

## TOWARDS A THIRD GENERATION OF ADMINISTRATIVE PROCEDURES

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### Abstract

Every country needs a system of making initial administrative decisions, a system of administrative adjudication, and a system of administrative rulemaking. These systems give rise to a large number of bewilderingly diverse administrative procedures. This chapter proposes a methodology to classify these procedures from a historical and comparative perspective, through the identification of three *variables* and three *models* of administrative procedures (generations or species). This taxonomy is further explained in the Introduction (I). On this foundation, this work then develops a contextualization of contemporary administrative law and new modes of governance, which is necessary to understand third-generation administrative procedures (II). Finally, these three generations are exemplified in Part III.

### I. A Taxonomy for administrative procedures. Three variables and three models.

Every country needs a system of making initial administrative decisions, a system of administrative adjudication, and a system of administrative rulemaking. These systems give rise to a large number of bewilderingly diverse administrative procedures. This chapter proposes a methodology to classify these administrative procedures from a historical and comparative perspective. To do this, we must first organize them according to three *variables*:

- a) Procedures merely implementing or applying substantive law and detailed statutes and rules (for example, a license to be granted without discretionary leeway), or, on the contrary, procedures designed to introduce or to establish new decisions on situations that have not been previously encountered or foreseen by statutes and regulations (i.e., urban planning procedures). *Law-applying tool vs. law-creating tool.*
- b) Inquisitorial or adversarial procedures in which the gathering and processing of information is mainly carried out by the administration itself (i.e. a sanction procedure), or, in contrast, the information process is carried out in collaboration with other administrations or private parties (i.e., procedures for the authorization and supervision of medicinal products for human and veterinary use in the European Union). *Ex officio investigation principle vs. shared information process.*
- c) Procedures carried out by competent authority alone in the main policy stages (priority setting, resource allocation, planning and drafting, final decision, implementation, enforcement, monitoring, evaluation and the like), as opposed to procedures in which others in addition to the competent authority, whether state or

non-state actors, participate, at least to some degree, in these stages and operate in a collaborative mode. An example of the first kind is that of executive rulemaking procedures conducted by administration without relevant consultation. Examples of the latter are procedural requirements under the REACH regime in the European Union.<sup>1</sup> *Autarchic administrative process vs. heterarchical administrative process.*

This chapter identifies three *models* in common use around the world that involve different combinations of these variables. These models are here called “generations” (or “species”) of administrative procedures.

The product of first-generation procedures is an *individual decision* that affect individual rights. The product of second-generation procedures is an executive *rule* or *regulation*., made by administration or government in a hierarchical way. In both cases administrative procedures are conducted by administration according to a traditional method of governance. It consists of binding laws that take everything into account, programming and steering all administrative action down to the smallest detail. It is a pyramidal administrative hierarchy, whose procedures are merely tools to apply the law, as part of a centralized top-down regulatory process. On the contrary, the products of third-generation procedures are not only *individual decisions, rules* or *regulations*, but also *procedural components* to be founded in different policy-making and implementation stages (such as standard-setting, evaluations, certifications, monitoring and the like). These procedures are conducted in a collaborative way. From this point of view, three models of administrative procedures can be distinguished:

- a) The first, and traditional, generation uses implementation procedures for making individual decisions (whether initial decision or administrative reconsideration), where gathering and information processing is mainly carried out by the administration itself. The procedure works as law-applying tool, the “courtroom-style” procedure, and it is the standard procedure for initial decisions made according to previous substantive criteria established in the law, and for adjudication. Most of the APAs around the world respond to this generation.
- b) The second generation employs gathering and information processes with limited participation and consultation, or without a true dialogue between parties and stakeholders in rulemaking procedures, that is, the rulemaking procedure is based mainly on information provided by the responsible authority (i.e., an executive regulation made through hierarchical administrative procedure implementing statutes, or an executive or presidential order). Rulemaking is mainly a part of a centralized top-down regulatory process.
- c) Finally, the third generation of administrative procedures consists of a collaborative method for making individual decisions and for rules and regulations, in which

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<sup>1</sup> See Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (available at <http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:02006R1907-20160203>).

This regime is based on principle of industry responsibility and thus, it imposes an informational burden on industry, in other words, it implements the “privatization” of procedural investigation. It establishes guarantees of transparency in registration, electronic information exchange procedure, etc. It is geared toward a collaborative environment for all the actors involved: member states, NGOs, the European Commission and others actors. The implementation period is as important as the decision-making period. Further explanation at <http://echa.europa.eu/regulations/reach/understanding-reach>.

other administrative or private actors not only collaborate in varying degrees in the process to gather the relevant information, but also participate in one or more of the procedural stages, and in which these procedures are open to develop new solutions that are not previously foreseen by the law (i.e., environmental impact assessment, strategic environmental assessment procedures in the EU, or environmental permit procedures<sup>2</sup>). Rules and decisions to be made are not discovered in the law, but rather invented or created in the procedure. Procedural requirements may be imposed to private parties participating in the regulatory cascade.

*Collaboration* between administrations, and between administrations and the private sector, is a core principle of the third generation. It focuses on bringing together and engaging critical stakeholders and administrations at a national and transnational level. Inter-agency and public-private collaboration is intended not only to improve participatory legitimacy (given the fact that the competent administration has a relevant discretionary leeway), but also to obtain more in-depth information from relevant actors, and to let them to participate in the regulatory cascade, thereby improving the efficacy and relevance of the regulations established. In many cases, administrations cannot make decisions in a vacuum, because they need external input from other administrations or private sector entities; they need their knowledge and cooperation. The most distinctive character of this third generation is defined not by control on the administrative process, but by this necessary collaboration. The underlying model of administration is not that of an autarkical and hierarchical one, but rather one working in synch with other administrations, within and without the national boundaries, and with the private sector.

While in many countries most of administrative procedures are those of first and second generation, third-generation procedures are becoming increasingly relevant.

Each of these generations or species requires a different analytical approach and diverse legal principles and regulations, given the fact that the role and function of administrative procedure change dramatically in each generation. Administration is the “mouth of the law” in the first generation and procedure is merely a tool to find what the law has established and to guarantee citizen rights. First-generation procedures (individual decisions) are derived from an essentially judicial concept of governance, in which laws are applied or interpreted rather than invented. Second-generation procedures (rulemaking) are conducted in a similar way. In both cases, policymaking is always incremental. Third-generation administrative procedures, on the other hand, are a means to find, in a collaborative way, new solutions – to develop new decisions and rules.

From the point of view of the final “product” (administrative acts, rules or regulations), first and second administrative procedures are neither innovative nor creative. On the contrary, the very essence of the third-generation procedures is to make or to create new decisions and regulations. The function and the role of the procedure involved are very different.

The first and second generations respond to a classical model of governance, in which agencies or administrations conduct official business according to established rules, within a defined jurisdiction, and for predetermined instrumental purposes. On the contrary,

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<sup>2</sup> These procedures must be fully coordinated where more than one competent authority is involved, in order to guarantee an effective integrated approach by all authorities competent for this procedure See section 7 of the European Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control.

third-generation administrative procedures respond to the new modes of governance that increasingly characterize the evolving administrative state. All three generations are still needed to fulfill the goals and meet the needs of modern administrative systems. However, the concept, the principles –and the regulations- of third-generation procedures must be seen from a different point of view from that traditionally espoused.

In practice, many of these layers overlap or combine, but I propose this array of types of procedures to facilitate further inquiry. Furthermore, this classification is useful to analyze whether a given administrative procedure should be designed according to the patterns of other generation (i.e., town planning procedures, considered in many some European countries as second-generation procedures, could be designed as a third-generation procedure).

