

Public Participation in Administrative Rulemaking: The Legal Tradition and Perspective in the American and European (English, German, Greek) Legal Systems

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I. Introduction

All over Europe nowadays there is a compelling requirement to reduce the distance between citizens and decisionmaking centres and increase openness and transparency in governmental processes. In this context public participation in administrative rulemaking acquires particular importance. Citizens can participate in the political process not only through voting and adjudication, but also through participating in the making of rules by administrative or quasi-governmental agencies. Rulemaking is one of the most important devices used by the administration both to implement the legislation produced by Parliament (as in the case of statutory instruments or *Rechtsverordnungen*) and also to structure discretion (as in the case of non-statutory administrative rules or *Verwaltungsvorschriften*).

This article aims to compare the American and several European legal systems (German, English, Greek) in the example of public participation in administrative rulemaking. Whereas the American legal system seems to foster participation rights to a considerable extent and at the same time regulate closely participatory processes, the European legal systems examined here seem to accord participation rights in a rather piecemeal and (with certain exceptions) unregulated way. It is believed, however, that public participation in administrative rulemaking can make an essential contribution towards more effective and accountable public decision-making and ultimately towards more effective control of government. If this statement is accepted, then appropriate procedures should be devised to guarantee catholic and genuine citizen participation at the rulemaking level.¹

For the purposes of this article I deal with the rules and regulations produced by traditional administrative authorities operating in the public law sector, excluding quasi-governmental or private agencies that may exercise a rule- or policymaking function. I begin in the first section by explaining the nature of administrative rules. I continue in the second section by examining the way administrative rules

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¹ For a theoretical discussion of public participation in rulemaking as a means for enhancing openness, legitimacy and accountability in government and the respective limits of public law, see Ziamou, T., *Public Participation in Administrative Rulemaking: A Comparative Study of the American and of European Legal Systems* (Dissertation, Oxford 1998).

are produced in each legal system, the traditional methods of control of administrative rulemaking, as well as the extent to which administrative rules are subject to control by the public; *lacunae* in the regulation of existing participatory opportunities are addressed and dealt with. In the third section I explore the normative value served by public participation in administrative rulemaking.

II. Administrative Rules

United States

The American Federal Administrative Procedure Act (hereinafter APA), is the only general administrative statute that has incorporated provisions about rules and rulemaking, and has given a specific definition of rules.

According to the Federal APA definitions,² a rule is “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy describing the organization, procedure or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances thereof or of valuations, costs or accounting, or practices bearing on and of the foregoing.”

Two elements appear to be of primary significance here: the “general or particular applicability” and the “future effect” of rules. With regard to the former, it is generally considered to be a core characteristic of rules to consist of requirements having a general application to all members of a broadly identifiable class.³ Their promulgation is normally associated with quasi-legislative modes of decisionmaking. However, the class affected can also be small, a single individual group, firm or governmental unit and consist of named parties – that is denoted by the inclusion of the phrase, “of ... particular applicability”;⁴ in such cases, quasi-judicial processes are usually best used to create rules.

It seems that, although the number of persons affected may influence the specific procedures used to issue a decision, this criterion is not a determinative for the classification of the latter as a rule. The crucial element appears to be the “future effect”. Even before the adoption of the APA, courts maintained that it is definitive for the nature of a rule to establish a course of conduct for the future. As Justice Holmes said in *Prentis v. Atlantic Coast Line Co.*, “... legislation looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.”⁵ It follows that, however broad or narrow the scope of a decision is, or whatever procedures are used to issue one, the underlying purpose of the action to create policy or law

² 5 U.S.C. para. 554(4).

³ See Chief Justice Burger dissenting opinion in *American Airlines v. CAB*, 359 F.2d 624, 636 (D.C. Cir. 1966), cert. denied, 385 U.S. 843 (1966).

⁴ Davis, K.C., *Administrative Law Treatise* (2d ed., 1979), para. 7:3.

⁵ 211 U.S. 210, 226 (1908). See also *People v. Cull*, 10 N.Y. 2d 123, 126 (1961).

in order to establish new future conditions allows a contrast to other forms of administrative action.

The Federal APA also is the only document that includes expressly in the same category of "rules" those that make policy as well as those that make law. Indeed, by analysing the APA's broad definition of a rule, one can distinguish several types of rules: rules of implementation, legislative, interpretative, general statements of policy and rules of agency organisation, procedure and practice. Implementing rules are issued when law or policy have been fully developed in primary legislation, a President's executive order, or a court decision.⁶ Legislative rules prescribe, modify or abolish duties, rights or exemptions and are adopted pursuant to statutory delegation to an agency.⁷ They are made when Congress establishes the goals of law or policy in statutes but provides few details as to how they are to be implemented.⁸ Interpretative rules do not alter the legal position of the individual, yet clarify or explain already existing law (statutes, other agency rules or orders, judicial decisions), thus stating the agency's view on it⁹ in cases where unanticipated or changing circumstances have to be confronted. General statements of policy advise the public of the manner in which the agencies intend to use their discretionary powers during the course of some future administrative conduct and do not alter anyone's legal rights either.¹⁰

What differentiates the legislative from the other two categories of rules, is that the former have "the force and effect of law"¹¹, which means that they are universally binding, that is, both upon the private parties they are addressed to and the government itself.¹² By way of contrast, non-legislative rules provide only guidance to the public and to the administrative staff and decisionmakers and are generally not legally binding on members of the public.¹³ If rules are promulgated without the exercise of delegated authority to create new law, they can only be non-legislative.¹⁴ Procedural rules, on the other hand, do not directly guide public conduct;¹⁵ however, they differ from the aforementioned non-legislative rules in that they may often be binding on both the public and the administration, if

⁶ See Kerwin, C.M., *Rulemaking: How Government Agencies Write Law and Make Policy* (Washington D.C. 1994), 5.

⁷ See *Joseph v. United States Civil Service Commission*, 554 F.2d 1140, 1153 (D.C. Cir. 1977), also *Chrysler v. Brown*, 441 U.S. 281, 302 (1979).

⁸ See Kerwin (note 6), 6.

⁹ See *Chamber of Commerce v. Occupational Safety and Health Administration*, 636 F.2d 464, 469 (D.C. Cir. 1980); *Citizens to Save Spencer County v. Environmental Protection Agency*, 600 F.2d 844, 875 (D.C. Cir. 1979).

¹⁰ See Asimov, M., *Nonlegislative Rulemaking and Regulatory Reform*, Duke L.J. 381 (1985).

¹¹ See *United States v. Howard*, 352 U.S. 212 (1957); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

¹² See Gellhorn, E./Levin, R.M., *Administrative Law and Process in a Nutshell* (St. Paul, Minn. 1991), 314.

¹³ *Batterton v. Marshall*, 648 F.2d 694, 701-2 (D.C. Cir. 1980).

¹⁴ See *American Trucking Association v. United States*, 688 F.2d 1337, 1341 (11th Cir. 1982); *Jean v. Nelson*, 711 F.2d 1455 (1983).

¹⁵ See *United States Department of Labor v. Kast Metals Corporation*, 744 F.2d 1145 (5th Cir. 1984).

they can draw upon a certain statutory delegation.¹⁶ Generally, courts have accepted that agencies may be bound by procedural rules in particular circumstances.¹⁷ They have resolutely maintained that an executive agency must be rigorously held to the standards by which it professes its action to be judged,¹⁸ in order to prevent arbitrariness.

In practice, it is not always easy to distinguish between legislative and non-legislative rules since, normally, the administration has not stated clearly whether it acted legislatively or not. The distinction is important not only because it helps citizens to know their legal position, but also because the APA attaches different procedural requirements for the promulgation of each category of rules.

The courts have used several criteria to draw the necessary distinctions. Although they normally give some deference to the agency's label of a rule, as the agency is free to proceed by whichever technique it deems appropriate,¹⁹ they tend to examine the substance of the contested rule.²⁰ During the 1970's courts used the "substantial impact test" to distinguish between legislative and non-legislative rules, maintaining that an agency is obliged to use pre-adoption procedures before issuing rules that have a substantial impact on the public, such as when they cause a notable change in the agency's policies²¹ or when they are unusually controversial or complex.²² Later, the courts seemed to disfavor this approach because it had no real foundation in the language of the APA.²³ They, then, adopted the "legal effect test": when an agency which enjoys delegated legislative power, promulgates rules, intending not only to interpret existing law, but mainly to create new law, then these rules are legislative.²⁴ Also, agency statements that are merely prospective, imposing no rights or obligations on the respective parties, will not be treated as binding norms²⁵ and neither will be pronouncements that impose no significant restraints on the agency's discretion.²⁶ This test seems

¹⁶ See *Service v. Dulles*, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957).

