ACADEMY OF EUROPEAN PUBLIC LAW

2010 SESSION

GENERAL COURSE

ADMINISTRATIVE PROCESS: THE DIGNITARY AND THE INSTRUMENTALIST APPROACHES

August 30th – September 18th

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E. The course's methodology

(i) Transnational analysis and not comparative law;

(ii) The modernisation of administrative national laws as a common phenomenon which can be abstracted from the single processes;

(iii) Typical ends, values and interests as agglutinative factors of a common basic legal reality in administrative process;

(iv) Problems posed by different legal traditions and by language barriers.

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F. Active participation of the students

Along the second and third weeks, at least one hour per day should be occupied by students speaking on subjects related to administrative process.
Some examples:

(i) Analysis of courts decisions;

(ii) A topic in the framework of a national legal system;

(iii) A topic in a comparative law perspective (might be presented by two students);

(iv) Report on a law (or a project of law) on general administrative process, dating from the last ten years;

(v) Comparative structural analysis of two laws of the same legal order, the one on general administrative process and another one on a specific administrative process.

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I

THE NATURE OF CONTEMPORARY ADMINISTRATIVE LAW: STRUCTURE, DYNAMIC VECTORS AND ESSENCE

§ 1 – The Structure of Administrative Law

§ 2 – The Dynamic Vectors in Administrative Law

§ 3 – Change and Continuity: the Unmodified Essence of Administrative Law

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§ 1
THE STRUCTURE OF ADMINISTRATIVE LAW

A. The Classical Perspective on the Structure of Administrative Law

1. *The historical emergence of Administrative Law as a branch of law in the XIX Century:*

- **France**: institutional separation, authority power and satisfaction of collective needs;

- **Germany**: self-legal-limitation of the pre-legal State's power through a typical form of administrative action.

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2. *The classical structure of Administrative Law*

(i) A three sides reality: the organic, the dynamic (functional) and the substantive (material);

(ii) The Public Administration in the organizational sense as the main reference: Administrative Law as the system of norms on the administrative organization, its specific ways of action and substantive powers and duties;

(iii) The central relevance of the specific forms of action: *acte administratif / Verwaltungsakt / provvedimento amministrativo*; *contrat administratif / contrato administrativo*.

The consideration of these forms as isolated legal realities.

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B. The Contemporary Perspective on the Structure of Administrative Law

3. *A more complex and sophisticated structure*

(i) A four sides reality: the judicial review of administrative action side.

- The increase of the role of the courts in Continental Europe;

- The development of a particular justice for administrative disputes in England.

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3. *A more complex and sophisticated structure* (Cont.)

(ii) The loss of weight of the Public Administration in the organic sense as the main reference.

- Multiplication of situations of exercise of public authority by private entities;

- Multiplication of instances of self-regulation;

- Material administrative legal relationships between private entities;

- Growing difficulty in defining Public Administration as a whole.

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3. *A more complex and sophisticated structure* (Cont.)

(iii) Integration of the specific forms of administrative action («*règlement*», «*acte administratif*», «*contrat administratif*», plans) in durable, time evolving, more comprehensive realities:

- legal administrative relationships;

- administrative process.

The process as a procedural relationship.

(iv) Administrative Law not only as the law peculiar to Public Administration, but also the law of citizens (and other prive entities) entitled to administrative positive or negative actions.

(v) The growing difficulty in defining the material or substantive essence of administration (to administrate).

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§ 2
THE DYNAMIC VECTORS IN ADMINISTRATIVE LAW

A. The Context

1. *The global Administrative Law*

- Constitutionalisation without constitutionalism;

- An Administrative Law without the State;

- Convergence on basic criteria for decision-making processes in the light of shared imperatives of good governance.

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2. *The International Administrative Law*

(i) Administration and administrative courts in international organizations;

(ii) Treaties on Administrative Law matters

Ex: WTO Convention on public procurement;

(iii) Injunctive resolutions from international organizations bodies

Ex: UN Security Council's Resolutions on the regime of sanctions.
Resol. 1267 (1999) and 1333 (2000)
Resol. 1390 (2002): authorizes the Commitee on Sanctions to define criteria and procedure for the listing: «*Guidelines of the Commitee for the conduct of its work*», aproved by Resol. 1735 (2006). The list aproved under this frame by the Commitee is injunctive for Member States (vg their Public Administrations) according Articles 25 and 48, Sect. 2, of the UN Charter.
Resol. 1730 (2006) instituted an appeals board (*focal point*) and an appeal procedure.

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3. *The European Administrative Law*

(i) European Law principles of supremacy, direct effect and interpretation of national legal norms in conformity with European Law;

(ii) Implementation effectiveness («effet utile»);

(iii) A mixed objectivistic and subjectivistic perspective;

(iv) Coordination of the Union's and the Member States administrative services;

(v) A process of reciprocal development: the importance of Member States common legal traditions; the reception of other national legal orders concepts through the EU Law; the «spill over» effect.

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4. *The Constitutional Administrative Law*

- The increase of constitutional norms on different aspects of public administration;

- The constitutionalisation of general principles of administrative law;

- The Fundamental Rights as source of restriction of administrative powers and of duties of protection through organizational and procedural mechanisms and as interpretative standards;

- The cross-fertilization of Constitutional and Administrative Laws.

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5. *The interaction between General Administrative Law and Special Administrative Laws*

- Examples of S.A.L.: Urban planning and construction, environment, health, energy;

- General part and special parts interrelated in manifold ways;

- Adaptation of general concepts and permanent structures: dialectical process of deduction and induction.

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6. *The growing porosity between Public and Private Law applicable to administrative action*

- Public administration: a teleological and not an ontological distinction;

- European law: depreciation of the organization form as determining factor: imposition of public law constraints independently from it;

- Cross-over subjects and overarching strategies of regulation.

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B. The Sources of Administrative Law

- ECHR;

- The growing importance of EU sources;

- The direct applicability of constitutional norms;

- The proportional diminution of conditional closed textured norms in statutory law in favour of finalistic norms;

- The proliferation of administrative rule-making.

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C. The Subjects and Relationships

- The (relative) subjectivization of Administrative Law: the individual as bearer of rights and duties and not as an object of administrative action;

- The dogmatic revival of the theory of legal relationship: a lasting structure open to actualization;

- Complementarity of theories of legal administrative relationship and of administrative legal forms;

- The importance of multipolar relationships;

- The overlapping of substantive and procedural legal administrative relationships.

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D. The Administrative Tasks

- «*State's» tasks*: material ambits of action aiming at the fulfilment of collective needs commissioned to the State by Constitution or statute;

- Historical variability of State's tasks;

- «*Administrative tasks*»: State's tasks entrusted by statute to certain public or private entities to be carried out through Administrative Law means;

- Heuristic concepts on Administration's main centering on certain types of tasks: «*Eingriffsverwaltung*»; «*Leistungsverwaltung*»; «*Infrastrukturierende-*» or «*Steuerungsverwaltung*»;

- The peculiar forms of action of «steering Administration» (*«Steuerungsverwaltung*»): informations, warnings, recommendations; awards, monetary incentives, co-operation, mediation.

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§ 3
CHANGE AND CONTINUITY: THE UNMODIFIED ESSENCE OF ADMINISTRATIVE LAW

A. The Dialectic Between the Respect of Individual Rights and the Efficient Satisfaction of Public Interest

- The subtle and varying balance between general welfare and individual interests;
- The double purpose of Administrative Law as the defence of the individual against administrative authority powers and the granting of such powers to ensure an efficient governance;
- Administrative law as a system of democratic public accountability and not only of individual protection;
- Inadequacy of a merely defensive conception in front of the proliferation of multipolar constelations of interests;
- The reinforcement of the defensive role of Administrative Law thanks to the qualification of some public subjective rights as Fundamental Rights.

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B. The Framework Shaped By the Main Principles of État de Droit/Rule of Law, Separation of Powers and Democracy

-«***État de Droit***» *(Staatsrecht*): banishment of arbitrariness, legality («juridicity»), individual guarantees, accountability of public powers***;***

- Separation of powers: the submission of administrative action to legislative steering *(«indirizzo»*) and to judicial review; the duty of judicial non-intrusion in the «area of administrative ultimate responsibility»***;***

- **Democratic principle**: transparency, participation and accountability.