## II. New Tendencies of Contemporary Administrative Law. A Contextualization of Administrative Procedure

The history of administrative law is a history of change and reform. Today, however, we are witnessing changes that are more intense and far reaching than those that have occurred in the past (globalization, privatization, new modes of governance, and the like). Administrative procedure will play a major role given its central place in administrative law and the increasingly proceduralization of the law in an uncertain world. Just to name some examples:

a) Between the global and the national spheres, there are many hybrid bodies and procedures, joint decisions and complex systems.<sup>1</sup> When making and implementing public policies, administration has become international (Zaring 2005, p. 547). In response, the administrative law of global governance seeks to address the consequences of globalized interdependence for efficiency, public accountability and legitimacy. Participation, transparency, or reasons giving are procedural requirements expected to be met at the global level.<sup>3</sup>

Domestic, supranational and global administrative law extends new procedures into these territories:

- One example is the development of “composite” procedures that connect domestic and supranational regulatory bodies. In the European Union<sup>2</sup> these procedures have grown, both horizontally and vertically, in proportion to the increase in the transnational administrative activities of the member states.<sup>3</sup>

- The extension of procedural decision-making principles to international bodies, such as those employed by the Basel Committee when the Basel II Accord was established, exemplifies this response as well.<sup>4</sup>

- New procedures are also needed at an internal level. Given that regulatory domestic systems must take into account their effect at the supranational level,<sup>5</sup> globalization and international collaboration must begin at home. Globalization has a “domestic face”

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<sup>3</sup> Benedict Kingsbury and Richard B. Stewart, 2016.

(Aman 2005, p. 520): the international cooperation of domestic regulatory organizations must be subject to internal mechanisms of democratic legitimacy and cannot be excluded from national accountability. New, globally oriented, domestic administrative law should not ignore internal rulemaking processes involving private and public actors. Even if a policy or rule will ultimately be adopted by a supranational body, national bodies should decide only after having satisfied domestic accountability, transparency, participation and legitimacy standards.<sup>6</sup>

b) Privatization opens new domains. Some problems can be dealt with through a procedural approach.<sup>7</sup>

- For example, if a private organization takes on public responsibilities, it may be required to express public values by means of procedural arrangements, such as operating under due process and fairness requirements (Freeman 2000, pp. 587, 589); or, in standard-setting organizations, assuring balanced representation on their technical committees to avoid the disproportionate influence of more powerful interests (Freeman 2000, pp. 641ff.), or designing internal procedural rules to promote information disclosure, reasoned decision making, fairness (Freeman 2000, p. 643), and the like (private procedure).

- If a government contracts out a function, it might write a contract that sets out the standards to be met. It might, for instance, mandate information disclosure, public consultation and auditing (Freeman 2003, p. 1288).

On the other hand, transposition of procedural components to private actors is also evident. One can find case law or legal provisions<sup>4</sup> that have imposed procedural requirements on private actors, based on the fact that they are behaving as public actors.<sup>5</sup> The Internet Corporation for Assigned Names and Numbers (ICANN) bylaws,<sup>6</sup> which in themselves are a sort of administrative procedure act.<sup>7</sup> In the European Union private companies working in water, energy, transport, and postal services,<sup>8</sup> or many private companies owned by governments,<sup>9</sup> are subject to public procurement law when acting as contracting entities or authorities, that is, they follow procedural requirements.

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<sup>4</sup> For example, the Italian Administrative Procedure Act (*Legge sul procedimento amministrativo*) establishes that private actors must apply administrative principles when they participate in some regulatory activities:

*1-ter. I soggetti privati preposti all'esercizio di attività amministrative assicurano il rispetto dei criteri e dei principi di cui al comma 1, con un livello di garanzia non inferiore a quello cui sono tenute le pubbliche amministrazioni in forza delle disposizioni di cui alla presente legge.*

These principles must be observed by private actors in the same way administrations do:

*L'attività amministrativa ... è retta da criteri di economicità, di efficacia, di imparzialità, di pubblicità e di trasparenza secondo le modalità previste dalla presente legge e dalle altre disposizioni che disciplinano singoli procedimenti, nonché dai principi dell'ordinamento comunitario.*

<sup>5</sup> Jody Freeman, 2000b, p.841.

<sup>6</sup> See articles I-IV (<http://www.icann.org/en/about/governance/bylaws/bylaws-08apr05-en.htm>).

<sup>7</sup> Sabino Cassese, 'New Paths for Administrative Law: A Manifesto', I-CON (2012). Vol. 10 No. 3 [hereafter, 'New Paths'], p. 607.

<sup>8</sup> For instance, these firms are treated in Europe as contracting entities. Public contracts which are awarded by the contracting authorities operating in the water, energy, transport and postal services sectors are covered by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. The current list of contracting authorities and entities can be found in the Annexes to Commission Decision 2008/963/EC (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:349:0001:0192:EN:PDF>).

A general view at [http://ec.europa.eu/internal\\_market/publicprocurement/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/index_en.htm)

<sup>9</sup> See Directive 2004/18/EC 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, article 1.9.

c) Following the classic understanding of the division of powers, legislation, implementation and enforcement are sharply differentiated phases of the traditional regulatory process. In this view, administrative procedure takes a secondary position and is used as a law-applying tool with a “courtroom-style” method of application. Unlike the traditional system, however, the governance model does not insist that legislation, implementation, enforcement, and adjudication be separate stages; but rather it seeks to form dynamic interactions among these processes. (Lobel 2004, p. 391).

The legislature cannot establish substantive criteria on subjects in continuous development. An example of this is the approval of products destined for human and animal use derived from biotechnology and other high-technology processes, or the evaluation, authorization and restriction of chemical substances. The legislature in these cases can only set out values and goals to be met and, no less importantly, specify *how* administrators are to make future decisions, thus indirectly determining what these decisions will be. These new procedures aim to find the best solution in a collaborative, deliberative and integrative way.

## 2. *The Shortcomings of Traditional Administrative Procedure Acts*

APAs are essential for the comprehension of state, administration and society. They contribute to the deciphering of the main principles and values of public law and of society itself.

One might expect that an instrument so fundamental would be subject to constant legislative and theoretical revision (Barnes 2008, p. 16). This, however, is not the case; the vast majority of national administrative procedure statutes date from the second half of the twentieth century and are now out of step with present-day realities (Barnes 2008; Rubin 2003). They say little or nothing about:

- *The private life of public administration*: how the administration should behave and make decisions when it puts away its “uniform” and acts as a civilian, subject to the realm of private law.
- *The public life of private actors*: how private actors should behave and make decisions when their actions are relevant to the public interest, in that they affect members of the public to a significant degree.
- *The public life of administrations when not acting through formal and binding instruments*: how the administration makes informal decisions and soft law, negotiates, seeks consensus, or releases information.
- *The international life of domestic administration*: how the administration should behave and make decisions, as well as whom it represents, when acting beyond the borders of the State.<sup>8</sup>

Many domestic statutes on administrative procedure are outdated because they do not represent much of contemporary administrative action. On the other hand, the new strategies of regulation and governance, like networked administrations system in the EU, require new procedural mechanisms and rules that are much more collaborative, flexible and informal than those now in use in traditional hierarchical models of government. Administrative procedures within governance must contribute to

openness, citizen and inter-agency participation, accountability, effectiveness, and coherence. In addition, constitutional requirements, such as those derived from the rule of law and democracy, must be adjusted to these new methods and scenarios. Classical APAs have yet to discover the vast reach of the new areas (Barnes 2008).

### 3. New Procedural Functions for the New Administrative Law

Traditional administrative law relies on a variety of essentially procedural controls (Salamon 2001, p. 1672) that aim to improve legality, fairness, neutrality, rationality, accountability, participation, due process and transparency. Its purpose is to prevent arbitrariness. Administrative law “uses procedure and structure to shape agency discretion so that it is accountable: agencies must demonstrate to others that they reached their decisions consonant with public law values of rationality, responsiveness, and reviewability. Administrative law, then, ‘regulates regulators.’” (Bamberger 2006, p. 381; Mashaw 2005).

According to McNollgast’s political economic analysis, the US Congress passed the US APA to assure continued influence over policies adopted by the administration. Congress invented procedural rules that could be enforced through litigation by individual citizens, that is, lawmakers used the citizens as agents in their competition with the executive (McCubbins, Noll and Weingast 1987; McNollgast 1999; Benvenisti 2005). The McNollgast theory assumes a legislature and a judiciary that are both independent of the executive branch. It might lead to the conclusion that in parliamentary democracies, such as those in Europe, where the legislature is often quite deferential to the executive, this theory would not work (Benvenisti 2005, pp. 322-323). However, this approach is also applicable in the European Union. The European legislature uses procedural features as a way to control domestic administrations. For example, by requiring strategic environmental assessment procedures (SEAs) for plans, programs and policies, the EU ensures that the environmental implications of decisions are taken into account before those decisions are made. The procedural rules that accompany the SEAs require broad and effective consultation and participation of the public and other administrations, free access to information, balancing, reason-giving by the agency, monitoring, remedial actions and the like, aimed to promote “responsiveness to the people.”<sup>9</sup> Moreover, the European Union legislature controls through procedure not only domestic agencies but national legislatures as well. Under EU law, the SEA and its procedural requirements “shall be carried out during the preparation of a plan or program before its adoption or submission to the legislative procedure” (Article 4.1 Directive 2001/42/EC); that is to say, the SEA administrative procedure is to be followed even when the national parliament is the authority empowered to enact the plan, program or policy.