¹⁷ See *Vitarelli v. Seaton*, 359 U.S. 535, 538, 541 (1959); *Sangamon Valley Television Corporation v. U.S.*, 269 F.2d 221, 225 (D.C. Cir. 1959); *United States v. Heffner*, 420 F.2d 809, 812 (4th Cir. 1969).

¹⁸ See *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87–8, 63 S.Ct. 454, 459; 87 L.Ed. 626 (1947).

¹⁹ See *Pharmaceuticals Manufacturers Association v. Finch*, 307 F.Supp. 858, 863 (D.Del. 1970), *Pickus v. United States Board of Parole*, 507 F.2d 1107, 1113–4 (D.C. Cir. 1974).

²⁰ See *American Bus Association v. United States*, 627 F.2d 525, 531 (D.C. Cir. 1980); *Chamber of Commerce v. OSHA*, 636 F.2d 464, 468–9 (D.C. Cir. 1977); *Dresser Industries v. Commissioner of Internal Revenue*, 911 F.2d 1128, 1138 (5th Cir. 1990).

²¹ See e.g. *Brown Express, Inc. v. United States*, 607 F.2d 695, 702–3 (5th Cir. 1979), and also the more recent, *Linoz v. Heckler*, 800 F.2d 871, 877 (9th Cir. 1986); *Mt. Diablo Hosp. Dist. v. Bowen*, 860 F.2d 951, 956 (9th Cir. 1988).

²² See *American Bancorporation v. Board of Governors of the Federal Reserve System*, 509 F.2d 29, 39 (8th Cir. 1974).

²³ *Energy Reserves Group, Inc. v. DOE*, 589 F.2d 1082 (Temp. Emer. Ct. App. 1978).

²⁴ See e.g. *General Motors Corporation v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1983).

²⁵ *American Bus Association v. U.S.*, 627 F.2d 525, 529 (D.C. Cir. 1980).

²⁶ *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987).

to have remained the prevailing standard,²⁷ although there is still some confusion over the distinction in question.²⁸

Even if non-legislative rules do not bind members of the public, it remains still to be examined, whether they might possibly bind the agencies that issue them and, thus, have some legal effect. Courts seem to be divided on this matter. In most cases it has been argued that agencies must adhere to their own regulations as a matter of principle, but they need not adhere to general statements of policy.²⁹ In the well-known case of *Lucas v. Hodges*,³⁰ though, it was stated that: "it is a familiar principle of federal administrative law that agencies may be bound by their own substantive and procedural rules and policies, whether or not published in the Federal Register, if they are intended as mandatory". In this case, it was held that prison officials charged with a decision having a significant impact on a prisoner's condition of confinement were not free to ignore standards or criteria, intended to or reasonably understood to govern the decision and give rise to a protected liberty interest, solely because they emanated from intra-institutional regulations not properly published; it was added, however, that this could not be true in every case. An agency's intent to give binding effect to its internal pronouncements is ascertained by an examination of the statement's language, the context, and any available extrinsic evidence.³¹ The phenomenon could almost be characterised as legislation by estoppel.³² In other cases concerning agency interpretative regulations, the latter have been held to have the force and effect of law if they are reasonably adapted to the administration of a congressional act, and are not inconsistent with any statute.³³

Germany

In Germany, significant issues of administrative rulemaking are regulated directly by the Constitution (art. 80 of the *Grundgesetz*, Basic Law), as will be explained in detail below. The German Administrative Procedure Act (*Verwaltungsverfahrensgesetz*, hereinafter *VwVfG*) contains provisions regarding only individual administrative acts and procedures and makes no mention of administrative rules or rulemaking. Special provisions apply in relation to the so-called "legally-binding planning procedure" (*Planfeststellungsverfahren* – paras. 72 et seq. *VwVfG*), which often produces effects similar to those of administrative

²⁷ See Asimov (note 10), at 394.

²⁸ See Gellhorn/Levin (note 12), 317.

²⁹ See *Pacific Gas & Electronic Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986).

³⁰ 730 F.2d 1493, 1504, n. 20 (D.C. Cir.), vacated as moot, 738 F.2d 1392 (D.C. Cir. 1984).

³¹ See also *Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977); *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987).

³² See Schwartz, B., *Administrative Law* (3rd ed., Boston 1991), 188.

³³ See *GSA v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969); *Justice v. Board of Education*, 351 F.Supp. 1252, 1260–1 (S.D.N.Y. 1972); *Stinson v. U.S.*, 113 S.Ct. 1913 (1993). See also Anthony, Which Agency Interpretations Should Bind Citizens and Courts?, 7 Yale J.Reg. 1 (1990).

norms, although it leads typically to the adoption of an individual administrative act. This topic will be dealt with separately in a subsequent section of this paper.

In German law, where formality seems to play a major role, the general term of “administrative decisions” (*Verwaltungsentscheidungen*), describes the expressive and definitive concretisation of administrative action, and encompasses both individual and regulatory acts.

Only the former type of decision is called an “administrative act” (*Verwaltungsakt*) in the technical sense of term.³⁴ The acts of the administration that establish general norms constitute a conceptually different category.

In German law, the abstract and general nature of the subject of the regulation is not essential for its classification as a statutory regulation; also orders which are in terms of their content neither abstract nor general, but which have taken the form of a law regulation (i.e. individual case, or individual person regulations) can be characterised and treated as such in administrative court procedures.³⁵ Thus, the criterion for differentiation between legislative and adjudicative acts is primarily formal.

Administrative decisions that lay down rules are divided into three general categories: statutory regulations or ordinances (*Rechtsverordnungen*), administrative regulations or directions (*Verwaltungsvorschriften*) and bylaws (*Satzungen*).

Statutory instruments (*Rechtsverordnungen*) are substantive law norms, issued by branches of the executive after legislative delegation. In that sense, they constitute one of the formal sources of law, the other being the Constitution, statutes and bylaws. This is only one side of their nature; statutory regulations constitute also administrative instruments, and the lower the issuing organ is situated in the administrative hierarchy, the more intensively they are used for purely executive matters. Statutory regulations are used by the administration when the latter, while implementing primary legislation, aims to regulate uniformly not individual cases, but a larger, not precisely definable number thereof. They constitute the tools for a spatially expansive regulation that affects a majority of people for a certain period of time.³⁶

Statutory instruments have generally binding effects, that is not only for the rule addressees but also for the administrative law judge.³⁷ Normally, they contain abstract and general rules and for that reason they have been described as “statutes in material sense”, as opposed to “formal statutes”, which are the ones produced by Parliament.

³⁴ According to para. 35 VwVfG, an administrative act is every disposition, decision or other measure that a public body takes in order to regulate a particular case in public law and produces an external, direct legal effect. Unlike in American law, where acts of particular applicability are statutorily regarded as rules, individual, administrative acts in Germany constitute also “general orders”, i.e. acts that are not directed towards a definite person but towards a definable class of persons (para. 35 sect. 2 VwVfG).

³⁵ Achterberg, N., *Allgemeines Verwaltungsrecht* (Heidelberg 1982), 317.

³⁶ Maurer, H., *Allgemeines Verwaltungsrecht* (12th ed., München 1999), 337.

³⁷ See Ossenhühl, F., *Rechtsverordnung*, in: J. Isensee/P. Kirchhof, *Handbuch des Staatsrechts* III (Heidelberg 1988), 387 et seq.

Bylaws (*Satzungen*) derive their essence from the constitutional principle of decentralisation in the state structure.³⁸ They are issued by local government authorities or autonomous bodies that are not part of the executive hierarchy of the state but which are recognised by the state as public agencies (e.g. universities, professional bodies, broadcasting establishments, the German Federal Bank, etc.). These have the authority to regulate independently and not by delegation their own affairs.³⁹ Bylaws need no specific statutory authorisation for their issue and should always abide by the Constitution and federal and state law.⁴⁰ Like statutory instruments, they are normally abstract and general in their content. Although they apply only within a specific locality or upon the organs or persons subject to the concerned autonomous bodies, they may produce also “external effects”, since they regulate not only the legal relations between the organisation and its organs or relations between the organs themselves but also legal relations between organs and their members or the citizens that make use of the organisation.⁴¹ Finally, the same formal criterion that applies to statutory regulations for their characterisation as such, applies also to bylaws. Often, an administrative decision constitutes a bylaw only because it is to be issued as one, according to the relevant statutory law. A representative example is the building plan (*Bebauungsplan*) which is issued as a bylaw, because so prescribed by article 10 of the Building Statutory Book.⁴²

Administrative regulations (*Verwaltungsvorschriften*) serve normally as internal administrative directions addressed by hierarchically superior public authorities to their subordinate ones and the civil servants and concerning either the internal order of a public authority or the actual administrative action. In principle, they produce no generally binding legal effects, that is, they have no “external effect”.⁴³ Despite this lack of external effect, administrative regulations are regarded by many as legal norms when they are the basis for the emergence and enforcement of other legal acts.⁴⁴ For example, interpretative administrative regulations that define legal norms (or rather, undefined legal notions contained in them) based upon statutory authorisation,⁴⁵ bind the administration and are open to review by

³⁸ Article 28 para. 2 of the Basic Law (GG): “The local authorities shall have the right to govern with their own responsibility and within the statutory limits, all of their affairs. Local authorities associations have the right to self-government as well, within the frame of their legal duties and according to law.” The same is guaranteed for Universities and other Higher Education Institutions by the individual constitutions of the lands (e.g. Article 16 of the Constitution of Nordrhein-Westfalen, Article 20 para. 2, VI of the Constitution of Rheinland-Pfalz). Apart from the above mentioned provisions, the autonomous power of the agencies to make bylaws is based on specific, individual statutes, which are usually the ones establishing the agencies.

