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Hermann Pünder

German Administrative Procedure  
in a Comparative Perspective  
– Observations on the Path to a Transnational  
“Ius Commune Proceduralis” in Administrative Law

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**GERMAN ADMINISTRATIVE PROCEDURE IN A COMPARATIVE PERSPECTIVE**  
**– OBSERVATIONS ON THE PATH TO A TRANSNATIONAL**  
**“IUS COMMUNE PROCEDURALIS” IN ADMINISTRATIVE LAW**

By Hermann Pünder\*

**I. Procedural Dilemma**

In all countries that adhere to the idea that the public administration is bound by the rule of law and needs legitimation by the people there is an ongoing debate about the importance of administrative procedure.<sup>1</sup> On the one hand, the necessity of administrative procedure and its advantages are widely acknowledged. Administrative procedure can provide the parties involved with effective pre-judicial remedies, may contribute to the democratic legitimacy of an agency's decision, and can facilitate the administration's information gathering. On the other hand, all legal systems have to take into account that administrative procedure is costly as it demands a great deal of time, personnel, materials and money. Procedural requirements thus may be at odds with the necessities of an effective and efficient completion of administrative duties.

The following study will inform about and evaluate the German solution to the procedural dilemma in a comparative perspective to countries which share the values of the rule of law and democratic legitimation in general.<sup>2</sup> How Germany and the other countries specifically balance these values with the necessities of an effective and efficient administrative decision-making process shall serve as the “*tertium*

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<sup>1</sup> Cf. to the advantages and disadvantages of administrative procedure from the U.S. perspective *Richard J. Pierce, Jr./Sidney A. Shapiro/Paul R. Verkuil*, *Administrative Law and Process*, 5<sup>th</sup> ed. 2009, p. 236 et seqq. For a German view *Hermann Pünder*, *The Importance of Administrative Procedure*, to be published in: Pünder/Waldhoff (eds.), *Debates in German Public Law*, 2013. In a comparative perspective *Javier Barnes*, *Towards a third generation of administrative procedures*, in: Rose-Ackermann/Lindseth, *Comparative Administrative Law*, 2010, p. 336 (340 et seqq.). Generally to the values served by administrative law *J. S. Bell*, *Comparative Administrative Law*, in: Reimann/Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2008, p. 1259 (1271 et seqq.); *Jerry L. Mashaw*, *Explaining administrative law: reflections on federal administrative law in nineteenth century America*, in: Rose-Ackermann/Lindseth, *Comparative Administrative Law*, 2010, p. 37 (44).

<sup>2</sup> To the question which legal systems can usefully be included in comparisons *Bell* (note 1), p. 1264 et seqq. (“Comparison with Ideological Communities”); *Gerhard Dannemann*, *Comparative Law: Study of Similarities or Differences?*, in: Reimann/Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2008, p. 383 et seqq.

*comparationis*” of the inquiry. Following a “functional approach”<sup>3</sup>, the comparison will look not only at the statutory requirements on the administrative procedure (“law in the books”), but also at the administrative practice, including the judicature, and the assessments in legal scholarship.<sup>4</sup> German administrative procedure will be compared first and primarily to U.S. decision-making process (*supra* II.). Comparing German administrative procedure to procedural rules and administrative practice in the U.S. seems to be especially fruitful as there is a common understanding in comparative legal scholarship – expressed for example by the German scholar *Fritz Scharpf* and the American *Susan Rose-Ackerman* – that Germany has a tendency to underestimate the importance of the administrative decision-making process while the U.S. takes the procedure more seriously fostering a participatory approach to administrative actions.<sup>5</sup> It is the first purpose of this article to question and reassess this traditional juxtaposition by studying the historical development of the German administrative law in comparison to the U.S. (*supra* II. 1.), by comparing the procedural legal requirements – as well as the administrative practice – in respect to a hearing and to a reasoned decision-making in administrative rulemaking and adjudication processes (*supra* II. 2.), and by looking at the judicial consequences of procedural errors in both jurisdictions (*supra* II. 3.). In a second step, the comparative perspective will be broadened to a certain extent to some other European countries – England and France – and finally to the European Union (*supra* III.). The study will finally argue that we are witnessing an transnational development of an “*ius commune proceduralis*” in administrative law (*supra* IV.).

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<sup>3</sup> For a general analysis of this method – also discussing the objections against it – *Ralf Michaels*, The Functional Method of Comparative Law, in: Reimann/Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2008, p. 337 et seqq.

<sup>4</sup> To the influences shaping administrative law *Bell* (note 1), p. 1284 et seq. (“Legislators, Professors, and Judges”).

<sup>5</sup> *Fritz Scharpf*, Die politischen Kosten des Rechtsstaats, 1970, p. 14 et seqq., and passim; *Susan Rose-Ackermann*, Controlling Environmental Policy: The Limits of Public Law in Germany and the United States, 1995, p. 1 et seqq., 71, 120 et seqq., and passim (each of them with differentiations though). Cf. for a German comparative perspective also *Rudolf Dolzer*, Verwaltungsermessen und Verwaltungskontrolle in den Vereinigten Staaten, DÖV 1982, p. 578 et seqq.; *Dirk Ehlers*, Anhörung im Verwaltungsverfahren, Jura 1996, p. 617 et seqq.; *Hans D. Jarass*, Besonderheiten des amerikanischen Verwaltungsrechts im Vergleich, DÖV 1985, p. 377 et seqq.; *Robert Riegert*, Das amerikanische Administrative Law, 1996, p. 20 et seq., 24, 153 et seq.; *Joachim Saurer*, Die Begründung im deutschen, europäischen und US-amerikanischen Verwaltungsverfahren, VerwArch 100 (2009), p. 354 et seqq. In a comparative perspective to UK and the EU *Catherine Donnelly*, Participation and expertise: judicial attitudes in comparative perspective, in: Rose-Ackermann/Lindseth, Comparative Administrative Law, 2010, p. 357 (358 et seqq.).

## II. German Administrative Procedure in Comparison with the U.S. law

### 1. Historical Development of Administrative Procedure

#### a) Administrative Procedure in the Shadow of Substantive Law and Court Procedure

For a long time, the importance of administrative procedure has been undervalued in Germany as well as in the U.S. Originally agencies in both countries – as a general rule – had nearly complete discretion with respect to their choices of decision-making procedures.<sup>6</sup> Efficient and effective government was the aim of administrative procedure. Questions of procedural legal protection and procedural democratic legitimacy were not yet found to be important. In Germany during the 19<sup>th</sup> century, as the so-called “*juristische Methode*” (legal methodology) began unfolding in public law, administrative procedure stood in the shadow of substantive law (“*materielles Recht*”) in the development of general rules of administrative law. Legal scholars were eager to bind administrative activities to the newly installed constitutional rule of law by creating the institution of the “*Verwaltungsakt*” (administrative act). Seminal in this development was the work of *Otto Mayer* (1846 – 1924). He coined the phrase “*Justizförmigkeit der Verwaltung*”, which refers to the notion that the administration must be bound to the ideals of court justice. *Meyer’s* analogy, however, was not focused upon the procedure followed by the administration, but upon the legally binding decisions being a just solution to each individual case.<sup>7</sup>

The idea to develop procedural requirements for the administration faced hardship not only during the “*Kaiserreich*” (1871 – 1919) and during the “Weimar Republic” (1919 – 1933). Contrary to the American constitution, even the “*Grundgesetz*” (GG), enacted in 1949, contains no provisions for administrative procedure although the modern Constitution has been strongly influenced by the American occupying military power after World War II. The mistrust toward the executive branch, which rose out of the ashes of the *Adolf Hitler’s* dictatorship (1933 – 1945), is reflected only

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<sup>6</sup> Cf. for an overview in respect to the American administrative law in the 19<sup>th</sup> century *Richard J. Pierce, Jr.*, *Administrative Law Treatise*, vol. 1 (2010), p. 9 et seqq. For more details – and for a relativization of the conventional recount that American administrative law has its origins in the late 19<sup>th</sup> century – see *Jerry Mashaw*, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 *Yale L. J.* (2005-2006), p. 1256 et. seqq.; *Reluctant Nationalists: Federal Administration and Administration Law in the Republican Era, 1801 – 1829*, 116 *Yale L.J.* (2006-2007), p. 1636 et seqq.; *Federal Administration and Administrative Law in the Gilded Age*, 119 *Yale L.J.* (2009-2010), p. 1362 et seqq.; *The American Model of Federal Administrative Law: Remembering the First 100 Years*, 78 *Geo. Wash. L. Rev.* (2010), p. 975 et seqq.

<sup>7</sup> *Otto Mayer*, *Deutsches Verwaltungsrecht*, vol. 1, 3rd ed. 1924, §§ 5 and 6. (1<sup>st</sup> ed. 1895).

in constitutional guarantees concerning *court protection*. Examples can be seen in the right to judicial review of administrative actions (Art. 19 IV GG), rules regarding the independence of the judiciary (Art. 97 GG) and in the right to be heard before a court (Art. 103 I GG).<sup>8</sup> Thus, the codification of administrative law since the 1950s was focused primarily on the judiciary, not on administrative procedure.<sup>9</sup>

b) Obstacles on the Road to Codification of Administrative Procedure and the Constraint Scope of Application of the German Administrative Procedure Act

In comparison to the development of administrative court proceedings, the procedure of administrative agencies experienced far less progress in Germany. While in the U.S. – after a long discussion especially with some opponents within the American Bar Association<sup>10</sup> – the federal Administrative Procedure Act (APA) came into force in 1946, administrative procedure in post-war Germany was for a long time governed primarily by unwritten legal principles. In spite of encouraging comparative legal research to the American law,<sup>11</sup> there was a great deal of skepticism as to whether or not it would be possible to produce a uniform procedural code which would satisfy practical necessities. In 1959, even the convention of the famous “*Deutsche Staatsrechtslehrervereinigung*” – the German association of public law professors – still maintained this skepticism toward codification.<sup>12</sup> But in 1960 the traditional “*Deutscher Juristentag*” – the assembly of practicing German jurists – eventually voted in favor of a codification of administrative procedure.<sup>13</sup> Nevertheless, it took seventeen more years before the project reached completion. In 1977 – in a time lack

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<sup>8</sup> Cf. *Rose-Ackermann* (note 5), p. 72 et seqq.