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C. The Central Position of the Principle of Competence

- The central position of the priciple of autonomy in Private Law;

- The central position of the principle of competence in Administrative Law:

↓ Administration as a function: a duty to act for the fulfilment of predetermined goals;

↓ Forms and effects of administrative action primarily determined by legislation.

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D. The Substantive Inequality of Powers in the Administrative Legal Relationship

-«*Droit Administratif: un droit d'inégalité*»**;**

- Legal position of the Administration: powers of authority and/or the limitations arising from the principle of competence and from the legal regime of typical forms and procedures**;**

- The compulsory effect of administrative adjudication («*acte administratif*», «*Verwaltungsakt*», «*provvedimento amministrativo, acto administrativo*»);

- The «*intra vires*» power must be exercised in a compatible way with subjective rights.

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E. The Dual Function of Administrative Law Norms as Standards of Conduct and as Patterns for Review

- Administrative Law as a system of decision-making (organic; procedural and substantive);

- Administrative Law as a review standard (its limits in face of merely finalistic (programmatic) norms and open-textured norms: areas of (never absolute) ultimate responsibility of Administration (except for political accountability).

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II
THE ADMINISTRATIVE PROCESS AS A STRUCTURAL ELEMENT AND AS A DYNAMIC VECTOR IN CONTEMPORARY ADMINISTRATIVE LAW

§ 4 – The Administrative Process as a Structural Element

§ 5 – The Administrative Process as a Dynamic Vector

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§ 4
THE ADMINISTRATIVE PROCESS AS A STRUCTURAL ELEMENT

A. Administrative Process: An Irreplaceable Element and Concept of Administrative Law as a Normative System

- Predetermined, rational, sequential data gathering and processing leading to the preparation, enactment and (if necessary) enforcement of an administrative decision (adjudication, contract or rule-making);

- Interface for an organized exchange of information and opinions between the different administrative concerned agencies and bodies and the individuals and other private entities holding or representing legally recognized interests that might be affected or served;

- A framework for the balancing operation proper of the exercice of discretion, comprehending the choice and evaluation of relevant elements of the real life situation and their analysis in accordance with fundamental principles, either substantive (proportionality, equality, legitimate expectations) or procedural (care);

- Through transparency and participation, a factor of legitimation and an instrument of the principle of democratic participation.

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B. Systemic Elements of the Administrative Process

- Procedural principles or maxims;

- Participants;

- Scope (formal and material);

- Phases;

- Rights and duties of the participants as such;

- Sanctions.

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C. A Definition of Administrative Process

The sequential structure, established by juridical principles and rules, for the conduct on the part of the administrative authorities and the private parties with which they have dealings, with a view to the preparation, adoption and execution of administrative decisions through the gathering and processing of relevant information.

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D. Linguistic Problems

- The administrative process and the process for judicial review of administrative action are not to be confused: they correspond to different functions and to the exercise of different State powers in most constitutional systems characterized by the separation of powers;

- Semantic differentiation in some legal systems:

  Italy : *procedimento / processo amministrativo*

  Germany : *Verwaltungsverfahren / Verwaltungsprozess*

  Portugal : *Procedimento administrativo / Processo administrativo*

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D. Linguistic Problems (Cont.)

- The special case of France: the administrative courts form part of the administrative structure: procedure in the courts and procedure in the «active administration» do not represent the exercise of constitutionally separate powers.

  However, the term *procédure* is differently qualified as «*contentieuse*» (litigious or judicial) or «*non contentieuse*» in order to distinguish the organizational settings.

- In American and English legal systems, the terms «process», «procedure» and «proceedings» are used indiscriminately to refer ... either *procedural forms of administrative action* ...

  ... or *judicial proceedings for direct review of administrative action*.

  «*Judicial review*»: judicial process as relates to Administrative Law.

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§ 5
THE ADMINISTRATIVE PROCESS AS A DYNAMIC VECTOR

A. The Dual Itinerary in the Formation of a Super-Principle of Due of Fair Administrative Process / Procédure Administrative Non-Contentieuse Équitable in the Framework of the «Euro-Atlantic Constitutional Arch or Circle»

«*Due / fair*»: connected but specific connotations:

Due process: US Constitution (Fifth and Fourteenth Amendments): no person may be deprived of «life, liberty or property without due process of law».

Origin: early common law rules on *natural justice*: «*audi alteram partem; nemo iudex in causa sua*».

Literal meaning of *due process*: *fair procedure*.

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A. The Dual Itinerary (...) (Cont.)

Contemporary English Administrative Law :

emergence of a broader implication to *fairness*, leading to different sets of procedural norms for distinct forms of decision-making.

With «due or fair», we pretend to encompass the broad reality in common law legal systems.

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A. The Dual Itinerary (...) (Cont.)

CHARTER OF FUNDAMENTAL RIGHTS OF EUROPEAN UNION
(CHARTER)

Art. 41, 1:

«Every person has the right to have his or her affairs handled impartially, *fairly* and within a reasonable time by the institutions, bodies, offices and agencies of the Union».

Correspondence to «fairly» in other official versions:

in French: «*équitablement*»
in Portuguese: «*equitativamente*»

In the light of non-anglo saxon legal traditions, *procédure équitable/processo equitativo* may alude to normative values not necessarily restricted to the English doctrines of fair process and even less confined to the scope and safeguards of the American due process.

Reason why, speaking in a transnational perspective, we prefer «*due*, *fair* or *equitable*» administrative process.

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A. The Dual Itinerary (...) (Cont.)

Anglo-saxon legal orders:

a core principle, developed in the frame of judicial process, is gradually transposed to the scope of administrative action and step by step adapted to this one's proper circumstances: the deductive itinerary.

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A. The Dual Itinerary (...) (Cont.)

Continental European legal orders:

moving from the particular to the general over several stages: 1. The courts lay down isolated procedural safeguards and requirements; 2. Statutes (some with the nature of codes of administrative process) pick up the isolated topics arising from case law and doctrine and organize them under a dualistic dignitary and utilitariam approach; 3. A tendency to incorporate in Constitutions rights of participants and functional requirements in the administrative process; 4. With Article 41 (1) 1 of the Charter, an unitary foundation consisting of an overarching principle of fair / equitable administrative process: the inductive itinerary.

B. The Deductive Itinerary in the United States

1. *The Constitution*

Constitution (5th and 14th Amendments): «No person shall ... be deprived of life, liberty or property without due process of law».

MASHAW: An open textured clause, «wonderfully vague» for the purpose of affirming a values frame to the procedures required by increasingly interventionist government.

Definition of the doctrine of due administrative process by the American Supreme Court: focussed on two fundamental aspects:

1. Scope: delimitation of the interests protected;

2. Proceedings: definition of the procedural safeguards required.

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2. *Application of the due process clause to the administrative process*

- in a climate of uncertainty, caused by the uselessness of part of the traditional thinking concerning the judicial process;

- not wholly consistent and linear, as a result of the piecemal way in which the courts define the law.

Negative consequences: uncertainty and insecurity.

Positive consequences: flexibility, allowing different approaches depending on socio-economic circumstances and dominant conceptions.

3. *Scope of due process*

- Interests protected from administrative action:

Abstract posible alternatives for the understanding of «life, liberty and property»:

a) Expression of all individual interests deserving the protection of law and potentially vulnerable to adverse impact from a government decision;

b) Specific limited areas, not embracing all the elements of the individual legal sphere.

The courts – and, in particular, the Supreme Court – preferred the second one, analysing wether each concrete interest fits comfortably in «liberty» or «property».

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(i) Scope of «liberty» interests

Mayer v. Nebraska, 262 US 390, 399 [1923]:

> «Liberty» denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children all of them «... essential to the ordely pursuit of happiness by free men».

Despite specifications of this kind, the Court has experienced difficulties in determining the scope of liberty interests for the purposes of due process.

PIERCE / SHAPIRO / VERKUIL (p. 243-247): the court has been retreating from its previous broad interpretation, limiting the scope of protection accorded to interests previously qualified as «liberty». An «inconsistent» treatment of this subject.

(ii) Scope of «property» interests

Initial reluctance of the Supreme Court to develop an approach that would take «property» beyond the narrow meanings of the right to ownership.

Problem posed by entitlement to welfare provisions: «privileges and not rights».

This severe limitation to the benefits of *due process* in the light of modern living conditions was set aside, in 1970, in the leading case of *Goldberg v. Kelly*. For the first time, the Supreme Court held that a welfare payment should be considered as a property interest within the scope of the due process clause.