³⁹ Ossenbühl (note 37), 390; Singh, M.P., *German Administrative Law in Common Law Perspective* (Heidelberg 1985), 27.

⁴⁰ BVerfGE 33, 125, 157 (1972).

⁴¹ Achterberg (note 35), 233, 329.

⁴² Baugesetzbuch – Bekanntmachung der Neufassung des Baugesetzbuchs vom 27. August 1997 (BGBl. I, 1241).

⁴³ Ossenbühl (note 37), 389.

⁴⁴ Achterberg (note 35), 230.

⁴⁵ As opposed to the administrative regulations which simply interpret other legal norms.

the courts. In the decision of 19.12.1985 known as the *Wyhl-Urteil*,⁴⁶ the Federal Administrative Court declared an administrative regulation “on the basis of calculation of exposure to radiation in radioactive air and waters”, issued by the Federal Ministry of Home Affairs, which defined section 45 of a relevant statutory regulation on the protection from radiation, as legally binding within its statutorily specified limits. Also, on the grounds of the constitutional principles of equality (Art. 3 I GG) and the protection of legitimate expectations deriving from the rule of law, the administration may not deviate from the application of administrative regulations to the detriment of a citizen, or else the latter is entitled to seek judicial protection.⁴⁷ This is analogous to the American example concerning administrative guidelines that change the policy of an agency and which, then, are deemed to have a legal effect.

Greece

Unlike German law, the term “administrative act” is used in Greek law to describe both an adjudicative act and a regulation issued by the executive branch of government. This is due to the influence of French administrative law, whereby the term “acte administratif” encompasses every act issued by public bodies, whether individual or regulatory.⁴⁸

There is no legislative definition of an administrative regulation. The recently enacted Code of Administrative Procedure contains only provisions relating to individual administrative acts.⁴⁹ Thus, the nature of an administrative act as a regulation or as an individual act, is determined on each occasion. According to Greek courts, a regulatory act is differentiated from an individual act on the basis of its general and abstract character.

It is general if the act is addressed to a class of persons which is undefined and undefinable in terms of number and identity. Possible local or temporal limitations, as well as the number of the affected or interested parties, are irrelevant.⁵⁰ It may be the case that a regulation concerns only three industries in total, whereas an individual act is addressed to three thousand conscripts.⁵¹ The criterion here is not numerical, but qualitative, and consists in the method of defining the persons to which regulations are addressed.⁵²

⁴⁶ See Maurer (note 36), 611.

⁴⁷ For an analysis of the above exceptions to the lack of external effect of administrative regulations and for related case-law, see *ibid.*, 554 et seq.

⁴⁸ See Spiliotopoulos, E., *Textbook on Administrative Law* (Athens 1991), 92, 99, and also Dagoglou, P., *General Administrative Law* (Athens 1997), 74.

⁴⁹ Statute 2690/99.

⁵⁰ Council of State 1707/66.

⁵¹ The Council of State has ruled (Council of State 2873/70) that the act of conscription issued by the Minister of Defense does not constitute a regulation but is analysed in as many individual acts as the number of conscripts.

⁵² See Spiliotopoulos (note 48), 98.

An abstract act is one that does not address a specialised case or a class of several specialised cases (in which case it would constitute an individual act), but concerns all cases defined according to genus, that is, all future situations of the same type.⁵³

Greek law also distinguishes between legally binding and non-binding regulatory acts. Regulatory acts generally bind the citizens, the courts and the administration itself. Article 87 para. 2 of the Constitution states that “the judges, in the exercise of their duties are subject only to the Constitution and the laws of the state”, the latter encompassing administrative laws as well. Furthermore, the administrative body that has issued a regulatory act is bound by it during the exercise of its discretion and may not act, except subject to its conditions.⁵⁴ The administration may amend or abolish a regulatory act, but it is obliged to abide by it while it remains in force.

As regards administrative procedural rules, it is commonly accepted⁵⁵ that the establishment, structure or abolition of public services or public organisations, as well as the assignment, modification or revocation of administrative competencies constitute law norms, because they affect indirectly the legal position of the citizen. By way of contrast, the regulation of completely internal matters that concern the functioning of a public corporation and do not affect the rights or duties of private parties or public servants,⁵⁶ does not have a normative character; this is because it is a central element of a legislative rule that it affects the content or the formation of competencies, rights or obligations.

Despite their great practical importance, interpretative orders, circulars or guidelines that define the application of regulatory acts are, similarly, only internally binding; the violation of such rules have possible disciplinary consequences for the responsible civil servant.⁵⁷ It is noteworthy that the courts tend to disregard the label of an act as a circular, but examine its function in effect, that is, if it imposes duties on the subordinate employees towards their superiors or, if it accords rights to the citizens. In these cases, the courts require proper publication as a condition for their validity as legislative regulations.⁵⁸

Another case in which a circular may acquire legislative force, is when its regular use creates an established practice (at least after two instances of application), the violation of which by the administration constitutes an infringement of the principle of equality. In this case, it is not the circular itself that may be challenged,⁵⁹ but only the individual act that was issued on the basis of a legal interpretation, different from the one that the established circular prescribed.⁶⁰

⁵³ See Dagtoglou (note 48), 75.

⁵⁴ Council of State 184/67.

⁵⁵ See Council of State 397/1966.

⁵⁶ Like e.g. the rules of public use of a library.

⁵⁷ Council of State 700/1986, 3594/1987, 2779/1987.

⁵⁸ Council of State 744, 3238/1983, 1465/1984, 4237/1986.

⁵⁹ Council of State 1426/79, 2152/87.

⁶⁰ See Dagtoglou (note 48), 77–78.

England

The English system provides a definition of rules not according to substance, but according to form. Secondary legislation takes primarily the form of statutory instruments. According to section 1 of the 1946 Statutory Instruments Act, statutory instruments comprise Orders in Council (made under the power conferred on His Majesty)⁶¹, rules made under ministerial powers stated to be "exercisable by statutory instrument" (subsect. 1) and rules made under statutes governed by the old Rules Publication Act of 1893 (subsect. 2). It follows that, if it is intended that the 1946 Act applies, every statute delegating legislative power must state expressly that rules shall be made "by statutory instrument".⁶² Certainly, there is a large range of terms used: Orders in Council (e.g. under the Emergency Powers Act 1920), regulations, rules (e.g. Fishing Vessels Safety Provisions Act 1970), directions (e.g. Town and Country Planning Act 1990, National Health Service Act 1977, Social Securities Contributions and Benefits Act 1992, Industry Act 1975), special procedure orders (as are those made under the Statutory Orders (Special Procedure) Acts 1945 and 1946)⁶³, bylaws (Local Government Act 1974)⁶⁴, local authorities orders (like those issued under the legislation on compulsory purchases); the precise name given to a piece of delegated legislation, though, is of no legal relevance.⁶⁵

In English law, non-statutory rules are made by the administration without delegation of rulemaking authority; they are based on the inherent power of the administration to exercise its discretion and are legislative in character in that they have a generality of application.⁶⁶ They comprise interpretative guides, codes of practice, circulars, procedural rules, evidential rules, instructions to staff etc. The variety of labels used to describe the rules every time is very broad but largely without legal significance.⁶⁷

However, the distinction between statutory and non-statutory rules is not always clear-cut, as regards their legal bindingness. What has to be borne in mind is

⁶¹ Orders in Council are employed when the rulemaking powers conferred fall outside the sphere of any particular minister, see Schwartz, B./Wade, W.H.R., *Legal Control of Government, Administrative Law in Britain and in United States* (Oxford 1972), 100.

⁶² Ibid.