<sup>9</sup> First, in 1953 the Social Court Procedure Code (*Sozialgerichtsgesetz*, SGG) was enacted. The Administrative Court Procedure Code (*Verwaltungsgerichtsordnung*, VwGO) followed in 1960. The Tax Court Procedures Code (*Finanzgerichtsordnung*, FGO) is from 1965.

<sup>10</sup> See for a short recount of the discussion *Pierce* (note 6), p. 13 et seqq. In more detail *George Shepherd*, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. (1995-1996), p. 1557 et seq.

<sup>11</sup> Cf. *Franz Becker*, *Das Allgemeine Verwaltungsverfahren in Theorie und Praxis*, 1960; *Ferdinand O. Kopp*, *Verfassungsrecht und Verwaltungsverfahren*, 1971; *Georges Langrod*, *La doctrine allemande et la procédure administrative non contentieuse*, 1961; *Carl Hermann Ule/Franz Becker*, *Verwaltungsverfahren im Rechtsstaat*, 1964.

<sup>12</sup> Cf. *Carl August Bettermann*, *Das Verwaltungsverfahren*, VVDStRL 17 (1959), p. 118 et seqq.; more optimistically *Erwin Melichar*, *Das Verwaltungsverfahren*, VVDStRL 17 (1959), p. 183 et seqq. During the discussion many of the speakers expressed their rejection of the idea of codification (op. cit. p. 219 et seqq.).

<sup>13</sup> See for the background *Carl Hermann Ule*, *Die Kodifizierung des Verwaltungsverfahrensrechts*, in: *Jeserich/Pohl/v Unruh* (eds.), *Deutsche Verwaltungsgeschichte*, vol. V 1987, p. 1162 (1170).



of more than 30 years compared to the U.S. – the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz*, VwVfG) came into force.<sup>14</sup>

The codification of administrative procedure was a great progress in Germany. However, contrary to its title, the German Administrative Procedure Act still does not yet comprise the entire administrative procedure.<sup>15</sup> In fact, the Act addresses only “the activity of authorities having an external effect and directed to the examination of basic requirements, the preparation and adoption of an administrative act or to the conclusion of an administrative agreement under public law” (§ 9 VwVfG). In a – scholarly often lamented – difference to the U.S. Administrative Procedure Act, all other forms of executive action – the enactment of executive rules (“*Rechtsverordnungen*”) and charters (“*Satzungen*”), the decision-making process in regard to non-legal, so-called informal actions (“*informelles Verwaltungshandeln*”), as well as the procedure leading to merely internal decisions (“*Verwaltungsvorschriften*”) – were not included. In addition, the codex refers only to administrative activities within the realm of public law (§ 1 I VwVfG) omitting the fact that administrative bodies can also take action within the confines of civil law.<sup>16</sup>

c) Procedural Euphoria: Decisions of the Federal Constitutional Court – Applauded by the Academia

More significant than the codification of administrative procedure law in Germany have been decisions reached by the Federal Constitutional Court (*Bundesverfassungsgericht*) since the 1970s. The justices eventually applied the procedural prerequisites for effective court protection<sup>17</sup> to pre-judicial administrative procedure. In light of only limited control through substantive statutory law and the correspondingly large scope of administrative discretion, it was established that “[t]he protection of fundamental constitutional rights must also be a concern of

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<sup>14</sup> The Act addresses the German federal government. As the federal states (*Bundesländer*) then more or less copied the federal act into their law, it is sufficient in a comparative perspective to merely refer to the federal codification.

<sup>15</sup> From an American perspective *Rose-Ackermann* (note 5), p. 59 et seqq. Generally to the shortcomings of “traditional administrative procedure acts” *Barnes* (note 1), p. 339 et seq.

<sup>16</sup> To fill these voids, it is necessary in Germany to revert to the use of analogies, general legal principles and directly to constitutional law. Incidentally, more specific procedural provisions take priority over the general Administrative Procedure Act. This fragmentation of German administrative procedure leads to a severe loss in predictability, a state of affairs which is often lamented. Some areas of administration are excluded completely. This applies namely to the Financial and Social Services Administration. However, the regulations governing procedure in these fields, correspond almost entirely with the general rules.

<sup>17</sup> *Bundesverfassungsgericht*, BVerfGE 53 (1979), p. 30 (65).

administrative procedure, and that these fundamental constitutional rights shall influence not only substantive law, but also procedure, in as far as this is required to adequately protect these rights”.<sup>18</sup> Similar to the U.S. law, administrative procedure thus gained relevance in its own right, separated from court procedure and substantive law.

In German academia, the adjudication of the Federal Constitutional Court was greeted with great approval, as it fitted in with the world-wide *Zeitgeist* of an era determined by a changing relationship between administration and its citizens.<sup>19</sup> At the 1971-convention of the German association of public law professors, *Peter Häberle* had developed the concept of a “*status activus processualis*”.<sup>20</sup> One of the main sources of this valuation was *Ferdinand Kopp’s* study of the constitutional foundations of administrative procedure.<sup>21</sup> The analysis was based mainly on a comparative assessment of the U.S. administrative law, emphasizing the protective and legitimizing functions of administrative procedure. The judicature of the Federal Constitutional Court led to a procedural euphoria in Germany. Administrative procedure was perceived as the very “concept of cooperative common welfare”.<sup>22</sup>

d) Subsequent Disenchantment: Legislative Measures toward Expediting Administrative Proceedings

Over time, however, disenchantment has widely taken the place of euphoria in Germany. In the midst of intensive discussions concerning the role of Germany in global economics during the 1990s, administrative procedure law was viewed as an economic burden to agencies and affected private entities (although empirical studies have not affirmed this perception<sup>23</sup>).<sup>24</sup> A comparable debate can be noted in the U.S. espe-

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<sup>18</sup> *Bundesverfassungsgericht*, BVerfGE 53 (1979), p. 3 (65 – Translation by the author).

<sup>19</sup> Cf. *Bundesverfassungsgericht*, BVerfGE 45 (1977), p. 297 (335): “The necessity for a dialogue between the administration and the citizens corresponds to the constitutional appreciation of the position of the citizens within a state” (Translation by the author).

<sup>20</sup> *Peter Häberle*, Grundrechte im Leistungsstaat, VVDStRL 30 (1972), p. 43 (80, 86 et seqq., 121 et seqq.)

<sup>21</sup> *Kopp* (note 11).

<sup>22</sup> Cf. *Walter Schmitt Glaeser*, Die Position der Bürger als Beteiligte im Entscheidungsverfahren gestaltender Verwaltung, in: *Lerche/Schmitt Glaeser/Schmidt-Aßmann*, Verfahren als staats- und verwaltungsrechtliche Kategorie, 1984, p. 37 (53 et seqq.); *Eberhard Schmidt-Aßmann*, Verwaltungsverfahren, in: *Isensee/Kirchhof* (eds.), Handbuch des Staatsrechts, vol. V, 3<sup>rd</sup> ed. 2007, § 109, note 2 et seqq. Concerning the concept of “proceduralisation” in general see *Gralf-Peter Calliess*, Prozedurales Recht, 1999; *Axel Tschentscher*, Prozedurale Theorien der Gerechtigkeit, 1999.

<sup>23</sup> Cf. *Andreas Fisahn*, Demokratie und Öffentlichkeitsbeteiligung, 2002, p. 340 ff; *Marko Martin*, Heilung von Verfahrensfehlern, 2004, p. 165 ff; *Christoph Wölki*, Verwaltungsverfahrensgesetz im Wertewandel, 2004, p. 98 ff, 105 ff; *Jan Ziekow/Alexander Windoffer/Martin-Peter Oertel*, Evaluation

cially concerning the “ossification” of the rulemaking procedures.<sup>25</sup> In Germany, the legislature reacted to this growing perception. In the interest of creating procedural law more in tune with the perceived high demand confronting administrative bodies, provisions were enacted which broadened the irrelevance of procedural errors (see Section II. 3.). The legislation in this area has been met with fierce criticism in academia.<sup>26</sup> It is feared that the new rules might lead the administration to take on a lax cavalier approach to procedure. *Horst Sendler* – between 1980 and 1991 President of the Federal Administrative Court (*Bundesverwaltungsgericht*) – argued that in light of the irrelevancy of certain procedural errors, some administrative bodies purposefully deny citizens the possibility to state their arguments, knowing that it is unlikely that citizens will seek legal remedy before a court.<sup>27</sup> The German legislature, however, remained unimpressed by these critiques. The newest statutes concerning the expedition of administrative procedure came into force in 2006/2007.<sup>28</sup>

## 2. Procedural Requirements

In order to analyze today’s procedural requirements in detail one has to distinguish in Germany like in the U.S. between administrative rulemaking and administrative adjudication.<sup>29</sup>

### a) Administrative Rulemaking

Compared to the elaborate rulemaking procedures required by the American Administrative Procedure Act (“formal rulemaking” and even the so-called “informal rulemaking”) German administrative institutions are traditionally relatively free from external

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von Regelungen zur Beschleunigung von Genehmigungsverfahren, DVBl. 2006, p. 1469 et seqq.

<sup>24</sup> Cf. from a comparative perspective *Rose-Ackermann* (note 5), p. 86 et seqq.

<sup>25</sup> See e.g. *Paul R. Verkuil*, Comment: Rulemaking Ossification - A Modest Proposal, 47 Admin. L. Rev. (1995), p. 453 et seqq.; *Jason W. Yackee/Susan Webb Yackee*, Administrative Procedures and Bureaucratic Performance: Is the Federal Rulemaking “Ossified”?, University of Wisconsin Legal Studies Research Paper N. 1079 (April 1, 2009); *Donnelly* (note 5), p. 358 et seq.