It must be stressed that influence by the legislature does not only mean control against arbitrariness. On the contrary, APAs can also determine the policy outcomes that emanate from these processes in a positive way. Administrative procedure is not limited to formal adjudication and detailed decision procedures or to formal hearings and notice-and-comment requirements. Judicial review and political control of powerful independent agencies’ discretion, supervision of an agent or rational decision-making processes are features that in no way exhaust the possible procedural requirements. These are mainly functions of a traditional administrative law understood as a “court-centered field focusing on judicial review of agency behavior.”<sup>10</sup> The unique constitutional position of US agencies and their increasing activity over time, on the one hand, and the dominant theoretical

trends in American legal academia, especially law and economics and public choice theory, on the other, might explain the American focus on the defensive aspect of APA.

Administrative procedure has recently taken on affirmative tasks; accordingly, it may be redesigned to comply with other relevant goals, such as the promotion of efficient and effective outcomes, achieved by encouraging analysis from multiple perspectives, careful assessment of regulatory impact, explanation of underlying assumptions, open deliberation of difficult issues and continuous reassessment of past choices. Procedures may also provide for the development of data, the testing of theories, the scrutiny of assumptions, the review of policy results and the refinement of thinking based on experience, that is, a deliberative legitimacy.<sup>11</sup> Procedures do not only seek a “structure-and-process” control of agency decision-making by manipulating, for example, an agency’s decision costs<sup>12</sup> or creating elaborate statutory procedural provisions that constrain administrative discretion. They also provide a strategic “structure-and-process” steering tool for agency decision making by encouraging, for example, effectiveness through careful regulatory impact assessments.<sup>13</sup> Such procedural instruments indirectly affect outcomes even though statutes and rules do not explicitly contain substantive requirements.<sup>14</sup> New procedures are needed to achieve public goals--procedures that have an increasingly relevant regulatory function for the legitimacy and efficacy of resulting outcomes (Bamberger 2006, p. 405).

This illustrates the growing importance of administrative procedure. “Most fights about new legislation focus on the legislation's substance. Yet legislators regularly decide not just what to do, but also when to do it” (Gersen and Posner 2007, p. 544), and how to do it, which procedural safeguards and components to implement, etc.

In fact, procedural rules laid down by parliament to determine administrative performance have implications for nondelegation doctrines (Rubin 2005, p. 210; Freeman 2000, pp. 580*ff.*). The need for procedural rules is in direct proportion to the lack of substantive provisions. These doctrines might well require that statutes specify procedures in cases where detailed substantive rules are not feasible. These statutory provisions should establish both agencies’ structures (how they are to be formed) and procedures (how they are to make decisions and to act). By doing so, legislatures can strategically govern and steer administrators in a desired direction through procedural arrangements.

In sum, the dilemma of statutory regulation is not between “determinate rules” versus “indeterminate standards” to enforce administrative compliance. Rather, the question is whether the values, goals and principles that the legislature seeks to achieve are better attained through detailed statutes or through procedural arrangements that control and steer administrators.

### III. Three Generations of Administrative Procedure. Some Samples

#### 1. Understanding the Transformation of Administrative Procedure

Transforming administrative procedure requires a clear understanding of trends in governance. I propose a systematic approach that groups ultimately administrative procedures into generations or species in light of their method of governance and the underlying model of administration. This classification enables us to establish a common

framework for comparing the wide variety of procedures, to broaden our understanding of new administrative procedures, to promote the exchange of experiences, and to evaluate, foster and guide legal reforms.

In a simplified manner, the evolution of administrative procedure falls into three phases. The first, beginning in the nineteenth century, was the development of procedural requirements for agency decision-making, administrative review and mechanisms of dispute resolution, to prevent unlawful or arbitrary administrative action and to safeguard citizen rights. The second phase took hold in some countries during the 1950s and 1960s; it was the timid emergence of rulemaking procedures, with the remarkable exception of the much more sophisticated 1946 US APA, conceived to regulate influential independent agencies. The third phase is an emergent and still tentative response to global governance, public-private cooperation and dynamic administrative processes that fall between lawmaking and implementation. Today's administration makes individual decisions, adjudicates, makes rules and regulations, and develops innovative and wide-reaching public policies in complex situations, such as those of the public-private and inter-agency collaborations within and beyond national-state boundaries.

Accordingly, I distinguish three “generations” of administrative procedural models. In the first, individual decision procedures are based on a “judicial” model and on hierarchical and command administrations. The rulemaking procedures of the second generation are the result of a mixture of judicial and legislative models and are enacted by hierarchical and authoritative administrations. Finally, the new and most recent generation encompasses public policy making and implementation procedural arrangements derived from new methods of governance, and includes procedures situated in a contemporary nonhierarchical and decentralized environment that promotes public/private and inter-agency cooperation.

Of course, there is no single, rigid method for policy making and implementation, even less one procedure for each policy. On the contrary, this environment is inhabited by a multitude of procedural rules or components that accomplish a wide range of purposes. Whether decisions, rules, assessments, information gathering, collaboration channels and the like are made or generated, third-generation procedures pay much greater attention and analysis to the process itself than the earlier generations, which focus more on the final result and its judicial review. Third-generation procedures conceive of public policy as a process, not a product. They do not aim to extract solutions or decisions embedded in the law, as in first-generation procedures, but rather to discover the solution (e.g., the best environmentally sustainable solution) via procedures. Rules, standards, information, discussions, monitoring, etc., are functions of the administrative process itself.

First-generation procedures promote outcomes that are consistent with legal mandates and within the limits of authority granted to those exercising power. Second-generation procedures aim to provide simple rules governing executive regulations derived from a hierarchical administration. Third-generation policy making and implementation procedural arrangements directly facilitate and channel new needs that arise from contemporary governance models. The first and second generations could be drawn in a formal, linear or staggered structure. A complex intertwined network or web could represent the third.

Mapping generations allows policymakers to assess existing and new procedures. This exercise can help officials not only to decide how to match processes with substantive policy areas, but also to evaluate whether a given procedure should be transferred from one

generation to another in light of desired governance methods.<sup>15</sup> Furthermore, it would highlight cases where the new models do not mesh with traditional methods and help reformers develop procedures that avoid the easy route of imitating traditional court-like processes (Barnes 2008, p. 32). Last but not least, this taxonomy reveals the underlying public law values behind each generation as well as gaps and tensions between competing values (e.g., by extending public values to private decision-making procedures). This would make it possible to create new procedures more systemically or to redesign procedures that need improvement. On the other hand, an understanding of generations of procedure based on governance models and typologies of administration allows us to contextualize the problems to be addressed and to place each procedural component in that particular context. Requirements concerning transparency, accountability, learning processes or participation, for example, can be fulfilled in an enormous variety of ways depending on which governance model applies.

Ultimately, it will be the content rather than any formal classification that determines the choice of procedural arrangements needed. Nevertheless, these three categories may provide guidance. This chapter aims to explain what “third-generation procedures” can be and to demonstrate their value in modern regulatory welfare states.

The two first generations center upon decision-making procedures, be they individual decisions or rulemaking. In most countries these procedures correspond to the traditional command-and-control regulation. These first two procedural systems aim to achieve accuracy in a given case via procedural due process requirements. These procedures ordinarily incorporate a detailed and procedural formality. The third generation is not only about modern decision and rulemaking procedures based on a collaborative model but, more generally, seeks procedural arrangements that make and implement public policies by means of flexibility, informality, public involvement, and new forms of accountability, transparency and mutual learning.

