup>108</sup> Spain,<sup>109</sup> Sweden,<sup>110</sup> and Switzerland.<sup>111</sup>

APAs often define their scope with specific definitions of terms used. This function is exemplified by a selection of topics here, without providing an exhaustive analysis, such as tax matters.<sup>112</sup> These definitions are useful for our discussion.

We will first consider the traditional element of administrative law: the existence of a public administration or authority.<sup>113</sup> Each APA establishes the necessity to apply to administrative authorities, but the legal techniques for delimiting the scope of application of APAs differ. For example, the Dutch and the German APAs define “administrative authority” not merely as any authority or body but specify that it must be “established under public law.”<sup>114</sup> Similarly, the Greek APA extends

102. Stjórnsýslulög [Administrative Procedure Act], No. 37/1993, arts. 26–31 (Ice.) (establishing a general remedy in the form of a complaint to a higher authority).

103. Zakona o upravnom postupku [Law on Administrative Procedure] 2014, No. 056/14, arts. 118–138 (Montenegro) (distinguishing between appeals, the repetition of the procedure, and what is called an objection).

104. See Lov om behandlingsmåten i forvaltningssaker (forvaltningsloven) [Act Relating to Procedure in Cases Concerning the Public Administration (Public Administration Act)], LOV-1967-02-10, §§ 28–36 (Nor.) (regulating appeals).

105. See similarly KODEKS POSTĘPOWANIA ADMINISTRACYJNEGO [KPA] [CODE OF ADMINISTRATIVE PROCEDURE], Dz. U. 1960, No. 30 poz. 168, arts. 127–152, 227–240 (Pol.) (distinguishing between appeals, objections, and complaints). See further Andrzej Skoczylas & Mariusz Swora, *Administrative Remedies in Polish Administrative Law*, in ALTERNATIVE DISPUTE RESOLUTION IN EUROPEAN ADMINISTRATIVE LAW, *supra* note 88, at 337.

106. See Zakon o opštem upravnom postupku [ZUP] [Law on General Administrative Procedure], No. 18/2016, arts. 213–238 (Serb.) (envisioning appeals as general remedies). See further Vuk Cucić, *Serbia as a Part of the European Administrative Space: ADR Tools Applied to Administrative Law*, in ALTERNATIVE DISPUTE RESOLUTION IN EUROPEAN ADMINISTRATIVE LAW, *supra* note 88, at 461.

107. Zákon o správnom konaní [Act on Administrative Procedure], No. 71/1967, §§ 53–61 (Slovk.) (appeals).

108. Zakon o splošnem upravnem postopku [ZUP] [General Administrative Procedure Act], No. 80/1999, art. 237 (Slovn.) (considering appeals as an ordinary remedy). See further Polonca Kovač, *Effective Conflict Resolution in Administrative Proceedings in Slovenia: A Theoretical and Empirical Analysis*, in ALTERNATIVE DISPUTE RESOLUTION IN EUROPEAN ADMINISTRATIVE LAW, *supra* note 88, at 365.

109. Law on the Common Administrative Procedure of the Public Administrations (B.O.E. 2015, 236) (Spain) (distinguishing between reviews (*revisiones*), which can be granted either *ex officio* or upon parties’ application, *id.* arts. 106–111, and appeals (*recursos administrativos*), *id.* arts. 112–126. See Susana Galera, Pablo Acosta & Helena Soletto, *ADR Tools in Spanish Administrative Law*, in ALTERNATIVE DISPUTE RESOLUTION IN EUROPEAN ADMINISTRATIVE LAW, *supra* note 88, at 233.

110. See §§ 40–48 FÖRVALTNINGSLAG (Svensk författningssamling [SFS] 2017:900) (Swed.) (appeals).

111. See Loi fédérale sur la procédure administrative [PA] [Federal Act on Administrative Procedure], Dec. 20, 1968, RO 757, arts. 44–79 (Switz.) (dealing with various types of appeals).

112. KODEKS POSTĘPOWANIA ADMINISTRACYJNEGO [KPA] [CODE OF ADMINISTRATIVE PROCEDURE], Dz. U. 1960, No. 30 poz. 168, ch. 1 (Pol.).

113. Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. GLOB. LEGAL STUD. 369 (2000).

114. Algemene wet bestuursrecht [AwB] [General Administrative Law Act] 1994, art. 1:1(a) (Neth.); Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], May 25, 1976, BGBL. I at 1253, § 1.1 (Ger.).

its application beyond the state and local authorities to “other legal entities of public law”; and the Finnish APA includes central and local authorities as well as “institutions governed by public law.”<sup>115</sup> This technique is also used in defining functions. The Dutch APA describes an “order” as a “ruling of an administrative authority constituted under public law,” while the German APA characterizes an administrative act in terms of the exercise of sovereign powers within public law.<sup>116</sup>

At this point, four comments are appropriate. While the terms “public law” and “private law” are often descriptive or prescriptive, here, the prescriptive usage prevails. The underlying idea is that an administrative authority operates under public law, subject to specific burdens or requirements such as duties of legality, fairness, and rationality which differ from those in private law. Despite the intellectual debate on this distinction,<sup>117</sup> it remains fundamental to European administrative laws, even with the prevalence of mixed or hybrid situations where public functions are performed by varied bodies. This distinction may prompt further comparative discussion from a transatlantic perspective.<sup>118</sup>

Second, most APAs do not cover institutions and functions related to legislative and judicial branches. Like the United States, both the Dutch and the German APAs exclude parliamentary and judicial bodies, a commonality among many APAs. However, consensus on exclusions is otherwise limited. The scope of “public authority” exclusions varies widely, from none in Italy to seven categories in Dutch law. Activities that are more frequently excluded from the scope of application of APAs include criminal investigations and police operations,<sup>119</sup> the administration of justice,<sup>120</sup> taxation procedures,<sup>121</sup> and military administration.<sup>122</sup>

115. KODIKAS DIOIKITIKES DIADIKASIAS [K.D.DIAD.] [ADMINISTRATIVE PROCEDURE CODE] art. 1 (Greece); Hallintolaki/Förvaltningslag [Administrative Procedure Act], No. 434/2003, § 2 (Fin.).

116. VwVfG § 35 (Ger.) (“[A]n administrative act shall be any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct external effect.”).

117. For critical comments, see DAWN OLIVER, COMMON VALUES AND THE PUBLIC-PRIVATE DIVIDE 10 (1999).

118. For an analysis concerning U.S. law, see Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) (proposing an administrative law agenda that places the interdependence of public and private actors at the heart of the inquiry).

119. AwB art. 1:6(a)–(c) (Neth.); Haldusmenetluse seadus [Administrative Procedure Act] RT I 2001, 58, 354, § 2(2) (Est.); Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], May 25, 1976, BGBl. I at 1253, § 2(2)(2) (Ger.); Loi fédérale sur la procédure administrative [PA] [Federal Act on Administrative Procedure], Dec. 20, 1968, RO 757, art. 3(c) (Switz.).

120. Hallintolaki/Förvaltningslag § 4 (Fin.); VwVfG § 2(3)(1) (Ger.); Lov om behandlingsmåten i forvaltningssaker (forvaltningsloven) [Act Relating to Procedure in Cases Concerning the Public Administration (Public Administration Act)], LOV-1967-02-10, § 4(a) (Nor.).

121. ÁLTALÁNOS KÖZIGAZGATÁSI RENDTARTÁSRÓL [ÁKR] [CODE OF GENERAL ADMINISTRATIVE PROCEDURE] 2016, § 8(1)(c) (Hung.); Legge 7 agosto 1990, n.241, G.U. Aug. 18, 1990, n.192, art. 13(2) (It.); VwVfG § 2(2)(1) (Ger.); KODEKS POSTĘPOWANIA ADMINISTRACYJNEGO [KPA] [CODE OF ADMINISTRATIVE PROCEDURE], Dz. U. 1960, No. 30 poz. 168, art. 3(1) (Pol.); PA art. 2 (Switz.).

122. AwB art. 1:6(d) (Neth.); Hallintolaki/Förvaltningslag § 4 (Fin.); PA art. 3(d) (Switz.).

Third, like the U.S. APA, many European APAs define acts; however, unlike the U.S. APA, some define a decision as an “order which is not of general nature,”<sup>123</sup> indicating that orders can be both general and individual. Furthermore, some APAs, reflecting a traditional public law perspective, treat both individual decisions and regulations as administrative “decisions,” subject to the same general principles.<sup>124</sup> Others apply different rules to individual and general acts, particularly regarding the requirement to give reasons.<sup>125</sup> Another legal definition, common in German legal tradition, limits the administrative act to that which affects an individual case or a specific group, excluding administrative rules from the scope of the APA’s application.<sup>126</sup>

Fourth, administrative laws increasingly involve private bodies in the discharge of public functions. APAs account for this evolution in several ways: Some address the provision of services of general interest, necessitating duties of publicity and transparency.<sup>127</sup> Others encompass private bodies with self-regulatory roles<sup>128</sup> or that issue decisions and regulations applicable to other legal entities.<sup>129</sup> Additionally, there are APAs that extend to private bodies when these are vested with public authority<sup>130</sup> or carry out publicly funded activities.<sup>131</sup> This trend prompts debate on the expanding scope of administrative law, in both comparative contexts and in its interplay with supranational law. Notably, within the European Union, the concept of a “body governed by public law” is well established in directives

123. AwB art. 1:3 (Neth.).

124. Forvaltningsloven § 2(a) (Nor.).

125. L. n.241/1990, art. 3 (It.) (where reasons are not required for regulations and administrative acts of general application).

126. VwVfG § 35 (Ger.).

127. L. n.241/1990, art. 22 (It.); Code des relations entre le public et l’administration [CRPA] [Code of Relations Between the Public and the Administration] art. L100-3 (Fr.) (referring to private legal entities entrusted with an administrative public service mission (“chargés d’une mission de service public administratif”)); Zakon o općem upravnom postupku [General Administrative Procedure Act], No. 47/2009, art. 3(3) (Croat.); Zakon o splošnem upravnem postopku [ZUP] [General Administrative Procedure Act], No. 80/1999, art. 3(3) (Slovn.) (both concerning public service providers who decide on users’ rights and duties).

128. KODI I PROCEDURAVE ADMINISTRATIVE [CODE OF ADMINISTRATIVE PROCEDURES] 2015, LIGJ No. 8485, art. 2(2) (Alb.).

129. Forvaltningsloven § 1 (Nor.).

130. Law on the Common Administrative Procedure of the Public Administrations art. 2(2) (B.O.E. 2015, 236) (Spain); AwB art. 1:1(1)(a) (Neth.); Zakon o općem upravnom postupku, No. 47/2009, art. 1 (Croat.); Zakon o opštem upravnom postupku [ZUP] [Law on General Administrative Procedure], No. 18/2016, art. 2 (Serb.); Administratīvā procesa likums [Administrative Procedure Law] 2001, No. 164, § 1(1) (Lat.).

131. Forvaltningsloven [Public Administration Act] 1985, No. 571, § 1(2) (Den.) (referring to activities mainly covered by public funds); ZÁKON SPRÁVNÍ RÁD [CODE OF ADMINISTRATIVE PROCEDURE], Zákon č. 500/2004 Sb., § 1(1) (Czech.); KODEKS POSTĘPOWANIA ADMINISTRACYJNEGO [KPA] [CODE OF ADMINISTRATIVE PROCEDURE], Dz. U. 1960, No. 30 poz. 168, art. 1 (Pol.).

on public procurements<sup>132</sup> and the Court of Justice of the European Union (CJEU) jurisprudence.

### C. *The Practical Significance of General Principles*

When examining the content of APAs, a distinction should be made between their provisions, depending on whether these constitute rules or principles. The Austrian case is of particular interest. The Austrian Civil Code of 1811 authorized judges to adjudicate cases on the basis of the “principles of natural law” when neither explicit provisions nor analogical interpretation sufficed. Other civil codes, notably those in Italy and Spain, permitted judges to apply “general principles of law,” alongside codified principles such as good faith and diligence. At the beginning of the twentieth century, the Swiss Civil Code granted courts considerable authority to appeal to “principles of justice and equity.”<sup>133</sup> These examples, among many possible others,<sup>134</sup> are notable because they reveal that legislators, even during the height of legal positivism, recognized their inability to anticipate every circumstance. While the problem of filling gaps in private-law relations was recognized by both practitioners and theorists, in the field of administrative law the general principles of law had an even greater importance and significance, because legislation was less comprehensive.

It is therefore insightful to examine how APAs address general principles, though this is not without challenges. One difficulty arises when legislation equates “principle” with a general rule. For example, the German APA devotes a whole section to “procedural principles,” some of which are true principles, like substance over form,<sup>135</sup> while others are procedural details, like appointing a representative. Not all legislative texts label these as “principles.” For instance, the Dutch APA obliges public authorities to avoid “disproportionate” adverse consequences relative to the purposes of an order.<sup>136</sup> Another issue is the variability in naming the same principle. For instance, the legality of administrative action is variously described as “protection under the law in administrative matters”<sup>137</sup> or as a prohibition against using

132. See Mario P. Chiti, *The EC Notion of Public Administration: The Case of the Bodies Governed by Public Law*, 8 EUR. PUB. L. 473 (2002).

133. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 10, 1907, SR 210, RS 210, art. 4 (Switz.). See further Alfred E. von Overbeck, *Some Observations on the Role of the Judge Under the Swiss Civil Code*, 37 LA. L. REV. 681, 687 (1977) (noting the difference with regard to Germany).