<sup>26</sup> *Gunnar Folge Schuppert*, Verwaltungswissenschaft, 2000, p. 780 et seqq.; *Friedrich Schoch*, Der Verfahrensgedanke im allgemeinen Verwaltungsrecht, Die Verwaltung 25 (1992), p. 21 (41 et seqq.).

<sup>27</sup> Cf. *Horst Sendler*, Guter Rechtsschutz und Verfahrensbeschleunigung, DVBl 1982, p. 812 (818).

<sup>28</sup> See for examples *Wilfried Erbguth*, Abbau des Verwaltungsrechtsschutzes, DÖV 2009, p. 921 (927 et seqq.).

<sup>29</sup> Pertaining to the distinction in an American perspective, see e.g. *Pierce/Shapiro/Verkuil* (note 1), p. 293 et seqq., and – comparing to the German law – *Hermann Pünder*, Exekutive Normsetzung in den Vereinigten Staaten von Amerika und der Bundesrepublik Deutschland, 1995, p. 29 et seqq. Note that administrative rulemaking and administrative adjudication are not the only forms of administrative decision-making (see above at II. 1. b). In respect to other forms of administrative action a comparative study is yet to be done.

requirements in this respect.<sup>30</sup> While public authorities in the U.S. have to give everybody the opportunity to participate in the process of administrative legislation (“notice-and-comment-procedure”)<sup>31</sup>, German law – as a general rule – does not require public participation in the procedure of making sub-legislative rules (“*Rechtsverordnungen*”). It is normally at the discretion of the authority to what extent the public is involved in the creation of delegated norms. Furthermore, the U.S. requirement to compile and make publicly available a “rulemaking-record” with a thoroughly reasoned “statement of basis and purpose”<sup>32</sup> is unknown in Germany. German law on administrative rule-making contains no general requirement that reasons must be given.<sup>33</sup> American courts – in contrast to the usual approach of their German counterparts – scrutinize the observance of procedural requirements especially strictly under the so-called “hard look” doctrine.<sup>34</sup> As the procedural control also covers the objective correctness of the basis for the decision, judicial control of executive rulemaking in the U.S. is in general much more rigorous than in Germany.<sup>35</sup>

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<sup>30</sup> See from the German perspective *Hermann Pünder*, Democratic Legitimation of Delegated Legislation – A Comparative View on the American, British and German Law, ICLQ 58 (2009), p. 353 et seqq., and for a broader comparison of the American and German rulemaking *Pünder* (note 29, with an summary in English). From an American Point of view *Rose-Ackermann* (note 5), p. 7 et seqq. For a comparative perspective on the American law from Britain see e.g. *Paul Craig*, Administrative Law, 5<sup>th</sup> ed. 2003, p. 384–387; *J. Garner*, Consultation in Subordinate Legislation, Public Law 1964, p. 105, 122 et seqq.; *William Wade/Christopher Forsyth*, Administrative Law, 9<sup>th</sup> ed. 2004, p. 897; *Donnelly* (note 5), p. 357 et seqq.

<sup>31</sup> § 553 APA provides for participation by all interested persons as a necessary step in all cases of delegated legislation. The public authority has to publish a proposed rule and to give notification of which empowering legislation the delegated legislation is based on, which the factual substantive basis for the decision-making is and how interested persons may participate in the legislative procedure (“notice of proposed rulemaking”). See for details § 553 (b) APA, and *Alfred Aman, Jr./William T. Mayton*, Administrative Law, 2<sup>nd</sup> ed. 2001, p. 44 et seqq. In addition, the public authority has to give an opportunity to “anyone who makes the effort to write a letter” (*William F. Fox, Jr.*, Understanding Administrative Law, 1986, p. 128) to participate in the process of legislation (“right to comment”, § 553 (c) sentence 1 APA). The agency has to take account of the “significant comments” either in writing or by means of a hearing. See *Aman/Mayton* (op. cit.), p. 55 et seqq. (with references to the judicature).

<sup>32</sup> § 553 (c) sentence 2 APA. See for example *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.* (1983) 463 U.S., 29 et seqq. To this decision and the following judicature of American courts in a comparative view *Donnelly* (note 5), p. 360 et seq.

<sup>33</sup> Cf. *Ulrich Ramsauer*, in Denninger et al. (eds.), Grundgesetz, 3rd ed. 2001, Art. 80 note 35, 74b.

<sup>34</sup> See for a comparative perspective *Donnelly* (note 5), p. 359 et seqq. Furthermore, judicial review is much easier to achieve in the USA than in Germany. See for a comparative perspective *Dirk Ehlers*, Die Klagebefugnis nach deutschem, europäischem Gemeinschafts- und U.S.-amerikanischem Recht, VerwArch 1993, p. 139 et seqq.; *Ronald Brickman/Sheila Jasanoff/Thomas Ilgen*, Controlling Chemicals: Politics of Regulation in Europe and the United States (1985), p. 108 et seqq. Claims by individuals, interest groups and associations are increasingly given *locus standi* (so-called “liberal standing”). See above all *Association of Data Processing Service Organizations, Inc. v. Camp* (1970) 197 U.S., 150 et seqq.; *U.S. v. Student Challenging Regulatory Agency Procedures* (1973) 412 U.S., 669 et seqq. A claimant can appear widely as “private attorney general representing the public interest” (*Brickman/Jasanoff/Ilgen*, op. cit., p. 108).

<sup>35</sup> See *Brickman Jasanoff/Ilgen* (note 34), p. 116 et seqq.; *Scharpf* (note 5), p. 24.

Some modern statutes in Germany, however, provide for a certain public participation in the form of hearings of affected interests (“*Anhörung beteiligter Kreise*”).<sup>36</sup> But according to the traditional German perception, the major purpose of such provisions is to incorporate experience and expertise in the administrative legislation process and thus enhance its rationality and efficiency.<sup>37</sup> Contrary to the American understanding, democratic legitimacy and pre-judicial legal protection are not seen to be goals of those requirements.<sup>38</sup> German courts and scholarship even view public input skeptically in that the persons involved represent their interests and not the “common good”.<sup>39</sup> To ensure democratic legitimation they traditionally argue that the decision-making power must solely remain with the executive delegate. Representative democracy is considered as the only “proper form of democracy”.<sup>40</sup> This approach is understandable if one considers that the German legislature (*Bundestag*) is – unlike the American Congress<sup>41</sup> – obliged to make the “significant decisions” itself (so-called “*Wesentlichkeitstheorie*”).<sup>42</sup> When delegating legislative competence to the executive branch of government, the German federal legislator must define “content, purpose and scope” of the delegated authority in comparatively precise terms.<sup>43</sup> Furthermore, the *Grundgesetz* demands that all administrative decisions lie within a chain of full political responsibility to parliament (“*Legitimationskette*”). While independent regulatory commissions and other independent agencies traditionally play an important role in the American administration, they are – as a general rule – considered unconstitutional in Germany.<sup>44</sup> This may explain why German courts tend to probe the substantive correctness of administrative decisions in respect to the parliamentary legislation, while American courts focus more

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<sup>36</sup> See for examples *Hans Schneider*, Gesetzgebung, 1982, p. 150; *Rose-Ackermann* (note 5), p. 61 et seqq.

<sup>37</sup> *Fritz Ossenbühl*, Rechtsverordnung, in Isensee/Kirchhof (eds.), *Handbuch des Staatsrechts*, 1988, p. 414.

<sup>38</sup> Cf. *Ferdinand Kopp*, Verfahrensregelungen zur Gewährleistung eines angemessenen Umweltschutzes BayVBl. 1980, p. 97 (101 et seqq.).

<sup>39</sup> Cf. *Bundesverfassungsgericht*, BVerfGE 66, p. 82 et seqq; *Ossenbühl* (note 37), p. 414 et seq.; *Klaus Stern*, Das Staatsrecht der Bundesrepublik Deutschland, vol. II 1980, p. 667 et seqq. From the American perspective *Rose-Ackermann* (note 5), p. 11.

<sup>40</sup> See *Ernst-Wolfgang Böckenförde*, Mittelbare/repräsentative Demokratie als eigentliche Form der Demokratie, in G. Müller et al. (eds.), *FS Eichenberger*, 1982, p. 301 et seqq. Cf. also *Andreas Hartisch*, Verfassungsrechtliches Leistungsprinzip und Partizipationsverbot im Verwaltungsverfahren, 1975, p. 90 et seqq. (with further references).

<sup>41</sup> See from a comparative perspective *Rose-Ackermann* (note 5), p. 14.

<sup>42</sup> See *Pünder* (note 30), p. 354 (358 et seqq); and for a detailed comparison *Pünder* (note 29), p. 38 et seqq. Cf. also *Rose-Ackermann* (note 5), p. 8 et seqq., 58.

<sup>43</sup> See Art. 80 I 2 GG.

<sup>44</sup> Generally to the German administrative organization *Mahendra P. Singh*, German Administrative Law in Common Law perspective, 2<sup>nd</sup> ed. 2001, p. 33 et seqq. For a comparative perspective on independent agencies in the U.S. *Daniel Halberstam*, The promise of comparative administrative law: a constitutional perspective on independent agencies, in: *Rose-Ackermann/Lindseth*, *Comparative Administrative Law*, 2010, p. 185 et seqq.

on the procedural rightness of the decision-making process.<sup>45</sup>

The Federal Constitutional Court of Germany has stated that there is no constitutional requirement of public input into the administrative rulemaking process. But it has not rendered the participation of citizens unconstitutional, either. The Court asserted that the legislature is free to decide whether it requires hearings in the process of making administrative rules and who might participate in these hearings.<sup>46</sup> More and more, however, comparative scholars in Germany – as well as from the U.S. – emphasize that the American model of participatory democracy and pre-judicial legal protection can enrich German law above all in such regulatory areas where legislation is highly controversial politically and where parliamentary legitimation alone fails to secure sufficient acceptance.<sup>47</sup> A look at the German legislative practice shows that regulating agencies already go a lot further than the constitution and procedural rules requires them to: On an informal level, consultations between executive officials and representatives of the regulated industry occur often during the administrative decision-making process.<sup>48</sup> Furthermore, the modern statutes' requirements on the participation of the affected interests can be interpreted as a signal demonstrating that even the legislator has begun to act – despite not being constitutionally obliged to do so. Procedural democratic legitimation and pre-judicial protection are gaining weight in the German law on administrative rulemaking.