⁶³ Such orders may be made by a local authority or statutory undertaking, submitted to the appropriate government department for approval and then laid before Parliament; they come into effect if they are not annulled or amended by a resolution of either House by the end of a prescribed period. See Baldwin, R., *Rules and Government* (Oxford 1995), 61–2.

⁶⁴ Bylaws may be made not only by local authorities, but also by public corporations and in some cases, by certain independent non-governmental bodies, like the National Trust. See Baldwin, *ibid.*, 62.

⁶⁵ See Craig, P.P., *Administrative Law*, (3rd ed. London 1994), 246–7, also Wade, H.W.R./Forsyth, C.F., *Administrative Law* (7th ed. Oxford 1994), 867–9.

⁶⁶ See Craig, *ibid.*, 270–1.

⁶⁷ See Baldwin, R./Houghton, J., *Circular Arguments: the Status and Legitimacy of Administrative Rules*, P.L. 239, 240–4 (1986).

that the legal effect of rules, in general, depends not on their name, but on the legal force that is given to them by statutes and by the interpretation of courts.⁶⁸

It may be that guidelines or codes embodied in statutes or statutory instruments are not given full legislative force, i.e. they do not give rise to legal proceedings, but judicial or administrative bodies must simply have regard to them.⁶⁹ It is also the case that the same statutory rules have sometimes been held to be merely directory and other times, they have been deemed to be mandatory and fully enforceable.⁷⁰

Conversely, non-statutory rules may be held in particular circumstances to have the effect of law or at least, some statutory effect. Rules resting upon no statutory authority have indeed been treated as legally binding (which were notably, though, published).⁷¹ In other cases, the existence of non-statutory rules of policy have generated hearing rights in the form of legitimate expectations, when the administration sought to resile from them.⁷² In other cases, policy has been afforded the regulatory force of a rule, provided that the individual is granted a hearing before its application in a particular case.⁷³ This should have important consequences in relation to the question of according participatory rights to the public in the formulation of such policy, as will be explored further below.

II. Administrative Rulemaking

2.1 The scope and limits of administrative rulemaking

United States

It is a characteristic of the American administrative practice that administrative rules regulating private conduct are issued every day in amounts that far outnumber the legislation produced by Congress.⁷⁴ The vast grant of legislative power is manifest not only in the large amount of secondary legislation actually produced, but also in the wording of the authorising statutes, which is either very general or

⁶⁸ Ganz, G., *Quasi-Legislation: Recent Developments in Secondary Legislation* (London 1987), 4, 6.

⁶⁹ See *R. v. Eastleigh Borough Council, ex p. Betts* [1983] 3 W.L.R. 397 concerning the Agreement on Procedures between local authorities concerning the housing of homeless persons. Also *R. v. Entry Clearance Officer, Bombay, ex p. Amin* [1983] 2 A.C. 818, with regard to the Immigration Rules 1971.

⁷⁰ Compare e.g. *R. v. Parkhurst Prison Deputy Governor, ex p. Hague* [1992] 1 A.C. 58 and *Raymond v. Honey* [1983] 1 A.C. 1, with regard to prison rules made under the Prison Act 1952.

⁷¹ Such are the published but not enacted rules, issued by the Home Secretary and directed to the Criminal Injuries Compensation Board; see e.g. *R. v. Criminal Injuries Compensation Board, ex p. Schofield* [1971] 1 W.L.R. 926, *ex p. Clowes* [1977] 1 W.L.R. 1353.

⁷² See *R. v. Secretary of State for the Home Department, ex p. Khan* [1985] 1 All E.R. 40; cf. with the *Re Findlay* case, [1985] A.C. 318.

⁷³ See *R. v. Port of London Authority, ex p. Kynoch Ltd.* [1919] 1 K.B. 176, 184 and also *British Oxygen Co. Ltd. v. Board of Trade* [1971] A.C. 610, as analysed by Craig (note 65), 392–3.

⁷⁴ See *INS v. Chadha*, 462 U.S. 919, 985–6 (1983).

leaves explicitly ample discretion to the administration to complete and harmonise their specific commands.⁷⁵ Courts have generously construed delegation of lawmaking power to include authority to publish and promulgate any rules or regulations that may be necessary to carry out the purposes of the enabling legislation.⁷⁶

American courts recognised very early the necessity of delegation. After the famous *Panama Refining* and *Schechter* cases,⁷⁷ where the Supreme Court struck down acts of Congress for enabling an unconstitutionally broad delegation of power by not providing sufficient standards to limit the scope of agency discretion, they have been hesitant to invalidate statutes on delegation grounds, thus upholding the granting of vaguely defined powers to administrative agencies. In most cases, though, the Court required that Congress provided some reasonable standard or intelligible principle that could guide the administration in the exercise of its delegated powers.⁷⁸ In other cases, it chose to construe narrowly statutes that appeared to grant to the administration extensive discretion in rulemaking, so as to avoid any constitutional questions connected with delegation.⁷⁹

In one notable case the Supreme Court insisted on the existence of sufficient substantial and procedural safeguards that would prevent administrative abuse of power in delegated rulemaking; these included the availability of judicial review, congressional oversight, the procedural requirements of the Administrative Proce-

⁷⁵ For example, the Federal Communications Commission and the Civil Aeronautics Board are instructed to exercise their powers according to the vaguely defined standards of public interest, convenience and necessity.

⁷⁶ See *In re Permanent Surface Mining Reg. Litig.*, 653 F.2d 514 (1981), also *Mourning v. Family Publications Serv.*, 411 U.S. 356, 369 (1973); *National Petroleum Refiners Association v. FTC*, 482 F.2d 672, 678–9 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

⁷⁷ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Both of these cases involved one of the broadest delegations in the New Deal era, the National Industry Recovery Act. In the first case, the Supreme Court found that the President had been given unlimited authority to determine policy of prohibiting the shipping of petroleum products in excess of states' authority, and that Congress had established no policy, standard or rule on the matter. In the second case, the Court struck down a delegation to the President to approve trade associations' codes of fair competition for lack of sufficient substantive statutory standards or procedural constraints.

⁷⁸ See *Yakus v. United States*, 321 U.S. 414 (1944); *Skinner v. Mid-America Pipeline Co.*, 109 S.Ct. 1726 (1989); *Mistretta v. United States*, 488 U.S. 361 (1989). The Court had insisted on the existence of congressional standards limiting discretion as a way to uphold broad delegations even before the New Deal era; see *Butterfield v. Stranaham*, 192 U.S. 470 (1903); *J.W. Hampton, Jr., and Co. v. U.S.*, 276 U.S. 394 (1928).

⁷⁹ See *Kent v. Dulles*, 357 U.S. 116 (1958); *National Cable Television v. United States*, 415 U.S. 336 (1974). See also *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 687 (1980), in which Justice Rehnquist, dissenting, tried to revive the nondelegation doctrine by supporting the view that the resolution of fundamental, politically divisive policy issues is the quintessence of legislative authority and could not "unnecessarily" be left to a politically unresponsive administrator. Justice Rehnquist insisted on this position in *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 547 (1981), also dissenting.

ture Act, and previous standard administrative practice, or the expectation that the agency will develop standards in the future.⁸⁰

The existence of due process safeguards, in particular, to secure the validity of a possibly overbroad delegation is reflected in both old and more recent decisions. In the *Schechter* and *Panama Refining* decisions the Supreme Court placed considerable emphasis on the fact that the enabling statutes did not require the respective agencies to use fair and open administrative procedures. In another case, which dealt with the validity of a Civil Service Commission rule banning resident aliens from government employment,⁸¹ the Court held that due process requires that there be a legitimate basis for a rule intending to serve a valid governmental interest.

The scope of delegation varies depending on the type of issues involved. Apart from certain core political functions which Congress may not delegate, like the impeachment power, the power to sign international treaties, or the power to legislate as such,⁸² other cases present less certainty. For instance, delegation is permitted but appears to be much narrower when personal liberties are at stake,⁸³ whereas it is not clear whether the power to impose taxes is at all delegable.⁸⁴

Germany

The Basic Law itself lays down express limits respecting the form and procedure of delegation. Unlike the American Supreme Court which, despite the wording and purpose of article I para. 1 of the Constitution, has struck down none of the numerous, almost unlimited delegations of federal legislative power since the *Schechter Poultry* case, the Federal Constitutional Court has ruled that the German Constitution is based on a *numerus clausus* of permissible forms of legislation; the legislative authority of the executive has to be sufficiently defined, or else it no longer executes the law, but takes over the legislature's function.⁸⁵

Article 80 of the Basic Law, which deals with the delegation of legislative power to the executive organs has a very important function in the German constitutional order; its incorporation with a strict formulation in the Basic Law was seen to guarantee the doctrine of separation of powers, and served as a reaction to the well-known abuses of delegated power by the executive during the Weimar Republic.⁸⁶

⁸⁰ *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

⁸¹ *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

⁸² See Tribe, L., *American Constitutional Law* (2nd ed., Foundation 1988), 362–363.