134. See further Iain Stewart, *Australia*, in CODIFICATION OF ADMINISTRATIVE PROCEDURE, *supra* note 1, at 32 (pointing out the various techniques used to ensure legal coherence).

135. Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], May 25, 1976, BGBL. I at 1253, § 10 (Ger.).

136. AwB art. 3:4(2) (Neth.).

137. Hallintolaki/Förvaltningslag [Administrative Procedure Act], No. 434/2003, § 1 (Fin.).

powers beyond their intended purpose,<sup>138</sup> while the principle of publicity is sometimes extended to include transparency.<sup>139</sup>

With these considerations, it can be observed that APAs deal with general principles in various ways. First, most APAs articulate general principles of administrative procedure. Often there is a provision listing these general principles,<sup>140</sup> though sometimes they are specified only for certain administrative actions, like inspections.<sup>141</sup> Second, these principles frequently aim to restrain and guide the exercise of public powers, in line with the traditional objective of administrative law. Such principles include legality, legal security,<sup>142</sup> and the protection of legitimate expectations. Additionally, principles designed to make administrative procedures more user-friendly might require public authorities to “ensure that contacts with private persons are smooth and simple.”<sup>143</sup> However, APAs also establish general principles to enhance the effective performance of administrative duties. Some emphasize the principle of good administration,<sup>144</sup> broadly understood, while others outline specific standards like effectiveness and economy.<sup>145</sup> Third, some APAs provide a framework allowing state or regional authorities to adopt their own procedural standards. While their specific rules apply only to national departments, agencies, and bodies, general principles also extend to regional and local authorities.<sup>146</sup> Fourth, APAs sometimes make a *renvoi* to external principles, which has notably increased administrative courts’ reference to these principles. For example, the Italian APA contains a *renvoi* to the principles of EU law;<sup>147</sup> the Latvian APA assumes the existence of additional general principles of administrative procedures, “discovered, derived or developed within institutional practice, or within case law, as well as legal science.”<sup>148</sup> This approach resembles Article 38 of the Statute of the International Court of Justice, which regards “judicial decisions and the teachings of the most highly qualified publicists” as “subsidiary means” for identifying principles to be upheld by the

138. AwB art. 3:2 (Neth.).

139. KODI I PROCEDURAVE ADMINISTRATIVE [CODE OF ADMINISTRATIVE PROCEDURES] 2015, LIGJ No. 8485, art. 5 (Alb.); Zakon o upravnom postupku [Law on Administrative Procedure], No. 29/02, arts. 6–7 (Bosn. & Herz.); ADMINISTRATIVNO-PROTSESUALEN KODEKS [APK] [ADMINISTRATIVE PROCEDURE CODE], SG No. 30/2006, art. 12 (Bulg.).

140. Administratīvā procesa likums [Administrative Procedure Law] 2001, No. 164, § 4 (Lat.) (including the principles of respect of individual rights, equality, rule of law, reasonableness, non-arbitrariness, confidence in legality, lawful basis, democracy, proportionality, priority of laws, and procedural equity).

141. VwVfG § 24 (Ger.) (“principle of investigation”).

142. § 5 FÖRVALTNINGSLAG (Svensk författningssamling [SFS] 2017:900) (Swed.).

143. *Id.* § 6.

144. Hallintolaki/Förvaltningslag § 1 (Fin.).

145. Legge 7 agosto 1990, n.241, G.U. Aug. 18, 1990, n.192, art. 1 (It.).

146. *Id.* art. 29(2).

147. *Id.* art. 1.

148. Administratīvā procesa likums [Administrative Procedure Law] 2001, No. 164, § 4 (Lat.).

Court.<sup>149</sup> Finally, the distinction between general principles and those specific to administrative law is significant. The extent to which principles of private law should apply to public bodies remains a debated issue. For example, the French approach historically barred the application of tortious liability to public administrations.<sup>150</sup>

The fact that APAs lay down general principles significantly impacts the structure and objectives of administrative law. Beyond interpreting sector-specific rules, general principles are foundational, reflecting the values of a society at a particular stage of its development, such as the rule of law<sup>151</sup> and transparency. This indicates that the legal status of APAs should be evaluated not just formally but also substantively, assessing whether they can be regarded as super-statutes.

#### D. *Super-Statutes: Theoretical Foundations*

The debate concerning super-statutes has become a focal point in recent public law scholarship in the United States. Before analyzing if European APAs qualify as super-statutes, it is important to understand the concept in the context of U.S. public law scholarship. This is not to say that the European APA debate should mimic the U.S. discussion. However, examining the substantive dimension of APAs offers a valuable perspective on the role they play in our legal systems. William Eskridge and John Ferejohn's work especially relevant, noting that "not all statutes are created equal."<sup>152</sup> Some statutes, like appropriations and budgetary laws, are inherently short-term or have effects spanning only a few years. Others may have very specific objectives or lack the ambition to influence policies beyond immediate circumstances. A few statutes "successfully penetrate public normative and institutional culture in a deep way. These last are what we call super-statutes."<sup>153</sup>

149. See Mads Andenas & Johann R. Leiss, *The Systemic Relevance of "Judicial Decisions" in Article 38 of the ICJ Statute*, 77 MAX PLANCK INST. J. INT'L L. 907 (2017) (positing that Article 38 "obliges" judges to consider the case law of other judicial bodies).

150. See TORT LIABILITIES OF PUBLIC AUTHORITIES IN EUROPEAN LAWS, *supra* note 42.

151. Though our focus lies on the public law aspect, it is crucial to recognize that the rule of law is also relevant from the perspective of private law: see Mauro Bussani, *Deglobalizing Rule of Law and Democracy: Hunting Down Rhetoric Through Comparative Law*, 67 AM. J. COMP. L. 791 (2019).

152. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001); WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010) (developing their theory according to which democracy advances by means of statutes that supplement the written Constitution and sometimes even supplant it); William N. Eskridge, *America's Statutory "Constitution,"* 41 U.C. DAVIS L. REV. 1, 6 (2007) (arguing that those who focus on formal—or large-C—constitutional reforms, risk not to know "what principles represent our highest aspirations"). For a diverse theory about "landmark statutes" that enjoy a sort of constitutional status, see Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1753 (2007).

153. Eskridge & Ferejohn, *supra* note 152, at 1215.

Super-statutes have three main features. First, a super-statute is either a law or a series of laws that seeks to promote change by establishing “a new normative or institutional framework for state policy.”<sup>154</sup> Super-statutes are generally adopted after extensive debates to address a particularly vexing problem or a set of problems. A second feature of super-statutes, although they may be amended, is their intended stability, since they address issues such as democracy, accountability, and fundamental rights, reflecting modern societal values and thus having a permanent foothold in the public culture. Third, a super-statute—or at least its guiding principles—is intended to have a broad effect on the law, such that “its earlier critics are discredited and its policy and principles become axiomatic for the public culture.”<sup>155</sup>

Considering the U.S. APA in light of these features,<sup>156</sup> we can see that it was adopted after years of debate between New Deal supporters and opponents and aimed to alleviate the “mood of discontent” with the administrative process.<sup>157</sup> The U.S. APA did not just codify existing procedural norms, but expanded them, such as enhancing the role of the administrative hearing officer.<sup>158</sup> However, some argue that the APA has contributed to “America’s fatal ascension to bureaucratic complexity.”<sup>159</sup> It has endured for over seventy-five years with no fundamental changes, and its significance is recognized in the field.<sup>160</sup> For many, the APA has not only reshaped the legislative landscape but also addressed the gaps left by the Constitution or updated it to meet the needs of the administrative state, thereby reinforcing democracy and the rule of law.<sup>161</sup>

#### *E. European APAs as Super-Statutes: Innovation, Stability, and Adaptation*

When assessing whether European APAs may be characterized as super-statutes, the short answer is relatively simple but not

154. *Id.* at 1216.

155. *Id.*

156. Eskridge, *supra* note 152, at 12.

157. Schwartz, *supra* note 33, at 2.

158. *Id.* at 3.

159. Martin Shapiro, *A Golden Anniversary? The Administrative Procedure Act of 1946*, 19 REGULATION 40 (1996).

160. See Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986) (noting that the APA’s story began in 1933); Craig N. Oren, *Be Careful What You Wish for: Amending the Administrative Procedure Act*, 56 ADMIN. L. REV. 1141 (2004) (viewing the Act as stemming from “an uneasy compromise” between supporters and opponents of the New Deal); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1025, 1077 (2004) (stating that the APA is “the most notable framework statute of the twentieth century”); Antonin Scalia, *Vermont Yankee: the APA, the D.C. Court, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363 (stating that “the Supreme Court regarded the APA as a sort of super-statute, or subconstitution”).

161. See Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1365 (2010) (suggesting that “a muscular national administration” generated a “backlash”); Ackerman, *supra* note 160, at 1078 (seeing in the APA’s ability to address the society’s changing needs “a triumph of constitutional

encouraging, given the great diversity among national legal orders. However, a more thorough answer can be derived from the three previously identified features: innovation, stability, and adaptation.

APAs are frequently adopted to establish a new normative state policy framework, sometimes following the entry into force of a new constitution. For instance, Austria did so in 1925, as did several countries of Central and Eastern Europe post-1989 during major political transitions.<sup>162</sup> Some APAs are enacted by parliamentary institutions when the functioning of public authorities fails to align with constitutional values and formal constitutional reform is seen as either uncertain or not timely, as was the case in Italy in 1990. Others are considered key to a strategy for gaining membership in a regional organization, such as the European Union. In summary, from a Kantian perspective, APAs are viewed as enabling transition from one state of administrative matters to a comparatively better one.<sup>163</sup>

APAs are often adopted after lengthy debates, marked by the interaction between experts and political leaders. For example, in Italy, although the first project was developed shortly after the Constitution came into effect in 1948, the APA was actually adopted more than four decades later. The German case is equally instructive. By the mid-1950s, there had been a “stronger tendency towards codification,” yet it took another two decades before the APA was adopted.<sup>164</sup> In France, the debate lasted even longer.

When assessing the stability of APAs, their variability over time becomes apparent. Significant changes to the Austrian APA occurred only seventy years after its adoption. In Scandinavian countries, APAs have been amended in parts without complete replacement. Notably, some Central and Eastern European countries that had followed the Austrian model either maintained their own APAs after 1945, when they fell under Soviet rule, or continued to apply its principles. Czechoslovakia preserved the rules from previous political regimes. Yugoslavia initially repealed its 1930 APA, along with other pre-1941 legislation, but introduced a new general

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adaptation”); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1208 (affirming that the APA is “the fundamental charter of the Fourth Branch of the government”).

162. See Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 448 (1991) (noting the reciprocal influences between those countries). But see also András Sajó, *On Old and New Bottles: Obstacles to the Rule of Law in Eastern Europe*, 22 J.L. & Soc’y 97 (1995) (suggesting that, in Eastern Europe, it is the law on the books that has changed, not the law in action).

163. Immanuel Kant, *On the Common Saying: “That May Be Correct in Theory, But It Is of No Use in Practice,”* in PRACTICAL PHILOSOPHY 273 (Mary J. Gregor ed., 1996).

164. Bachof, *supra* note 29, at 380. See also Eberle, *supra* note 50, at 67 (illustrating the main features of the APA).

framework in 1956.<sup>165</sup> Hungary adopted its procedural rules following the brutal suppression of the 1956 Revolution.<sup>166</sup> Poland, aiming to eliminate “persisting influence of bourgeois conceptions and ideas” inappropriate for a “socialist state and law,” adopted its APA in 1960.<sup>167</sup> Nonetheless, this APA upheld several “bourgeois” principles, including legality, objectivity, due process, and the duty to give reasons.<sup>168</sup>

Various reasons have been proposed for these decisions. The first is that procedural principles aimed at ensuring a respect for fair play, established under the “bourgeois” constitutional framework, could be left unchanged simply because there were no independent courts to enforce them, rendering them essentially hortatory, or “teethless.” Another reason is that the foundation of new legislation was primarily to ensure that administrators adhered to political guidelines, making procedural principles tools of political control.<sup>169</sup> Furthermore, the emphasis on legality does not necessarily correlate with respect for the rule of law and fundamental rights. Socialist constitutions framed legality as a civic duty imposed on citizens, rather than a defense against governmental infringement on rights.<sup>170</sup> These insights can also shed light on the Spanish case, where the 1958 APA was not revised shortly after the new Constitution entered into force in 1978, but nearly fifteen years later. For some, the reason lay in its technical rigor and the clarity of its principles, which significantly influenced public life and had a notable impact in Latin America.<sup>171</sup>

#### F. A Higher Rank: Constitutional Provisions Concerning APAs

The third feature of super-statutes is that, over time, their initial critics become discredited and their principles become axiomatic.

165. See Nikola S. Stjepanović, *The New Yugoslav Law on Administrative Procedure*, 8 AM. J. COMP. L. 358 (1959) (suggesting that, before 1956, agencies continued to apply the general principles of the 1930 APA).

166. See Michael Polanyi, *The Message of the Hungarian Revolution*, 35 AM. SCHOLAR 661 (1966). For a reassessment, see Mark Kramer, *The Soviet Union and the 1956 Crises in Hungary and Poland: Reassessment and New Findings*, 33 J. CONTEMP. HIST. 163 (1998) (based on new documents that became available after the collapse of the USSR).