Each generation responds to a specific goal or scenario, that is, newer generations do not render the older obsolete. Legal reforms can improve the operation of the older models, but the most important innovations ought to apply to the third generation. The emergence of new models and methods of administrative regulation and governance require new, qualitatively distinct administrative procedures to deal with them. The collaborative model underlying the new methods of regulation and governance means that all parties must work together to realize their interests and goals in a mutually respectful way; this requires procedures that ensure that all “parties’ interests and externalities are taken into account, negotiation processes are adequately structured, and the bargaining power of stakeholders is addressed” (Lobel 2004, p. 379).

## 1. First-generation procedures

First-generation procedures aim at making individual decisions, such as authorizations, licenses, sanctions, adjudications and dispute resolutions. They seek to guarantee citizen’s rights and to assure a proper application and enforcement of the law. Most of today’s administrative procedure statutes belong to this generation. They arise from a traditional administration and regulatory model. The basic structure of first-generation procedures has remained relatively unchanged since their beginning in the nineteenth century and will probably remain unchanged in the foreseeable future.

As some American scholars explain, administrators adhered to judicial standards and employed quasi-judicial procedures; this was the result of the common law heritage of administrative law, which had also influenced the legal training of officials, as well as the fact that most agencies had spent previous decades trying to satisfy reviewing courts (Grisinger 2008, p. 408). The judiciary, trained in the rigors of procedural regularity, has arguably greater institutional competence to address legal norms such as due process, rationality, equality, public participation and openness than do the other branches of government (Freeman 2003, p. 1335).

Some European scholars stress that the first APAs and case law are overtly inspired by the judicial process. This was the closest model the legislature and the judiciary had as a system of guarantees to resolve disputes between citizens and administrators. These laws, therefore, made special note of the right to be heard, of reasoned argumentation and the like. Due to their familiarity with the adjudicatory process, courts expanded its implications to administrative procedures. This model was furthered by laws passed in the second half of the twentieth century.

Historical reasons aside, the system is most appropriate when a citizen's right is affected and the decision must be found within the confines of the enacted law. This explains why statutory provisions followed a typical judicial pattern: proceedings initiated *ex officio* or by interested parties, investigation and probatory phases, hearings, resolution and enforcement (Barnes 2006, pp. 275-278, 297-298).

## 2. Second-generation procedures

The second generation of administrative procedure concerns rulemaking (secondary legislation or executive regulation), approved by hierarchical administrations, as part of a centralized top-down regulatory process. Thus, this model for rulemaking is not based on the vision of cooperation between agencies and regulated parties.<sup>16</sup>

These procedures arguably resemble legislative decision-making. However, given the fact that there are very few procedural rules that govern legislatures, to a great extent they are also built on the principles that govern courts (Rubin 2003, p. 95). Participation rights in rulemaking procedures thus often follow the same values and principles present in adjudication procedures: the right to be heard, due process and rule of law. In other words, participation is viewed as a defensive right, not as a collaborative dialogue between citizen and agencies.

These procedures may also encompass the preparation of laws,<sup>17</sup> but the bulk of administrative law pertains to rules and regulations that are usually based on previous statutes. Notice and comment requirements in this generation may be very simple.<sup>18</sup>

By separating individual decision procedures from rulemaking, due process and rule of law concerns were dealt with in the former, while a separate, more flexible procedure permitted more efficiency and freedom in the latter. Outside the United States, rulemaking processes are not closely regulated by statute, and courts do not intervene very actively to create extra-statutory public participation requirements.<sup>19</sup> The mainly classically orientated

procedures of this second generation do not take into account many contemporary developments, such as soft law or negotiated rulemaking.

Generally speaking, rulemaking procedures have played a modest role in most countries. First, because administrative law usually establishes very few, if any, requirements and, second, because in most parliamentary systems, typical rules and regulations only aim to implement in detail statutes containing certain substantive standards which have been previously enacted by Parliament (“executive regulation” of law).

On the other hand, if the statute is silent and does not contain substantive standards, as will often be the case, there is traditionally considerable room for procedural discretion in rulemaking. Statutory and institutional structures of economic policy, for example, often vest enormous discretion in the government actors charged with implementing the regulatory schemes. In these cases, when regulatory bodies making rules enjoy greater leeway, procedural requirements to be followed –let’s say by a central bank- may be fewer and less elaborate than those of executive regulations, whose task is simply to implement substantive standards previously enacted by parliament. Surprisingly, in many cases the greater the freedom for making substantive rules enjoyed by agencies, the fewer procedural requirements need to be followed.

There are many new approaches to rulemaking that place greater emphasis on more widespread participation or collaboration (Zaring 2006, p. 295). This can produce grey areas between this generation and the third. In our opinion, the deciding factor that determines the passage from the second generation to the next is the model of governance and administration on which rulemaking is mainly based.

### 3. Third-generation procedures

Command-and-control regulation has monopolized the field for many decades. As a result of dissolving frontiers, however, much administrative regulation and government must be done in a different way, because the administration’s domestic and international policy is in a mutually dependent relationship with other regulatory bodies and the private sector, and lawmaking and implementation become part of a continuous regulatory process. Public-private and inter-agency cooperation and decentralized, participative, deliberative, bottom-up processes require new administrative law tools and procedures.

Third-generation procedures operate in a new, non-hierarchical and decentralized environment that values public-private and inter-agency cooperation, national-supranational governance and administrative processes designed to *create* the best solution rather than find it in a previously enacted statute. They do not aim mainly to control, but to steer public and private actors.

The third-generation procedure is a new hybrid version of procedures that respond to the changing needs of the new methods or modes of governance. A wide range of policy innovations seeks to create more effective forms of participation, coordinate multiple levels of government, allow more diversity and decentralization, foster deliberative arenas, mutual learning and information gathering, permit more flexibility, monitoring and revisability. Procedural rules are deeply involved in policy design and implementation: from simplification of procedures to ongoing information exchange between agencies at

national, supranational and global levels, from assessing public policy options to monitoring and reviewing decisions, programs, plans or standards that are never definitive given the dynamic nature of some policy-making. In the framework of new governance models, policy making and implementation rely on new procedural components much more than the traditional command-and-control regulation did, given that those regulatory processes are much more complex, involve a variety of public and private actors and levels of government, and aimed at setting out substantive standards. Regulatory cooperation has exhibited a notable impetus towards proceduralization.<sup>20</sup>

In this context, third-generation procedures are applicable to the making of individual decisions, of rules and regulations and, above all, as a means to channel various emergent needs into modern public policies.

Some examples to better illustrate this:

#### A. Individual decision procedures

- Some third-generation procedures apply to individual decisions as a substitute for older first generation processes. For instance, the EU has simplified administrative procedures and formalities that service providers need to comply with. The EU Services Directive of 2006 aims to achieve a genuine internal market in Europe by facilitating the cross-border provision of a wide range of services, i.e., cases in which a business wants to supply services across the borders in another Member State, without setting up an establishment there.<sup>21</sup> The Directive obliges Member States to review and evaluate all their authorization schemes concerning access to a service activity or the exercise thereof and abolish them or replace them by less restrictive means (such as simple declarations), where they are unnecessary or otherwise disproportionate (Articles 5 and 15.3). To compensate for the “liberalization” and simplification of domestic controls, the Directive will strengthen the soft law documents, self-regulation, gathering information and processing carried out by private parties, information regulation and a sophisticated inter-agency partnership across Europe.<sup>22</sup>

- Procedures embedded in industrial emissions policies, such as those granting permits under the European integrated pollution prevention and control system constitute another example.<sup>23</sup> Integrated pollution prevention and control concern new or existing industrial and agricultural activities with a high pollution potential.<sup>24</sup> Among other procedural arrangements,<sup>25</sup> directives establish a consultation procedure that ensures that the public has a right to participate in the decision-making process and be informed of its consequences, by having access to permit applications in order to give opinions, results of the monitoring of releases and the like. The decision to permit or reject a project must be made public and sent to the other Member States concerned.

- Environmental impact assessment procedures undertaken for individual projects such as dams, motorways, airports or factories are another example.<sup>26</sup> Procedural rules determine the information required from the developer, the breadth of public and government participation, the administrative duties to be taken into consideration in the development of compliance procedures, the results of consultations and the information gathered. (Articles 3-8 of the EIA Directive).