#### b) Formal Adjudications

Similarities between German and U.S. Law can be found concerning “formal adjudications”. American law provides that such decisions shall be reached through a “trial type”-procedure, if a “hearing on the record”<sup>49</sup> is statutorily required.<sup>50</sup> In this case the public has to be informed about the administrative intent to conduct a decision-making process. The “notice” must include information about the determining factors of the

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<sup>45</sup> See in a comparative perspective *Pünder* (note 29), p. 174 et seqq., 192 et seqq. 301.

<sup>46</sup> *Bundesverfassungsgericht*, BVerfGE 42 (1976), p. 191 (205).

<sup>47</sup> See for details *Pünder* (note 30), p. 354 et seqq.; *Rose-Ackermann* (note 5), p. 8 et seqq., 74 et seq., 92 et seq. (with further references). Cf. also *Barnes* (note 1), p. 338: “The need for procedural rules is in direct proportion to the lack of substantive provisions”.

<sup>48</sup> See *Rose-Ackermann* (note 5), p. 8 et seqq., 61 et seqq.

<sup>49</sup> Where statutes demand only a “hearing”, a “formal adjudication” procedure is not necessary. This is only the case, where the exact term “hearing on the record” is used. See *Pierce* (note 6), § 8.2. For an overview over the many possible types of procedures cf. *Michael Asimow*, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to all Evidentiary Hearings Required by Statute*, 56 *Admin. Law Rev.* 2004, p. 1003 et seqq.

<sup>50</sup> §§ 554, 556 und 557 Federal APA. See for more details *Michael Asimow/Ronald M. Levin*, *State and Federal Administrative Procedure Law*, 3<sup>rd</sup> edition 2009, §§ 4.1. – 4.3.

decision-making in law and fact. Next, a “hearing” before an independent decision-maker within the administration (often an “Administrative Law Judge”) takes place.<sup>51</sup> During this procedure, the parties involved are given the opportunity to state their view and support it by evidence. They may also present witnesses and appear with an attorney. The hearing leads to a “record”, containing all information brought forward during the procedure as well as all other documents, on which the final administrative decision is based. Finally, reasons for the decision must be given.

“Trial-type”-procedures which add democratic legitimation to administrative adjudications and provide for pre-judicial legal protection can be found in Germany as well.<sup>52</sup> They are used when a so-called “*formelles Verfahren*” (“formal procedure”) is statutorily required<sup>53</sup> and – more importantly – when projects of great urban and regional planning impact are at stake (“*Planfeststellungsverfahren*”)<sup>54</sup> – for example in decisions concerning the construction of highways, railway tracks, airports, waterways and waste disposal sites.<sup>55</sup> In order to resolve conflicts in a way that provides for democratic legitimacy and with the aim to secure procedural legal protection, a detailed hearing-procedure is to be followed. This procedure is conducted in principle – somewhat comparably to the American law – by an agency different from the authority that has to decide the case.<sup>56</sup> The so-called “hearing authority” (*Anhörungsbehörde*) first arranges for the draft of the plan to be publicly exhibited for one month in those municipalities “on which the project is likely to have an impact”.<sup>57</sup> Then, “any person whose interests are affected by the project” may, up to two weeks after the end of the inspection period, lodge objections to the plan. Following the closing date for lodging objections, no further objections are allowed.<sup>58</sup> This so-called “*Präklusion*” (preclusion of demurs) is ap-

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<sup>51</sup> Cf. *Asimow/Levin* (note 49), § 4.3.; *Michael Asimow*, Inquisitorial Adjudication and Mass Justice in American Administrative Law, forthcoming in: *The Windsor Journal of Access to Law*.

<sup>52</sup> See for a comparative perspective *Ehlers* (note 5) p. 617 (618); *Franz Erath*, *Förmliche Verwaltungsverfahren und gerichtliche Kontrolle – Eine rechtsvergleichende Studie unter Berücksichtigung Deutschlands und der USA*, 1996; *Jarass* (note 5), p. 377 (380 et seqq.); *Rose-Ackermann* (note 5), p. 82 et seqq.

<sup>53</sup> § 63 - § 71 VwVfG.

<sup>54</sup> § 72 - § 78 VwVfG.

<sup>55</sup> But note that many of these cases would in the U.S. be considered to be “rulemaking”. In Germany special forms of administrative procedure exist furthermore for example in the telecommunication regulation area, in public procurement law and in environmental law. See *Hermann Pünder*, *Verwaltungsverfahren*, in: *Erichsen/Ehlers* (eds.), *Allgemeines Verwaltungsrecht*, 14. Aufl. 2010, p. 548 et seqq.; *Rose-Ackermann* (note 5), p.82 et seqq.

<sup>56</sup> § 73 IX VwVfG. See for details *Pünder* (note 55), p. 515 et seqq.; *Rose-Ackermann* (note 5), p. 84 et seqq.

<sup>57</sup> § 73 II, III 1 VwVfG

<sup>58</sup> § 73 IV 1, 3 VwVfG.

plicable not only in the administrative procedure but also in the event of a trial before administrative law courts. Comparable to American agencies in formal adjudications, the hearing authority has to discuss the objections made to the plan in good time as well as comments made by other authorities in a “meeting for oral discussion” (*Erörterungstermin*) with the project developer, the authorities involved and the persons who have lodged objections to it.<sup>59</sup> The target of this meeting is to reach mutual consent between the parties. The hearing authority then issues a – non-binding – statement concerning the result of the hearing and transfers the case together with the plan, the opinions of the authorities and those objections which have not been resolved to the “planning approval authority” (*Planfeststellungsbehörde*), which will consider and decide on the plan by an administrative act called “planning approval decision” (*Planfeststellungsbeschluss*).<sup>60</sup> Above all, the planning approval must contain the agency’s decision concerning the objections on which no agreement was reached during the discussions before the hearing authority.<sup>61</sup> Finally, a detailed reasoning is to be given.<sup>62</sup> To sum up: Looking at “formal adjudications”, one can – unlike the traditional view in comparative legal scholarship suggests – not any more conclude that German law takes administrative procedure less seriously than American law. The procedural requirements in the two jurisdictions are quite alike. The conflict between the demand for democratic decision-making under the rule of law and administrative efficiency is resolved in a similar way in both countries.

### c) Informal Adjudications

However, in both countries most decisions are reached as “informal adjudications”.<sup>63</sup> In this field, a difference is to be noted between the jurisdictions, which is often overlooked by the comparative legal academia. It is even further at odds to the traditional comparative assessment that American law is more demanding than German law. In respect to informal adjudications German law appears to be more ambitious than

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<sup>59</sup> § 73 VI 1 VwVfG.

<sup>60</sup> § 73 IX, § 75 I VwVfG.

<sup>61</sup> § 74 II VwVfG.

<sup>62</sup> § 74 I 2 in connection with § 69 II 1 VwVfG.

<sup>63</sup> In fact, about ninety percent of administrative decisions in the US are made through informal adjudications; see *Pierce/Shapiro/Verkuil* (note 1), p. 365. When the APA was drafted, it was the legislator’s intent, that formal adjudication procedures should apply only to the minority of cases, see *Gary J. Edles*, An APA-Default Presumption for Administrative Hearings: Some Thoughts on “Ossifying” the Adjudication Process, 55 Admin. Law Rev. (2003), p. 787 (791); *Winfried Brugger*, Einführung in das öffentliche Recht der USA, 2nd ed. 2001, p. 240.



American law.<sup>64</sup> Contrary to the American law, the Administrative Procedure Act in Germany explicitly – and quite in detail – regulates the administrative procedure for the enactment of “administrative acts”. Above all, § 28 I VwVfG states that “before an administrative act affecting the rights of a participant may be issued, the latter must be given the opportunity of commenting on the facts relevant to the decision”.<sup>65</sup> Compared to the American law this entitlement to a hearing has a broad scope of application as it applies to anyone whose rights can be negatively affected by the administrative decision. The right to a hearing includes not only the person the administrative act is directed at but also third parties if their rights are concerned.<sup>66</sup> A hearing is further necessary if an application for public benefits is rejected. Moreover, the German administrative procedure act in § 39 I VwVfG explicitly forces the administration always to give a “statement of grounds” containing “the chief material and legal grounds, which have led the authority to take its decision” and the “points of view which the authority considered while exercising its power of discretion”.<sup>67</sup> The importance of these rules has been stressed – as we have seen (*supra* II. 1. c) – by famous decisions of the German Federal Constitutional Court noting that the fundamental constitutional rights “shall influence not only substantive law, but also procedure, in as far as this is required to adequately protect these rights.”<sup>68</sup>

Unlike the German *Verwaltungsverfahrensgesetz* the American Administrative Procedure Act contains hardly any regulations for the procedure to be followed.<sup>69</sup> Unless there are specific statutory requirements, procedural rules for informal adjudications have to be derived merely from the constitutional “due process”-clause (V. and XIV. amendment), which protect “life, liberty and property”. In a comparative perspective American courts traditionally tend to face the “due process”-clauses with rather strong self-restraint. A right to a hearing is not even provided for every act directly interfering with the rights of an individual person. In contrast to the approach of the German Fed-

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<sup>64</sup> See *Michael Fehling*, *Eigenwert des Verfahrens im Verwaltungsrecht*, in: *VVdStRL* 70 (2010), p. 278 (289 et seqq). For a different assessment *Ehlers* (note 5) p. 617 (623 et seq.).