⁸³ *Ibid.*, 366.

⁸⁴ See the opposing views of Tribe, *ibid.*, 366 and A man, A.C./Mayton, W.T., *Administrative Law* (St. Paul, Minn. 1993), 23.

⁸⁵ BVerfGE 8, 274, 323–27 (1958); 24, 184, 199 (1968). For an interesting comparison between German and American law in the issue of delegation of legislative power, see Nolte, G., *Ermächtigung der Exekutive zur Rechtsetzung*, 118 AöR 378 (1993).

⁸⁶ BVerfGE 10, 20 et seq. (1959).

Article 80 para. 1 lays down three basic limitations of form on delegation when statutory regulations are involved. First of all, authorisation for their issuance is to be given only by means of formal legislation, that is, by statute. Secondly, this regulatory power can only be conferred on the federal government, a federal minister or the land governments, the three specified authorities or organs, enumerated exclusively in the above article (art. 80 I 1); they, in turn, may subdelegate their power to other executive organs provided that the sub-delegation is provided for by the enabling legislation and that they achieve it by a specific statutory regulation (art. 80 I 4 of the Basic Law). Thirdly, the authorising statute must state clearly the content (i.e. the subject matter of the regulation)⁸⁷, purpose (i.e. the programme intended by Parliament to be achieved through administrative regulation)⁸⁸ and scope (that is, the limits or extent of the regulation)⁸⁹ of the powers conferred (art. 80 I 2 of the Basic Law). According to the Federal Constitutional Court, the above requirements define sufficiently the authorisation, if the citizen can foresee with sufficient clarity in which cases and with which propensity the latter will be used and what would be the content of the regulations to be issued.⁹⁰ The controlling courts can make this determination based not only on the language of the clause authorising the regulation, but also on the legislative aim and history of the whole statutory scheme, in connection with the other provisions of the authorising statute.⁹¹ This somewhat reserved attitude of the German courts (especially when seen in comparison to the position of the American ones), becomes stricter when delegation to the executive may violate individual rights, which may usually occur in the area of criminal and tax law; in this case courts require even greater clarity in the statutory language, as to what can be required of a citizen.⁹² By way of contrast, courts tend to relax the limitations they place on delegation, when the regulation concerns technical and highly complex sets of facts, like environmental law, or areas subject to rapid growth and change, like economic life⁹³; here practical considerations deriving from the need for technical expertise justify wide delegation, usually discernible in the use of undefined statutory terms (*unbestimmte Rechtsbegriffe*).⁹⁴

The provisions of article 80 I 2 of the Basic Law on delegation apply only at federal level, that is, only for regulations based on federal statutes. The majority of state constitutions, especially those that were established after the Basic Law (1949), contain similar provisions. If this is not the case, article 80 I 2 applies also at state level; nowadays such a provision is missing only from the constitution of Hessen.⁹⁵

⁸⁷ BVerfGE 20, 283, 305 (1966).

⁸⁸ BVerfGE 19, 354, 364 (1966).

⁸⁹ BVerfGE 5, 71, 77 (1956).

⁹⁰ BVerfGE 29, 198, 210 (1970); 55, 226 (1980); 56, 1, 12 (1981).

⁹¹ BVerfGE 26, 16, 27 (1969); 29, 198, 210 (1970); 55, 207, 226 (1980); 58, 257, 277 (1981); 62, 203, 209 (1982); 68, 319, 332 (1984).

⁹² BVerfGE 7, 282, 302 (1958); 58, 257, 278 (1981).

⁹³ BVerfGE 48, 210, 222 (1978).

⁹⁴ See Rose-Ackerman, S., Controlling Environmental Policy – The Limits of Public Law in Germany and the United States (New Haven, London 1995), 58.

⁹⁵ See Maurer (note 36), 338.

The Federal Constitutional Court and German scholars have developed a coherent body of doctrine relating to the purpose and function of delegating legislative power to the executive. Such delegation has the sense of relieving the Parliament from politically insignificant and ephemeral matters or purely technical details.⁹⁶ It is thus not unlimited. The Federal Constitutional Court has interpreted the Constitution as placing substantive delimitations on the types of decisions that Parliament may delegate. The first question that the Court asks is whether delegation is at all possible, in other words, whether the issue at hand must be decided entirely by Parliament or whether in part it may be left to administrative rulemaking. This is the question commonly referred to as parliamentary reservation (*Parlamentsvorbehalt*).⁹⁷ If the answer is positive, then the Court proceeds to ask how much decisionmaking power may be given to the administration and how much decisionmaking may be made by statute.

In order to provide an answer to these questions, the Court has developed its so-called theory of essentials (*Wesentlichkeitstheorie*).⁹⁸ According to this theory, when the legislature seeks to regulate for the first time an area that involves the exercise of fundamental rights, it is obligated by the principle of democracy and the principle of the rule of law found in the Basic Law to make the essential decisions itself and not leave them to the discretion of the administration.⁹⁹ Such essential rules have included school education issues involving the protection of the child's right to protection of his personality,¹⁰⁰ or rules concerning the legalisation of peaceful use of atomic energy and determination of who shall bear the risks involved.¹⁰¹

Greece

In Greece, the rules governing the exercise of legislative power by the administration are set out in the Constitution.

The Greek Constitution of 1975/86 provides basically for two kinds of legislative power of the executive. On the one hand it bestows directly upon the President of the Republic, and only him, the competence to issue decrees containing legal norms (regulatory decrees) and bearing the signature of the responsible minis-

⁹⁶ Ossenbühl, F., Die Quellen des Verwaltungsrechts, in: Erichsen, H.U./Martens, W., Allgemeines Verwaltungsrecht (Berlin 1986), 78.

⁹⁷ See Wilke, D., Bundesverfassungsgericht und Rechtsverordnungen, 98 AöR 196 (1973).

⁹⁸ The Constitution also mentions explicitly several issues which can only be regulated directly by parliamentary enactment; these are the transfer of sovereign rights to international institutions (Article 24, para. 1 GG); the budget (Article 110); and the law that amends the Constitution (Article 79). However, none of these provisions are of significance for the question of delegation.

⁹⁹ BVerfGE 47, 46, 78 (1977).

¹⁰⁰ Ibid.

¹⁰¹ Judgment of August 8, 1978, [1979] DVBl. 47.

ter;¹⁰² on the other hand, it provides for the possibility of statutory authorisation of the President of the Republic and the other executive organs to issue regulatory acts in specific situations and on the basis of certain formal conditions.

The President of the Republic may issue regulatory decrees in the following cases:

a) In normal circumstances, he may issue executory decrees that simply execute, that is, concretise law which, otherwise, could not be applied immediately; they do not create new rights or obligations.¹⁰³ b) In a state of exceptionally imminent and unforeseen emergency (as is, for instance, an earthquake), in which case they are called "acts of legislative content"¹⁰⁴ and are considered of equivalent force to formal statutes. c) In cases of internal or external danger, the President enjoys widest legislative power, which includes the suspension of certain articles of the Constitution, the entering into force of the emergency legislation called "statute on the state of siege", the establishment of extra-ordinary courts and generally, the taking of all necessary legislative measures¹⁰⁵. d) Especially before the holding of parliamentary elections, the President of the Republic may issue a regulatory decree that determines the number of delegates that can be elected by every electoral region on the basis of its population.¹⁰⁶

In a separate case, the Constitution delegates directly and exclusively a) to the Prime Minister the legislative power to determine the duties of ministers without portfolio¹⁰⁷ and b) both to the Prime Minister and to the heads of ministries the determination by common decision of the duties belonging to their sub-secretaries.¹⁰⁸

Regulatory decrees can be issued not only following direct authorisation by the Constitution, as explained above, but also after statutory authorisation. In this case and in contrast to simply executory decrees, they establish legally binding norms (that is, they create rights and obligations).

Statutory authorisation for the issue of regulatory decrees can be given to govern any topic that is not expressly exempted by the Constitution. The courts do not have the power to control whether a matter should be regulated by delegation or by statute.¹⁰⁹ Thus, statutory authorisation may be granted for any issue, except only for the ratification of certain international treaties, the determination of the object of taxation, of the tax factor and the tax exemptions, and for the award of pensions;¹¹⁰ these matters can only be regulated by formal statute.

¹⁰² Article 35 para. 1 of the Greek Constitution. The signature of the competent minister relieves the President of any political accountability. The minister remains therefore solely accountable before Parliament.

¹⁰³ Ibid., Article 43.

¹⁰⁴ See Article 44 of the Greek Constitution.

¹⁰⁵ Article 48 of the Greek Constitution.