But the assumption that the inclusion of the interest within the scope of *due process* required a judicial-type hearing prior to terminating welfare benefit led the Court, confronted with the pratical impossibility to apply such requirement to millions of agency decisions, to seek to limit the possible reach of the *Goldberg* decision, circumscribing, without much systemic logic, the number of interests classifiable as «property».

4. *The procedural safeguards required by due process*

(i) Avoiding an impasse

- The dilemma posed by the extension to administrative process of a due process clause shaped in accordance to the judicial trial form, instead of other more flexible and less costly procedural instruments for participation, transparency and the absence of bias.

Avoiding an impasse: *Mathews v. Eldridge*, 424 U.S. 319 (1976): a middle course offered by the methodology of *interest balancing*.

Due process: a principle (and not a rule): according to the Court,

> «*Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances*».

(ii) The structure of the balancing test.

«... Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail».

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- The balancing test (Cont.)

Criterion for weighting up the sacrifices required from conflicting interests: the prognosis of a malfunction due to the insufficiency of procedural requirements.

Pratical concordance

between interests to
- preventing the risk of a legally incorrect outcome;
- making a judicious employment of bureaucratic and fiscal resources.

(iii) Subsequent difficulties in maintaining coherence with the *Mathews* precedent :

- Judges' hesitations as to the legislator's margin of autonomy in deciding on the appropriateness of the procedural solutions;

- Criticism of the cost-benefit analysis, accused of leading to unpredictable judicial valuations or of adopting an utilitarian perspective and loosing sight of the dignitary approach.

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5. The distinction between due process procedural rights and non-constitutional procedural rights

The role of the Constitution seen more as one of limiting legislative discretion

than

as one of a central core from which the entire legislative construction of the system will irradiate.

The two main legislative sources of administrative process for each agency:

- *Administrative Procedure Act 1946 (APA)*;

- Organizational law governing the particular agency.

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APA : is **not** a codification of minimum procedural safeguards required for adjudication within the scope of protection of due process clause:

The thinness of statutory procedural safeguards leaves the judge with the responsibility of extracting any other requirements from the due process clause (depending on the balance of interests present in each case).

The due process clause **does not apply** to rule-making.

C. The Deductive Itinerary in England

1. *The hesitating initial course*

- The common law principle of *natural justice* as starting point.

- Without a written Constitution and without the pervasive effect of the principle of separation of powers, a distinct model from the one of the USA has taken shape: a much tardy awareness of the difference between the functions of the executive and the judiciary.

- The transitional concept of «*quasi-judicial decision*».

- A first propensity of the courts to consider that *natural justice* would not apply to administrative action, leaving this immune from judicial review.

- *Ridge v. Baldwin* [1964] AC 40 as the turning point:
  application of *natural justice* to all administrative action capable of generating harmful effects on individuals.

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2. *Development of «fairness» (or duty to act fairly)*

(i) The scope

- No need to classify situations in terms of categories like *liberty* and *property*. No discrimination between any potentially affected individual rights or interests.

  Setting aside of the classical distinction between *rights* and *privileges*.

- As *fairness* still fits mostly into an adjudicative framework, there is a tendency to extend its scope to other forms of decision-making, such as mediation, arbitration, contract or managerial direction.

  Administrative rule-making is not subject to fairness.

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2. *Development of «fairness» (or duty to act fairly)* (Cont.)

(ii) The procedural requirements

- Old rules of *audi alteram partem* and *nemo iudex in causa sua* now seen as specific applications of the deeper principle of *procedural fairness*.

- With the possible exception of *hearing* (although in many cases *non-adversarial*, *conducted in writing* or *even waived*), no general common law duty requires the employment of any particular procedural safeguards.

  A tendency in that direction with *giving of reasons*.

- Ever more often, statute and European Union Law establish the procedural requirements for certain kinds of administrative action.

- In recent years, particular importance of Article 6 ECHR as a yardstick of procedural fairness for the decision of administrative bodies (*administrative tribunals*).

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3. *Application maxims*

- *Procedural fairness*: a general principle which applies across the spectrum of administrative processes, its precise content being determined in each context;

- Greater flexibility in the administrative process (than in the judicial one), frowning on categorization of cases and making the requirements more closely dependent on evaluation of the facts in the actual circumstances (balancing methodology);

- A set of safeguards deriving from the principle of *procedural fairness*: a) notice; b) oral hearing; c) representation; d) discovery; e) cross-examination; f) reasoned decisions.

- Double spectrum:
  a) Not all the procedural safeguards are required in the same case and sometimes other are mentioned, such as consultation, appeals, time-limits for the making of decisions;

  b) Same of the safeguards (like *hearing*) comprehend different types, varying with the nature of interests being asserted and the different areas of administrative action.

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C. The Inductive Itinerary in the Roman-Germanic Legal Systems

1. *The steps of an inductive evolution*
   Along a period of two centuries

(i) Piecemal affirmation by the courts and, later on, by statute of procedural good behaviour standards.

(ii) Incorporation in laws on general administrative process, the requisites being seen more as autonomous values than as concretions of an unknown super-principle of fair or equitative administrative process.

At the most, separate derivations from the principle of *État de Droit / Rechtsstaat* combined with the purpose of enhancing the quality of decisory outcomes.

(iii) The same piecemal vision underlying the incorporation of some procedural requirements in some Constitutions.

(iv) Article 41 (1) of the CHARTER
(under a not very precise heading: «Right to good administration».

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1. *The steps of an inductive evolution* (Cont.)

- The outcome of the inductive evolution in a super-principle and Fundamental Right:

«The right to have his or her affairs handled *impartially*, *fairly (equitably)* and *within a reasonable time*».

An overarching principle as a point of arrival:

Article 41 (2):

Explicitly refers as concretions some «classical» procedural guarantees («This right includes:»)

- right to be heard;
- right of acess to the file;
- duty of giving reasons.

2. *The dialectic in the itinerary*

(i) The central role of «*acte administratif / Verwaltungsakt / provvedimento amministrativo / acto administrativo*»

- creation or «discovery» of a new legal category rather than the recasting of judicial decisions;

- from a perspective centred in the typical form of exercise of State power, seen as the main instrument of *Rechtsstaat* due to its detailed legal discipline, t he preceding moments appeared merely as «formalities» relating to the decision and not as stages of a process or a space offered for a legal relationship between the individual and the Public Administration.

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2. *The dialectic in the itinerary* (Cont.)

(ii) The contribution of the Italian and Austrian legal doctrines in the interwar years

- Italian scholars

The construction of a theoretical framework for administrative process:

not based on an analogy with the judicial process but on concepts drawn from the general theory of Administrative Law
(↓ legal purpose of administractive conducts; ↓ legal administrative relationship; ↓ administrative act; ↓ instrumental or acessory acts; ↓ functional connections, and so on);

SANDULLI (1940): the process not as the substantive phenomenon but as the manner of its unfolding.

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(ii) The contribution of the Italian and Austrian legal doctrines in the interwar years (Cont.)

- Austrian legal theory

KELSEN´s «Pure Theory of Law»

The State's only existence in Law and through Law and the Law as a dynamic phenomenon creating increasingly detailed layers of rules framed by other norms of higher legal force.

Process: a legal method, governed by its own rules, for pursuing State's functions through the creation of rules, including individualized decisions giving rise to legal bonds: a single legal category.

The more highly developed judicial process as a justifiable model for analogical application to the administrative process (**MERKL**).

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(ii) The contribution of the Italian and Austrian legal doctrines in the interwar years (Cont.)

- Austrian General Administrative Procedure Law (1925, revised in 1959)

Subjective rights in legal proceedings (↓ right of acess to the record; ↓ right to a hearing; ↓ right to the orderly delivery of a decision; ↓ right to know the reasons; ↓ right to enforcement).

- An important difference from judicial process: the inquisitory principle: powers of administrative authorities to assess *ex officio* all the facts they deem relevant to a correct decision (the efficiency rationale).

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(iii) The adoption of new democratic Constitutions based on value systems

- The milestones in the transition to the next stage.

- Despite obvious differences, the Austrian and the Italian constructs shared a positivist and formalist vision of law: «*État legal*» instead of «*État de Droit*»: the legal order as a logical order, not structured by fundamental values.