167. See Colin T. Reid, *The Polish Code of Administrative Procedure*, 13 REV. SOCIALIST L. 59, 60 (1987).

168. See MAJA BINKOWSKA ET AL., *THE CODE OF ADMINISTRATIVE PROCEEDINGS* (2010).

169. For further discussion of this purpose, in the U.S. context, see McCubbins, Noll & Weingast, *supra* note 71 (observing that “administrative procedures are another mechanism for inducing compliance”). See also Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. 267 (1990); Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1753 (2007).

170. See further Inga Markovits, *Law or Order: Constitutionalism and Legality in Eastern Europe*, 34 STAN. L. REV. 513, 518 (1982). On the USSR, see Walter Gellhorn, *Review of Administrative Acts in the USSR*, 66 COLUM. L. REV. 1051, 1058 (1966) (observing that citizens’ low esteem of administrative appeals explained their “heavy reliance on the Procuracy”).

171. Garcia de Enterria, *supra* note 13, at 205.

There is no doubt that, even in the countries where the debate about the adoption of one type of code over another persisted for years and opponents dominated for extended periods, APAs have garnered increasing support after their entry into force. Our comparative inquiry reveals that the importance of APAs stems from multiple factors, including constitutional underpinnings and legislative efforts to ensure legal certainty and consistency among statutes.

The existence and content of an APA may be guided by constitutional provisions. In Spain, the transition to democracy was solidified by the 1978 Constitution, which established general principles, such as impartiality and objectivity. It also included a specific provision for primary legislation to protect certain process rights. Article 105 tasks the legislator with regulating three process rights: the hearing of interested parties “when appropriate”; citizens’ access to files and records held by administrative authorities, except in specified areas; and citizens’ participation in administrative rulemaking (“administrative provisions”).<sup>172</sup> Similarly, the Portuguese Constitution upholds the principles of justice, impartiality, and participation and mandates Parliament to enact a “special law”—a statute specifically addressing administrative procedure—to ensure citizens’ participation in the decision-making processes that affect them.<sup>173</sup>

A legal system may combine constitutional criteria and judicial interpretation to grant a quasi-constitutional status to the APA, or more specifically, to some of its principles. Italy serves as a case in point. When its APA was adopted in 1990, it did not declare its superiority over other national legislation, but included a clause stating that regional legislation must adhere to its principles. Two significant changes have followed. A constitutional provision now stipulates that only national legislation can set the standards for protecting both civil and social rights.<sup>174</sup> This has been interpreted to encompass the procedural requirements set out by the APA, a conclusion now affirmed by the APA’s final provision.<sup>175</sup> The general principles, such as due process of law, efficient and timely exercise of powers, and transparency, are seen as “guarantees for citizens with regard to administrative action” and must be observed by specific legislative provisions that detail process rights for particular sectors, even without a direct mandate to the legislator. The APA has been updated to state that while regions cannot set lower standards than those it ensures, they can establish higher standards.<sup>176</sup> Similarly, in Germany, administrative law has been reinterpreted in light of the Basic Law and the

172. C.E., B.O.E. n.311, art. 105(1), Dec. 29, 1978 (Spain).

173. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.], arts. 266, 267(5) (Port.). See also CÓDIGO DO PROCEDIMENTO ADMINISTRATIVO [CPA] [CODE OF ADMINISTRATIVE PROCEDURE], art. 12 (Port.) (affirming the principle of the prior hearing (*previa audiencia*)).

174. Art. 117(2)(m) COSTITUZIONE [COST.] (It.).

175. Legge 7 agosto 1990, n.241, G.U. Aug. 18, 1990, n.192, art. 29(2-bis) (It.).

176. *Id.* art. 29(2-quater).

decisions of the Federal Constitutional Court,<sup>177</sup> leading to discussion about whether the APA occupies a comparable position.

G. *APAs and Other Statutes: Subsidiarity, Complementarity, and Coherence*

Despite their varying formal titles, APAs share a crucial common feature: they regulate the “common” or “general” administrative procedure, or in broader terms, administrative law, as seen in the Dutch case.<sup>178</sup> This grants courts considerable latitude in applying APAs’ general principles and rules to interpret and supplement sector-specific legislative provisions. APAs employ multiple criteria in their interaction with sector-specific legislation, typically characterized by subsidiarity, complementarity, and coherence.

Subsidiarity is evident, for example, when APA provisions are applied except where sector-specific norms establish higher protection standards. This approach is generally adopted by the APA of Iceland,<sup>179</sup> and is also found in specific legislative provisions. For example, while the right to be heard is a standard feature of APAs, some offer higher standards for disciplinary or sanction-related procedures. The Dutch APA includes rules that may be considered as “the best regulations” for ordinary cases, such as the requirement for written form.<sup>180</sup>

Complementarity arises when the general principles laid down by the national APA apply in the absence of norms that state or regional authorities are empowered to establish. The provisions of the APA then serve as default rules. For instance, the Italian APA stipulates a deadline for concluding an administrative procedure unless specified by sector-specific legislation or government regulation.<sup>181</sup> Regardless of the source, there is a legal obligation to meet this deadline, and failure to do so has implications for the responsible officials.

Coherence is achieved in various ways. Many APAs implicitly or explicitly invoke the Roman maxim “lex specialis derogat legi generali,” meaning sector-specific rules override general ones. For example, the Lithuanian APA states that tax matters are regulated by specific provisions, as do other APAs.<sup>182</sup> This presents challenges for coherence, a core

177. See further Georg Nolte, *General Principles of German and European Administrative Law: A Comparative Perspective*, 57 MOD. L. REV. 191, 198 (1994); Ferdinand Wollenschläger, *Constitutionalisation and Deconstitutionalisation of Administrative Law in View of Europeanisation and Emancipation*, 10 REV. EUR. ADMIN. L. 1, 25 (2017) (arguing that such priority is founded on the primacy of the democratically elected legislator).

178. See Tom Barkhuysen, Willemien den Ouden & Ymre E. Schuurmans, *Netherlands*, in CODIFICATION OF ADMINISTRATIVE PROCEDURE, *supra* note 1, at 253 (noting that the law contains provisions of general applicability).

179. Stjórnssýslulög [Administrative Procedure Act], No. 37/1993, art. 2(2) (Ice.).

180. See Barkhuysen, den Ouden & Schuurmans, *supra* note 178, at 266.

181. L. n.241/1990, art. 2 (It.).

182. See Paul Craig et al., *Administrative Procedure Acts: History, Features, and Reception*, in RENEWAL MODEL RULES ON EU ADMINISTRATIVE PROCEDURE 11 (Paul Craig et al. eds., 2017).

value of all legal systems. At its simplest, a general code establishes the procedural baseline to be adhered to, serving a gap-filling role and potentially guiding the interpretation of sector-specific provisions. Despite lacking special status, the Lithuanian APA regarding firm supervision supersedes contrary provisions, unless they implement EU law or international treaties.<sup>183</sup> Other APAs allow sector-specific norms to govern certain rights only if they do not contradict the general principles of administrative procedure, as seen in all APAs from former Yugoslavian countries<sup>184</sup> and Switzerland.<sup>185</sup> Meanwhile, French administrative procedure laws vary in status; some hold legislative weight, while others fall under secondary legislation amendable by executive decrees. However, this does not diminish the APA's importance. It acts as a comprehensive code setting out generally applicable procedural requirements in the absence of sector-specific provisions.<sup>186</sup> Moreover, for administrative judges, the *lex specialis* does not always override the APA.

To summarize, both functional and structural analyses reveal that the vast number and diversity of administrative procedures across departments and agencies do not preclude the adoption of general legislation applicable to all. On the contrary, it necessitates such general legislation to provide a guiding framework to administrative officials, limiting their powers and ensuring accountability. The role of the judiciary in enforcing this legislative framework is crucial. Therefore, “factual analysis” is in order.<sup>187</sup>

#### IV. CITIZENS' RIGHTS AND DUTIES UNDER APAS

This Part addresses the contents of APAs. One straightforward approach to examining them relates to how APAs outline traditional procedural fairness and propriety requirements. Four essential requirements will be considered: the right to be heard and the right to access the documents held by public authorities; participation in

183. Viešojo administravimo įstatymas [Law on Public Administration], June 17, 1999, No. VIII-1234, art. 43 (Lith.) (providing that “[i]f the requirements laid down in other laws and applicable to the supervision of activities of economic entities conflict with the provisions of Chapter IV of this Law, this Law shall apply, with the exception of the cases where mandatory requirements of legal acts of the European Union or international agreements of the Republic of Lithuania are incorporated into . . .”).

184. Zakon o upravnom postupku [Law on Administrative Procedure], No. 29/02, art. 2 (Bosn. & Herz.); Zakon o općem upravnom postupku [General Administrative Procedure Act], No. 47/2009, art. 3(1) (Croat.); Zakona o upravnom postupku [Law on Administrative Procedure] 2014, No. 056/14, art. 4 (Montenegro); Zakon o opštem upravnom postupku [ZUP] [Law on General Administrative Procedure], No. 18/2016, art. 1 (Serb.).

185. Loi fédérale sur la procédure administrative [PA] [Federal Act on Administrative Procedure], Dec. 20, 1968, RO 757, art. 4 (Switz.).

186. Code des relations entre le public et l'administration [CRPA] [Code of Relations Between the Public and the Administration] art. L100-1 (Fr.).

187. See JUDICIAL REVIEW OF ADMINISTRATION IN EUROPE: PROCEDURAL FAIRNESS AND PROPRIETY, *supra* note 42.

rulemaking and planning; the obligation to provide reasons; and, a less evident aspect, the imposition of duties on private parties.

#### A. *The Right to Be Heard in Adjudicatory Procedures*

Central to many legal traditions is the principle that an individual accused of something must have the right to understand the case presented by the public authority.<sup>188</sup> However, a caveat is necessary due to a tension between two main trends in this area. The first is the widespread acknowledgment of the right to be heard in adjudicatory procedures. All European legal systems with an APA affirm the right to be heard before a potentially adverse decision is made,<sup>189</sup> indicating its fundamental role in administrative action. An examination of legal systems without an APA, such as Great Britain's, could further substantiate this. The second trend involves the diverse manifestations of the right to be heard, encompassing the right to notice, sufficient time to prepare a case, a hearing, and legal assistance.<sup>190</sup>

The right to be heard is universally extended in various ways. Some APAs explicitly or implicitly reflect the principle of *audi alteram partem*,

188. For a comparative analysis, see GIACINTO DELLA CANANEA, *DUE PROCESS OF LAW BEYOND THE STATE: REQUIREMENTS OF ADMINISTRATIVE PROCEDURE* (2016). On the right to be heard in the context of natural justice, see Bernard Schwartz, *The Right to Be Heard in English Administrative Law*, 2 HOWARD L.J. 193 (1956); GALLIGAN, *supra* note 53, at 75.

189. See KODI I PROCEDURAVE ADMINISTRATIVE [CODE OF ADMINISTRATIVE PROCEDURES] 2015, LIGJ No. 8485, art. 47 (Alb.); ALLGEMEINES VERWALTUNGSVERFAHRENSGESETZ [AVG] [GENERAL ADMINISTRATIVE PROCEDURE ACT] BGBL No. 51/1991, §§ 37, 40, [www.ris.bka.gv.at/Dokumente/Erw/ERV\\_1991\\_51/ERV\\_1991\\_51.pdf](http://www.ris.bka.gv.at/Dokumente/Erw/ERV_1991_51/ERV_1991_51.pdf) (Austria); Zakon o upravnom postupku, No. 29/02, art. 10 (Bosn. & Herz.); ADMINISTRATIVNO-PROTSESUALEN KODEKS [APK] [ADMINISTRATIVE PROCEDURE CODE], SG No. 30/2006, art. 8 (Bulg.); Zakon o općem upravnom postupku, No. 47/2009, art. 30 (Croat.); ZÁKON SPRÁVNÍ RÁD [CODE OF ADMINISTRATIVE PROCEDURE], Zákon č. 500/2004 Sb., § 36 (Czech.); Forvaltningsloven [Public Administration Act] 1985, No. 571, § 19 (Den.); Haldusmenetluse seadus [Administrative Procedure Act] RT I 2001, 58, 354, § 40 (Est.); Hallintolaki/Förvaltningslag [Administrative Procedure Act], No. 434/2003, § 34 (Fin.); CRPA arts. L122-1, L211-2 (Fr.); Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], May 25, 1976, BGBL I at 1253, § 28 (Ger.); KODIKAS DIOIKITIKES DIADIKASIAS [K.D.DIAD.] [ADMINISTRATIVE PROCEDURE CODE] art. 6 (Greece); ÁLTALÁNOS KÖZIGAZGATÁSI RENDTARTÁSRÓL [ÁKR] [CODE OF GENERAL ADMINISTRATIVE PROCEDURE] 2016, § 5 (Hung.); Stjórnisslulög [Administrative Procedure Act], No. 37/1993, art. 13 (Ice.); Legge 7 agosto 1990, n.241, G.U. Aug. 18, 1990, n.192, arts. 7–10 (It.); Administratīvā procesa likums [Administrative Procedure Law] 2001, No. 164, §§ 14, 62 (Lat.); Zakona o upravnom postupku, No. 056/14, art. 14 (Montenegro); Algemene wet bestuursrecht [AwB] [General Administrative Law Act] 1994, art. 3:15 (Neth.); Lov om behandlingsmåten i forvaltningssaker (forvaltningsloven) [Act Relating to Procedure in Cases Concerning the Public Administration (Public Administration Act)], LOV-1967-02-10, § 16 (Nor.); KODEKS POSTĘPOWANIA ADMINISTRACYJNEGO [KPA] [CODE OF ADMINISTRATIVE PROCEDURE], Dz. U. 1960, No. 30 poz. 168, art. 10 (Pol.); CÓDIGO DO PROCEDIMENTO ADMINISTRATIVO [CPA] [CODE OF ADMINISTRATIVE PROCEDURE], art. 67 (Port.); ZUP art. 9 (Serb.); Zákon o správnem konaní [Act on Administrative Procedure], No. 71/1967, § 33 (Slovk.); Zakon o splošnem upravnem postopku [ZUP] [General Administrative Procedure Act], No. 80/1999, art. 9 (Slovn.); Law on the Common Administrative Procedure of the Public Administrations art. 82 (B.O.E. 2015, 236) (Spain); § 25 FÖRVALTNINGSLAG (Svensk författningssamling [SFS] 2017:900) (Swed.); PA art. 29 (Switz.).