¹⁰⁶ Ibid., Article 54 para. 2.

¹⁰⁷ Ibid., Article 83 para. 1.

¹⁰⁸ Ibid., Article 83 para. 2.

¹⁰⁹ Council of State 1192/52.

¹¹⁰ See Articles 36 para. 4 and 78 para. 4 sect. 1 of the Greek Constitution.

The Constitution provides for two kinds of delegation. The so-called “specific statutory authorisation” of article 43 para. 2 is the most common one. The courts, in determining in numerous cases if a certain statutory authorisation was sufficiently specific, have formulated the general rule that the requirement of specification is fulfilled, if the authorising statute defines the object of the regulation. The statutory authorisation also has to be concrete, in that it contains the general principles and directions that will govern the regulation of the relevant topics. The latter do not have to be expressly cited in the authorising statute (like in the case of frame-laws, as explained below), but it is enough if they can be deduced from the whole of the statutory provisions or from the existing relevant legislation.¹¹¹ If the above requirements are not met, the whole delegation is invalid.¹¹²

The administration enjoys discretion as to whether to make use of the statutory authorisation. It follows that individuals may not claim in court the issue of an administrative regulation.¹¹³ Exceptions have been recognised in cases where the use of delegation is mandatory to substantiate the parliamentary or constitutional will.¹¹⁴

The second kind of statutory authorisation, for which the Constitution of 1975/86 provides for the first time, may be contained in what is named “framework statute”. This is a statutory form that regulates its object only very generally, laying down only the perceived principles and guidelines of the pursued regulation.¹¹⁵ This general statutory authorisation aims at the rapid and more efficient regulation of certain issues, by yielding to the executive the widest part of legislative work and leaving Parliament only with a minimum of legislative power.¹¹⁶

However, this sort of delegation is not unlimited. For fear of substituting in effect the exercise of legislation by the executive and the secrecy that accompanies it for parliamentary processes and the publicity that distinguishes them, the Constitution has circumscribed the issue of framework statutes with three limitations. First of all, they can only be voted for by Parliament in plenary session;¹¹⁷ secondly, they must set specific deadlines for the use of the authorisation,¹¹⁸ which have to be strictly adhered to by the administration; thirdly, in addition to the issues that cannot be objects of specific statutory authorisation as previously explained, general delegation may not be used to regulate issues that can only be de-

¹¹¹ Council of State 2497/1974, 1201/1980.

¹¹² Council of State 197–199/45, 1637–1638/46, 768/48, 1472, 1501/58, 144, 264/59, 778/1968, 1807/1983.

¹¹³ Council of State 641/1979, 1601/1982.

¹¹⁴ See, for example, Article 22 para. 4 of the Greek Constitution on the state obligation to provide for the social insurance of all employees. Relevant is the decision 2052/80 of the Council of State, reported in (1981) To S.103.

¹¹⁵ Article 43 para. 4 sect. 2 of the Greek Constitution.

¹¹⁶ Dagoglou (note 48), 88–92.

¹¹⁷ Article 43 para. 4 sect. 1 of the Greek Constitution.

¹¹⁸ Ibid., Article 43 para. 4 sect. 2.

cided by Parliament in plenary session.¹¹⁹ These issues include electoral law, the relations between the Church and the State and general religious matters, the alteration of the country boundaries, the granting of powers to international institutions, the recognition of limitations during the exercise of *dominium*, the exercise and protection of individual rights, the function of political parties, the ministerial accountability, the state of siege, the President's grant, the authentic statutory interpretation by Parliament, the approval of the state Budget, and everything else that, according to the Constitution, has to be approved by Parliament in plenary session¹²⁰ or with special majority.¹²¹ However, general statutory authorisation can be used for the imposition of countervailing or equalisation charges or tariffs or the taking of economic measures to meet the obligations of the state in the international economy, or of measures seeking to secure the position of the national currency.¹²² This way, the administration enjoys the possibility of a flexible and easily adaptable financial, economic and currency policy, which is absolutely necessary for a country belonging to the European Union, like Greece.¹²³

General as well as specific statutory authorisation for the issue of regulatory decrees can only be granted to the president of the republic,¹²⁴ who may not sub-delegate this legislative power to a minister.¹²⁵ Exceptionally, the Constitution provides for delegation of legislative power to other administrative bodies which may regulate specialised topics (that is, of more particular nature in comparison to the main object of the statutory regulation)¹²⁶, or issues of local interest or of technical or detailed nature.¹²⁷ These administrative bodies include the cabinet, the prime minister, the ministers, independent authorities like the National Council for Radiotelevision, prefects, police authorities, or local authorities. In the case of such bodies, the constitutional requirement of speciality of the topics that may be regulated through delegated legislation is readily fulfilled by the specialised nature of the area of regulation, for which each body is responsible. This is especially evident in the case of delegation to local authorities; the issue of regulations by them will always concern matters "of local interest".¹²⁸

¹¹⁹ Ibid., Articles 43 para. 3 and 72 para. 1.

¹²⁰ Such issues are the compensation and tax exemptions in favour of the Members of Parliament (Article 63 paras. 1, 2), the Parliamentary Order (Article 65 para. 1) and the economic and social development plans (Article 79 para. 8).

¹²¹ That is, exceeding the commonly (Article 67) required absolute majority of present delegates, that cannot be smaller, though, than one quarter of the total number of delegates, which amounts to 300.

¹²² See Article 78 para. 5 of the Constitution.

¹²³ Dagtolou (note 48), 89.

¹²⁴ Articles 43 para. 2 sect. 1 and 43 para. 4 of the Greek Constitution.

¹²⁵ Dagtolou (note 48), 91.

¹²⁶ Council of State 2956/1983, 1530/1984.

¹²⁷ Article 43 para. 1 sect. 2 of the Greek Constitution.

¹²⁸ See Efstratiou, P.M., Die Verordnungsgebung der III. Griechischen Republik von 1975/1986, 39 JöR 495, 523 (1990).

Greek law does not grant legislative autonomy to self-governing public organisations, of the kind that German law recognises for the issue of bylaws (*Satzungen*).¹²⁹ Especially for local authorities, the Council of State has ruled expressly that the Greek Constitution does not provide local authorities with the power to set their own legislation, but only grants them the right to self-government.¹³⁰

England:

Administrative rulemaking in England is in no way as tightly controlled and pre-programmed by Parliament, as it is, for example, in Germany. Legislative power is granted rather generously by Parliament, partly due to the fact that it is the same government that legislates, that also controls the parliamentary majority and, thus, the content of statutes.¹³¹ Sometimes the enabling legislation grants legislative powers in such widely defined terms, that the administration ends up determining matters of policy at the broadest level.¹³²

The wide extent of legislative powers enjoyed by the executive is also apparent in the existing possibility to delegate powers even to amend statutes, on the condition, though, that the modifications intended are expressly stated in the statutory instrument and not merely inferred from its content.¹³³ The Deregulation and Contracting Out Act 1994 is a good example of a contemporary act allowing a minister to repeal or amend any Act which authorises or requires the imposition of a burden affecting any trade, business or profession, where the burden can be removed or reduced without removing any necessary protection.¹³⁴ Finally, the administration enjoys the most indefinite legislative powers after the enactment of the European Communities Act of 1972, under which it may issue Orders in Council and departmental regulations, which may alter the law and prevail over all past or future Acts of Parliament, in any way that may be necessary to implement Community obligations or give effect to Community rights and matters related thereto; exceptions are only recognised in cases of increased taxation, retrospective operation, delegated legislation and excessive penalties.¹³⁵

¹²⁹ Elements of autonomy, in the sense that the self-governing bodies may define their own competence, can be found in the constitutional provisions concerning the organisation of the Church (Article 3), the civil and agricultural co-operatives (Article 12 para. 5) and the Higher Education Institutions (Article 16).

¹³⁰ Council of State 955/78; 2078/78, (1979) To S.83–84.

¹³¹ See Schwartz/Wade (note 61), 97.

¹³² These are the so-called “skeleton acts”, examples of which include the Social Security Act 1986, the Education (Student Loans) Act 1990, and the Jobseekers Act 1995, all of which left various key matters to be determined in regulations; this is reported by Ganz, G., *Delegated Legislation: A Necessary Evil or a Constitutional Outrage?*, in: Leyland, P./Woods, T. (Eds.), *Administrative Law Facing the Future: Old Constraints and New Horizons* (London 1997), 60, 63–64.

¹³³ See *R. v. Secretary of State for Social Security, ex p. Britnell* [1991] 1 W.L.R. 198.

¹³⁴ See Ganz (note 132), 60, 65–66.

¹³⁵ Sect. 2 (2), (4), and 2nd sched.