<sup>65</sup> The exceptions to the rule are rather restrictive. According to § 28 II VwVfG a hearing may be omitted *inter alia* when “an immediate decision appears necessary in the public interest”, when the hearing “would jeopardize the observance of a time vital to the decision”, and when “the intent is not to diverge to his disadvantage from the action statements made by a participant in an application or statement”.

<sup>66</sup> § 28 I VwVfG in connection with § 13 VwVfG.

<sup>67</sup> Again, exceptions are very restricted. See § 39 II VwVfG for details.

<sup>68</sup> *Bundesverfassungsgericht*, BVerfGE 53 (1979), p. 30 (65).

<sup>69</sup> Informal adjudication is described rather sketchy in § 555 APA and to some degree in § 558 APA.

eral Constitutional Court,<sup>70</sup> the idea to understand the “liberty“-clause widely as an individual right to remain untroubled by unlawful government actions,<sup>71</sup> could not win general recognition.<sup>72</sup> Until today, it seems to be nebulous in the U.S. to which extent third parties are protected by the “due process“-clause.<sup>73</sup> Different to German law, an obligation for the state to actively protect individual rights by administrative procedure is hardly ever recognized.<sup>74</sup> If a person is denied state benefits, a “deprivation” of “property rights” is only found in the case that the citizen was “entitled” to the social benefits and that they have been either revoked or not prolonged.<sup>75</sup> Third parties are in principle never granted a right to a hearing in public benefits claims.<sup>76</sup> Finally, under U.S. law, a reasoning must only be given when the written request of an interested person<sup>77</sup> is dismissed, but not for all actions directly interfering with individual rights. *Justice Marshall’s* broad understanding of the “due process“-clause in *Board of Regents v. Roth*<sup>78</sup> has not been generally accepted.<sup>79</sup> All this, however, should not make us forget that the Supreme Court since the 1970s generally applies the “due process“-clause broader than it originally used to.<sup>80</sup> On a long term perspective, American law, too,

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<sup>70</sup> The German Federal Constitutional Court understands “liberty” in Art. 2 I GG as the freedom to remain untroubled by any illegal governmental actions. See most importantly *Bundesverfassungsgericht*, BVerfGE 6, p. 32 (36).

<sup>71</sup> It has always been difficult to determine, which interests apart from bodily freedom are protected by the “liberty“-clause. See *Pierce/Shapiro/Verkuil* (note 1), p. 257 et seqq.; *William Van Alstyne*, Cracks in the New Property Adjudicative Due Process In the Administrative State, 62 Cornell L. Rev. (1977), 445 (487).

<sup>72</sup> See in respect to the judicature regarding the “due process” clause in general *Richard J. Pierce*, Administrative Law Treatise, vol. 2 (2010), § 9.3. With regard to liberty interests in particular, see *Pierce/Shapiro/Verkuil* (note 1), p. 257 ff. et seqq.

<sup>73</sup> See *Jerry L. Mashaw*, Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance, 76 Geo. Wash. L. Rev. (2007), 99 (120), showing that this problem applies not only to persons affected negatively by government actions concerning another person’s rights but also to potential beneficiaries of state actions against others. There are, however, two categories of disputes in which third parties may hold hearing rights. These are “comparative hearings” and the “third party intervention”. See *Jerry L. Mashaw/Richard A. Merrill/Peter M. Shane*, Administrative Law, 6<sup>th</sup> ed. 2009, 417 et seqq.

<sup>74</sup> See e.g. *Town of Little Rock v. Gonzales*, 545 U.S. 748 (2005).

<sup>75</sup> In order to understand this interpretation, one must consider the requirement of a deprivation. In cases where the affected person has already received benefits, it seems easier to find that this person has been “deprived” of an interest. If a person has never received a benefit, it seems harder to come to this conclusion. See *Pierce* (note 72), § 9.4. Cf. also *Mashaw* (note 73), p. 99 (120).

<sup>76</sup> Neither are people who seek protection from violators of their rights by enforcing statutory provisions. In both cases, no access to judicial review against the state’s refusal to act is granted. See *Mashaw* (note 73), p. 99 (120).

<sup>77</sup> See § 555(e) APA.

<sup>78</sup> *Board of Regents v. Roth*, 408 U.S. 564 (1972) – *Justice Marshall*, dissenting, pp. 587 et seqq.

<sup>79</sup> For an overview over the US administrative law and jurisprudence concerning hearing requirements, see *Pierce* (note 6), § 8.5. (Especially p. 719). In most cases (but not always) the right to reasoning is parasitic to the right to a hearing. In the view of American law, one of the most important purposes of a reasoning requirement is to ensure that the administrative decision actually deals with aspects brought forward at the hearing. See *Mashaw* (note 73), p. 99 (106 et seqq., esp. p. 107).

<sup>80</sup> See *Mashaw/Merrill/Shane* (note 73), p. 376 et seqq., for a summary of the Supreme Court’s judicature in this respect. For example, the Court has widened the scope of application from traditionally

shows at least a certain extent of movement towards a stronger scope of procedural review.

### 3. Consequences of Procedural Errors

The true conflict, however, emerges regarding the question as to which consequences ought to be posed upon procedural mistakes. In Germany, prior to the codification of administrative procedure in the 1970s, there was controversy among courts and academics as to the consequences of “merely” formally unlawful decisions. Meanwhile, the German law contains explicit regulation on this matter. According to § 45 I VwVfG an “infringement of the rules governing procedure shall be ignored” when “the necessary hearing of a participant is subsequently held” or when “the necessary statement of grounds is subsequently provided”. Once the procedural error has been corrected, the administrative act is viewed as lawful; courts have no right to overturn the decision of the administration.<sup>81</sup> Pursuant to § 45 II VwVfG, procedural mistakes can be corrected even during court proceedings. This rule serves the purpose of effective and efficient decision-making and is part of the legislature’s efforts to further expedite administrative procedure.<sup>82</sup> But it is precarious, as formal requirements cease to be relevant if their breach could lead to no court sanctions whatsoever.<sup>83</sup> Therefore some German scholars argue that the possibility to correct procedural errors is even unconstitutional.<sup>84</sup> If procedural errors are not corrected or if a correction is not possible, the party

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only “rights” to so-called “privileges” – meaning rights granted by the state such as employment in the civil service. See above all *Goldberg v. Kelly*, 397 U.S. (1970), 254, 262 et seqq. For a comparative perspective *Jarass* (note 5), p. 377 (383).

<sup>81</sup> This was already recognized by the Prussian Highest Administrative Court (*Preußisches Oberverwaltungsgericht*). See for details *Wolfgang Durner*, Die behördliche Befugnis zur Nachbesserung fehlerhafter Verwaltungsakte, *VerwArch* 97 (2006), p. 345 (351). But note, that the party can pursue a so-called “*Fortsetzungsfeststellungsklage*” (§ 113 I 4 VwGO), a law suit designed to establish that an administrative decision was unlawful until the time of its correction, in addition to the possibility of being able to sue for damages for losses incurred due to the error (Art. 34 GG, § 839 BGB).

<sup>82</sup> Up until 1996, the correction of procedural errors was limited to the time up until an action was filed with the courts.

<sup>83</sup> But note that the Federal Administrative Court stated that the correction can make the error obsolete in court only when the arguments brought forth by the party are subsequently included in the new agency decision. If the agency merely references the arguments in a formal way – without truly dealing with them, merely in order to uphold their decision before the courts – the error may not be viewed as corrected. Cf *Bundesverwaltungsgericht*, BVerwGE 66 (1982), 111, 114 et seq.

<sup>84</sup> See *Barbara Bredemeier*, Kommunikative Verfahrenshandlungen im deutschen und europäischen Verwaltungsrecht, 2007, 359 ff; *Wolfgang Erbuth*, Zum Gehalt und zur verfassungs- wie europarechtlichen Vereinbarkeit der verwaltungsprozessual ausgerichteten Beschleunigungsgesetzgebung, *UPR* 2000, 81, 85 ff; *Martin* (note 23), p. 286 f; *Matthias Niedobitek*, Rechtsbindung der Verwaltung und Effizienz des Verwaltungsverfahrens, *DÖV* 2000, 761 ff; *Helge Sodan*, Unbeachtlichkeit und Heilung von Verfahrens- und Formfehlern, *DVB* 1999, 729, 738; *Armin Hatje*, Die Heilung formell rechtswidriger Verwaltungsakte im Prozess als Mittel der Verfahrensbeschleunigung, *DÖV* 1997, 477, 483.

will generally be entitled to have a court reverse the decision of the agency.<sup>85</sup> According to § 46 VwVfG this is not the case, however, when it is “evident that the infringement of regulations governing procedure has not influenced the decision on the matter”. Obviously the preclusion of the right to a reversal further expedites administrative procedure. But, on the other hand, a cavalier approach to procedural regulations must be feared. The notion may arise that the breach of these regulations are forgivable sins. Therefore some scholars argue that § 46 VwVfG is also unconstitutional.<sup>86</sup> § 46 VwVfG cannot be applied though to errors which could still be corrected. Furthermore, the norm is irrelevant if the agency is granted discretion in its decision-making. As the procedural standards in these cases fulfill the purpose of influencing the agency’s decision, the Federal Administrative Court stated that it can never be certain that the observation of the procedural requirements may not have led the agency to reach a different decision.<sup>87</sup>

The underlying reasoning of the German rules concerning the consequences of procedural errors is the notion that the correct decision according to substantive law is to be sought, whereas the path leading to it and the form in which it finds its expression are secondary. In comparative scholarship this view is often considered to be a very typical German approach showing that German law takes procedure less seriously than the American law in balancing the necessities of democracy, rule of law, and administrative efficiency. This traditional assessment, however, overlooks the so-called “harmless error doctrine” in the U.S. which is based on the “rule of prejudicial error” (§ 706 APA).<sup>88</sup> American courts investigate either if a mistake has influenced the decision’s basis of facts (“record based standard”<sup>89</sup>) or sometimes – in even stronger coherence to the German law – whether the mistake has influenced the final decision (“outcome-based

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<sup>85</sup> § 113 I 1 VwGO.