- Post Second World War Democratic Constitutions (Italy, Germany, France (thanks to the jurisprudence of *Conseil Constitutionnel*), Greece, Portugal, Spain, Brazil, etc):

  Legality no longer a neutral quality; it serves the Law as an idea of value endowed with its own materiality.

  Administrative Law ceases to be an isolated entity and becomes constitutional law put into pratice

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(iv) New laws (codes) of general administrative process

- The «paradigm»: German «*Verwaltungsverfahrensgesetz*» of 1976.
  Influenced others, like the Portuguese Code of Administrative Process (1991/1996) and the Spanish Law of 1992/1999.

- Brazil: Federal Law 9784, of 29.01.1999: enshrines the rights of citizens to whom an administrative decision prepared through a process relates to: ↓ acess to the file; ↓ set out their position before the decision; ↓ to be assisted by legal counsel; ↓ to request the replacement of the agent with decision-making powers by suspiction of partiality; ↓ to the reaching of the decision within legal time-limit; ↓ to notice .

- France: Laws falling short of general laws on administrative process, enunciating a range of common requirements or safeguards
  [Law of 11.07.1979 (giving reasons); Law of 28.11.1983 (hearing)]

- Italy: Law of 7.08.1990, nr. 241, on administrative process and the right of disclosure concerning the documents in the record: ↓ duty to decide by express act; ↓ giving reasons; ↓ notice; ↓ participation; ↓ disclosure.

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(v) Constitutions: inclusion of provisions on safeguards or requirements concerning administrative process

- More commonplace, so far, the efforts of legal scholars and the courts to deduce these safeguards and requirements from other principles *(Rechtsstaat*) or guarantees (for ex. the giving of reasons as a prerequisite of the guarantee of the effectiveness of judicial review).

- Constitution of the Hellenic Republic: ↓ right to disclosure with regard to the information in the process (art. 10(3)); ↓ right to the heard before an administrative decision taken that might affect rights or interests (art. 20 (2)); ↓ right to be given the reasons for it (art. 10 (1)).

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(v) Constitutions: inclusion of provisions on safeguards or requirements concerning administrative process (Cont.)

- Constitution of the Portuguese Republic:
  (probably the one, in Western Europe, with the most precepts on the subject):
  ↓ right to appoint a lawyer (art. 20 (2)); ↓ right to a decision in a reasonable period (art. 52 (1)); ↓ right to participate (on the terms established by law) in an administrative process when decisions may affect the individual (art. 267 (5)); ↓ right to be informed of the proceedings and to notice of the decision (art. 268 (1) (3)); ↓ Administration's duty of giving reasons for decisions that affect rights or legally protected interests (art. 268 (3)).

- Constitution of the Federal Republic of Brazil:
  right of petition to any authorities (art. 5, (XXXIV), a)); ↓ right to be heard in processes where administrative penalties may be applied (art. 5, (LV)); ↓ right of parties to obtain the official transcription of the record (art. 5 (XXXIV), b)); ↓ principle of publicity (art. 37).

- All these Constitutions enuntiate a series of separate safeguards and requirements without organizing them in an intentional and systematic manner around fair/equitative process as the central and common denominator principle.

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E. Subsisting Differences and Lines of Convergence

1. *Subsisting differences*

(i) The relation between the statutory laws on administrative process and the Constitutions: separate worlds or irradiation;

(ii) General or specific scope of the super-principle and/or of its concretions;

(iii) The importance of the trial-type proceedings;

(iv) The assessment on the mix of safeguards and respective degree of severity left entrusted in preference to the first instance judge or to the law-maker, through the choice of special administrative processes, open-textured rules or waiving of the application of general rules (Ex. of waiving: Portuguese Code, 103 (1)).

2. *Lines of convergence*

(i) The *ex officio* initiative of the administrative body;

(ii) Accomodation of the dual aims of individual guarantee and functional effectiveness;

(iii) Dual position of the administrative process concerning Fundamental Rights: either as a subject-matter or as an instrument for the realization of substantive Fundamental Rights

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III
THE SYSTEM OF THE ADMINISTRATIVE PROCESS

§ 6 – The Administrative Procedural Legal Relationship

§ 7 – The Procedural Phases

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§ 6
THE ADMINISTRATIVE PROCEDURAL LEGAL RELATIONSHIP

A. The Administrative Legal Relationship

1. The definition

«*The diachronic system of correlative legally relevant situations between administrative authorities and individuals or corporate entities (or just between administrative entities), bipolar or multipolar, internal or external, respecting to the implementation of administrative tasks and the protection of rights in connection with it*».

(**PROTTO**, 105).

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2. *Theoretical and dogmatic benefits from the use of the legal category of «administrative legal relationship»*
   Amongst others:

- Reconstruction of the principle of legality in intersubjective terms:
  a better balance between liberty/authority; the «administered person» (*l'administré*) and the Public Administration both as holders of reciprocal rights and duties;

- Increased attention to the real life situation underlying the legal discipline;

- Clearer vision of the interrelationship between several legal subjective situations:
  multipolar relationships;

- The diachronic vision;

- Better understanding of the interpenetration of Public and Private legal norms in the framing of one complex situation;

- A larger basis than that provided by the «*acte administratif/ Verwaltungsakt*» to the acess to judicial protection.

B. The Relational Conception of the Administrative Process

- The procedural legal relationship (*Verfahrensrechtsverhältnis*): a structural element of the theory of administrative process.

- A diachronic system of correlative legal procedural situations (powers, rights, reflex protection of interests, duties, subjections, burdens, etc).

- Superposition (but not identity) with the ruled substantive administrative legal relationship.

- Reinforcement of the functional unity of the different moments in the process.

- The adjudicative decision as the fruit of prior interaction: usually, the relationship is there before the moment of adjudication.

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C. The Subjects: The Administrative Duty to Participate Steering the Process and the Right to Participate of Citizens, Other Private Interests Holders and Other Private Non-Political Representatives of Meta-Individual Interests

- The competent administrative authorities and the duty to adjudicate and /or to examine the submissions;

- The private entities to whom administrative authority has been contracted-out:

S. ASSMANN (297): «privatization of the administrative process»

P. CRAIG (137): reluctance of the (English) courts to hold them subject to HRA 1998 or to jucial review («regrettable»).

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C. The Subjects: The Administrative Duty to Participate Steering the Process and the Right to Participate of Citizens, Other Private Interests Holders and Other Private Non-Political Representatives of Meta-Individual Interests (Cont.)

- The holders of the affected private interests;

  Claimants and counter-interested: the right to participate;
  The substantive administrative legal relationship as a basis for standing in the administrative process: an individualized connection with the scope of the adjudication or public contracting.

- The cases of private representation of public and other meta-individual interests

  Meta-individual interests («*interesses difusos*»; «*interesses colectivos*»)
  «*Actio popularis*» in (non-judicial) administrative process: democratic administration beyond multi-party representative democracy.

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§ 7
THE PROCEDURAL PHASES

A. Procedural Legal Requirements and Procedural Discretion

- Public Administration's informal conducts:
  Negotiated preparation of procedures; Intra-procedural agreements.

- Procedural discretion in a proper sense
  Margin of appreciation left by the lawmaker to the administrative competent body in the shaping of certain aspects of the administrative process.

- Procedural discretion and inquisitorial procedure

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A. Procedural Legal Requirements and Procedural Discretion (Cont.)

Different solutions in the national legal orders

Examples: § 10 *VwVfG*
«Whenever any special legal norms do not command a form for the process, the administrative process is not bound to specific forms. It must be simple, adequate and swiftly carried through».

USA *APA* (*Administrative Procedure Act* of 1946):
formal and informal adjudication; formal and informal rulemaking.

An agency is required to use formal adjudication only when Congress has directed it to do it. According to *APA*, three categories of rulemaking: without any procedures, informal and formal. An agency is required to use formal rulemaking only when its organic act requires it to do so.

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B. The Phases

- **Set-up**
  Officious or by demand
  Discretionary or mandatory

- **Interim measures**

- **Gathering of information**
  Enquiries
  Forms of evidence
  Co-operation of the participants
  Administrative co-operation

- **Preparation of the decision**
  Evaluation of the information
  Hearing

- **Decision**

- **Notice**

- **Implementation**

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C. The Reasonable Time Clause

- CHARTER:

Art. 41 (1) «Every person has the right to have his or her affairs handled impartially, fairly and *within a reasonable time* ...».

(ECHR, art. 6 (1)): «Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et *dans un délai raisonable*, par un tribunal indépendant et impartial ...).