- A very different case is what we might call “private” as opposed to “administrative” procedures: the procedural rules to be followed by private entities carrying out essentially public duties.<sup>27</sup> The issue here is not only to extend procedural controls to private actors when, for instance, they adjudicate claims or make individual decisions,<sup>28</sup> provide services of economic general interest, or participate in the regulatory cascade<sup>29</sup>, but also to set out procedural positive guidance for non-government actors, as some private risk management procedures do.<sup>30</sup>

## B. Rulemaking procedures

- As examples of third-generation rulemaking procedures might be considered all kinds of rules and regulations made by agencies based on the collaborative governance model; procedures to make soft law (Mendelson, 2007), such as the European Aviation Safety Agency rulemaking process;<sup>31</sup> private procedures governing standard-setting by private bodies;<sup>32</sup> deliberative procedures of international governance (e.g., International Accounting Standards Board), etc.

- Cases in point are also some of the procedures under the “Lamfalussy process,” an approach to the development of financial service industry regulations.<sup>33</sup> The EU has been a pioneer in introducing and enforcing various regulatory principles, such as the bottom-up approach, open consultation, impact analysis, early and thorough participation of market professionals and consumer bodies plus national regulators.<sup>34</sup> This process divides the legislation into high-level framework provisions, voted on by the Council and Parliament (level 1), and implementing measures, led by the Commission (level 2). Open consultation procedures and greater transparency are central to these arrangements. The detailed level 2 legislation is prepared by the Commission on the basis of advice provided by representatives of national supervisory authorities, acting through committees (e.g., the CESR).

- On the other hand, the standard rules of procedure for committees at European Union also belong to this generation.<sup>35</sup>

## C. Procedural arrangements that directly respond to the needs arising from new modes of governance

The universe of administrative action does not divide into two general decision-making categories -rulemaking and individual decisions- as one might be led to deduce from APAs. As noted above (II.2), there are many other actions to be considered by modern advanced societies.

Third-generation procedures thus not only aim to make individual decisions or regulations, but also to resolve policy needs deriving from new collaborative modes of governance, such as information gathering and exchange; deliberation among actors; preliminary agenda setting consultations; cooperative processes between regulators, i.e., supervisory cooperation facilitating the convergence of outcomes and providing informal guidance on implementation issues;<sup>36</sup> monitoring and review;<sup>37</sup> transparency policy;<sup>38</sup> periodical reconsideration and updating of policy choices or permit conditions;<sup>39</sup> the identification at an early stage of unforeseen adverse effects of the implementation of plans and programs;<sup>40</sup>

assessing the potential impacts of policy options;<sup>41</sup> and the like. These processes are not necessarily decisional in nature, in that they do not focus on the outcome but on the process itself.

Most of these processes are based on singular procedural components that operate in a given stage of the policy cycle: problem identification (or agenda setting), policy formulation, adoption, implementation or evaluation. Examples of these components would be impact assessments, public consultations or the making of rules as temporary solutions subject to revision.

- In some cases, however, these procedural arrangements cover several stages, as for example in strategic environmental assessment procedures (SEA): The EU Directive 2001/42/EC, on the assessment of the effects of certain plans and programs on the environment, is a framework law that establishes a common SEA procedure for major official plans and programs prepared for agriculture, forestry, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning, or land use (Article 3). The key role of the SEA procedure lies in the intense participation of the public and in the inter-agency cooperation in the phases of agenda setting, policy formulation, implementation and oversight. SEA procedures must involve all public bodies, even beyond the state,<sup>42</sup> which will be affected by the proposed plan or program, on both a horizontal and a vertical level. The agency responsible for environmental issues must be consulted and has particular formal functions at various stages in the assessment procedure (Articles 5 and 6).

Collaboration is therefore required during every stage of administrative procedure: (i) screening of plans and programs, to ensure that their overall characteristics fall within the requirements of the SEA Directive and to assess their environmental significance; (ii) scoping the SEA, to choose the main elements of the plans and programs, collect and report on relevant environmental standards at all levels, develop objectives, indicators and targets; (iii) identification, prediction, evaluation and mitigation of any potential environmental impact; and (iv) revision and post-adoption activities, to undertake “fast-track” SEA on significant changes in plans and programs, to revise the monitoring program periodically, to report regularly on monitoring results.

In other words, SEA procedures promote a holistic, cross-sectional approach to the achievement of sustainable development. An integrated view of the process of making significant choices entails both an integrated administration structure and collaborative governance methods. For that purpose, procedures are based on more flexible and open tools, such as focus groups, public meetings, intergovernmental fora, consensus conferences, advisory committees, or steering groups.

- Another example is provided by the Open Method of Coordination (OMC), which is an EU policy-making process, or regulatory instrument, formally initiated by the Lisbon European Council in 2000. The OMC does not result in EU legislation, but is a method of soft governance which aims to spread best practice and achieve convergence towards EU goals in those policy areas which fall under the partial or full competence of Member States. Since binding EU rules cannot be used as the means to achieve convergence among Member States in such cases, OMC relies on other mechanisms. These mechanisms involve establishing guidelines, quantitative and qualitative indicators and benchmarks, and national and regional targets, backed by periodic evaluations and peer reviews. The evaluations are aimed at helping Member States learn from one another and consequently

improve their domestic policies. However, 'peer pressure' and 'naming and shaming' are terms often used to describe this process of learning and improvement, and these may hint at processes of greater weight than the apparently 'soft' nature of the governance implies.<sup>43</sup>

#### IV. Conclusion

As new public policies expand into territories once hidden behind closed frontiers, new mechanisms must accommodate and respond to the need for extended participation and collaboration discovered there. New procedural arrangements are one response.

Our conception of what constitutes “procedure” must change. Contemporary patterns of interaction between regulators and other actors in domestic and international life, and more generally in the new modes of governance, are no longer well captured by the standard legal typologies of administrative procedures. First, they differ in terms of structure; these new procedures are not linear but networked. The actors and their forms of engagement, the nature of the law, the use of knowledge and information, the models of administration and its functions are also different and have yet to be fully chartered.

One cannot say in the abstract which procedural arrangements will properly fulfill the needs of the new public policies, that is, of the new modes of governance (Zaring 2005, p. 578; Schepel 2004, pp. 166-167). That is to say, the new methods of governance and regulation should be taken into account in order to set up a revised conceptual framework for administrative law and, as a consequence, for administrative procedure as well. Accordingly, each procedural component requires adjustment. For example, participation and supervision exercised by the public and other administrations tend to be internal and informal, not just external and adversarial, and also be present at an early stage of the public policy (i.e., prior to the publication of a preliminary rule, or at the agenda-setting phase). If consultation is intended to maintain an effective dialogue between interested parties and agencies - consultation being not a one-off event but a dynamic process - procedures must be established to ensure contact with stakeholders throughout the process as well as opportunities for feedback.<sup>44</sup>

The growing impetus towards proceduralization in an uncertain world given the weakness of legislator brings a subsequent growing role of administrative procedure, where rules, activities and solutions are to be invented. Among other consequences, the observance of the law of the administrative procedure in this respect becomes much more important than in first-generation administrative procedures in that these are merely tools to discover and to apply the enacted law.

Table

THREE GENERATIONS OF ADMINISTRATIVE PROCEDURES (AP)

	FIRST GENERATION  (Individual decisions)	SECOND GENERATION  (Regulations)	THIRD GENERATION  (Public Policies based on new governance models)
When	Since mid 1800s	Post-war era (1945)	Since late 20th Century
Examples	Spanish Administrative Procedure Act (APA), 1889	Legal provisions for executive secondary legislation in European states (50s, 60s)	Strategic environmental assessment procedures in the EU, 2001
Where found	Traditional APAs	Traditional statutes governing rulemaking	New governance models legislation
Scope	Individual decisions	Regulations	AP that operate in modern <b>policy-making</b> and implementing processes
	Adjudication procedures / procedures for granting authorizations, licenses, approvals or concessions / award procedure leading to the procurement of contracts ...	Rulemaking procedures / rules governing the preparation of laws. APAs do not contemplate a variety of types of rulemaking procedures.	Procedural rules governing inter-agency, public-private cooperation / new methods of governance ...
Objective	To protect citizen's rights / To apply the law properly	To make regulations	To channel the needs of the new methods of governance
	Defensive attitude towards abuses of power and arbitrary actions	Defensive attitude by assuring participation of affected citizens, or affirmative task by promoting democratic legitimacy	Assuring good governance / greater legitimacy / Promoting new regulatory strategies

Nature of procedure	AP is mainly a decision-making process.	AP is mainly a decision-making process.	In the context of the new forms of governance, it may be understood as a system of communication exchange between administrations and citizens.
Focus on	Final decision	Final decision	The process itself
Administrative Procedure Model	“Judicial” model	“Legislative” model	“Administrative” model
	Procedures resemble judicial decision-making: bilateral and adversarial procedure, a sequence of administrative actions geared toward a final decision, and a process designed to apply a solution laid down in substantive law.	Procedures resemble legislative decision-making. However, in fact there are few procedural rules that govern legislatures. Therefore they are also based on the rules that govern courts.	New modes of governance: hierarchy comes to be replaced by more fluid and interactive consultative networking.
	<u>Judicial concept of governance:</u> Decisions or solutions to be made are found in the laws.	<u>Legislative concept of governance:</u> Rules and regulations to be made are based on the previous statutes and established material standards.	<u>New administrative concept of governance:</u> Rules, standards, information, discussions, monitoring, etc., are developed through the administrative process itself.