<sup>86</sup> See e.g. *Niedobitek* (note 84), p. 761 et seqq.

<sup>87</sup> Siehe *Bundesverwaltungsgericht*, BVerwGE 61 (1980), p. 45 (50). Only in cases in which the agency had no discretion for its decision, the Federal Administrative Court accepted that there can be no right to a reversal as the agency would have had to issue the very same decision had it observed all the procedural standards. Cf. *Bundesverwaltungsgericht*, BVerwGE 62 (1981), 108, 116; NVwZ 1988, 525, 526.

<sup>88</sup> Here too, like in the German law, the underlying principle is that procedural errors that have only very unlikely caused any material harm to the plaintiff might not give the court’s jurisdiction to vacate or remand agency action. For details see *Richard J. Pierce*, *Making Sense of Procedural Injury*, 62 Admin. L. Rev. (2010), p. 1 (2 et seqq.).

<sup>89</sup> For the “record-based-standard” with the burden of proof lying by the claimant, see e.g. *Gerber v. Norton*, 294 F. 3d (D.C. Cir. 1991) 173, 182. In informal rulemaking, the burden of proof lies rather by the agency. See *Shell Oil Co. v. EPA*, 950 F. 2d (D.C. Cir. 1991), 741, 752.

standard”<sup>90</sup>).<sup>91</sup> Furthermore, the claimant under U.S. law is like in Germany expected to show that procedural mistakes may have been of influence on the final decision in order to be granted standing in claims based only on formal errors (“plausibility test”<sup>92</sup>).<sup>93</sup> Finally, American law like German law accepts corrections of procedural mistakes to a certain extent.<sup>94</sup> A decision without a proper reasoning is usually considered unlawful and annihilated. But American courts – comparable to German law – grant the agency a possibility to correct its mistake during court proceedings, as long as the given reasoning is proven to contain the agency’s actual motives – not just reasons the officials have made up.<sup>95</sup> To sum up, German law is not more generous than U.S. law in respect to procedural mistakes.<sup>96</sup> Contrary to the traditional comparative assessment, both jurisdictions appear to use quite a similar approach with regard to this issue.

### **III. Broadening the Comparison to the European Perspective**

#### **1. Administrative Procedural Law in other European Countries**

In a European comparative perspective, English and French law are well worth examining as both countries lack an exhaustive codification of administrative procedural law – in spite of the tendencies toward codification in other European countries, which to a good part follow the German (or the comparable Austrian) role-model.<sup>97</sup> The analysis of the English and French law will show that their administrative procedural standard meanwhile has reached a level which can be viewed as quite similar to German and

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<sup>90</sup> See for example *Kurzon v. United States Postal Service*, 539 F. 2d (1st Cir. 1976), 788, 796.

<sup>91</sup> See for a critical analysis of the not very systematic judicature *Craig Smith*, Taking “Due Account” of the APA’s Prejudicial Error Rule, 96 Virginia L. Rev. (2010), p. 1727 (1739 et seq.).

<sup>92</sup> Besides the “plausibility test”, which asks whether a procedural mistake might plausibly have changed the agency’s final decision, courts may also apply the “probability test”. Here, the court assesses whether the petitioner has demonstrated that the error’s impact on the outcome of a dispute is “substantially probable”. See *Pierce* (note 88), p. 1 (2).

<sup>93</sup> See for example *Lujan v. Defender of Wildlife*, 504 U.S. (1992), 555, 572, with regard to an omitted hearing or *Elec. Power Supply Assn. v. FERC*, 391 F. 3d (D.C. Cir. 2004), 1255, 1262, concerning unlawful ex-parte contacts in formal procedures. For an overview see *Pierce* (note 88), p. 1 (2 et seq.), and in a comparative perspective *Rose-Ackermann* (note 5), p. 134 et seqq.

<sup>94</sup> Cf. *Tourus Records v. DEA*, 259 F. 3d (D.C. Cir. 2001), 731, 738; *Pierce* (note 6), § 8.5 (especially p. 725). Courts have a large scope of discretion concerning the remedies granted. They can choose whether to annihilate a decision with effect for only the future or also the past. They may also keep the decision in effect, but order the agency to take other measures to correct the consequences of its mistakes. This fact gives the courts additional flexibility. *Cal. Forestry Assn. v. U.S. Forest Serv.*, 102 F. 3d (D.C. Cir. 1996), 609, 613. For an overview over the different measures a court may take see *Pierce* (note 88), p. 1 (11).

<sup>95</sup> Cf. *Florida Power & Light Co. V-Lorion*, 470 U.S. (1985), 729, 744; *Pierce* (note 6), § 8.5 (especially p. 720). *Pierce* points out the great importance for the court to determine the “real” reasons for an agency decision. These are the critical aspect for judicial review and must not necessarily be identical with what the agency’s lawyer states. For a comparative perspective *Saurer* (note 5), p. 354 ff (378).

<sup>96</sup> See *Fehling* (note 64), p. 278 (299).

<sup>97</sup> Cf. for an comparative overview *Pünder* (note 55), § 12 note 25 et seq.

American law.

a) Administrative Procedure in Britain

In special statutes, British law sometimes demands a “public inquiry” which is comparable to the German and American procedures for making “formal adjudications” (*supra* II. 2. b).<sup>98</sup> But unlike in Germany yet as in the U.S. (*supra* II. 2. c), every-day administrative decision-making lacks special regulation. British agencies have a wide range of discretion as to which procedures they use in order to most effectively and efficiently fulfill their duties.<sup>99</sup> A certain level of “fairness” is achieved – in a certain coherency to the American constitutionally based approach – by the application of the “rules of natural justice” for decisions affecting “rights”, “privileges” or “legitimate expectations”.<sup>100</sup> Most importantly, these rules include the principle of “*audi alteram partem*”. Those affected by administrative decisions must be informed about the intended decision and the materials it is supposed to be based on,<sup>101</sup> although exceptions to this right to a hearing exist. Above all, the hearing is unnecessary for legislative actions by the administration.<sup>102</sup> Thus, in respect to administrative rulemaking, English law is like German law in contrast to the U.S. (*supra* II. 2. a)<sup>103</sup> Besides that, giving reasons is generally not yet demanded in Britain contrary to German law.<sup>104</sup> However, courts have begun to apply exceptions, if important rights, such as personal liberty, are involved or if the decision appears to be abnormal.<sup>105</sup>

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<sup>98</sup> Such procedures play an important role in the making of “structure plans” by the counties and of local plans by the districts as well as when building permits are issued. See e.g. Town and Country Planning Act 1990, sections 42, 320; *Wade/Forsyth* (note 30), p. 962. In principle, public inquiries are only part of the decision-making process and end merely with a report or a suggestion. Only so-called planning inquiries end with a decision by the “planning inspectors”.

<sup>99</sup> See for a comparative perspective *Donnelly* (note 5), p. 367.

<sup>100</sup> The leading cases are *Ridge v Baldwin* [1964] AC 40; *McInnes v Onslow-Fane* [1978] 1 WLR 1520 and already *Cooper v Wandsworth Board of Workers* (1863) 14 CBNS 180. For the academia see *Wade/Forsyth* (note 30), p. 489 et seqq.; *Peter Cane* Introduction to Administrative Law, 3<sup>rd</sup> ed. 1996, 160 et seqq.; *Craig* (note 30), p. 405 et seqq.

<sup>101</sup> Cf. *R v Secretary of State for the Home Department, ex p Hickey* (No 2) [1995] 1 WLR 734; *R v Secretary of State for the Home Department, ex p Fayed* (No 1) [1998] 1 WLR 763.

<sup>102</sup> Cf. *R v Secretary of State for Transport, ex p Pegasus Holdings (London) Ltd* [1988] 1 WLR 990; *R v Falmouth and Truro Port Health Authority, ex p South West Water Ltd* [2001] QB 445; *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876; *Bates v Lord Hailsham of St Marylebone* [1972] 1 WLR 1373.

<sup>103</sup> See from the German perspective *Pünder* (note 30), p. 353 et seqq., and for a broader comparison of the American and German rulemaking *Pünder* (note 29). For a Britain view see e.g. *Craig* (note 30), p. 384–387; *Garner* (note 30), p. 105, 122 et seqq.; *Wade/Forsyth* (note 30), p. 897.

<sup>104</sup> Cf. *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, 564 per Lord Mustill; *R v Ministry of Defence, ex p Murray* [1998] COD 134 per Lord Bingham CJ; different opinion *R v Lambeth London Borough Council, ex p Walters* (1994) 26 HLR 170.

<sup>105</sup> Cf. *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 WLR 242, 264. Elaborate *Peter Leyland/Terry Woods* Administrative Law, 3<sup>rd</sup> ed. 1999, p. 342 et seqq.; *Fordham* Judicial Review Handbook, 3<sup>rd</sup> ed. 2001, note 62.

The judiciary – especially the “Administrative Court” founded in 2000 as part of the “High Court of Justice”<sup>106</sup> – monitors the procedural rules relatively closely. “Procedural impropriety” represents a cause for legal action.<sup>107</sup> A breach of “natural justice” generally leads to nullity of the agency decision. Occasionally, though, British judges will deny a “quashing order”, if the procedural error had no consequence for the decision.<sup>108</sup> In addition, a correction of administrative errors in regard to procedure is allowed.<sup>109</sup> This jurisprudence corresponds with the German rules as well with the American “harmless error doctrine” as discussed above (*supra* II. 3.).

b) Administrative Procedure in France

Like the other jurisdictions, French law has been underestimating the law of administrative procedure for a long time. Comparable to the German traditional approach (*supra* II. 1.), the possibility to seek court remedies after having received administrative decisions was considered to sufficiently provide legal protection. Even nowadays, the idea of codifying administrative procedure is viewed with certain skepticism. Procedural rules are developed mainly by the “*Conseil d’Etat*” as a “*jurislateur*”.<sup>110</sup> Meanwhile, however, certain procedural provisions can be found (which do not all have the rank of parliamentary statutes, though).<sup>111</sup> The most important element of the “*procédure administrative non-contentieuse*” – this notion distinguishes administrative procedure law from the law concerning the procedure of the administrative law courts (“*procédure administrative contentieuse*”)<sup>112</sup> – is to protect the “*droits de la defense*”. In order to achieve this target, the law provides an adversarial procedure in cases where the administrative act reaches a certain level of interference (“*gravité*”) with individual rights.<sup>113</sup> As in the U.S. and in Germany (*supra* II. 2. c) as well as in England (*supra* III.