The enormous increase in the volume and breadth of delegated legislation gave rise to a lot of criticism in the House of Lords in 1990, which eventually led to the establishment in 1992 of the Delegated Powers Scrutiny Committee, which in 1996 was renamed Delegated Powers and Deregulation Committee. The Committee has as part of its task the examination of bills to determine whether their provisions delegate inappropriately legislative power and to report to the House before the bill has reached the Committee stage of detailed consideration. It has been reported that although the Committee has, indeed, severely criticised a lot of broad delegations and may have contributed to fewer reprehensible bills coming forward, it has in reality no power but to make a report on a bill; it is then up to the government whether to accept its recommendations to amend a bill or not. It has not laid down standard criteria for what constitutes inappropriate delegation of power either.¹³⁶

Over the years it has been the courts that developed principles of lawful delegation. These can be summarised briefly in the maxim *delegatus non potest delegare*, which in English law has the particular meaning that a power must be exercised by that person upon which it is conferred.¹³⁷ This principle finds application where the power conferred is legislative.¹³⁸ It does not apply rigidly in cases where officials may exercise powers in the name of the minister¹³⁹ or where sub-delegation to a different authority is expressly or impliedly allowed by Parliament.¹⁴⁰

2. Rulemaking procedures; traditional mechanisms of control and accountability

United States

Very early in the history of American administrative rulemaking, the centre of gravity shifted from the control of delegation to the procedural control of administrative discretion. Since the concentration of so much vital power in the hands of an executive not directly responsible to the elected legislature and of independent agencies responsible to none was an irreversible fact, the main danger for the democratic institutions calling for action seemed to come from the abuse of political discretion.¹⁴¹ The concern of Congress with the process by which rules were being written by agencies became particularly apparent in the 1970s, when, as we saw earlier, the subject matter of rulemaking expanded significantly. It has been

¹³⁶ See Ganz (note 132), 71–72.

¹³⁷ *Ellis v. Dubowski* [1921] 3 K.B. 621; *Allingham v. Minister of Agriculture* [1948] 1 All E.R. 780.

¹³⁸ *King-Emperor v. Benoari Lal Sarma* [1945] A.C. 14.

¹³⁹ *R. v. Skinner* [1968] 2 Q.B. 700.

¹⁴⁰ *King-Emperor v. Benoari Lal Sarma* [1945] A.C. 14 at 24; *Nelms v. Roe* [1970] 1 W.L.R. 4.

¹⁴¹ See Asimov, M., *Delegated Legislation: United States and United Kingdom*, 3 O.J.L.S., 253–276 (1983).

observed that the rulemaking provisions of the statutes at the time created considerably more complex and difficult processes for rulemakers to use.¹⁴²

Of course, concern with rulemaking process began much earlier than the 1970s. Congress provided guidance on rulemaking procedures for specific programmes, like on regulatory negotiations for the establishment of rules governing wages in the Fair Labor Standards Act, as early as the 1930s.¹⁴³ The most important development, though, came about with the enactment of the Federal Administrative Procedure Act of 1946. This Act was the result of an invaluable report produced by the Attorney General's Committee on "Administrative Procedures on Government Agencies"¹⁴⁴. This was requested by President Roosevelt, who was seeking at the time to establish generally applicable procedural standards in rulemaking proceedings, which were already well-developed by many agencies, albeit not always as we traditionally think of them.¹⁴⁵

With the APA, Congress recognised that rulemaking is a legislative-like activity, appropriate to Congress and its delegates – the agencies,¹⁴⁶ which requires special procedures, different to those used in adjudication. The aim of the differentiation was to avoid, on the one hand, too cumbersome a procedure and to require, on the other hand, an adequate procedure.¹⁴⁷ Thus, adjudication is conducted according to paras. 554, 556 and 557 of the APA¹⁴⁸, which specify agencies' formal hearing processes and require a separation of powers between an agency's executive-prosecutorial and its judicial arms.

Rulemaking takes several procedural forms: it may be formal, informal or exempted from the Act's procedural requirements. Informal procedures are generally applied to rulemaking, unless rules "are required by statute to be made on the record after notice and hearing"¹⁴⁹, in which case formal procedures are required.¹⁵⁰ The Supreme Court established these precise words as a test of when

¹⁴² Kerwin (note 6), 15.

¹⁴³ See *ibid.*, 45.

¹⁴⁴ Administrative Procedures in Government Agencies, S Doc 8, 77th Cong., 1st Sess. (1941).

¹⁴⁵ Most rules that were issued at the time tended to be developed through a relatively formal, trial-type procedure; i.e. rates or other tariff provisions which are now "rules" in a technical sense under the APA, were developed through trial processes.

¹⁴⁶ An agency is defined by the APA as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include Congress, the courts and other exceptions" (5 U.S.C. para. 551 [1]). Courts have limited this broad definition by interpreting it to apply only to establishments that have the power to take action which, if left undisturbed by a higher authority, would have actual legal effect; see *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971). There is no basis in law for subjecting entities other than agencies as defined by the APA to the requirements of the APA and since the passage of the APA there is no federal administrative common law governing the conduct of entities not considered federal agencies, like, for example, government corporations; see Beer mann, J., *The Reach of Administrative Law in the US*, in: Taggart, M., (ed.), *The Province of Administrative Law* (Oxford 1997), 171, 172–173.

¹⁴⁷ See S. Rep. No. 752 app. at 39.

¹⁴⁸ 5 U.S.C. paras. 551–559, 701–706 (1988).

¹⁴⁹ *Ibid.*, para. 553 (c).

¹⁵⁰ *Ibid.*, para. 556–557.

formal, adjudicatory-type procedures should be used.¹⁵¹ Even if these particular words are not present, some argue that formal rulemaking procedures are still called for when it can be inferred from the governing statute that a hearing, accompanied by the typical procedural protections of a trial is to be used.¹⁵² The formal rulemaking mode is usually employed for limited categories of agency decisions, like ratemaking and decisions dealing with food additives.

Informal rulemaking, on the other hand, aims at obtaining democratisation of the rulemaking process without destroying its flexibility by imposing procedural requirements that are too onerous.¹⁵³ A detailed account of the participatory requirements involved in both formal and informal rulemaking will be given in the following chapters. Here suffice it to say that informal rulemaking requires that general notice of proposed rules is published in the Federal Register, interested persons are afforded the opportunity to exercise input in the rulemaking process through submission of written data, views or arguments, with or without opportunity for oral presentation, and that all relevant material gathered this way is considered by the agency.¹⁵⁴

Agency rulemaking proceedings may be exempted from the APA's procedural requirements. Interpretative rules, general statements of policy and rules of agency organisation, procedure and practice are exempted from the public, notice-and-comment procedure that precedes the issuance of legislative rules.¹⁵⁵ As aforesaid, non-legislative rules do not in themselves alter anyone's substantive rights or guide directly public conduct, so the preservation of agency flexibility in their making seems to take precedence over any other consideration.¹⁵⁶

In addition, all rulemaking proceedings relating to "a military or foreign affairs function", "agency management or personnel" or to "public property, loans, grants, benefits or contracts" are completely exempted from public input requirements.¹⁵⁷ These exceptions have been deemed as unjustifiably broad, especially the latter one. The ratio behind it was the prevailing assumption at the time of the drafting of the APA, that few administrative law protections were afforded when governmental action affected "privileges" or "mere gratuities" rather than private property. It is doubtful, however, if the same justification still applies nowadays, when procedural rights are extended to these areas as well.¹⁵⁸

Finally, notice-and-comment procedures do not apply when "notice and public procedure ... are impracticable, unnecessary, or contrary to the public interest",

¹⁵¹ *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973).

¹⁵² See Davis (note 4), para. 6:3; Schwartz (note 32), 200.

¹⁵³ See Schwartz/Wade (note 61), 87.

¹⁵⁴ See generally 5 U.S.C. para. 553 of the APA.

¹⁵⁵ *Ibid.*, para. 553(b)(A).

¹⁵⁶ *American Hosp. Assn. v. Bowen*, 843 F.2d 1037, 1045 (D.C. Cir. 1987); *United States Dept. of Labor v. Kast Metals Corp.*, 744 F.2d 1145 (5th Cir. 1984).

¹⁵⁷ 5 U.S.C. para. 553(a).