Model of Administration	A pyramidal administrative hierarchy, whose procedures are merely tools to apply and enforce the law.	Rulemaking is mainly a part of a centralized top-down regulatory process.	Networked and collaborative Administration
Method of administrative regulation	Command and control regulation	Command and control regulation	New methods of governance
Administrative procedure and discretionary powers	AP is considered an <i>ex post</i> control mechanism.  AP aims to assure the legality (minimum)  Reactive, Defensive, <i>Ex post</i>	AP is used as a limited <i>ex ante</i> control instrument.  AP aims to complete an enacted statute	AP as a steering tool of discretionary power ( <i>ex ante</i> control)  AP aims to achieve the best solution (Maximum)  Proactive, <i>Ex ante</i>

Information gathering and processing	Investigation principle <i>ex officio</i> :	Limited participation of the affected and at a late procedural stage	Public-Private and inter-agency cooperation throughout the entire process or policy cycle
	Decision based upon the record of the hearing.	Administration may make rules based on information not obtained through procedure.	Inter-agency gathering, processing, and exchange of information are very intensive.
	APAs tend to establish rigid and limited channels of communication exchange between the administration and the citizenry.	There is no effective dialogue between agencies and citizenry.	Investigation and information gathering may be carried out by the private sector-
	Citizen participatory duties and rights are formalized and strictly defined.		Integrated approach: All information should be considered over a long period of time and shared. Regularized continuous reflection.
	The administration alone provides information on common interests and needs. Investigation and information gathering are carried out <i>ex officio</i> .		
	Information may be selective for fear of liability.		
	Administrative procedural requirements are rigid and hard. They establish fixed requirements regarding:  - Who may participate, and when, - The means and channels of information exchange, - The ways and methods of decision-making.		APAs offer flexibility and softness. Their requirements contemplate: - Open communication, - Fluid participation, - A deliberative process based on the exchange of experiences and good practices, leading to consensus.
Role of Private Actors	Individual is the object of the decision-can merely comply or not.	Individual is the object of the regulation-can merely comply or not.	Individuals are “co-generators” of the norms, actively participating throughout the entire process.

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Administrative procedure as a communication system	The flow of information within the internal structure of the administration used to be of little interest to the law.  Interagency collaborative procedures are isolated exceptions in the system. The participation of other administrations in the procedure is infrequent and not of primary importance.	The flow of information is very limited: input from the public or those affected is restricted to a late procedural phase and of scarce influence.  There is no an effective dialogue between administrations and citizens.	The exchange of information and communication is permanent and it extends throughout all phases of public policy.  Procedure exists as a medium of exchange of information between the administration and the citizen, and between the various administrations themselves.
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## References

- Aman, Alfred C., Jr. 1999. Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest. *Indiana Journal of Global Legal Studies*. 6: 397-420.
- Aman, Alfred C., Jr. 2002. Globalization, Democracy, and the Need for a New Administrative Law. *UCLA Law Review*. 49: 1687-1716.
- Aman, Alfred C., Jr. 2005. Privatization, Prisons, Democracy, and Human Rights: The Need to Extend the Province of Administrative Law. *Indiana Journal of Global Legal Studies*. 12: 511-550.
- Bamberger, Kenneth A. 2006. Regulation as Delegation: Private Firms, Decision-making, and Accountability in the Administrative State. *Duke Law Journal*. 56: 377-468.
- Barnes, Javier. 2006. “Sobre el Procedimiento administrativo: evolución y perspectivas,” in Javier Barnes, ed., *Innovación y Reforma en el Derecho Administrativo*. Seville: Global Law Press – Editorial Derecho Global, pp. 263-341.
- Barnes, Javier. 2008. “Reform and Innovation of Administrative Procedure,” in Javier Barnes, ed., *Transforming Administrative Procedure*. Seville: Global Law Press – Editorial Derecho Global, pp. 13-41.
- Barnes, Javier. 2015a. “New Frontiers of Administrative Law: A Functional and Multi-Disciplinary Approach. Private Life of Administration – Public Life of Private Actors”, in *Common European Legal Thinking (Essay in Honour of Albrecht Weber)*. Edited by H.J. Blanke, P. Cruz Villalón, T. Klein, J. Ziller), Springer, Heidelberg, pp. 563-588.
- Barnes, Javier. 2015b. “Die Übertragung öffentlich-rechtlicher Werte auf private Akteure auf der Grundlage von Organisation und Verfahren”, en *Strategien der Rechts im Angesicht von Ungewissheit und Globalisierung* (Hrsg. Darnaculleta, Esteve, Spiecker), Nomos, 2015, pp. 323-365.
- Barr, Michael S., and Geoffrey P. Miller. 2006. Global Administrative Law: The View from Basel. *The European Journal of International Law*. 17: 15-46.
- Benvenisti, Eyal. 2005. The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions. *Law and Contemporary Problems*. 68: 319-340.
- Cassese, Sabino. 2005a. Global Administrative Law: An Introduction (22 February 2005), pp. 1-48, available at [http://www.globusetlocus.org/it\\_data/fil/s\\_cassese\\_global\\_administrative\\_law.pdf](http://www.globusetlocus.org/it_data/fil/s_cassese_global_administrative_law.pdf).

- Cassese, Sabino. 2005b. Administrative Law Without the State? The Challenge of Global Regulation. *New York University Journal of International Law and Politics*. 37: 663-694.
- Cassese, Sabino. 2005c. Global Standards for National Administrative Procedure. *Law and Contemporary Problems*. 68: 109-126.
- Cassese, Sabino. 2009. *Il Diritto Globale. Giustizia e Democrazia oltre lo Stato*. Torino: Einaudi.
- Coglianesi, Cary. 2002. Empirical Analysis and Administrative Law. *University of Illinois Law Review*. 2002: 1111-1138.
- Esty, Daniel C. 2007. Good Governance at the World Trade Organization: Building a Foundation of Administrative Law. *Journal of International Economic Law*. 10: 509–527.
- Freeman, Jody. 1997. Collaborative Governance in the Administrative State. *UCLA Law Review*. 45: 1-98.
- Freeman, Jody. 2000a. The Private Role in Public Governance. *New York University Law Review*. 75: 543-675.
- Freeman, Jody. 2000b. ‘Private Parties, Public Functions and the New Administrative Law’, *Administrative Law Review*, (52 Admin. L. Rev. 813) .
- Freeman, Jody. 2003. Extending Public Law Norms Through Privatization. *Harvard Law Review*. 116: 1285-1352.
- Gersen, Jacob E. and Eric A. Posner. 2007. Timing Rules and Legal Institutions. *Harvard Law Review*. 121: 543-590
- Grisinger, Joanna. 2008. Law in Action: The Attorney General’s Committee on Administrative Procedure. *The Journal of Policy History*. 20: 379-418.
- Hoffmann-Riem, Wolfgang and Eberhard Schmidt-Aßmann, eds. 1996. *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen*. Baden-Baden: Nomos Verlagsgesellschaft.
- Hoffmann-Riem, Wolfgang and Eberhard Schmidt-Aßmann, eds. 2002. *Verwaltungsverfahren und Verwaltungsverfahrensgesetz*. Baden-Baden: Nomos Verlagsgesellschaft.
- Hunter, Nan D. 2007. “Public-Private” Health Law: Multiple Directions in Public Health. *Journal of Health Care Law & Policy*. 10: 89-120.
- Karkkainen, Bradley C. 2006. Managing Transboundary Aquatic Ecosystems: Lessons from the Great Lakes. *Pacific McGeorge Global Business & Development Law Journal*. 19: 209-240.
- Kingsbury, Benedict, Nico Krisch and Richard B. Stewart. 2005. “The Emergence of Global Administrative Law”. *Law and Contemporary Problems*. 68: 15-62.
- Kingsbury, Benedict, and Richard B. Stewart. 2016. *Hacia el Derecho Administrativo Global: fundamentos, principios y ámbito de aplicación*. Global Law Press, Seville, Spain.