190. PAUL CRAIG, *ADMINISTRATIVE LAW* 432 (5th ed. 2005).

which mandates that anyone making a decision that could adversely affect another must allow the affected party a chance to be heard. Other APAs build upon this right to include a range of procedural rights, like legal assistance, thus expanding its application and clarifying any ambiguities. The Bosnian and Serbian APAs illustrate the first approach, specifying a “principle” related to the opportunity for a “party hearing” or the conduct of hearings, ensuring that before a decision is made by a public authority, those potentially impacted can comment on relevant facts and circumstances, unless legally exempted.<sup>191</sup> Conversely, the Italian APA does not set out a general concept, but mandates specific procedural rights, including notice, access to documents held by the public authority in charge of decisionmaking, and the submission of opinions and evidence.<sup>192</sup> The German APA, on the other hand, adopts a more comprehensive approach by detailing an array of procedural safeguards, including notice, oral hearing, representation and advice (with special rules for participants with aligned interests), language, information, evidence, hearing and cross-examination, and the requirement for reasoned decisions.<sup>193</sup>

The right to be heard is similarly manifested in various ways. One method is a general statement about the public authorities’ obligation to notify the commencement of a procedure. Another provides a detailed description of the steps to be followed. A broad spectrum exists between these two approaches. Often, APAs mandate that public authorities notify not just the individuals directly affected by the final act or measure but also those potentially adversely impacted. A number of APAs stipulate that such notice must be given in a timely manner. Some also consider additional factors in determining the required notice, like the type of act and the number of affected individuals. The Austrian APA, for instance, sets specific rules for “mass administrative procedures” affecting over a hundred people,<sup>194</sup> while other APAs mention the potential impact on a large number of people more generally.<sup>195</sup> The principle remains consistent, with legislation balancing interests, the benefits of extended notice obligations, and the compliance costs for public authorities.

Differences also exist in national procedures regarding the right to an agency hearing. Some APAs, particularly those of Central and Eastern Europe, presume hearing will be oral.<sup>196</sup> Others mandate an

191. Zakon o upravnom postupku, No. 29/02, art. 10 (Bosn. & Herz.); ZUP art. 9 (Serb.).

192. L. n.241/1990, arts. 7–11 (It.).

193. VwVfG §§ 11–34 (Ger.). See further Eberle, *supra* note 50, at 77–78 (considering that hearings in Germany are of less importance than in the U.S. experience).

194. AVG § 44(a) (Austria).

195. CRPA art. L122-1(2) (Fr.); Loi fédérale sur la procédure administrative [PA] [Federal Act on Administrative Procedure], Dec. 20, 1968, RO 757, art. 30a (Switz.).

196. Zakon o upravnom postupku, No. 29/02, art. 10(1) (Bosn. & Herz.); Zakon o općem upravnom postupku, No. 47/2009, arts. 4(1), 54(1) (Croat.); ZUP art. 154 (Slovn.); ZUP art. 144 (Serb.); ÁKR § 74(1)(a)–(c) (Hung.); Zákon o správnom konaní [Act on Administrative Procedure], No. 71/1967, § 21(1) (Slovk.); Haldusmenetluse

oral hearing upon private parties' request<sup>197</sup> or if a written procedure would be inconvenient, as seen in the Scandinavian APA.<sup>198</sup> However, no universal rule mandates oral hearings. Some APAs require them unless the law specifies otherwise, for example for reasons of urgency. Others guarantee an oral hearing if requested by private parties,<sup>199</sup> with all discussions fully recorded. Conversely, some APAs, including Italy's, dispense with an oral hearing unless sector-specific regulations, such as those for disciplinary actions, require it.<sup>200</sup>

All APAs contain rules on evidence to varying degrees. Even without a required oral hearing, APAs recognize the right to submit evidence, which must be reviewed, and the right to comment on the evidence presented by the public authority. This ensures individuals can dispute allegations against them, leading several APAs to take a position on the issue of representation—the right to choose a representative, including a lawyer. European legal systems offer three approaches in this regard. First, most grant an unconditional right to representation, without any further specification.<sup>201</sup> A second group of APAs gives special importance to legal representation, linking this right with ensuring that individuals can meaningfully participate in procedures affecting them. For example, the Bosnian APA considers not just a lack of expertise but also illiteracy.<sup>202</sup> A third group of APAs

seadus § 45(1) (Est.); Zákon č. 500/2004 Sb., § 36(2) (Czech.). See also KPA art. 89 (Pol.) (providing that a hearing shall be held whenever it would simplify or expedite the procedure).

197. AwB art. 3:15 (Neth.); CRPA art. L122-1 (Fr.) (modernizing the previous rules and establishing that prior contradictory procedure (*procédure contradictoire préalable*) shall be applied not only to the issuance of individual decisions that must be motivated according to article L211-2 (i.e., decisions that are unfavorable), but also to decisions that concern an individual (“décisions qui . . . son prises en considération de la personne”).

198. §§ 9, 24 FÖRVALTNINGSLAG (Svensk författningssamling [SFS] 2017:900) (Swed.); Lov om behandlingsmåten i förvaltningsaker (förvaltningsloven) [Act Relating to Procedure in Cases Concerning the Public Administration (Public Administration Act)], LOV-1967-02-10, § 11(d) (Nor.); Hallintolaki/Förvaltningslag [Administrative Procedure Act], No. 434/2003, § 37 (Fin.). See also KODI I PROCEDURAVE ADMINISTRATIVE [CODE OF ADMINISTRATIVE PROCEDURES] 2015, LIGJ No. 8485, art. 88(1) (Alb.).

199. AwB art. 3:13 (Neth.); § 24 FÖRVALTNINGSLAG (SFS 2017:900) (Swed.).

200. L. n.241/1990, art. 10-bis (It.). See further Roberto Caranta, *Participation into Administrative Procedures: Achievements and Problems*, 2 ITALIAN J. PUB. L. 311 (2010).

201. KODI I PROCEDURAVE ADMINISTRATIVE 2015 art. 35 (Alb.); ALLGEMEINES VERWALTUNGSVERFAHRENSGESETZ [AVG] [GENERAL ADMINISTRATIVE PROCEDURE ACT] BGBl. No. 51/1991, § 10, [www.ris.bka.gv.at/Dokumente/ErV/ERV\\_1991\\_51/ERV\\_1991\\_51.pdf](http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1991_51/ERV_1991_51.pdf) (Austria); Zakon o upravnom postupku, No. 29/02, art. 49 (Bosn. & Herz.); Zakon o općem upravnom postupku, No. 47/2009, art. 32 (Croat.); Zákon č. 500/2004 Sb., § 31 (Czech.); Forvaltningsloven § 8 (Den.); AwB art. 2:1 (Neth.); Haldusmenetluse seadus § 13 (Est.); Hallintolaki/Förvaltningslag § 12 (Fin.); CRPA art. L122-1 (Fr.); VwVfG § 14 (Ger.); ÁKR § 13 (Hung.); Administratīvā procesa likums [Administrative Procedure Law] 2001, No. 164, § 35 (Lat.); Forvaltningsloven § 12 (Nor.); KPA art. 32 (Pol.); Law on the Common Administrative Procedure of the Public Administrations art. 5 (B.O.E. 2015, 236) (Spain); § 14 FÖRVALTNINGSLAG (SFS 2017:900) (Swed.); PA art. 11C (Switz.).

202. Zakon o upravnom postupku, No. 29/02, art. 12 (Bosn. & Herz.) (“[T]he authority conducting the procedure shall take care that the ignorance and illiteracy of persons participating in the procedure are not detrimental to the rights belonging to them under the law.”).

does not universally acknowledge the right to representation,<sup>203</sup> making it contingent on sector-specific norms, public authority regulations and practices, or judicial interpretations that may permit assistance by a lawyer or advisor. In deciding on representation, courts weigh various factors, such as permitting legal or expert assistance, whether from a lawyer or a trade union in disciplinary proceedings.<sup>204</sup>

This analysis leads to two observations. Notwithstanding the differences identified between APAs regarding the necessity of an oral hearing, a shared commitment to ensuring a fair hearing for private parties is evident. Within this general trend, there is noticeable resemblance among APAs of geographically or historically linked countries, like those in Scandinavia or the former Yugoslavia. This supports the earlier observation about Central Europe: rather than the widespread adoption of a single model across Europe, certain principles and rules have been collectively shaped and honed by specific legal system clusters, leading to an increasing convergence among them. In other words, we move away from the notion of simplistic model transfer and argue that the concept of diffusion merits further reflection.

#### *B. The Nature of the Protected Interests and Their Limitations*

So far, we have seen that APAs consider process rights applicable when an individual's right or interest is affected by a public authority's decision. We now aim to delve deeper to identify which rights or interests are recognized and protected, and to determine the holders of these rights or interests. Additionally, we will examine the constraints on exercising process rights.

While the term "right" is utilized in both constitutional and legislative texts, its application spans civil, political, and economic rights, including proprietary rights. For example, when a public authority seeks to expropriate an individual's right of ownership, the law mandates adherence to due process and compensation provisions. A form of hearing is also required when the administrative actions adversely affect an individual's freedom, for example by prescribing certain obligations. However, there is debate across legal cultures about extending this traditional rights concept to cases where, for example, administrative action impinges on welfare benefits.<sup>205</sup> This has led to an increasing number of APAs adopting the term "interest"—sometimes

203. KODIKAS DIOIKITIKES DIADIKASIAS [K.D.DIAD.] [ADMINISTRATIVE PROCEDURE CODE] (Greece); L. n.241/1990 (It.); Stjórnarsýslulög [Administrative Procedure Act], No. 37/1993 (Ice.).

204. See Case 32/62, *Alvis v. Council*, 1963 E.C.R. 49.

205. See CRAIG, *supra* note 190, at 419 (noting that the "definition of what constitutes a right is itself contentious"). See also Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543 (2008) (criticizing the thesis that only traditional rights are qualified for protection under the Due Process Clause). See also Paul Oberst, *Parties to Administrative Proceedings*, 40 MICH. L. REV. 378 (1942) (discussing pre-World War II U.S. theories addressing the role of parties in administrative procedures).

qualified as legitimate or not—which offers a broader application scope than “right,” while some APAs extend their coverage beyond just rights and interests. The Spanish, German, and Swiss APAs illustrate these varied approaches. The Spanish APA identifies as “interested” (*interesados*) those with rights or with legitimate or collective interests who initiate the procedure or are otherwise affected by it.<sup>206</sup> The German APA adopts a wider definition of “party,” considering anyone with a legal interest affected by an administrative procedure’s outcome.<sup>207</sup> Conversely, the Swiss Federal APA defines a “party” as “anyone who has a right, interest or obligation affected by the matter.”<sup>208</sup>

The above discussion about the Spanish APA highlights a shift in how interests are considered. Traditionally, nearly all APAs mandated a hearing when an individual’s legally recognized interest is “directly” affected by administrative action.<sup>209</sup> However, many recent APAs include legal provisions that extend process rights to situations where an interest may not be directly affected. For example, in the context of housebuilding or alterations, process rights apply based on the individual having an interest separate from the owner seeking a construction or transformation permit. Following this logic, several APAs assume that an indirect interest is significant enough to warrant procedural rights for its holder, thereby protecting third parties by requiring public authorities to notify all individuals with a legal interest potentially affected by the decision.<sup>210</sup> Interestingly, some legislative provisions also grant “equal procedural possibilities to participate” in the administrative process.<sup>211</sup> However, this is not always the case. The Austrian APA draws a distinction between mere participants (*Beteiligte*) and effective parties (*Parteien*), providing only the latter with full participatory rights.<sup>212</sup> Similarly, the Dutch APA grants the right to express views to those directly affected by a decision, with other parties receiving such opportunities only under sector-specific regulations or at the discretion of public authority.<sup>213</sup>

206. Law on the Common Administrative Procedure of the Public Administrations art. 4(1) (Spain); see also L. n.241/1990, art. 7 (It.); KODI I PROCEDURAVE ADMINISTRATIVE 2015 art. 33 (Alb.) (both referring to individual and collective interests).

207. VwVfG § 13 (Ger.). See also AwB art. 1:2 (Neth.) (referring to interests).

208. PA art. 6 (Switz.). See also Hallintolaki/Förvaltningslag § 11 (Fin.).

209. AwB art. 1:2 (Neth.) (referring to a person “directly affected by a decision”); Forvaltningsloven § 2(e) (Nor.) (including both the person to whom a decision is directed and “whom the case otherwise directly concerns”).