- Importance of the time factor (the «adequate decision time»)

The need of a «time consciencious Administration» (*Zeitbewusstsein der Verwaltung*)
S. ASSMANN, 56

The Administration's ties with the present (*Gegenwartsgebundenheit der Verwaltung*)

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C. The Reasonable Time Clause (Cont.)

- Double role of procedural time-limits.
  - ↓ the role of a guarantee: access to courts in case of administrative inertia.
    double edged protection in multipolar relationships (standstill periods).

  - ↓ timeliness as a condition of efficiency.

- Introduction of «fast tracks» in already existing administrative procedures.

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IV
THE DUAL FINALISTIC NATURE OF THE ADMINISTRATIVE PROCESS

§ 8 – The Rationales of the Administrative Process and Their Tendencial Overlapping

§ 9 – The Protection of the Individual From Public Power

§ 10 – The Satisfaction of the Public Interest through the Efficiency of the Administrative Action

§ 11 - The Consequences of Procedural Faults

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§ 8
THE RATIONALES OF THE ADMINISTRATIVE PROCESS AND THEIR TENDENCIAL OVERLAPPING

A. The Rationales

1. *The «guarantistic» rationale*

- Ancient «*audi alteram partem*» and «*nemo iudex in causa sua*», brough up to date in the guise of *participation* and *impartiality*, aim at the protection of individuals confronted with the exercise of decision-making powers of the administrative authorities.

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1. *The «guarantistic» rationale* (Cont.)

- Most of the requisites of administrative process: directly designed to protect the individual in his or her procedural relations with the administrative authority.

This, for instance, is the case of the guarantees of ↓ an unbiased authority, or ↓ notice of the bringing of proceedings, or ↓ being represented by counsel, or ↓ having access to the record, of ↓ presenting evidence, of ↓ being given notice of proposed action and of presenting reasons why it should not be taken, of ↓ receiving notice of the final decision and its reasons, and, in due course, of ↓ appealing to another administrative authority.

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2. *The administrative efficiency rationale*

- Efficiency: a legal value centred in the idea of rationality in the allocation of public means.

- The administrative process as a normative program for reaching a balance between a methodology for good outcomes (legally and technically correct solutions) and an economic management of public resources.

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3. *The democratic accountability as a third rationale ?*

The contemporary democratic deficit: insufficiency of the democratic public life vital force when only based on electoral processes and indirect representation.

Participative democracy and democratic access to information on the State's tasks as complements.

The administrative process as a platform for the participation of interested individuals, of citizens and of NGOs in the conduction of administrative policies and for the diffusion of information thereon.

B. The Tendencial Overlapping

1. *The easy combination*

- The fundamental purposes of the administrative process are closely intertwined and may easily be combined in many instances. **NEHL**, 23.

  Example: «Giving reasons»

  - ↓ respect for the dignity of the affected person ↓ and better conditions to assess about judicial review and for its effectiveness;
  - the need for a methodic assessment of the relevant points of fact and of law and of reasoning for the purpose of meeting the mandatory solution or finding the best one;
  - Enhancing the transparency.

2. *The conflict of rationales*

- An up-grading of the protective rationale may run counter to administrative efficiency. For instance:
  - The «dialogue requirement» (with its protective and democratic dimensions) and the risk of capture of the decision maker.
  - Extent (subjective and functional) of participation and reasonable decision schedules.

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3. *The reasonable balance between rationales*

An example: the Administration's duty to collect evidence: it may not be urged to make *excessive* efforts in sampling the relevant data in the individual case.

Instead, a reasonable balance has to be struck between
- the interest in individual procedural protection; and ...
- ... the need for accurate, economic and efficient policy implementation in the public interest.

The proportionality standard: a careful balancing to be carried out; in first instance, by the lawmaker and, then, by the judiciary.

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§ 9
THE PROTECTION OF THE INDIVIDUAL FROM PUBLIC POWER

A. Legal Protection as a Process Finality

One of the State's tasks: a duty of protection and guarantee of the objective legal order and of rights and other legal positions of the participants in the legal order (*sujets de droit*): «*Gewährleistungsaufgabe*».

This duty is to be carried out not only by the lawmaker and the judge, but also by the Public Administration. **S. ASSMANN**, 15.

This being the case, it is natural that, as the administrative process is the formal way to administrative action, it will be conceived and applied as a protection instrument.

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A. Legal Protection as a Process Finality (Cont.)

The goal of protection moulds many of the process'es elements: for instance, the right to participate, the interim measures, the sequential order of some phases, the rules of evidence.

Protection through:

- the discipline emerging from formality (JEHRING: «Formality, the sworn enemy of arbitrary, and the twin sister of freedom»);

- the granting of process rights and the recognition of legally protected interests.

B. The Relevance of the Administrative Process to Fundamental Rights

1. *Administrative procedural fundamental rights*

Constitutional procedural safeguards

- directly affirmed in the constitutional text or by constitutional custom;

- derived by the courts and doctrine from other constitutional principles and/or rights.

Principle of *Rechtsstaat*: requisites of a fair process became «*Prozessgrundrecht*». **SCHLINK**, 26.

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2. *The administrative process as an instrument for the protection of non administrative procedural Fundamental Rights*

GOERLICH (*Grundrechten als Verfahrensgarantien*, 79)

«The unbreakable link between material Fundamental Rights and Process Law; ... the guarantee and fulfilment of Fundamental Rights depending from their protection thanks to the structure of the process».

«*Status activus processualis*»: the faculty of defending interests protected by Fundamental Rights through participation in a fair (administrative) process.

The procedural side of basic liberties: the imperative of a legislative definition and of an administrative steering of the administrative process according with the fulfilment of the Fundamental Rights that may be involved.

«Irradiating effects» of Fundamental Rights and the «duty of protection» by the State.

The direct derivation of process requirements from their instrumentality towards Fundamental Rights (without the need to resort to «*Rechtsstaat*» principle).

C. Procedural Safeguards

- National legal systems: different catalogues around the same main values.

- Procedural rights and procedural fundamental rights:
  Inherent value of certain procedural principles transcends all questions of instrumentality, even with regard to the protection of the individual's interest in a certain outcome:

  Two degrees of protection:
  - of individualized interests in general;
  - of human dignity of the individual as participant in the process.

- Under the Constitutional mantle, the «protective approach» becomes a «*dignitary approach*».

  «Euro-Atlantic arch or circle»: human dignity as the supreme value imbued in every fundamental right. «FR» distinguish themselves from other norms or rights because they are directly instrumental to the value of human dignity, from which they derive their unity of meaning.

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C. Procedural Safeguards (Cont.)

The gradual incorporation in some constitutional texts of due of fair or equitable administrative process or of its mostly common held principles (such as those of «hearing», «representation», «disclosure» or «reasons») signifyes recognition of the essential role of these norms and rights, in the preservation and promotion of human dignity.

MASHAW (162,163):
The need to distinguish between outcome-oriented motives and process-oriented arguments.

«We do distinguish between losing and being treated unfairly».

«... Process affronts as somehow related to disrespect for our individuality, to our not being taken seriously as persons».

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D. Administrative Process and the Exercise of Substantive Discretion

- The limits of judicial control increase the importance of a right procedural methodology, in the framework formed by the administrative process, for the purpose of the exercise of discretion.

- General assumption: the statute gives a discretionary power to a certain administrative authority in order that, on the face of the concrete case's particular circumstances, a solution may be found that is adequate for the satisfaction of the public interest aimed at by the power's concession.

- As a consequence: the Administration has the duty to «find» a (not «the») right sense for the decision through an objective and unbiased analysis of the relevant public and private interests present in the case.

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D. Administrative Process and the Exercise of Substantive Discretion (Cont.)

- «Objective impartiallity» or «principle of care»: requires the Administration to collect and consider all the relevant facts and legal points of the individual case and not taking into consideration irrelevant points.

  Relevancy: the «adequacy» or «aptitude» maxim of proportionality, referred to the public interest aimed at by the norm that grants the discretionary power.

  Importance, for this purpose, of the data collection and classification moments during the process and of the possibility for the interested parties to comment on that subject.

- «*Ermessensmissbrauch*»: one of the modalities of «discretion faulty application»: taking into consideration aspects that should be irrelevant, or vice versa.

- Inevitable blending of procedural and substantive legality; and, also, of protective and efficiency approaches.