- Lobel, Orly. 2004. The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought. *Minnesota Law Review*. 89: 342-470.
- Mashaw, Jerry L. 2005. Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law. *Issues in Legal Scholarship*, The Reformation of American Administrative Law: Article 4, pp. 1-38, available at <http://www.bepress.com/ils/iss6/art4>.
- McCubbins, Mathew D., Roger G. Noll and Barry R. Weingast. 1987. Administrative Procedures as Instruments of Political Control. *Journal of Law, Economics, and Organization*. 3: 243-277.
- McNollgast. 1999. The Political Origins of the Administrative Procedure Act. *Journal of Law, Economics, and Organization*. 15: 180-217.
- Mendelson, Nina A. 2007. Regulatory Beneficiaries and Informal Agency Policymaking. *Cornell Law Review*. 92: 397-452.
- Ohnesorge, John. 2006. Chinese Administrative Law in the Northeast Asian Mirror. *Transnational Law and Contemporary Problems*. 16: 103-164.
- Röhl, Hans Christian. 2008. “Procedures in the European Composite Administration,” in Javier Barnes, ed., *Transforming Administrative Procedure*, Seville: Global Law Press – Editorial Derecho Global, pp. 75-96.
- Rose-Ackerman, Susan. 1988. Progressive Law and Economics—And the New Administrative Law. *Yale Law Journal*. 98: 341-368.
- Rubin, Edward. 2003. It’s Time to Make the Administrative Procedure Act Administrative. *Cornell Law Review*. 89: 95-190.
- Rubin, Edward L. 2005. *Beyond Camelot. Rethinking Politics and Law for the Modern State*. Princeton: Princeton University Press.
- Sagers, Chris. 2007. The Myth of “Privatization”. *Administrative Law Review*. 59: 37-78.
- Salamon, Lester M.. 2001. The New Governance and the Tools of Public Action: An Introduction. *Fordham Urban Law Journal*. 28: 1611-1674.
- Schäffer, Heinz. 1993 “El Procedimiento Administrativo Austriaco: Evolución, Estado Actual y Perspectivas,” in Javier Barnes, ed., *El Procedimiento Administrativo en el Derecho Comparado*. Madrid: Editorial Cívitas, pp. 405-440.
- Schepel, Harm. 2004. “Constituting Private Governance Regimes: Standards Bodies in American Law,” in Christian Joerges, Inger-Johanne Sand and Gunther Teubner, eds., *Transnational Governance and Constitutionalism*. Oxford: Hart Publishing, pp. 161-188.
- Schmidt-Aßmann, Eberhard. 2004 *Das allgemeine Verwaltungsrecht als Ordnungsidee*, 2nd edition. Berlin: Springer-Verlag.

Schmidt-Aßmann, Eberhard. 2006. “Cuestiones Fundamentales Sobre la Reforma de la Teoría General del Derecho Administrativo. Necesidad de Innovación y Presupuestos Metodológicos,” in Javier Barnes, ed., *Innovación y Reforma en el Derecho Administrativo*. Seville: Global Law Press – Editorial Derecho Global, pp. 15-132.

Schuppert, Gunnar Folke. 2000. *Verwaltungswissenschaft: Verwaltung, Verwaltungsrecht, Verwaltungslehre*. Baden-Baden: Nomos.

Stephenson, Matthew C. 2007. Bureaucratic Decision Costs and Endogenous Agency Expertise. *Journal of Law, Economics, and Organization*. 23: 469-498.

Stewart, Richard B. 2003. Administrative Law in the Twenty-First-Century. *New York University Law Review*. 78: 437-460.

Stewart, Richard B. 2005a. The Global Regulatory Challenge to U.S. Administrative Law. *New York University Journal of International Law and Politics*. 37: 695-762.

Stewart, Richard B. 2005b. U.S. Administrative Law: A Model for Global Administrative Law?. *Law and Contemporary Problems*. 68: 63-108

Strauss, Peter L. 2006. Rulemaking in the Ages of Globalization and Information: What America can Learn from Europe and Vice Versa. *Columbia Journal of European Law*. 12: 645-694.

Zaring, David. 2005. Informal Procedure, Hard and Soft, in International Administration. *Chicago Journal of International Law*. 5: 547-604.

Zaring, David. 2006. Best Practices. *New York University Law Review*. 81: 294-350.

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<sup>1</sup> “There is no clear separation of function, activity, or in many cases of personnel between global bodies and domestic agencies. ... National systems of administration and law become porous; global norms penetrate them, circumventing the national legislature.” Stewart (2005a, p. 703), citing Cassese (2005a), currently also available as Cassese (2005b).

<sup>2</sup> The European Union is first and foremost a union of domestic and European administrations based on the collaboration principle. Procedures, information gathering and exchange, control and regulations are not divided according to a separation principle between national and European spheres. On the contrary, all administrations and agencies are involved in sophisticated governance models. See Schmidt-Aßmann (2006, pp. 103-111); Schmidt-Aßmann (2004, pp. 377ff.).

<sup>3</sup> The composite administration in the EU is created and safeguarded by procedure. For examples of these procedures in which participate different public actors, see Röhl (2008, pp. 85-94).

<sup>4</sup> See Barr and Miller (2006). Establishing administrative law procedures at the supranational level has many difficulties. See, e.g., Kingsbury, Krisch and Stewart (2005, pp. 40-42); Esty (2007, pp. 526-527).

<sup>5</sup> See Aman (1999, p. 415): “I believe that there should be a requirement in all rulemaking proceedings that the international and global implications of a proposed policy be considered explicitly--a kind of global impact statement, if you will. The National Environmental Policy Act (NEPA) required environmental impact statements; we should require global impact statements as well.”

<sup>6</sup> Regarding the impact of global governance on the rules of domestic procedure, see Cassese (2005); Stewart (2005a). Regarding international regulation and global administrative law, see Stewart (2003, p. 455).

<sup>7</sup> New changes constitute new regulatory and procedural questions that require new solutions: “how best can nonstate actors be involved in decisionmaking processes; how can we maximize the flow of information involving these decisions; and how can we mitigate conflict of interest concerns that arise from the fusion of public and private that typify many markets and market approaches to policy issues--issues ranging from private prisons to welfare eligibility.” (Aman 2005, p. 516). In my judgment, in answering these questions, procedural arrangements should play a huge role.

<sup>8</sup> In other words, when administrators play roles as international lawmakers, producing hard or soft law, guidances, best practices, etc., in horizontal or vertical processes used by domestic regulators to establish international standards. Governing these processes and their outcomes requires new procedural arrangements, far away from traditional forms of administrative procedure. See, e.g., Barr and Miller (2006). More generally, see Stewart (2005b). Another example is the case of best practices, see Zaring (2006, p. 307); see also EU-U.S. Declaration on Combating Terrorism (Dromoland Castle, 26 June 2004), available at [http://www.consilium.europa.eu/uedocs/cmsUpload/10760EU\\_US26.06.04.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/10760EU_US26.06.04.pdf).

<sup>9</sup> See Articles 3-10 Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

<sup>10</sup> Rose-Ackerman (1988, p. 347). Similar observations can be found on the other side of the Atlantic. See, e.g., Hoffmann-Riem and Schmidt-Aßmann (2002); Schäffer (1993).

<sup>11</sup> In relation to the WTO, see Esty (2007, p. 524).

<sup>12</sup> See Stephenson (2007, pp. 487-488), noting that certain control mechanisms “operate primarily by manipulating an agency’s decision costs, making some courses of action relatively more or less costly by altering procedural requirements” (p. 487).