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<sup>106</sup> Besides that there are “Administrative Tribunals” with the right to a *de novo*-hearing. The system has been reformed by the Tribunals, Courts and Enforcement Act of 2007 (esp. strengthening the independence and creating “First-Tier” and “Upper Tribunals”). Cf. in a comparative perspective to Australia Michael Asimow/Jeffrey S. Lubbers, The Merits of “Merits” Review: A Comparative Look at the Australian Administrative Appeals Tribunal, 28 The Windsor Year Book of Access to Justice (2010), p. 261, 267 et seqq.

<sup>107</sup> Cf. Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410.

<sup>108</sup> Cf. *Malloch v Aberdeen Corp* (1971) 1 WLR 1578; *Glynn v Keele University* (1971) 1 WLR 487; different opinion *Annamunthodo v Oilfields Workers’ Trade Union* (1961) AC 945; more restrictive *John v Rees* (1970) Ch. 345, 402.

<sup>109</sup> Cf. *Calvin v Carr* (1980) AC 574.

<sup>110</sup> Cf. René Chapus Droit administratif général, Vol. 1, 15th ed. 2001, note 116; Gilles Lebreton Droit administratif général, 2<sup>nd</sup> ed. 2000, p. 48.

<sup>111</sup> See the texts in the Code Administratif by Dalloz.

<sup>112</sup> Cf. Bell (note 1), p. 1261.

<sup>113</sup> Cf. Chapus (note 110), note 1311 et seqq.; Jean Rivero/Jean Waline Droit administratif, 19th ed.

1. a), French agencies are obliged to contact the individuals affected in an “*avertissement préalable*” and to give them the opportunity to bring forward demurs (“*observations*”).<sup>114</sup> For a long time, an obligation to issue a reasoning (“*motivation*”) has not been acknowledged by French courts. Today – as in Germany – it is required by a statute.<sup>115</sup> Besides the adversarial procedure, there is a consultative procedure (“*procédure consultative*”) in form of a hearing of experts<sup>116</sup> and, above all, the “*enquête publique*”, which – similar to “formal adjudications” in the U.S. and in Germany (*supra* II. 2. b) as well as to “inquiries” in England (*supra* II. 3. a) – has the target to give the agency a broader scope of information and make it more democratic, especially in procedures concerning compulsory acquisition, urban and regional planning and environmental law.<sup>117</sup>

Judicial review of procedural errors in France is also comparable to the jurisdictions already dealt with.<sup>118</sup> The legal action to seek “*annulation*” of an agency decision (“*recours pour excès de pouvoir*”) deals – like in American, German and English law (*supra* II. 2. c), III. 1. a) – not only with substantive legality, but also with the question of formal legality (“*légalité interne*” and “*externe*”). Breaches of procedural requirements (“*vice de procédure*”) generally lead to the reversal of the decision at hand.<sup>119</sup> Procedural errors, however, are irrelevant – similar to the jurisprudence in German law – when they concern decisions in which the agency had no discretion (“*compétence liée*”). In regard to discretionary decisions (“*pouvoir discrétionnaire*”), a breach will only be seen

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2002, note 95 et seq.; Bernard Braibant/Guy Stirn *Le droit administratif français*, 6th ed. 2002, p. 271 et seq.; Langrod (note 11).

<sup>114</sup> Leading case: C.E. Sect. v 5.5.1944 Rec, 133 (“*Dame veuve Trompier Gravier*”). Meanwhile there is a norm in Art 8 des Décret no. 83-1025 du 28 novembre 1983 concernant les relations entre l’administration et les usager, J.O. v 3.12.1983, 3492. The hearing can be unnecessary for reasons of time pressure and the “*ordre public*”. Above all no hearing has to be held before preemptive “*mesures des police*” and before decisions the affected person has applied for. Critically: René David/Camille Jauffret-Spinosi, *Les grands systèmes de droit contemporains*, 9<sup>th</sup> ed. 1988, note 87.

<sup>115</sup> Loi no 79-587 du 11.7. 1979 relative à la motivation des actes administratifs et à l’amélioration des relations entre l’administration et le public, J.O. v 12.7.1979, 1711. Cf. Chapus (note 110), note 1318 et seq.; Rivero/Waline (note 113), note 96-1.

<sup>116</sup> Cf. Chapus (note 110), p. 1303 et seq.; Charles Debbasch *Institutions et droit administratifs*, Vol. 2, 2<sup>nd</sup> ed.1986, p. 160 et seq.

<sup>117</sup> Loi no 83-630 du 12.7. 1983 relative à la démocratisation des enquêtes publiques et à la protection de l’environnement (J.O. du 13.7. 1983, p. 2156). Cf. Braibant/Stirn (note 113), p. 495 et seq.; Charlonneau in: Hélin/Hostiou/Jegouzo/Thomas, *Les nouvelles procédures d’enquête publique*, 1986, p. 105 et seq.; Debbasch (note 116), p. 161 et seq.; Bruno Lasserre/ Noëlle Lenoir/Bernard Stirn, *La transparence administrative*, 1987, p. et seq.

<sup>118</sup> But note that the American judicial review – unlike the other jurisdictions analyzed – does not follow the “inquisitorial”, but the “adversarial” model. See Asimow (note 51).

<sup>119</sup> In a comparative perspective: Thomas v. Danwitz, *Europäisches Verwaltungsrecht*, 2008, p. 59 et seq., 65 et seq.; Clemens Ladenburger, *Verfahrensfehlerfolgen im französischen und im deutschen Verwaltungsrecht*, 1999, p. 156 et seqq.



as irrelevant if it represents a mere irregularity (“*irrégularité*”) and is a breach of un-substantial formalities (“*formalités accessoires*” or “*non-substantielles*”). The distinction between whether or not the error affected the decision, or whether the purpose of the procedural regulation was fulfilled in another way, is crucial. The correction of fundamental errors is barred in France, unlike under German, American and English law.

## 2. Administrative Procedure in European Union Law

European Union law is generally executed not directly by European agencies but indirectly by the member states applying their own procedure law.<sup>120</sup> However, there are limits to the member states’ procedural autonomy.<sup>121</sup> In lack of special rules, general procedural principles apply which have been developed by the European Court of Justice (ECJ) in a comparative view of the member states’ laws.<sup>122</sup> Above all, the ECJ has stated that there is a right to a hearing, which includes information about the intended decision.<sup>123</sup> It applies when a decision can possibly have a noticeable effect on an individual. Furthermore, the Court has decided that reasons must be given for administrative decisions.<sup>124</sup>

The correction of procedural errors has been allowed by the ECJ during the administrative procedure when European agencies directly execute European law,<sup>125</sup> but – in contrast to German law (*supra* II. 2. c) – not during court proceedings.<sup>126</sup> In order to pre-

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<sup>120</sup> ECJ, ECR 1971, I-49 Sec. 4; ECR 1971, I-1107 Sec. 3/4 – International Fruit Company.

<sup>121</sup> Constitutive: ECJ, ECR 1983, I-2633 Sec. 17 – Deutsche Milchkontor.

<sup>122</sup> Their foundations are the principles of loyalty towards the union, non-discrimination (Art. 18 TFEU) and the Union’s four freedoms (Art. 28 et seqq. TFEU) and thus, in law ranking higher than secondary EU law. Cf. for an overview from the American perspective *Michael Asimow/Lisl Dunlop*, The Many Faces of Administrative Adjudication in the European Union, 61 Administrative Law Review, Special edition 2009 (Proceedings of the 5<sup>th</sup> Administrative Law Discussion Forum), p. 131 et seq.

<sup>123</sup> Cf. ECJ, ECR 1963, I-107, 123 – Alvis; ECR 1974, I-1063 Sec. 15 – Transocean Marine Paint; ECR 1979, I-461 Sec. 9 et seqq. – Hoffmann-La Roche; ECR 1983, I-3461 Sec. 7 – Michelin; ECR 1986, I-2263 Sec. 27 – Belgium/Commission; ECR 1990, I-959 Sec. 46 – Belgium/Commission; ECR 1996, I-151 Sec. 9; ECR 1996, I-5373 Sec. 21 – Lisrestal; ECR 1998, I-2873 Sec. 47 – Windpark Groothusen; ECR 2001, I-5281 Sec. 28 – Ismeri Europe/Court of Auditors. See also the accurate comparative legal approach at *GA Warner* in: ECJ, ECR 1974, I-1090 et seqq. – Transocean Marine Paint. See for a comparative perspective also *Donnelly* (note 5), p. 361 et seqq.

<sup>124</sup> ECJ, ECR 1987, I-4097 Sec. 15 – Unectef; ECR 1990, I-395 Sec. 15 f – Delacre; ECR 1991, I-2357 Sec. 22 – Vlassopoulou; ECR 1993, I-1663 Sec. 40 – Kraus; ECR 1996, I-5151 Sec. 22, 48 – Germany et al./Commission; EGC, ECR 2002, II-3731 Sec. 100 et seqq. – Sgaravatti Mediterranea. For a comparative perspective *Mashaw* (note 73), p. 99 et seqq.

<sup>125</sup> Cf. ECJ, ECR 1983, I-3151 Sec. 29; ECR 1987, I-3259 Sec. 10 – Hochbaum and Rawes.