210. PA art. 6 (Switz.). See also Hallintolaki/Förvaltningslag § 41 (Fin.) (referring to every case in which a decision has a “significant effect on the living environment, work or other conditions of persons other than the parties”).

211. ADMINISTRATIVNO-PROTSESUALEN KODEKS [APK] [ADMINISTRATIVE PROCEDURE CODE], SG No. 30/2006, art. 8(1) (Bulg.); KODI I PROCEDURAVE ADMINISTRATIVE 2015 art. 47 (Alb.).

212. ALLGEMEINES VERWALTUNGSVERFAHRENSGESETZ [AVG] [GENERAL ADMINISTRATIVE PROCEDURE ACT] BGBl. No. 51/1991, § 8, [www.ris.bka.gv.at/Dokumente/ErV/ERV\\_1991\\_51/ERV\\_1991\\_51.pdf](http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1991_51/ERV_1991_51.pdf) (Austria). See further Schäffer, *supra* note 18, at 873.

213. AwB art. 3:15(2) (Neth.). See also Forvaltningsloven § 11(d) (Nor.).

There is a significant deviation from the traditional view that an administrative act or decision solely affects the individuals to whom it is directed. Such a deviation occurs when the scope of the application of process rights is extended to collective and “diffuse” interests.<sup>214</sup> Collective interests represent specific groups, like professional association members, while diffuse interests, such as environmental protection, may concern the broader public but are often advocated by associations or committees. This distinction, however, is not strictly applied, as some APAs broadly interpret collective interests to include all economic and social interests.<sup>215</sup> The traditional distinction between rights and interests remains legally relevant but does not solely determine the applicability of procedural protection. Instead, there is a trend towards broadening process rights to benefit individuals possessing an interest or expectation, rather than a formal right.

Although the legislative provisions considered thus far expand the scope of application of process rights, all APAs also include mechanisms to limit participation in various ways. One approach is to exempt certain types of administrative procedure from the scope of application of the APA or from specific provisions. For example, the Finnish and Swedish APAs specify that participation rules do not apply to procedures related to admissions to employment, voluntary education and training programs, or the allocation of research grants and economic benefits based on an assessment of the applicant’s qualities.<sup>216</sup> Additionally, the German APA and the Swiss Federal APA exclude procedures, aimed at enforcing previous decisions from participation rules.<sup>217</sup>

A second method APAs use to limit the scope of process rights grants public authorities the discretion to determine if certain phases of the administrative procedure can be omitted or if requirements, such as notice, can be executed in a limited manner. This implies that public authorities weigh the interests of the individual against the impact of procedural protection on administrative action. Notably, such discretion is provided by the APAs of Nordic countries,<sup>218</sup> and

214. L. n.241/1990, art. 9 (It.).

215. KODEKS POSTĘPOWANIA ADMINISTRACYJNEGO [KPA] [CODE OF ADMINISTRATIVE PROCEDURE], Dz. U. 1960, No. 30 poz. 168, art. 31 (Pol.); Law on the Common Administrative Procedure of the Public Administrations art. 4(1) (B.O.E. 2015, 236) (Spain).

216. Hallintolaki/Förvaltningslag § 34 (Fin.); § 25 FÖRVALTNINGSLAG (Svensk författningssamling [SFS] 2017:900) (Swed.).

217. Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], May 25, 1976, BGBl. I at 1253, § 28(2)(5) (Ger.); PA art. 30(2)(d) (Switz.). See also KODI I PROCEDURAVE ADMINISTRATIVE 2015 art. 89 (Alb.) (excluding competition procedures).

218. See Hallintolaki/Förvaltningslag § 34(2) (Fin.); Stjórnsýslulög [Administrative Procedure Act], No. 37/1993, art. 13 (Ice.); Forvaltningsloven § 16(3)(c) (Nor.); § 25 FÖRVALTNINGSLAG (SFS 2017:900) (Swed.).

the German APA, which aims to enhance administrative efficiency. It specifies that a hearing may be omitted when it is not required by the circumstances or when it is “grossly against the public interest.”<sup>219</sup> Yet, this legislative provision also outlines scenarios where a hearing is deemed unnecessary, thereby constraining public authorities’ discretion. Another legislative approach addresses claims that can be rejected either because they are patently inadmissible or groundless, or when parties have already presented their case before a decision is made.<sup>220</sup> This raises concerns about potentially excessive discretion afforded to public authorities and the safeguards in place to prevent abuses.

A third limitation of procedural protection involves exceptions in cases of urgency. General exceptions apply to the rights of notice and comment under the premise that involving numerous interested persons would be too costly, both economically and in terms of delays.<sup>221</sup> Broader legislative provisions grant public authorities the power to curtail citizen participation when it would be detrimental not just to public interest at large, but also to specific interests like public health or the environment.<sup>222</sup> Another form of legislative exception pertains to evidence: If facts can be ascertained from official data or publicly available information, a hearing can be omitted and a decision made.<sup>223</sup>

Understanding these limitations is crucial for grasping the actual scope of process rights. However, two trends must be taken into account. First, the presence of legislative challenges the notion that public authorities inherently have broad discretion over the process rights granted. Second, traditional restrictions, such as those related to acts of “high administration” or actions involving greater discretionary judgment, have been revisited. In court, public authorities often argue that procedural protections are inapplicable in certain contexts, while individuals contend that process rights should be fully

219. VwVfG § 28(2)–(3) (Ger.).

220. Hallintolaki/Förvaltningslag § 34(2)(1) (Fin.); Administratīvā procesa likums [Administrative Procedure Law] 2001, No. 164, § 62(2)(2) (Lat.) (referring to the case in which a hearing may be omitted because it is “objectively insignificant”); KODI I PROCEDURAVE ADMINISTRATIVE 2015 art. 89(1)(b) (Alb.).

221. Forvaltningsloven [Public Administration Act] 1985, No. 571, § 19(2) (Den.); Haldusmenetluse seadus [Administrative Procedure Act] RT I 2001, 58, 354, § 40(3)(1) (Est.); Code des relations entre le public et l’administration [CRPA] [Code of Relations Between the Public and the Administration] art. L122-1(2) (Fr.); VwVfG § 28(2)(1) (Ger.); L. n.241/1990, art. 7(1) (It.); § 25 FÖRVALTNINGSLAG (SFS 2017:900) (Swed.). See similarly KODI I PROCEDURAVE ADMINISTRATIVE 2015 art. 89(1)(a) (Alb.); APAs of countries formerly part of Yugoslavia, e.g., Zakon o upravnom postupku [Law on Administrative Procedure], No. 29/02, art. 132(1)(4) (Bosn. & Herz.).

222. Hallintolaki/Förvaltningslag § 34 (2) (Fin.).

223. Zakon o općem upravnom postupku [General Administrative Procedure Act], No. 47/2009, arts. 48–49 (Croat.).

upheld. This underscores the importance of the reasons adduced by public authorities.

### C. *The Duty to Give Reasons*

Another near-universal principle in administrative adjudication is the duty to give reasons. This obligation offers significant benefits and some potential disadvantages for both decision-makers and those affected by their decisions, though an in-depth discussion is beyond our scope here.<sup>224</sup> Instead, we focus on the notable similarity across European legal systems, with the United Kingdom being a partial exception. Continental European legal frameworks broadly mandate the provision of reasons, as outlined either in constitutional or APA provisions. The Treaty of Rome also laid down a wide-ranging requirement to give reasons, covering individual decisions, regulations, and directives. This requirement attracted the attention of American scholars like Jerry Mashaw and Martin Shapiro,<sup>225</sup> and has been reaffirmed by the EU Charter of Fundamental Rights.<sup>226</sup> In contrast, U.K. common law does not universally require public authorities to justify their decisions, although some specific sectors mandate reasons for decisions adversely impacting the rights or interests of individuals. Moreover, the position of the courts has evolved in light of both non-instrumental and instrumental justifications, recognizing the close connection between decision making and human dignity and the ability to contest factual and legal errors in court.<sup>227</sup>

Similar to the right to be heard, APAs reflect a key constant—the obligation to give reasons—alongside various unique characteristics. Crucially, primary legislation *virtually always* imposes the duty to give reasons, but it does so expansively. APAs usually require public authorities to articulate the factual and legal basis for decisions affecting individuals,<sup>228</sup> enabling them to understand the interests at

224. See Paul Craig, *The Common Law, Reasons and Administrative Justice*, 53 CAMBRIDGE L.J. 282 (1994) (positing that rules can assist courts in their supervisory function, ensure administrative efficiency without frustrating the objectives of administration, while fulfilling their more general function to increase public confidence in the administrative process).

225. See Martin Shapiro, *The Giving Reasons Requirement*, 1 U. CHI. LEGAL F. 179 (1992); Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WA. L. REV. 99 (2007).

226. Charter of Fundamental Rights, art. 41, 2012 O.J. (C 326) 2 (providing that the right to good administration includes, among other things, “the obligation of the administration to give reasons for its decisions”).

227. Craig, *supra* note 224, at 288 (pointing out the importance of reasons from the viewpoint of the principles of reasonableness and proportionality); CAROL HARLOW & RICHARD RAWLINGS, *LAW AND ADMINISTRATION* 611 (3d ed. 2017).

228. KODI I PROCEDURAVE ADMINISTRATIVE 2015 art. 100 (Alb.); Zakon o upravnem postopku, No. 29/02, arts. 59, 197(3) (Bosn. & Herz.); Zakon o općem upravnem postopku, No. 47/2009, art. 98 (Croat.); ZÁKON SPRÁVNÍ RÁD [CODE OF ADMINISTRATIVE PROCEDURE], Zákon č. 500/2004 Sb., § 68 (Czech.); Forvaltningsloven § 22 (Den.); Algemene wet bestuursrecht [AWB] [General Administrative Law Act] 1994, arts. 3:46–3:47 (Neth.); Haldusmenetluse seadus § 56 (Est.); Hallintolaki/Förvaltningslag §§ 44–45 (Fin.); VwVfG § 39 (Ger.); KODIKAS DIOIKITIKES DIADIKASIAS [K.D.DIAD.] [ADMINISTRATIVE PROCEDURE CODE] art. 17 (Greece); ÁLTALÁNOS KÖZIGAZGATÁSI RENDTARTÁSRÓL

stake and to assess whether the act or measure can be challenged before the courts. The stringency of this obligation depends on the language of the specific APA and on the broader context, distinguishing, for example, between the requirement to give reasons and a broader, but also general, duty to justify administrative actions.

To elucidate the range and substance of national provisions, it is instructive to compare three specific examples. The Swedish APA mandates public authorities to provide the reasons that “have been decisive,” specifying that, if such reasons are not given at the time of the decision, “the authority shall, if possible, give a statement of reasons afterwards if a private person so requests,” albeit with exceptions where reasons “may be omitted wholly or in part.”<sup>229</sup> The Italian APA imposes a broad obligation for every administrative decision or measure to include “a statement of reasons,” covering all relevant factual and legal issues as they arose in the administrative procedure. However, it exempts administrative rules from this requirement.<sup>230</sup> The Dutch APA offers a structured approach: reasons must be stated when a decision is “published.”<sup>231</sup> Should they be absent, they must be “notified as quickly as possible” upon request by an interested party,<sup>232</sup> marking a duty, rather than the optional nature seen in the Swedish context. Additionally, if reasons are documented elsewhere, parties must be informed.<sup>233</sup> The Dutch APA further specifies that any deviation from opinions expressed during the procedure should be explicitly noted,<sup>234</sup> and demands that decisions be underpinned by “proper reasons.”<sup>235</sup>

At this juncture, three comments are pertinent. First, concerning the scope of the requirement to provide reasons, the three APAs examined above mandate a universal requirement for reasoning in all individual decisions. Conversely, other APAs stipulate reasons only when a decision adversely affects one party or deviates from established

[ÁKR] [CODE OF GENERAL ADMINISTRATIVE PROCEDURE] 2016, § 81 (Hung.); L. n.241/1990, art. 3 (It.); Zakona o upravnom postupku [Law on Administrative Procedure] 2014, No. 056/14, art. 22 (Montenegro); Lov om behandlingsmåten i forvaltningssaker (forvaltningsloven) [Act Relating to Procedure in Cases Concerning the Public Administration (Public Administration Act)], LOV-1967-02-10, § 24 (Nor.); KODEKS POSTĘPOWANIA ADMINISTRACYJNEGO [KPA] [CODE OF ADMINISTRATIVE PROCEDURE], Dz. U. 1960, No. 30 poz. 168, art. 11 (Pol.); Zakon o opštem upravnom postupku [ZUP] [Law on General Administrative Procedure], No. 18/2016, art. 196 (Serb.); Zákon o správnom konaní [Act on Administrative Procedure], No. 71/1967, § 47 (Slovk.); Zakon o splošnem upravnem postopku [ZUP] [General Administrative Procedure Act], No. 80/1999, art. 210 (Slovn.); § 32 FÖRVALTNINGSLAG (SFS 2017:900) (Swed.); Loi fédérale sur la procédure administrative [PA] [Federal Act on Administrative Procedure], Dec. 20, 1968, RO 757, art. 35 (Switz.).

229. § 32 FÖRVALTNINGSLAG (SFS 2017:900) (Swed.).