<sup>13</sup> Administrative law’s affirmative tasks, and especially the efficacy and effectiveness in the outcomes of administrative action, have a strong ideological substrate developed in Germany under the so-called “Steuerungswissenschaft.” See, e.g., Schmidt-Aßmann (2004, pp. 18ff.).

<sup>14</sup> The original constitutional framework of the European Union (division of powers, allocation of responsibilities, interplay between the main three institutions, Commission, Council and Parliament) leads to new modes of governance in search of political legitimacy and effectiveness, through consensus-based processes, broad participation, strong and ongoing inter-agency cooperation, to mention a few paths. Control of discretionary powers is not, by any means, the main goal of such processes.

<sup>15</sup> For instance, forward planning procedures for secondary regulations are often much less developed in many countries and there is no systematic coordination. See, e.g., Better Regulation in Europe: An Assessment of Regulatory Capacity in 15 Member States of the European Union. Better Regulation in the United Kingdom, OECD (2009), available at <http://www.oecd.org/dataoecd/0/35/43307706.pdf>. These planning procedures, then, could be understood as second-generation procedures. The legislature might choose to move them from the second to the third generation, which means not only a new set of rules but also a new understanding and design for such planning, in line with a more collaborative governance model. See *infra* Part II.3.

<sup>16</sup> Because of its advanced outlook, the US APA could easily be categorized in the third generation and not the second. Regarding the development of the US APA, see Grisinger (2008).

<sup>17</sup> Sometimes tools in place focus on the production of primary regulations. See, e.g., Better Regulation in Europe: An Assessment of Regulatory Capacity in 15 Member States of the European Union. Better Regulation in Denmark, OECD (2009), p. 46, available at [www.oecd.org/dataoecd/16/46/43325733.pdf](http://www.oecd.org/dataoecd/16/46/43325733.pdf).

<sup>18</sup> For example, the Spanish Statute on the Executive (Ley 50/1997), Article 24, establishes some requirements for rulemaking procedures to be followed by Departments. One of these is the consultation of the Council of State that may be judicially enforceable.

<sup>19</sup> Something very similar occurred in the nations of Northeast Asia. See Ohnesorge (2006, p. 121).

<sup>20</sup> See Coglianesi (2002, p. 1112): “For at least the past twenty years ... some of the most prominent and persistent calls for regulatory reform have tended to be procedural ones.” For an example in the area of financial regulatory cooperation, see Zaring (2005, p. 578).

- <sup>21</sup> See Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0123:EN:NOT>.
- <sup>22</sup> In order to function properly, administrative cooperation relies on a direct and fast communication system between the competent authorities of different Member States. See Handbook on Implementation of the Services Directive, available at [http://ec.europa.eu/internal\\_market/services/services-dir/proposal\\_en.htm#handbook](http://ec.europa.eu/internal_market/services/services-dir/proposal_en.htm#handbook).
- <sup>23</sup> See Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control.
- <sup>24</sup> The integrated approach means that the permits must take into account the whole environmental performance of the plant, covering, e.g., emissions to air, water and land, generation of waste, use of raw materials, energy efficiency, noise, prevention of accidents and restoration of the site upon closure.
- <sup>25</sup> Procedures for exchange of information on best available techniques (serving as a basis for emission limit values) are held regularly between the Commission, the Member States and the industries concerned.
- <sup>26</sup> The EIA procedure ensures that environmental consequences of projects are identified and assessed before authorization is given. The public can give its opinion and all results are taken into account in the authorization procedure of the project. The public is informed of the decision afterwards. See Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (EIA Directive).
- <sup>27</sup> See Aman (1999, p. 416): “A separate procedural provision designed for private actors could be crafted, one which not only emphasizes flexibility, but public involvement and the basic public law protections of notice, participation, transparency, and some forms of accountability. Indeed, creative disclosure requirements designed to inform the public just how certain markets work would also further these goals.”
- <sup>28</sup> For example, Article III (Transparency), Section 1 of the Bylaws for Internet Corporation for Assigned Names and Numbers (ICANN), a California Nonprofit Public-Benefit Corporation (as amended 30 September 2009, available at <http://www.icann.org/en/general/bylaws.htm#1>), establishes that ICANN shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. According to Article I, Section 2, it will make decisions by applying documented policies neutrally and objectively, with integrity and fairness.
- <sup>29</sup> See Javier Barnes, 2015a and 2015b.
- <sup>30</sup> See, e.g., Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), Articles 22, 123, etc. See also Article 43 (risk management) of the Proposal for a Directive of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance Solvency II (Brussels, 10.7.2007. COM(2007) 361 final).
- <sup>31</sup> The Agency's Rulemaking Directorate contributes to the production of all EU legislation and implementation material related to the regulation of civil aviation safety and environmental compatibility. See [http://www.easa.europa.eu/ws\\_prod/r/r\\_main.php](http://www.easa.europa.eu/ws_prod/r/r_main.php). See also a standard rulemaking procedure to be put in place by the Agency at [http://www.easa.europa.eu/ws\\_prod/r/r\\_rps\\_documentation.php](http://www.easa.europa.eu/ws_prod/r/r_rps_documentation.php); according to this a set of internal procedures and work instructions was developed and adopted. See also Strauss (2006, p. 685).
- <sup>32</sup> For instance, in the EU, procedures for private/public mechanisms of law-generation are “an alternative approach to legislation”: For co-regulation and self-regulation, the Inter-institutional Agreement on Better Law-making provides agreed definitions, criteria and procedures (Official Journal C321 of 31.12.2003). The principles governing the conditions of use for alternative instruments such as co-regulation and self-regulation are transparency and representativeness (Art. 17).
- <sup>33</sup> See the so-called “Lamfalussy Directives,” adopted on the basis of the so-called “Lamfalussy approach” at [http://ec.europa.eu/internal\\_market/securities/transposition/index\\_en.htm](http://ec.europa.eu/internal_market/securities/transposition/index_en.htm).
- <sup>34</sup> See Communication from the Commission, Review of the Lamfalussy process - Strengthening supervisory convergence (Brussels, 20.11.2007. COM(2007) 727 final.) See also the working procedures of the CESR, an independent Committee of European Securities Regulators (<http://www.cesr-eu.org/index.php?page=cesrshort&mac=0&id>), at <http://www.cesr-eu.org/popup.php?ref=08-375d> (Articles 5 and 6).
- <sup>35</sup> See (2011/C 206/06), Official Journal of the European Union C 206/11, 12.7.2011.
- <sup>36</sup> For example, level 3 under Lamfalussy arrangements. See supra notes 36 and 37.
- <sup>37</sup> See Guidance Document on improving the collection and submission of data for the review of the BREFs, IEF 20 – 4 (March 2008), available at [http://eippcb.jrc.ec.europa.eu/ief/doc/IEF20-4\\_Guid\\_on\\_data\\_collec.pdf](http://eippcb.jrc.ec.europa.eu/ief/doc/IEF20-4_Guid_on_data_collec.pdf).
- <sup>38</sup> For instance, ICANN will employ open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process (article I, Section 2 of the Bylaws).
- <sup>39</sup> See, e.g., Directive 2008/1/EC concerning integrated pollution prevention and control (the IPPC Directive).
- <sup>40</sup> Article 10.1 **Directive 2001/42/EC**.
- <sup>41</sup> See, e.g., European Commission, Impact Assessment Guidelines, 15 June 2005, with March 2006 update, SEC(2005) 791, pp. 6-15; and the revised Impact Assessment Guidelines, 15 January 2009, SEC(2009) 92. On the Commission Impact Assessment Guidelines, see also [http://ec.europa.eu/governance/impact/commission\\_guidelines/commission\\_guidelines\\_en.htm](http://ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm).
- <sup>42</sup> See Article 7 (Transboundary consultations).
- <sup>43</sup> See at <http://www.europarl.europa.eu/thinktank>. EPRS | European Parliamentary Research Service Author: Martina Prpic, Members' Research Service EN PE 542.142
- <sup>44</sup> On the dimensions that the shift from rules to governance implies, see, e.g., Karkkainen (2006, p. 237): “The new governance arrangements are also characterized by an iterative, adaptive, and experimentalist management approach, driven by the complex and dynamic nature of the undertaking.”