<sup>126</sup> Cf. ECJ, ECR 1996, I-5151 Sec. 22, 48 – Germany/Commission; EGC, ECR 1995, II-1775 Sec. 98, 103 – Solvay; ECR 1995, II-1825 Sec. 53 – Solvay; ECR 1995, II-1847 Sec. 108, 113 – ICI; ECR 1995, II-2841 Sec. 39 – France-Aviation. The Court is particularly strict when it comes to breaches of the right to a statement of grounds or the right to be heard. Cf. ECJ, ECR 1958/59, I-89, 115 et seq. – Nold; ECR 1967, I-99, 125 – Cimenteries; ECR 1979, I-321 Sec. 6 et seqq. – France/Commission; ECR 1980, I-3333 Sec. 37 – Roquette Frères; ECR 1981, I-1805 Sec. 26 et seq. – Rewe; ECR 1987, I-4013 Sec. 22 –

serve the uniformity of EU-law, this restriction must also be observed when European law is indirectly executed by the member states.<sup>127</sup> In addition, the subsequent fulfillment of procedural specifications has no retroactive effects according to European law, if the practical effect of the procedural rule would otherwise be undermined.<sup>128</sup> Furthermore, European law does not require procedural errors to always lead to a reversal of agency decisions, irrespective of the consequences of the error for the decision itself. As far as direct execution of EU law goes, only the breach of fundamental procedural provisions qualifies for a nullification action (Art. 263 II TFEU). This so-called “harmless error principle” can also be applied to indirect execution by member states. A procedural stipulation is considered to be fundamental, only if its breach can influence the content of an action.<sup>129</sup> However, as far as breaches of the right to a statement of grounds and of the right to be heard go, the ECJ generally finds these mistakes to be fundamental.<sup>130</sup>

#### IV. Development of a Transnational “*Ius Commune Proceduralis*” in Administrative Law

The comparison of the German administrative procedure law to the American procedural requirements has shown that the traditional view in comparative legal scholarship, implying that Germany lags behind the U.S. in respect to public participation, is nowadays only partly true. While the U.S. had a head-start in codifying procedural requirements, Germany – not least thanks to an intensified comparative research – has caught up (*supra* II. 1. b). Meanwhile, American law has procedural advantages over German law merely in regard to administrative rule-making, where it is a lot more de-

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Germany/Commission; ECR 1996, I-5151 Sec. 48 – Germany/Commission; ECR 2001, I-5281 Sec. 31 et seq. – Ismeri.

<sup>127</sup> In these cases, § 45 of the German Administrative Procedure Act may only be applied until the end of the administrative procedure, but not during court proceedings. See for details *v. Danwitz* (note 119), p. 541 et seq.; *Wolfgang Kahl*, Grundrechtsschutz durch Verfahren in Deutschland und in der EU, *VerwArch* 95 (2004), p. 1, 20 et seq.

<sup>128</sup> Cf. ECJ, ECR1991, I-5505 Sec. 16 f – FNCE; ECR 1996, I-3547 Sec. 67 – SFEL.

<sup>129</sup> Cf. ECJ, ECR1980, I-2229 Sec. 26 – Distillers Company; ECR 1983, I-2191 Sec. 7 – *Geist*; ECR 1990, I-307 Sec. 31 – France/Commission. Errors have therefore been deemed irrelevant, not only where no legal alternative to the decision met existed (cf. ECJ, ECR 1983, I-2191 Sec. 7 – *Geist*), but also where there simply was no factual alternative to the decision, in spite of discretion on the part of the agency. Cf. ECJ, ECR1976, I-1415 Sec. 10 et seq. – *Morello*; ECR 1986, I-2263 Sec. 30 – Belgium/Commission; ECR 1987, I-4393 Sec. 13 – France/Commission; ECR 1990, I-307 Sec. 31 – France/Commission; ECR 1990, I-959 Sec. 48 – *Tubemeuse*.

<sup>130</sup> Cf. ECJ, ECR 1985 I-849 Sec. 31 – *Timex*; ECR 1991, I-2283 Sec. 21 – *Oliveira*; ECR 1991, I-2257 Sec. 17 – *Interhotel*; ECR 1992, I-3525 Sec. 20 – *Infortec*; ECR 1993, I-2667 Sec. 34 – *Sart-Tilman*; E.C.R. 1996, I-5151 Sec. 38, 48, 58 – Germany/Commission; ECR 1998, I-1719 Sec. 74, 78 – *Sytraval*; EGC, ECR 1995, II-503 Sec. 65 – *France Aviation*; ECR 1996, II-1827 Sec. 30 et seq., 55 et seq. – *Rendo*. § 46 of the German Administrative Procedure Act must be interpreted in a way which conforms to European law. See for details *Bernhard Wegener*, *Rechte des Einzelnen*, 1998, 296 et seqq.

manding (*supra* II. 2. a). In this respect, Germany still has much to learn from the U.S.<sup>131</sup> But as seen, at least certain tendencies towards more participation of the public in delegated rulemaking can already be found. The influence of American administrative procedure could become even greater by broadening the scope of the German Administrative Procedure Act.<sup>132</sup> Concerning “formal adjudications”, the procedural standards have become akin in both countries (*supra* II. 2. b). In respect to “informal adjudications”, the German law goes even slightly further than the U.S. law (*supra* II. 2. c). The German approach of a broader involvement of those affected by the agency’s decision might provide food for thought to American scholars and judges interpreting their constitutional “due process”-clause. Besides that, the comparison might encourage American legislatures to codify the procedure of informal adjudications following the German example. Similarities can be found in the way the two jurisdictions treat the consequences of errors (*supra* II. 2. c). But in this respect again, the fact that there are explicit rules in Germany seems to be favorable.<sup>133</sup>

In Europe, it is said that the path towards an administrative “*ius commune europaeum*” has been entered.<sup>134</sup> The analysis of the English and the French law supports this assessment. This is remarkable as there is no comprehensive codification of administrative procedure in both countries unlike in most of the other European legal systems. One of the reasons for the European tendency to the harmonization of administrative law lies again in the intensified comparative examination of foreign law. The other ground is based in the European law and especially in the leading role of the European Court of Justice.<sup>135</sup> Particularly the recently codified conception of “good administration” in Article 41 of the EU-Charter of Fundamental Rights (CFR)<sup>136</sup> is rooted in the Court’s judicature.<sup>137</sup> If one includes the U.S. law in the comparative considerations it is not too daring to even speak of the development of a transnational “*ius commune proceduralis*” in the administrative law of all those countries that identify with the rule of

<sup>131</sup> See above at note 47, and from an American perspective *Rose-Ackermann* (note 5), p. 16 et seqq. (warning the Americans of adopting the German approach).

<sup>132</sup> See also *Rose-Ackermann* (note 5), p. 126 et seq.

<sup>133</sup> The American comparative scholar *Rose-Ackermann* (note 5), p. 138 et seq., even opts for a separate administrative court system following the German example.

<sup>134</sup> See to the discussion e.g. *Kahl* (note 127), p. 1, 28 et seqq. (with further references).

<sup>135</sup> See to the role of the European Union *Rose-Ackermann* (note 5), p. 108 et seqq. (however meanwhile a little outdated).

<sup>136</sup> See from an American perspective *Mashaw* (note 73), p. 99 et seqq.

<sup>137</sup> Cf. concerning the right to good administration e.g. ECJ, ECR 1989, I-4097 Sec. 15 – Heylens; ECR 1989, I-3283 Sec. 35 – Orkem; ECR 1992, I-2253 Sec. 7 – Burban; ECR 1991, I-5469 Sec. 14 – TU München; EGC, ECR 1995, II-2589 Sec. 73 – Nölle; ECR 1999, II-2403 – New Europe Consulting. Generally in a comparative perspective *Bell* (note 1), p. 1273 et seqq.

law and the need for democratic legitimation.<sup>138</sup>

This development will not least be indorsed by the fact that citizens all over the world demand more participation in the administrative decision-making. In modern Western countries – which have been sharply criticized, with widespread international recognition, by the British sociologist *Colin Crouch* as being “Post-Democracies”<sup>139</sup> – voting for the legislatures in elections does not any more provide sufficient ground for the acceptance of administrative decisions. People call for a democracy which is – in a word of the American political theorist *Benjamin Barber* – “stronger”.<sup>140</sup> Including citizens in the administrative decision-making processes seems to be one of the remedies against the growing “*Politikverdrossenheit*” – the increasing disenchantment with politics – in all Western countries. But public participation does not only strengthen the democratic legitimacy of agencies’ decisions. It also saves the expenses of administrative information gathering, makes the cumbersome *ex-post* judicial review less likely, and – in a long term perspective – might reduce the costs of implementing administrative determinations.<sup>141</sup> However, considering the characteristics of the various national legal systems, which have derived from a long and diverse development and which concern fundamental principles of these jurisdictions, a long way still lies before us – a route which will be aggravated by the common practical phenomenon of the “path dependence”.<sup>142</sup> For a long time, it will therefore remain a task of comparative law, to accumulate and analyze those provisions that are part of a common “right to a good administration”.

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<sup>138</sup> Cf. also *Barnes* (note 1), p. 336 et seqq. Generally to transnational trends in administrative law *Bell* (note 1), p. 1267 et seqq.

<sup>139</sup> *Colin Crouch*, *Post-Democracy*, 2004.

<sup>140</sup> *Benjamin Barber*, *Strong Democracies*, 1984.

<sup>141</sup> Cf. *Pünder* (note 29), p. 300 et seqq.

<sup>142</sup> The theory of the path dependence is commonly illustrated by the “*qwerty rule*”, meaning that the arrangement of letters on an English language keyboard may not be the best arrangement, but it is the most familiar one and the costs of adopting a new arrangement probably outweigh the benefits of doing so. See for a comparative law context *Asimow* (note 51). Generally *Oona A. Hathaway*, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 *Iowa Law Review* (2001), p. 601 et seqq.