230. AwB art. 4:19 (Neth.).

231. *Id.* art. 4:17.

232. L. n.241/1990, art. 3(2) (It.).

233. AwB art. 4:19 (Neth.).

234. *Id.* art. 4:20.

235. *Id.* art. 4:16.

norms,<sup>236</sup> with various specifications and exceptions, akin to the Swedish model, where reasons are provided upon an individual's request.<sup>237</sup> Limitations hinge on the APA's stipulations regarding the necessity for reasons beyond administrative adjudication, for example rulemaking.<sup>238</sup> This marks a notable divergence from the U.S. approach, where reasons in rulemaking are obligatory.

Second, regarding the procedural character of the requirement to give reasons, it is noted that might not always accompany the administrative act or measure affecting individual rights directly but may be supplied through another medium. Courts in several jurisdictions have endorsed this, balancing administrative efficiency and the protection of individual rights. Hence, reasons might be offered *per relationem* (indirectly), with some legislative provisions acknowledging this method.<sup>239</sup>

Third, an important distinction, underlined by Shapiro,<sup>240</sup> must be drawn between procedural and substantive interpretations of the requirement to give reasons. Rather than merely requiring reasons, the Dutch APA demands adequate or good reasons, elevating the standard significantly.<sup>241</sup> This shift from procedural to a substantive requirement implies that superficial or formulaic reasons may subject the decision's legitimacy to scrutiny. A decision deemed inadequately justified could be considered illegal by the court.<sup>242</sup> This would not

236. ALLGEMEINES VERWALTUNGSVERFAHRENSGESETZ [AVG] [GENERAL ADMINISTRATIVE PROCEDURE ACT], BGBl. No. 51/1991, § 58, [www.ris.bka.gv.at/Dokumente/ErV/ERV\\_1991\\_51/ERV\\_1991\\_51.pdf](http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1991_51/ERV_1991_51.pdf) (Austria); Code des relations entre le public et l'administration [CRPA] [Code of Relations Between the Public and the Administration] arts. L121-1–L211-2 (Fr.); CÓDIGO DO PROCEDIMENTO ADMINISTRATIVO [CPA] [CODE OF ADMINISTRATIVE PROCEDURE], art. 152 (Port.); Law on the Common Administrative Procedure of the Public Administrations art. 35 (B.O.E. 2015, 236) (Spain).

237. AwB art. 23 (Neth.) (with reference to oral decisions); Stjórnissýsluðög [Administrative Procedure Act], No. 37/1993, art. 21 (Ice.); Administratīvā procesa likums [Administrative Procedure Law] 2001, No. 164, § 73 (Lat.).

238. L. n.241/1990, art. 3(1) (It.). *But see* ADMINISTRATIVNO-PROTSESUALEN KODEKS [APK] [ADMINISTRATIVE PROCEDURE CODE], SG No. 30/2006, arts. 66(2), 73, 75 (Bulg.); ZÁKON SPRÁVNÍ RÁD [CODE OF ADMINISTRATIVE PROCEDURE], Zákon č. 500/2004 Sb., § 172 (Czech.); Law on the Common Administrative Procedure of the Public Administrations art. 129 (Spain).

239. AwB art. 3:49 (Neth.); L. n.241/1990, art. 3(3) (It.); Lov om behandlingsmåten i forvaltningssaker (forvaltningsloven) [Act Relating to Procedure in Cases Concerning the Public Administration (Public Administration Act)], LOV-1967-02-10, § 25 (Nor.).

240. Shapiro, *supra* note 225, at 185.

241. AwB art. 3:46 (Neth.); KODIKAS DIOIKITIKES DIADIKASIAS [K.D.DIAD.] [ADMINISTRATIVE PROCEDURE CODE] art. 17(2) (Greece); Zakon o opštem upravnom postupku [ZUP] [Law on General Administrative Procedure], No. 18/2016, art. 199 (Serb.) (establishing that reasons must be “decisive”).

242. Zakon o upravnom postupku [Law on Administrative Procedure], No. 29/02, art. 193(1) (Bosn. & Herz.); APK art. 7 (Bulg.); Zakon o opštem upravnom postupku [General Administrative Procedure Act], No. 47/2009, art. 98(5) (Croat.); Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], May 25, 1976, BGBl. I at 1253, § 39(1) (Ger.) (which reinforces the duty to give reasons with regard to discretionary decisions); Zakon o splošnem upravnem postopku [ZUP] [General Administrative Procedure Act], No. 80/1999, art. 214 (Slovn.).

undermine the discretionary power, but rather emphasize the necessity for detailed explanations to elucidate the administrative choices made.<sup>243</sup> Moreover, a legislative provision addressing the factual and legal basis identified during the preliminary fact-finding investigations carried out by the public authority transcends the mere duty to provide reasons by establishing a requirement for dialogue,<sup>244</sup> ensuring that the arguments and evidence from private parties are duly taken into account.

#### D. *Non-adjudicatory Procedures*

The discussion thus far has been primarily concerned with the applicability and content of procedural protections within administrative adjudication, drawing an implicit parallel with judicial adjudication. Yet, some APAs also incorporate measures related to other forms of administrative action, such as rulemaking, public contracts, and internal appeals. Rulemaking merits particular attention given its relative neglect in scholarly discussions, which is focused almost exclusively on adjudicative procedures.<sup>245</sup> This oversight is unwarranted, as adjudication represents “but one form of decision-making,”<sup>246</sup> and often plays a lesser role in public policy formulation than other methods. The key question is whether rulemaking exhibits a different mix of common and unique characteristics. It appears there is considerably less uniformity in rule-making procedures compared to administrative adjudication, and very few European APAs adopt legislative provisions akin to the U.S. APA’s notice-and-comment procedures, which significantly enhance citizen participation.<sup>247</sup>

The various legal systems examined in this Article explore different approaches. First, influential European APAs, like those from Austria and Germany,<sup>248</sup> do not explicitly address rulemaking. Initially, this omission reflected a hesitation to acknowledge administrators as rulemakers alongside legislators, later justified by the idea that rulemaking presented unique challenges as to which interests need to be considered and weighed, and how. For example, the Italian APA merely states that citizen participation remains subject to sector-specific norms of procedure.<sup>249</sup>

243. This line of reasoning would be accepted by the courts in the United Kingdom: Craig, *supra* note 224, at 286.

244. See Shapiro, *supra* note 225, at 186.

245. See *contra* THEODORA T. ZIAMOU, RULEMAKING, PARTICIPATION AND THE LIMITS OF PUBLIC LAW IN THE USA AND IN EUROPE (2001).

246. CRAIG, *supra* note 190, at 452.

247. See Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943 (2006).

248. As observed earlier, the German APA deals with general orders, that is, those that apply to a given number of persons.

249. Legge 7 agosto 1990, n.241, G.U. Aug. 18, 1990, n.192, art. 13 (It.).

Another approach involves APAs establishing procedural protections for rulemaking or planning processes. The Bulgarian APA closely mirrors the U.S. model in three aspects: it extends process rights whenever a general act or measure affects an indefinite number of persons; it mandates public notification of procedure initiation through the media, outlining participation mechanisms; and it includes the submission of written objections and proposals, along with direct involvement in public hearings.<sup>250</sup> Thus, public consultation plays a pivotal role, underscoring that not only major legal systems deserve comparative scrutiny. Other APAs, like those of the Czech Republic and Norway, promote consultation in adopting general measures but limit comments to written submissions,<sup>251</sup> albeit leaving the door open for public hearings under certain conditions. The Czech APA permits hearings based on sector-specific norms or at the discretion of the public authority,<sup>252</sup> whereas the Norwegian APA allows them when social groups and legal entities are significantly impacted by the proposed regulation.<sup>253</sup>

While the first two approaches—direct regulation and reference to sector-specific norms—reserve for parliamentary bodies the authority to delineate the standards for administrative authorities, a third approach amplifies their role by granting them broad discretion. Specifically, the French APA addresses public consultation in two ways: through sector-specific norms or at the discretion of the competent authority. This flexibility is reinforced by the provision that, in the issuance of an *acte réglementaire*, the administration may consult a *commission consultative* and has the option, though not the obligation, to engage in a *consultation ouverte*, allowing the interested parties to present their comments, including through electronic means.<sup>254</sup> Nonetheless, it is important to note that a *débat public* is mandatory for all administrative actions expected to have a significant impact on local communities, such as infrastructure projects.

The variation among European APAs extends beyond administrative adjudication, as evidenced by the treatment of appeals. Similar to rulemaking and planning, only some APAs contain procedural rules for appeals. Where such rules exist, they navigate between striving for uniformity and tailoring procedures to cope with the unique challenges posed by appeals, and between adhering to individualized

250. APK arts. 65, 66(2), 69(1) (Bulg.).

251. See similarly Law on the Common Administrative Procedure of the Public Administrations art. 133 (B.O.E. 2015, 236) (Spain) (providing that open consultation shall generally be held in electronic form).

252. ZÁKON SPRÁVNÍ RÁD [CODE OF ADMINISTRATIVE PROCEDURE], Zákon č. 500/2004 Sb., § 172(2)–(4) (Czech.).

253. Lov om behandlingsmåten i forvaltningssaker (forvaltningsloven) [Act Relating to Procedure in Cases Concerning the Public Administration (Public Administration Act)], LOV-1967-02-10, § 37(2)–(4) (Nor.).

254. See Jacky Richard & Vassiliki Kapsali, *La participation à l'élaboration des règlements administratifs en France*, in DROIT COMPARÉ DE LA PROCÉDURE ADMINISTRATIVE/COMPARATIVE LAW OF ADMINISTRATIVE PROCEDURE, *supra* note 61, at 317.

adjudication and addressing broader concepts of “mass justice.” Uniformity does not necessarily mean that appeals must follow the same procedural rules as adjudication; rather, it suggests that there is fundamentally no reason appeals should not uphold the individual’s right to both a hearing and legal representation.<sup>255</sup>

From another perspective, some APAs suggest that an appeal against an initial decision does not automatically warrant a hearing unless new arguments or evidence, previously unconsidered, are introduced.<sup>256</sup> Conversely, APAs like Austria’s stipulate that if an appeal could impact parties other than the appellant, these parties should have the chance to be heard before the appeal is decided.<sup>257</sup> This approach is motivated not solely by the desire to protect individual interests but by pragmatic considerations: involving other parties may help to guarantee more objective and efficacious administrative actions or simply prevent a proliferation of similar legal challenges. Thus, the guiding principle is effective administration rather than fairness or natural justice.

#### *E. Assistance to Private Parties*

With the rise in the number of APAs, new terminology has emerged. While earlier APAs typically referenced legal assistance and representation,<sup>258</sup> more recent legislation increasingly mentions assistance and collaboration. These concepts were introduced in the 1980s, for example in the Swedish APA of 1986. Since then, their application has varied: Some APAs broadly interpret assistance to include providing information and responding to inquiries, while others link these responsibilities to a duty of fair and proper conduct. This shift reflects a wider trend in administrative governance extending beyond jurisdictions with procedural legislation, such as the United Kingdom,<sup>259</sup>

255. See, e.g., *Zakon o upravnom postupku* [Law on Administrative Procedure], No. 29/02, art. 233(1) (Bosn. & Herz.); *Code des relations entre le public et l’administration* [CRPA] [Code of Relations Between the Public and the Administration] art. L411-6 (Fr.); *KODIKAS DIOIKITIKES DIADIKASIAS* [K.D.DIAD.] [ADMINISTRATIVE PROCEDURE CODE] art. 6(4) (Greece); *ÁLTALÁNOS KÖZIGAZGATÁSI RENDTARTÁSRÓL* [ÁKR] [CODE OF GENERAL ADMINISTRATIVE PROCEDURE] 2016, § 111 (Hung.); *KODEKS POSTĘPOWANIA ADMINISTRACYJNEGO* [KPA] [CODE OF ADMINISTRATIVE PROCEDURE], Dz. U. 1960, No. 30 poz. 168, art. 140 (Pol.).

256. Law on the Common Administrative Procedure of the Public Administrations art. 118 (Spain).

257. *ALLGEMEINES VERWALTUNGSVERFAHRENSGESETZ* [AVG] [GENERAL ADMINISTRATIVE PROCEDURE ACT] BGBl. No. 51/1991, §§ 67(d)(1), 67(d)(3), [www.ris.bka.gv.at/Dokumente/Erw/ERV\\_1991\\_51/ERV\\_1991\\_51.pdf](http://www.ris.bka.gv.at/Dokumente/Erw/ERV_1991_51/ERV_1991_51.pdf) (Austria). See also *KODI I PROCEDURAVE ADMINISTRATIVE* [CODE OF ADMINISTRATIVE PROCEDURES] 1999, LIGJ No. 8485, art. 136(3) (Alb.); *Zakon o splošnem upravnem postopku* [ZUP] [General Administrative Procedure Act], No. 80/1999, art. 241 (Slovn.).

258. See, e.g., *Forvaltningsloven* § 12 (Nor.).

259. See Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 90 WIS. L. REV. 297 (2010) (examining the statutes that apply to all federal agencies, particularly with a view to participation and transparency). See also Susan Rose-Ackerman, *Citizens and Technocrats: An Essay on Trust, Public Participation, and Government Legitimacy*, in *COMPARATIVE ADMINISTRATIVE LAW*, *supra* note 65, at 251.

highlighting diverse approaches to achieve similar results. Thus a comparative analysis of these methods will prove insightful.