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§ 10
THE SATISFACTION OF THE PUBLIC INTEREST THROUGH THE EFFICIENCY OF THE ADMINISTRATIVE ACTION

A. A Notion of Administrative Efficency

- Efficiency:

«A relation between the goal and the means that will allow meeting the goal in the best way possible with the minimum means possible» («*Zweck-Mittel-Relation*»: **STELKENS**, 58) ...

... or

... *«The relation between costs (the personnel, finantial and logistic resources utilized) and the goal aimed at (benefits, sucess)»*. **S. ASSMANN**, 284.

- Administrative efficiency:

The goals are public interests, qualified in the Constitution or by statute.

The choice of means and of their mix appertains, in the first place, to the lawmaker and, in the measure he didn't do it, it becomes an object of discretion for the administrative body legally empowered to develop the activity.

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- A legal principle or a sheer policy standard ?

In some legal orders, at least for certain purposes, it is a legal principle:

Ex: Portuguese Constitution, art. 267 (5):
«The processing of the administrative action will be ruled by a specific law that will ensure *the rationality of the utilization of means by the departments* and the participation of the citizens in the decision making that concerns them».

This is a directive adressed to the lawmaker (and not, directly, to the administration).

As a constitutional principle, efficiency will have to be taken into account for the purpose of the interpretation of administrative procedural law.
Difficulties arising from the indeterminacy or vagueness of the concept, specially in the field of constitutional judicial review.

Such maxims like celerity, simplicity, praticability, flexibility may help as finalistic standards, but their vagueness is also obvious.

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B. The Administrative Process as a Means to Efficiency

- Not all the principles and rules of administrative process may be explained as standards of due/fair/equitative process.

  Example: the officious inquiring and deciding principle (U*ntersuchungsgrundsatz*; deciding *extra petitum*).

  In some national legal systems, this administrative capacity amounts to a principle of administrative process, albeit not (at least directly) one of due/fair/equitative process. Its main and direct purpose is the realization of public interests.

- Aspects in the statutory devising of the administrative process that may contribute to administrative efficiency: ↓ methodical sequence of phases and interventions; ↓ cooperation between the concerned bodies; ↓ participation, envisaged as a means for gathering relevant information; ↓ the duty to give reasons ruled as a way to make the competent body be methodical in the identification and balancing of the relevant interests; ↓ simplicity; ↓ celerity (amongst others).

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- In the administrative action, efficiency means, mainly, the aptitude of the process to provide correct outcomes:

Instrumental rationality as one (not «the») goal of the administrative process blueprint: procedure evaluated in terms of its propensity to prevent error of fact or of law (an error on a relevant fact amounts to an error of law in administrative adjudication).

But, this appraisal refers to a vocation, not to an absolute aptness: usually, the process contributes to, but doesn't ensure, a correct outcome.

MASHAW: «In *Eldridge* it became clear that the public interest was not an interest in getting every decision right, but rather an interest in a generally reliable process of decision» (104).

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C. The Values of the Public Procurement Process and the Electronic Process

Important reference: *Directive 2004/18/CE, of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.*

General principles: Art. 2: Equality of treatment, non-discrimination and transparency («principles of awarding contracts»).

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PREAMBLE

(12) «Certain new electronic purchasing techniques are continnually being developed. Such techniques help to increase competition and streamline public purchasing, particularly in terms of the savings in time and money ... Contracting authorities may make use of electronic purchasing techniques, providing such use complies with the rules drawn up under this Directive and the principles of equal treatment, non-discrimination and transparency ...».

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ARTICLE 1 - DEFINITIONS

(6) «A «*dynamic purchasing system*» is a completly electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification».

(7) «An «*electronic auction*» is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods».

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ARTICLE 38 - ... RECEIPT OF TENDERS

(6) «The time limits for receipt of tenders ... may be reduced by five days where the contracting authority offers unrestricted and full direct acess by electronic means to the contract documents ... from the date of the publication of the notice ... specifying in the text of the notice the internet address at which the documentation is acessible».

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ARTICLE 42 - RULES APPLICABLE TO COMMUNICATION

Establishes requisites and guarantees in relation to the electronic transmission and receipt of tenders and of requests to participate.

- IN SUM:
  Electronic means: ↓ simplification; ↓ better publicity of the procedures and of the contracts; ↓ better efficiency and transparency of the procurement processes (special administrative processes).

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§ 11
THE CONSEQUENCES OF PROCEDURAL FAULTS

A. The Administrative Procedural Norms: An Aunomous Role or a «Serving Function»?

Different perceptions according to legal cultures.

1. *The «serving role» perception*

Main assumptions:

- The basic aim of the administrative action is the substantive correctness of decisions;
- Rules of administrative process perform a role as instruments for such substantive correctness;

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1. *The «serving role» perception* (Cont.)

- The disrespect of those rules only matters if and while it impairs the substantive correctness, specially the protection of Fundamental Rights;

- Mistrust of labelled «excessive proceduralism»: admissibility of amending procedural faults (v.g. giving reasons) in the course of the judicial review;

- Courts are suposed to protect individual substantive rights: what matters in court is to ascertain if the citizen has the alleged substantive right and, if such is the case, condemn the Administration to perform the corresponding duty, and not as much participatory values or the observance of some ritual formalities, which are above all conceived for reasons of good administrative management.

2. *The autonomous role perception*

Main assumptions:

- The need of an uncompromising treatment of the infringement of «due process (sub) principles»: that is to say, procedural fundamental norms, essential to the constitutional vision of «individuals as autonomous and self-respecting moral agents» (**MASHAW**, 171);

- Mistrust of prudential elaboration and devaluation of the procedural economy principle.

- Seems to be the perception corresponding to the judicial review tradition in «natural justice cases»: quashing order (former *certiorari*): rendering the *ultra vires* administrative decision as if it never had any legal effects (void).

  As the court does not impose its own decision, the matter may go back to the original body to reconsider afresh.

  But a quashing order is a discretionary remedy.

  CRAIG: 777, 778.
  LEYLAND/ANTHONY: 452-456.

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- Some decisions of European Community Courts about the *absolute* relevance and *inviolability* of the right to be heard, disregarding the so-called «harmless error principle» and annulling the administrative measures without asking wether the procedural defect would actually have altered the substantive outcome of the decision-making process.

  Probably, an implicit recognition of the «natural justice philosophy» originating in the common law.

  NEHL: 97, 98.
  Case C-135/92, *Fiskano v. Commission* [1994] ECR I-2885, par. 44.
  Case C-304/89, *Oliveira v. Commission* [1991] ECR I-2283, paras 17, 21.

2. *A pragmatic perception based upon the balancing of principles*

(i) Seminal distinction between «fully bound powers» (*compétence liée*) and discretionary powers

- «Fully bound» powers

On the face of the real concrete life's situation, the applicable statutory and regulation norms impose one sole substantive decision, which has been taken notwithstanding the disregard of an administrative procedural Fundamental Right;

- «Fully bound» powers (Cont.)

  Face to face with the lack of an alternative on the substance, no rational purpose for quashing the administrative decision seems likely when it is sure that this will have to be taken again in the same sense.

  How to conciliate, then, the constitutional principle of legality with the procedural fundamental right, ensuring the systemic unity of the legal order?

  The answer lies in the Public Administration's liability for moral damages and, eventually in mechanisms of political accountability (Ombudsman, for instance).

- Discretionary powers

Substantive legality loses strenght as a principle competing with the procedural Fundamental Rights (diminution of its scope).

By the contrary, the weight of such rights (and principles) augments: in the lack of a legal determination of the decision's sense, the correctness of the evaluation made along the process becomes essential.

- Only logic reasons for disregard of procedural faults in the exercise of discretion

  (a) The incidental achievement of the purpose of the procedural requirement;

  (b) When, in the face of concrete circumstances, no other decision might have been taken (very exceptional cases, like reduction of discretion to zero - «*Ermessensreduktion auf Null*»).

  Apparently, a better solution than the last wording of §46 *VwVfG*: «... *Wenn offensichtlich ist, dass die Verletzung die Entscheidung in der Sache nicht beeinflusst hat*».