Exceptions exist within this trend: notably APAs that establish general principles of administrative procedure without specifically addressing individual assistance. Italy, for instance, while not directly mentioning assistance, incorporates measures to avoid unnecessary administrative burdens on individuals.<sup>260</sup> Another category includes legislative provisions that view assistance to private parties as integral to recognizing and protecting procedural rights. A duty of assistance is thus established by several Balkan legal systems,<sup>261</sup> sometimes in conjunction with a general mandate for “active help,”<sup>262</sup> or, as in the Croatian APA, with a provision ensuring that ignorance is not detrimental to citizens’ legally guaranteed rights.<sup>263</sup> The Polish APA, too, treats assistance in very broad terms, aiming to foster “the trust of citizens in State bodies” as well as “public awareness and appreciation of the law” through “active involvement” of citizens in administrative processes.<sup>264</sup>

Another subset of APAs contains legislative provisions that are more detailed and precise. For example, the Swedish APA mandates each public authority to “provide information, guidance, advice and similar assistance to all persons concerning matters falling within the scope” of its functions. This duty is qualified, with the level of assistance tailored to the nature of the matter and the individual’s needs.<sup>265</sup> Other Nordic APAs tackle the issue of misdirected applications, establishing that an incorrect submission should not negate procedural protection. Specifically, the public authority receiving the application is required to forward it to the competent one, albeit with qualifications like “as far as possible.”<sup>266</sup>

A fourth category of APAs introduces distinct legal requirements. The French and German APAs are illustrative here. The French APA requires public authorities to guide private parties and make sure that their submissions are complete, advising on necessary additions or rectifications within a set timeframe.<sup>267</sup> The German APA obligates

260. Legge 7 agosto 1990, n.241, G.U. Aug. 18, 1990, n.192, art. 1 (It.).

261. Zakon o upravnom postupku, No. 29/02, art. 5 (Bosn. & Herz); ADMINISTRATIVNO-PROTSESUALEN KODEKS [APK] [ADMINISTRATIVE PROCEDURE CODE], SG No. 30/2006, art. 9(4) (Bulg.); Zakon o opštem upravnom postupku [ZUP] [Law on General Administrative Procedure], No. 18/2016, art. 15 (Serb.); ZUP art. 7 (Slovn.).

262. KODI I PROCEDURAVE ADMINISTRATIVE 2015 art. 9 (Alb.).

263. Zakon o općem upravnom postupku [General Administrative Procedure Act], No. 47/2009, art. 7 (Croat.).

264. KODEKS POSTĘPOWANIA ADMINISTRACYJNEGO [KPA] [CODE OF ADMINISTRATIVE PROCEDURE], Dz. U. 1960, No. 30 poz. 168, arts. 8, 10(1) (Pol.).

265. § 6 FÖRVALTNINGSLAG (Svensk författningssamling [SFS] 2017:900) (Swed.).

266. Forvaltningsloven [Public Administration Act] 1985, No. 571, § 7(2) (Den.); Hallintolaki/Förvaltningslag [Administrative Procedure Act], No. 434/2003, § 8 (Fin.); Stjórnssýslulög [Administrative Procedure Act], No. 37/1993, art. 7 (Ice.); Forvaltningsloven § 11(4) (Nor.).

267. Code des relations entre le public et l’administration [CRPA] [Code of Relations Between the Public and the Administration] art. L114-5 (Fr.).

public authorities to inform parties of their rights and assist them in the correcting errors or misunderstandings in submissions.<sup>268</sup>

The above discussion demonstrates that the concept of individual assistance, like many legal concepts, is multifaceted. Its growing inclusion in APAs is noteworthy, reflecting a trend towards defining procedural protections more broadly in favor of the individual. Thus, the principle of good administration increasingly embodies a general duty to act fairly towards individuals.

#### *F. From Process Rights to Duties*

There is another aspect to consider, related to the duties of cooperation required of individuals. These duties are introduced in two ways. At times, there is a restatement of the general obligation to supply documents that are both authentic and accurate. The expectation for documents to remain unaltered and for declarations to be truthful is not difficult to understand and aligns with modern visions of citizenship.

Additionally, duties are sometimes presented alongside the provision of assistance to private parties, establishing a reciprocal obligation. In the German and Spanish APAs, these responsibilities are dealt with more or less in the same way. German regulations focus on the acquisition of evidence, stating that the public authority “may gather information of all kinds, hear the evidence of participants, . . . obtain documents and records, visit and inspect the locality involved,”<sup>269</sup> and subsequently require participants to “assist in the ascertaining of facts” as known to them.<sup>270</sup> In a parallel, but in a more concise manner, the Spanish APA provides that “parties shall cooperate with the administrative authorities during the whole course of the proceedings.”<sup>271</sup>

These provisions, along with others of a similar nature, highlight at least two comparative issues. Unlike APAs in other jurisdictions, including the United States, they delineate specific duties. This distinction is neither intrinsically positive or negative; public law inherently balances rights and duties, although the former is often prioritized over the latter in scholarly literature. The rationale behind such duties prompts inquiry. Historically, APAs of European countries subject to Soviet rule often imposed duties on the individual, consistent

268. *Verwaltungsverfahrensgesetz [VwVfG]* [Administrative Procedure Act], May 25, 1976, BGBL. I at 1253, § 25(1) (Ger.).

269. *Id.* § 26(1).

270. *Id.* § 26(2).

271. Law on the Common Administrative Procedure of the Public Administrations art. 18(1) (B.O.E. 2015, 236) (Spain). *See also* *Zákon o správnom konaní* [Act on Administrative Procedure], No. 71/1967, § 3(2) (Slovak.); *Loi fédérale sur la procédure administrative* [PA] [Federal Act on Administrative Procedure], Dec. 20, 1968, RO 757, art. 13 (Switz.).

with the doctrines of socialist legality. Today, the approach has shifted away from viewing the state as superior to the individual. Instead, these duties are seen as essential for garnering citizen cooperation in effectively implementing public policies, offering a functional, rather than hierarchical, rationale. Nonetheless, from the perspective of individual rights, the legitimacy of imposing certain duties on private parties in their interactions with public authorities remains contentious. Drawing a distinction between moral and legal obligations to truthfulness may be difficult, yet crucial in certain contexts. For instance, in the field of criminal law, many nations uphold the principle laid down by the International Covenant on Civil and Political Rights, according to which no one should be compelled to self-incriminate.<sup>272</sup>

#### V. NATIONAL DIVERSITY WITHIN AN INCREASING COMMONALITY

After examining administrative procedural legislation, we seek to understand what it reveals in terms of the interaction between diversity and similarity across European administrative laws. To place this discussion in context, we briefly revisit the traditional debate and highlight the significance of overarching administrative procedure legislation. Next, we delve into the causes of diversity, concentrating on context and policy decisions. Lastly, to grasp the essence of commonality, we differentiate between autonomous developments and those that are the product of integration within regional legal orders, namely the European Union and the Council of Europe.

##### A. *The Relevance and Significance of General Legislation on Administrative Procedure*

As noted at the outset, late nineteenth-century public law literature often underscored a stark “divide” between common law countries and civil law countries. The Victorian constitutionalist A.V. Dicey contended that French administrative institutions were fundamentally different from those in England and the United States, because the former rested on “ideas foreign to the . . . rule of law.”<sup>273</sup> The limitations of this comparative approach have been extensively critiqued by contemporaries of Dicey, such as Frank Goodnow,<sup>274</sup> and by subsequent generations of public law scholars,<sup>275</sup> and there is no need to repeat them here.

However, it is crucial to recognize that the perceived dichotomy between the administrative laws of England and France, representing

272. International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171.

273. DICEY, *supra* note 3, at 328.

274. See FRANK J. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW* 7 (1902) (criticizing Dicey not only with regard to the U.S. system, but also to that of the United Kingdom).

275. See *contra* HARLOW & RAWLINGS, *supra* note 227, at xv; PETER LEYLAND & GORDON ANTHONY, *ADMINISTRATIVE LAW* 1 (3d ed. 2012).

broader distinctions between civil law and common law systems, becomes debatable in the context of administrative procedure. Following the adoption of the U.S. APA, Bernard Schwartz, an American public lawyer familiar with French administrative practices, pointed out that the United States had diverged from the United Kingdom<sup>276</sup> and other common law jurisdictions, such as Canada.<sup>277</sup> Contrary to the widespread belief that French administrative law typifies continental legal systems, the Austrian codification of 1925 ushered in a distinct approach to administrative procedure, adopted by several other states. Consistent with this shift, the consensus is now that “administrative procedure, rather than judicial review of administrative acts, lies at the heart of administrative law.” The focus shifts towards the actions of public authorities and how they are executed, and away from an emphasis solely on oversight.<sup>278</sup>

Our analysis confirms the growing importance of administrative procedure legislation. The foundational rationales persist, yet increasingly, procedural definitions reflect parliamentary intent over executive regulation. Despite the differences among APAs, their particular legal weight stems from their (relative) stability, linking past, present, and future legislation. APAs offer comprehensive solutions, reducing the need for new legislative interventions. Although they will be supplemented by sector-specific provisions, it is the overarching legislation or its interpretation that upholds general principles and basic process rights. APAs prioritize process rights,<sup>279</sup> though they may also establish duties. Consequently, they form a legal framework that underpins the broad structure of administrative action. Thus, APAs are not mere statutes; they are “foundational statutes,”<sup>280</sup> exerting substantial influence on the economy and society. These developments led to two outcomes: national administrative laws, once largely uncoded, now frequently feature general legislation governing administrative procedure, challenging the conventional classification of legal systems into “families” like civil and common law systems.<sup>281</sup>

### B. *Explaining Diversity: Context and Choice*

If there is a general shift towards administrative procedure legislation, attributing diversity to historical and cultural context,

276. Bernard Schwartz, *The American Administrative Procedure Act 1946*, 63 LAW Q. REV. 43, 47 (1947).

277. See André Braën, *Canada et Québec*, in CODIFICATION OF ADMINISTRATIVE PROCEDURE, *supra* note 1, at 77 (noting the absence of any type of general framework governing administrative procedure).

278. Bermann, *supra* note 1, at v.

279. See in particular EDUARDO GARCIA DE ENTERRIA, *LA LENGUA DE LOS DERECHOS: LA FORMACIÓN DEL DERECHO PÚBLICO EUROPEO TRAS LA REVOLUCIÓN FRANCESA* (1996) (describing the influence exerted by the language of rights imposed by the French Revolution).

280. Bignami, *supra* note 2, at 875.

281. See RENÉ DAVID, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* (8th ed. 1982). But see *contra* Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997) (calling for non-Euro-American-centric classifications).

while plausible, demands deeper examination. This explanation has some merit, considering that Spain, Austria, and several Central and Eastern European countries, including Czechoslovakia and Poland, have upheld their historical legislative regulation of administrative procedures despite significant political changes. However, this reasoning warrants further investigation. It does not fully account for why legal systems, at a certain point in the development, choose to legislate administrative procedures. For instance, Germany's enactment of an APA in 1976 and France's in 2015 marked departures from their national traditions of deferring procedures to the executive or administrative courts. Additionally, tradition alone falls short in explaining, for example, why France has developed a unique legal framework, the *débat public*, for public consultations on infrastructure projects.<sup>282</sup>

The traditional comparison of administrative laws, heavily focused on historical and cultural influences, encounters a fundamental challenge. It rests on a deterministic conception of society, a notion Montesquieu vigorously questioned in the eighteenth century by showing that we are only partially bound by our history and tradition.<sup>283</sup> Montesquieu's insight reminds us that societies are characterized by both continuity and change and underscores the lessons that can be learned from others. In administrative procedure, it is common for national reformers to observe and sometimes adopt approaches from their counterparts, particularly neighboring countries. Exceptions exist, like the United Kingdom's preference for executive regulation and judicial review over statutory regulation, but this stance is becoming more of an anomaly.

Diversity also stems from how legal systems handle similar problems within their APAs, often influenced by differing local conditions and legal traditions. For example, Germany's administrative culture, shaped by Otto Mayer's doctrine of the individual and unilateral decision (*Verwaltungsakt*), is pivotal in its APA. Policy choices also play a role, weighing objectives legislators seek to attain, such as procedural fairness and regulatory efficacy. German legislation's impact is evident in amendments to other APAs, such as Italy's, which now limits the annulment of administrative acts to significant procedural breaches. Nations sharing common values, like the rule of law and fundamental rights, as enshrined both in EU treaties and the European Convention on Human Rights (ECHR), may still diverge in the specific rules they prioritize for embodying these values, influenced by culture and policy.

282. See Yves Jegouzo, *L'Enquête publique en débat*, in *ÉTUDES OFFERTES AU PROFESSEUR RÉNÉ HOSTIOU* 281, 281 (2008) (discussing the elements of strength and weakness); Giacinto della Cananea, *Exit or Voice? Débat Public Goes to Italy*, 25 EUR. PUB. L. 157 (2019).

283. MONTESQUIEU, *L'ESPRIT DES LOIS* 125 (Victor Goldschmidt ed., Flammarion 1985). See also Ana J. Samuel, *The Design of Montesquieu's "The Spirit of the Laws": The Triumph of Freedom over Determinism*, 103 AM. J. POL. SCI. 305 (2009).