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V

THE ADMINISTRATIVE PROCESS AND THE JUDICIAL ADMINISTRATIVE PROCESS

§ 12 – The Different Natures of Administrative Process and Judicial Administrative Process

§ 13 – The Functional Connection between the Administrative Process and the Judicial Administrative Process

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§ 12
THE DIFFERENT NATURES OF ADMINISTRATIVE PROCESS AND JUDICIAL ADMINISTRATIVE PROCESS

A. The Nature of the Judicial Administrative Process

1. *The jurisdictions*

Definition of Judicial Administrative Process: «*The system of courts, procedures and remedies focussed on the judicial settlement of disputes arising from legal administrative relationships*».

«Judicial» : employed in a broad sense: the case of the French «*Contentieux Administratif*».

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- Monism or dualism in the systems of Courts

(a) *Dualism inside the judiciary*
(Germany, Italy, Portugal)

(b) *Dualism with the administrative judges outside the judiciary*
(France)

(c) *Monism* : one only judiciary
(England: increasingly attenuated: - Reform in 2000: an «Administrative Court» inside the High Court)

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- «Administrative Tribunals» (England)

Refashioning, in 2007, of the former institutions in a single system with structural coherence, comprising first tier and an appelate second tyer (Upper Tribunal).

Institutional separation between executive and judicial branches of government.

A single route of appeal to an appelate division for all tribunals.
«Tribunal Judges»
LEYLAND / ANTHONY (159-174)

Visible convergence with the French model; but still, very important differences:

(a) the judicial review originary jurisdiction of the Hight Court;

(b) an intricate net of actions for judicial review and recourses in appeal from the Upper Tribunal to the High Court or the Court of Appeal.
CRAIG (266-274)

2. *The procedures*

- The more dualistic a system is in regard to the courts, the more dualistic it tends to be in respect of procedures, and vice-versa.

- Most national systems combine the use of administrative procedure and civil procedure actions for the judicial settlement of administrative disputes.

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- In the national judicial adminstrative process systems historically departing from the French model of «*Contentieux Administratif*, the nowadays trend is for enlarging the catalogue of actions and remedies in a way that will not allow the non-existence of judicial protection due to holes in the actions and remedies catalogue.

  (Examples from national systems to be given by Students).

- The enlargement of categories of actions and of the range of remedies generates a much more active functional connection between the administrative processes and the judicial administrative processes.

B. The Main Differences Between the Administrative and the Judicial Administrative Process

(a) Different State's powers and functions: Executive/administration; Judiciary/ judicial review;

(b) The institutional setting: Public administration / courts;

(c) The different kinds of impartiality required from the decision-maker;

(d) The different procedural positions of the Public Administration: a party to the administrative procedural relationship but also having the responsibility for conducting the process and for making the decision / a mere party with an equality of arms status in front of the private party and without decision-making powers (which belong to the court).

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B. The Main Differences ... (Cont.)

(e) The political accountability of the decision-maker in the Administrative Process / the independence and lack of political accountability of the judge;

(f) Prominence of the inquisitorial principle (*Untersuchungsgrundsatz* or *Inquisitionsmaxime*) in the Administrative Process / and of the dispositive principle (*Verfügungsgrundsatz* or *Dispositionsmaxime*) in the Judicial Administrative Process;

(g) Different categories of final acts: administrative adjudication (*acte administratif / Verwaltungsakt*), public contract, administrative rule, plan, material operation, in the Administrative Process / a judicial ruling in the Judicial Administrative Process;

(h) Different orientations in time: to the present and to the future, in the administrative action formalized through the Administrative Process / to the past through the final settlement of a lingering dispute in the Judicial Administrative Process.

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§ 13
THE FUNCTIONAL CONNECTION BETWEEN THE ADMINISTRATIVE PROCESS AND THE JUDICIAL ADMINISTRATIVE PROCESS

A. «Ex Ante» Influence of the Administrative Process upon the Judicial Administrative Process

- «Locus standi» and intervention of third parties
  (multipolar relationships);

- Determination of the respondent authority;

- Duty to give reasons
  ↓ helps the eventual applicant to estimate the opportunity of initiating judicial review and to decide about the grounds of the claim; ↓ assists the courts in performing their supervisory function.

B. Intersecting Between both Kinds of Process

1. *The «classical period»*

- Classical model of the «Contentieux Administratif».

Judicial intervention only a *posteriori* of the administrative adjudication
and
with the sole purpose of quashing the offending decision, rendering it retrospectively null. (*recours contentieux en annulation*);
Possibility of, by demand of the claimant, the granting , by the judge, of a typical form of interim relief: suspension of the efficacity of the questioned «*acte administratif*» («*sursis à éxécution*», nowadays «*référé en suspension*».

- In principle:
  (a) No intersection before the administrative adjudication;
  (b) Intersection only in the course of the phase of the enforcement of the administrative decision by the administrative authority.

2. *The present day trend*

- Possible effects from the judicial administrative process over the administrative process: destructive, steering, hindering; suspensive or substitutive.

- Destructive effects: a ruling quashing an administrative adjudicative decision (*acte administratif / Verwaltungsakt*), an administrative rule or an administrative contract:

  Renders retrospectively null the constitutive act formed in the frame of the administrative process.

- Steering effects: mandatory rulings, enjoining the adressee authority to exercise a power which it has not exercised in the procedural time-limit, or has refused to exercise in the demanded sense, has exercised in an erroneous sense needing to be substituted by a correct one (either legally predetermined or discretionary):

Creates the duty to reopen the administrative process and to take a discretionary decision according to a correct methodology, or a decision with the legally mandatory content declared by the judge.

- Hindering effects: prohibition ruling, enjoining the adressee authority to abstain from taking or enforcing a certain administrative decision or rule, or from concluding a contract, or from practising some other legal or material conduct; such rulings can be issued either in a principal action with the purpose of settling the administrative dispute, or as an interim measure:

An effect upon the administrative process of preventing its commencement, or its evolution in a certain sense, or of imposing its termination.

- Suspending effects: as an interim measure.

- Substitutive effects: the creation, through a judicial ruling, of legal effects which, in principle, correspond to the statutory powers of an administrative body – (licensing, mostly).

  Enforcement of a former mandatory ruling which has not been observed.

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VI
NATIONAL, EUROPEAN AND GLOBAL ADMINISTRATIVE PROCESS

§ 14 – The European Administrative Process

§ 15 – The Global Administrative Process

§ 16 – Intertwining of National, European and Global Administrative Process

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§ 14
THE EUROPEAN ADMINISTRATIVE PROCESS

A. The European Judicial Review as the Catalyst for Constitutionalising Administrative Process Principles

- The national Administrative Process Laws are more and more put in the frame of the principles of European Union Law.

- A comprehensive codification of EC administrative decision-making would be difficult, due to the particular exigencies displayed by distinct domains of policy implementation (competion proceedings, for instance).

  But certain basic process rules have been being recognised as a common standard of reference: the rights ↓ to be heard, ↓ of access to the file and the ↓ duty to give reasons, are now classified under the category of principles of good administration (as well as the rights ↓ to an impartial and ↓ reasonable time-bound decision-making.
  CHARTER, Art. 41 (1) (2)

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- Application by the national Administrations while implementing EC law.

Spill-over effect: a tendency towards recognising the universal character and the «constitutional» significance of those legal principles.
NEHL, 5.

A powerful driving force vested in the EU Courts. Practices of the Member States, when acting as «Community Agents» in the field of EC competence, gradually subjected to a common standard of procedural principles of «good administration».

The task of these courts: to find a reasonable balance between the progressive development of procedural constraints and the administrative leeway needed for efficient policy implementation.

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B. The Normative Sense of «Good Administration»

- *White book on governance*, 2001
(COM (2001) – 428, in http:// eurlex.europa.eu/LexUriServ/site/it/com/2001/com 2001_0428 it 02.pdf)

Governance: «*norms, procedures and actions with an influence on the way in which powers are exercised at the european level*», «Handbook on good practices»:

- transparency;
- coherence;
- participation.

Elements of reference to the European policies: efficacy, timeliness and proportionality.

Comment: mostly, objective standards for sound administrative policies...

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- Juridical self-sufficiency of «good administration» as a legal principle.

Two non-irreconcilable levels:

↓ a general standard with innovative irradiation capacity;

↓ a legal value with an aptitude to the linking of procedural principles (hearing, disclosure, reasons, etc).

In a perspective of future, the main interest lies in the irradiation capacity. The systemic linking role should belong to the due/fair/equitable process principle.