However, this does not preclude a consensus on basic principles of procedural fairness and propriety, as demonstrated by the near-universal recognition of the right to be heard and the duty to give reasons,<sup>284</sup> and to a certain degree, transparency for documents held by public authorities.

*C. Explaining Commonality: Functionalism, Prestige, and Diffusion*

We suggest that both internal and external dynamics contribute to the growing similarity among national administrative laws. Notably, the last decade of the twentieth century was rife with debates on convergence and divergence.<sup>285</sup> The concept of convergence, however, faces two challenges. First, it is too broad, failing to differentiate between organic changes within national legal systems and those stemming from EU law. A clear line must be drawn between natural convergence and enforced uniformity.<sup>286</sup> Second, among organic changes, a further distinction must be made between the superficial commonality found in general principles and the substantive differences in detailed procedural rules. At a certain level of abstraction, the right to be heard prior to a potentially adverse decision and the obligation to provide the reasons for that decision might be seen as constants. Yet, to assume this equates to homogeneity in procedural principles across national administrative legal regimes would be an oversimplification. In practice, these principles are subject to nuances and limitations. For example, while some APAs mandate hearings, others merely require written communication between the public authority and the individual. Additionally, the requirement for a “dialogue” varies, with some APAs demanding adequate or good justification from the authorities. It is within these nuances and boundaries that we can recognize a trend towards commonality in European APAs.

This commonality is attributable to three primary factors: functionalism, prestige, and diffusion. Functionalism has long been very important in comparative studies of private law,<sup>287</sup> despite recent critiques, and it holds significance in public law as well.<sup>288</sup> Administrative

284. See *supra* Parts IV.A and IV.C.

285. See Sabino Cassese, *Le problème de la convergence des droits administratifs nationaux: Vers un modèle administratif européen?*, in *L'ÉTAT DE DROIT: MÉLANGES EN L'HONNEUR DE GUY BRAIBANT* 49 (1996) (observing a tendency to converge); Jürgen Schwarze, *The Convergence of the Administrative Laws of EU Member States*, in *THE EUROPEANISATION OF LAW: THE LEGAL EFFECTS OF EUROPEAN INTEGRATION* 163 (Francis Snyder ed., 2000). *Contra* PATRICK J. BIRKINSHAW, *EUROPEAN PUBLIC LAW* 4 (2003) (noting that some years ago “it was very popular to argue for convergence”).

286. Rob J.G.M. Widdershoven, *Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity*, 7 *REV. EUR. ADMIN. L.* 5 (2014); *EUROPEANISATION OF PUBLIC LAW* (Jan H. Jans et al. eds., 2d ed. 2015).

287. See further Ralf Michaels, *The Functional Method in Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 341 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

288. Martin Loughlin, *The Functionalist Style in Public Law*, 55 *U. TORONTO L.J.* 361 (2005) (viewing functionalism as characterized, among other things, by the emphasis on the services to be delivered).

law's evolution in the nineteenth century was driven mainly by two forces. The first was the societal demand for governmental action, especially in areas such as health and welfare, amid growing industrialization. The development of the welfare state in the twentieth century called for new administration to manage the new, increasingly complex, and costly programs.<sup>289</sup> The second catalyst was technological advancement, such as railways and telecommunications, which stimulated debate about adequate regulation. This functional perspective of administrative law was prevalent. For example, reviewing two comparative studies in the mid-1950s, Frederick Lawson observed that "in the field of administrative law all civilized countries have much the same problems and much the same desire for their proper solution."<sup>290</sup> This functionalist account gained further acceptance with the founding of the European Communities, aimed at tackling issues shared by member states.<sup>291</sup>

A functionalist explanation, while valuable, does not entirely account for the role of prestige. The prestige of legal institutions spurred many nineteenth-century reforms, notably the creation of administrative courts in Austria, Germany, and Italy between 1872 and 1890. This was partly a response to dissatisfaction with the judicial services provided by ordinary courts and partly inspired by the esteem of the powerful French administrative justice system. Prestige also played a role in the post-1989 legislative choices of some Central and Eastern European nations, which, in adopting administrative procedure legislation, considered the Austrian and German laws.

The influence of Austrian legislation, in particular, extends beyond prestige to diffusion, a concept that gained prominence in the second half of the twentieth century. The aftermath of the dissolution of the Habsburg Empire saw the emergence of new states, driven not by the dissatisfaction with an ineffective government, but by a commitment to maintain the principles of good governance inherent in the old "mixed" polity, leading them to transplant, with some variations, the Austrian APA.<sup>292</sup> Similarly, since the 1960s, Scandinavian countries have increasingly aligned on the principles of administrative

289. Jerry L. Mashaw, *The Managerial Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 50 CORNELL L. REV. 772 (1973).

290. Frederick H. Lawson, *Review of C.J. Hamson, Executive Discretion and Judicial Control and B. Schwartz, French Administrative Law in the Common-Law World*, 7 STAN. L. REV. 159 (1955). See also Claude-Albert Colliard, *Comparison Between English and French Administrative Law*, 25 TRANSACTIONS GROTIUS SOC'Y 119, 133 (1939) (arguing that "administrative law has everywhere to deal with the same problems").

291. Jean Rivero, *Vers un droit commun européen: Nouvelles perspectives en droit administratif*, in NOUVELLES PERSPECTIVES DU DROIT COMMUN DE L'EUROPE 389 (Mauro Cappelletti ed., 1978).

292. See *supra* Part I.B.

procedure, though without conforming to a singular model or prototype.<sup>293</sup>

*D. Explaining Commonality: The Influence of Supranational Legal Orders*

It is essential at this point to acknowledge the impact of two supranational legal orders: the Council of Europe (CoE) and the European Union, to properly contextualize the discussion. The CoE encompasses a broader membership of forty-seven countries, spanning from the Atlantic to the Urals, and upholds a bill of rights—the European Convention on Human Rights—enforced by a supranational court, the Strasbourg Court. The European Union, comprising twenty-seven nations, is committed to fostering “an ever closer union” among their populations and grants substantive legislative authority to shared institutions. The influence of these supranational bodies has been somewhat overlooked in comparative legal studies, which is unwarranted in light of three key factors. Both the CoE and the European Union are instrumental in defining common standards and providing judicial oversight. Additionally, the European Union specifically exerts influence through its policies towards candidate countries seeking membership.

Regarding the first mechanism, although the CoE lacks legislative authority, its Committee of Ministers’ recommendations reflect the laws of the member states and are often seen as benchmarks for best practices. Moreover, courts are increasingly interpreting domestic legislation in light of these recommendations, thereby promoting adherence to procedural rights in line with the principles established both prior to and in the wake of the ECHR.<sup>294</sup> Among the CoE’s recommendations, three stand out: (i) the 1980 recommendation on the exercise of discretionary powers by administrative authorities which mandates respect for the right to be heard in adjudicative procedures;<sup>295</sup> (ii) the 1987 recommendation concerning administrative procedures affecting a large number of persons defines principles which all member states are required to respect, including the participation of individuals or groups with a potential interest in administrative action;<sup>296</sup> and (iii) a more recent 2007 recommendation on good administration sets out principles for public authorities to act promptly and to

293. See Herlitz, *supra* note 28, at 687 (noting that these countries have both similarities and differences, attenuated by their increasing cooperation).

294. See BIRKINSHAW, *supra* note 285, at 4; BERNARD STIRN, *VERS UN DROIT PUBLIC EUROPÉEN* 45 (2012) (both noting the influence of the Council of Europe on the substantive and procedural laws of its members).

295. Comm. of Ministers, Recommendation No. R. (80) 2, 316th Mtg. (Mar. 11, 1980) (concerning the exercise of discretionary powers).

296. Comm. of Ministers, Recommendation No. R. (87) 16, 410th Mtg. (Sept. 17, 1987) (on administrative procedures affecting large numbers of persons).

provide adequate opportunities to participate in procedures affecting individuals.<sup>297</sup>

In the European Union, national authorities face stricter obligations to respect rights enshrined in the EU Charter and treaties like the Aarhus Convention, on access to information, public participation in decision making, and access to justice in environmental matters.<sup>298</sup> They must also adhere to various sector-specific regulations. For example, in liberalized public utilities sectors, such as electronic communications, gas, and electricity, EU harmonization directives mandate that national regulators maintain independence and fulfill duties of fairness, openness, and transparency in the exercise of their powers.<sup>299</sup>

Judicial oversight, too, has a strong impact on administrative procedure. In many countries, a substantial number of cases are argued on ECHR grounds, for example those concerning expropriation of private property. A key principle is due process under Article 6 ECHR.<sup>300</sup> What began as a narrow interpretation confined to judicial proceedings has expanded to encompass various forms of administrative adjudication, such as disciplinary and sanction-imposing procedures.<sup>301</sup>

Within the European Union, the Court of Justice ensures adherence to procedural standards through both indirect and direct methods. Indirectly, it has held that the absence of a procedural safeguards, like the duty to give reasons, hampers effective judicial protection, contravening rights upheld by Article 6 and those belonging to common constitutional traditions. Such omissions also detrimentally impact the enforcement of substantive treaty rights, such as the free movement of persons and the right of establishment for professionals.<sup>302</sup> Directly, the Court assesses the decision-making process,

297. Comm. of Ministers, Recommendation No. R (2007) 7, 999bis Mtg. (June 20, 2007) (concerning good administration).

298. See in particular Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, arts. 4, 6, June 25, 1998, 2161 U.N.T.S. 447 (concerning access to documents and participation). See further Maria Lee & Carolyn Abbott, *The Usual Suspects? Public Participation Under the Aarhus Convention*, 66 MOD. L. REV. 80 (2003).

299. Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services, 2002 O.J. (L 108) 33, as amended by Directive 2009/136/EC, 2009 O.J. (L 337) 11.

300. European Convention on Human Rights, art. 6 Nov. 4, 1950, 213 U.N.T.S. 221 (protecting the right to a fair trial, as well as to the conclusion within a reasonable term, for both civil and criminal proceedings). See further on the article's applicability, Paul Craig, *The HRA, Article 6 and Procedural Rights*, 2003 PUB. L. 753. For a comparative analysis of the Convention's impact, see A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (Alec Stone Sweet & Helen Keller eds., 2008).

301. Hence the question about whether the *ne bis in idem* prohibition applies to administrative pecuniary sanctions: see *Grande Stevens v. Italy*, App. Nos. 18640/10, 18647/10, 18663/10, 18668/10, and 18698/10 (Mar. 4, 2014), <https://hudoc.echr.coe.int/?i=001-141794>.

302. Case 222/86, *Unectef v. Heylens*, 1987 E.C.R. 4097, ¶ 15 (holding that "effective judicial review must be able to cover the reasons for the contested decisions").

including the necessity of hearings or reason-giving, especially when national authorities implementing EU law may conflict with Article 41 of the Charter of Fundamental Rights of the European Union.

The third mechanism concerns the assessment of application for EU membership. At the 1993 Copenhagen meeting, the European Council set criteria for applicant states, including stable, functional, democratic institutions capable of ensuring the protection of the European Union's fundamental values and meeting the administrative obligations of membership.<sup>303</sup> Subsequently, for some Central and Eastern European countries, the adoption of an APA became part of their pre-accession strategy. Although the European Union does not require its members to adopt an APA, it has shaped the development of administrative procedure standards. Membership carries significant implications, further emphasized by the 2007 Treaty of Lisbon. Article 197(1) TFEU states that "effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest."<sup>304</sup> The provision's exclusion of "any harmonization of the laws and the regulations of the Member States"<sup>305</sup> clarifies that it is harmonization, not approximation of national laws, that is precluded. This has led to a heightened interest in regulating national agencies' administrative procedure. More generally, EU law has a twofold effect: There is a spillover effect for the resolution of domestic issues which are comparable to those under EU regulation and promotes bringing the public law systems across Europe "closer together."<sup>306</sup>

#### CONCLUSION

Focusing on administrative procedure legislation offers several advantages. First, it highlights the transformation in administrative law over the last century, moving from the absence of codification to establishing a general framework. Second, it reveals the pivotal role the Austrian codification of 1925 played in initiating this shift, providing a blueprint for other legal systems. Third, there is evidence that national legal systems are not insular entities; rather, the development of administrative law is characterized by cross-cultural exchanges and legal transplants. In more recent times, integration processes within the European Union and the Council of Europe have

303. See also Consolidated Version of the Treaty on European Union, art. 49, 2010 O.J. (C 83) 13 (laying down the procedure for a new member to join).

304. Consolidated Version of the Treaty on the Functioning of the European Union, art. 197(1), May 9, 2008, 2008 O.J. (C 115) 47.

305. *Id.* art. 197(2).

306. See CRAIG, *supra* note 190, at 324; Gordon Anthony, *Community Law and the Development of UK Administrative Law: Delimiting the "Spill-Over" Effect*, 4 EUR. PUB. L. 253 (1998); Armin von Bogdandy, *Common Principles for a Plurality of Orders: A Study on Public Authority in the European Legal Area*, 12 INT'L J. CONST. L. 980 (2014) (pointing out the commonality of principles).

further unified legal systems. Against this backdrop of commonality, national differences sometimes appear more pronounced than before, when an observer noted the “distinguishable shades which mark the individual national setting.”<sup>307</sup> Consequently, while Europe still lacks a model state APA, there is a growing consensus or, more precisely, a common core of administrative procedure.

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307. Fritz Morstein Marx, *Comparative Administrative Law: The Continental Alternative*, 91 U. PA. L. REV. 118, 121 (1942).