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- Some angles of «good administration» as an autonomous standard:

The hesitating position of the EU courts:

(a) The principle of good administration does not bestow by itself rights to the individuals, except when it expresses specific rights, like the right to have his or her affairs handled impartially, fairly and within a reasonable time ...
CFI, 4.10.2006, Case T 193/04, *Tillack v. Commission*, ECR, 2006, II, 3995.

(b) Cases when the principle has been evoked as a possible autonomous procedural standard for review in the absence of the visible offence of other more identifiable principles:

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(Judicial direct application of the duty of good administration (Cont.))

(b1) Duty to take into account all the relevant circumstances and to evaluate them with diligence.
CFI, 13.07.2006, T-413/03, *Shandong Reipu Biochemicals Co. Ltd. V. Council,* ECR, 2006, II, 2243.

(b2) In anti-dumping procedures, the Commission, as the inquiring authority, cannot exempt itself from the onus of reuniting evidence and it cannot transfer it to the other party because that will constitute a blatant violation of the principles of diligence and good administration (*Shandong*);

(b3) Duty to co-operate – within certain limits – with the private party, for instance registering in a *procès-verbal* (minutes of the meeting) a claim orally presented.
CFI, 15.03.2006, T 15/02, *B.A.S.F. AG v Commission*, ECR, 2006, II, 497;

(b4) Reasons of good administratiton may justify that the competent body will take into account facts and evidence presented to it by an interested party after the end of the time-limit.
ECJ 13.03.2007, C-29/05 P, *UAMI v. Kaul GmbH* in http://www.curia.europa.eu

(b5) Duty of the administrative body to require from the interested party only the information necessary to enquire about the offence under examination and to exclusively utilize the indispensable information.
CFI, 12.12.1991, T 39/90, *Samenwerkende Elektriciteits- produktiebedrijeven, N.V. v Commission*, ECR, 1991, II, 1497;

(b6) Duty of non disclosing information covered by professional secrecy.
CFI, 5.04.2006, T.279/02, *Degussa A.G. v Commission*, ECR, 2006, 897.

(b7) The Commission offends the duty of communitarian good administration by divulging to the press information harmful towards a company which has not by then suffered any sanction.
ECJ, 18.09.2003, C-338/00, *Volkswagen v. Commission*, ECR, 2003, I, 9189.

In common, in relation to all these points:

The offence of a good administration duty autonomously considered has an invalidating effect of the administrative adjudication only when it can be demonstrated that, without such an offence, the decision would have had a different content.
SIMONATI, 163-190.

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C. Future Perspectives

(a) Need of systemic consolidation of the principle of good administration;

(b) Need of a clearer distinction between procedural principles (notice, disclosure, hearing, reasonable time, bias, etc) and substantive principles (like equality of treatment, proportionality, legitimate expectations).

(c) Need of a progressive clarification of which, among the «good administration» corollaries have a primary guarantistic essence (the components of the fair or equitative administrative process principle) and those corresponding in the first place to objective conditions for efficient administrative policies («good administration» in an objective sense);

(d) Need of clarification of the different invalidating aptness of procedural principles with a clear-cut profile and strong roots in the national legal systems (like hearing and giving reasons) and others, maybe with the reservation to the first group of the category of Fundamental Principles and Rights;

(e) Need for a more precise definition of the participation proceedings;

(f) Need of a deeper reflexion about the consequences of the non-observance of the reasonable – time clause;

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§ 15
THE GLOBAL ADMINISTRATIVE PROCESS

A. The Importance of the Administrative Process in Global Administrative Law

- Scholars of global administrative law have so far focused mostly on «equivalents or potential equivalents to procedural administrative law».
  DYZENHAUS, *Accountability* ..., 2.

- Extreme diversity of the subject-matters and fluidity of the organizational structures in the field of transnational regulatory systems.

  The level where the convergence of basic criteria is easiest is therefore that of techniques for action or decision-making process in the light of the shared imperatives of good governance.
  CASSESE, *Oltre lo Stato*, 51 et seq.

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- In global administrative law, due process values interconnect with the wider methodology of administrative adjudication, rule-making and contracting.

  However, the almost universal acceptance of basic administrative process requirements has moved fastest in the field of the protection of the individual from the wrong exercise of authority powers.

- Gradual formation of a *ius commune* resulting from the convergence of domestic and regional legal systems, in particular throughout the «Euro-Atlantic Constitutional arch or circle». But the phenomenon may also be observed in other important areas of the world (Japan, India and Australia, for instance).

- In front of highly disparate situations and of the absence of structured systems of sources of law, the law has in part evaded the dominance of the State to return – as at the time when the *ius commune* or *common law* took shape – to contemplation of «what ought to be» *(Sollen; dever – ser*) determined through reflexive, theoretical and value oriented recognition achieved through theoretical debate between lawyers commited to discovering the logic of what is reasonable.
  RUY DE ALBUQUERQUE, 752 et seq.

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B. The Globalization of Due or Fair or «Équitable» Administrative Process

- It is not due to chance that, at the start of the XXIst Century, we have seen:

(a) The emergence of written norms of constitutional or equivalent value, such as Article 41 of the CHARTER;

(b) Seminal judicial decisions, such as the judgment of the ECJ in the Kadi case;

(c) Scattered procedural rules, adopted by transnational regulatory structures, which recognize that interested parties in administrative decision-making have the right to a pre-decision hearing and also impose to administrative adjudicators the duty to give reasons.

These are all consequences of the circulation, within the community of legal scholars and practising lawyers, of methods and ways of shaping the legal universe. Despite the ever continuing debate, sources of reference have been adopted which are regarded as inalienable.
HÄBERLE: «Common legal thought» (*Gemeinrechtsdenken*).

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- Enshrinement of due/fair/equitable process in global administrative law: reflects the ability of contemporary jurists to overcome the «strong introversion» in their domestic legal cultures and to see in the public law doctrine a field for the free movement of methodologies, concepts and values drawn from other environments but which merit analysis and use on a much broader scale.

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- The nature of many entities which today take part in the exercise of transnational administrative activity: widespread democratic deficit within the organizations and broad margins of appreciation with regard to standard clauses:

  importance of the – to certain extent – offseting role of participatory and transparent proceedings in adjudication and rule-making models.

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- Easiness in circumventing – at the Global Administrative Law level – problems posed, in domestic systems, by historical antecedents, in relation to the scope of the principle and the requirements of its implementation.

- Overlapping of inductive and deductive routes in the construction of due/fair/equitable administrative process in global law.

  (a) the importance of the inductive route;

  (b) The ECJ Kadi judgement as an historical step in the deductive route.

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§ 16
INTERTWINING OF NATIONAL, EUROPEAN AND GLOBAL ADMINISTRATIVE PROCESS

- A developing process of reciprocal influences: reception and integration in the construction of a more complex system of Administrative Law.

- Examples like the ones of Europe and the USA serve as an irrefutable demonstration that, in the contemporary world, it is not possible to conceive of administrative activity being carried out without procedural parameters, assuring a degree of compatibility between the aims of individual protection and efficient satisfaction of the public interest.

- When the logic of the system transforms the means for assuring personal protection into essential factors for satisfactory achievement of the public interest, the due/fair/equitable administrative process cannot but be regarded as a legal imperative, albeit, perhaps, on a minimalist scale.

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- Face to face with the pluralist structure of National, European and Global Law, the Public Law Theory allows us to conclude that, in each one of these levels, due/fair/equitable administrative process is either a Fundamental Right or is not a right.

Its nature as a general clause does not allow for immediate enforceability.

The role of this concept is therefore that of a «right as a whole» (*Recht als Ganze*) a right consisting of a bundle of right positions.

- The irradiation of rights from a «mother right», in which only the rights generated from the original core are sufficiently precise in content to be enforceable, is a typical feature of Fundamental Rights.

  Only they present simultaneously the nature of an objective norm as a principle and of a subjective claim as a right.
  SARLET, 141 et seq.

- In addition, because they are also principles, Fundamental Rights are «*prima facie* rights», and therefore non immutable entitlements, because they can be displaced, at least in part, by competing principles, through balancing in the light of the specific circumstances of the case.

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- In many sectors of global administrative law, it may prove problematic to classify certain propositions as «fundamental», due to the absence of a structure of sources headed by a charter endowed with formal constitutional force.

  The inclusion in such global legal layers of «*as a whole*» and «*prima facie*» principles, such as due/fair/equitable administrative process, points to a worldwide «constitutionalisation without constitutionalism».