¹⁵⁸ The Supreme Court abandoned the right-privilege distinction in deciding which interests deserve protection by the Due Process clause in the famous decision *Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970).

on the condition that the agency has a "good cause" and also incorporates a brief statement of its reasons for avoiding them.¹⁵⁹ This exception applies generally to permit emergency action¹⁶⁰ or when the routine or trivial subject matter renders the necessity for public participation negligible.¹⁶¹

The actual rulemaking procedures that agencies use, appear hardly in the simple form prescribed by the APA. For one thing, rulemaking has been moulded and even restructured by the reviewing courts. The latter have given content to the relevant provisions of the APA, for example by requiring that the agency discloses in its notice of proposed rulemaking its methodology and supporting studies or that it includes in the statement of basis and purpose of the final rule its entire reasoning process.¹⁶² In the 1970s, when the explosion of health, safety, environmental and consumer-protection regulation was accompanied by sparseness of rule-making procedures to determine efficiently the factual predicates for the proposed rules, reviewing courts (lower courts in particular, especially in the District of Columbia circuit) began to instruct the agencies to use trial-type procedures, beyond those required by APA sect. 553, like presentation of oral evidence combined frequently with cross-examination.¹⁶³ The hope was that the rule produced would be better supported by a record.¹⁶⁴ This judicial activism that generated a kind of rulemaking best known as "hybrid", was put on halt by the landmark *Vermont Yankee* case, which held that reviewing courts are generally not free to impose additional procedural requirements if the agencies have not chosen to grant them.¹⁶⁵ This decision is in accordance with very early judicial authority refusing to apply the constitutional principle of due process in the rulemaking context.¹⁶⁶ Of course hybrid rulemaking is still very much in existence in cases where agencies themselves or the enabling statutes impose additional procedural requirements.

Whatever procedures legislation or courts require, an agency is generally free to employ more if it chooses to do so, as long as the mandatory minimal requirements of notice to and opportunity to comment by the interested public and of codified and published standards contained in the APA or the particular statutes, are satisfied. Indeed, an agency, only, can best weigh considerations of practicality,

¹⁵⁹ 5 U.S.C. para. 553(b)(3)(B). See Jordan, E., The Administrative Procedure Act's "Good Cause" Exemption, 36 Admin. L. Rev. 113 (1984).

¹⁶⁰ *Council of S. Mountains v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981); *American Federation of Government Employees v. Block*, 655 F.2d 1153 (D.C. Cir. 1981).

¹⁶¹ *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741 (10th Cir. 1987).

¹⁶² *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974).

¹⁶³ See e.g. *Mobil Oil Corp. v. F.P.C.*, 483 F.2d 1283 (D.C. Cir. 1973).

¹⁶⁴ *Aman/Mayton* (note 84), 83.

¹⁶⁵ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

¹⁶⁶ *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915); *Londoner v. Denver*, 210 U.S. 373 (1908).

necessity and public interest and judge which matters are so important, as to deserve more elaborate public procedures.¹⁶⁷

Different statutes have also transformed the rulemaking process. The above procedures applicable in rulemaking, whether formal or informal, do not exhaust themselves in the APA. After the date of the establishment of the APA, rulemaking evolved into a much more rigorous process, as shown previously. In the 1960s and 1970s, this prompted the enactment of regulatory reform legislation which tended to stress openness and mandate public access to a wide variety of agency records and data, reflecting the American political idea that publicity can serve as an effective constraint on governmental action.¹⁶⁸ This legislation includes the Federal Advisory Committee Act¹⁶⁹, the Freedom of Information Act¹⁷⁰, the Privacy Act¹⁷¹ and the Government in the Sunshine Act¹⁷². Other acts did not change the essential procedures that rulemaking agencies employed as much as they required agencies to consider certain specific consequences of proposed rules when making their own evaluations thereof: The National Environmental Policy Act of 1969¹⁷³ required for the first time agency actors to include environmental considerations in the decisional processes leading to major actions affecting the environment and prepare an environmental impact statement; the Paperwork Reduction Act¹⁷⁴ requires rulemakers to develop information on the paperwork costs that accompanies rules; the Regulatory Flexibility Act¹⁷⁵ requires agencies to make special analyses on the impact of proposed rules on small businesses; the Unfunded Mandates Reform Act of 1995¹⁷⁶ requires something akin to economic impact analysis for any major rule affecting the private sector and imposes on the rulemaking agency the obligation to select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The Act is not judicially enforceable in this respect,¹⁷⁷ but compliance with it is monitored by the Office of Information and Regulatory Affairs of the President's Office of Management and Budget.

¹⁶⁷ See Senate Report No. 752, at 14–15. According to Attorney General's Report 103, *supra* n. 144, policy may be developed by "oral or written communications and consultation; by specially summoned conferences; by advisory committees; or by hearings".

¹⁶⁸ This idea has been characteristically expressed by the phrase: "sunlight is the best disinfectant", see Wade, W./Ragnemalm, H./Strauss, P. L. (ed. by A. Piras), *Administrative Law – The Problem of Justice – Anglo-American and Nordic Systems*, vol. 10 (Milan 1991), 720.

¹⁶⁹ 5 U.S.C. app. sect. 1–15 (1994).

¹⁷⁰ *Ibid.*, sect. 552 (1994).

¹⁷¹ 5 U.S.C. sect. 552(b).

¹⁷² *Ibid.*, sect. 552(b) (1994).

¹⁷³ 42 U.S.C. sect. 4321, 4331–4335, 4341–4347 (1994).

¹⁷⁴ 44 U.S.C. sect. 3501–3520 (1988 & Supp. V 1993).

¹⁷⁵ 5 U.S.C. sect. 601–612 (1988 & Supp. V 1993). This act was made judicially enforceable on behalf of its small business beneficiaries by the Small Business Regulatory Enforcement Fairness Act, sect. 244, 110 Stat. at 867–68.

¹⁷⁶ 2 U.S.C.S. sect. 1501 (L. Ed. Supp. 1996).

¹⁷⁷ *Ibid.*, sect. 1535.

Other statutory changes to rulemaking have been more particular, being directed to the needs of specific agencies. The following can be mentioned indicatively. The Clean Air Amendments of 1977¹⁷⁸ require the Environmental Protection Agency to give detailed notice about the methodology used in arriving at a proposed rule and also to respond to significant comments from that sector about the substance of the rule. The Federal Trade Commission Improvement Act¹⁷⁹ goes even further in the intensification of rulemaking process by imposing procedures normally associated with adjudication. It gives interested parties the right to make oral argument as well as written comment, provides for cross-examination when there are disputed issues of fact and requires the elaboration of a record of the proceedings to be reviewed by courts according to a substantial evidence form of review.

Finally, in 1990 Congress enacted the Negotiated Rulemaking Act¹⁸⁰ to codify uniform procedures for the so-called negotiated rulemaking. When an agency uses negotiated rulemaking,¹⁸¹ it invites representatives of all of the affected parties to negotiate with the agency with the assistance of an impartial facilitator to develop a proposed rule. The agency then publishes the proposed rule in the Federal Register and applies the traditional APA notice-and-comment procedures. This practice of all interested parties sitting at the same table and getting involved in making a choice and reaching a decision is indeed unique in American administrative law. Negotiated rulemaking encourages agencies and the public to develop cooperative relationships and to work together to develop creative and innovative approaches to rulemaking, reduces the time required for the promulgation of rules and also the likelihood that rules are later challenged in court.¹⁸²

Procedural control of rulemaking would mean little if it was not complemented by an elaborate publication mechanism in the Federal Register and the Code of Federal Regulations. It is a fundamental democratic principle that people are in a position to always know the rules and regulations that affect them. Consistency in

¹⁷⁸ 42 U.S.C.A. sect. 7607(d).

¹⁷⁹ 15 U.S.C.A. sect. 57(a); the Toxic Substances Control Act of 1976, 15 U.S.C. sect. 2601, imposes similar requirements for cross-examination, while the Occupational Health and Safety Act of 1970, 29 U.S.C.A. sect. 651, the Consumer Product Safety Act of 1972, 15 U.S.C.A. sect. 2058(d), and the Department of Energy Organization Act of 1977, 42 U.S.C. sect. 7101 impose more modest procedures, like publication of a statement of reasons for the agency's rulemaking, or the compilation of a record for informal rulemaking.

¹⁸⁰ 5 U.S.C. para. 561 (1994).

¹⁸¹ In some cases Congress has made negotiated rulemaking mandatory, requiring specific negotiating procedures. Examples include the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, in connection with the federal program of aid for education of disadvantaged children, and the Price-Anderson Amendments Act of 1988 regarding the indemnification of radiopharmaceutical licensees. Similarly the Congress reauthorised in the Higher Education Amendments of 1992 the student financial assistance programs of 1965, providing for a "Program Integrity Triad" of accrediting agencies, the states and the Department of Education to control access to these programs. The regulations implementing the above program and other provisions of the legislation are required to be developed through negotiated rulemaking.

¹⁸² See Johnson, *Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 (2) Admin.L.Rev. 277, 318–319 (1998).

the agency application of its law and policy and thus even equal protection are also served¹⁸³, since published rules bind uniformly the agency as well as the public.¹⁸⁴ In a major Supreme Court decision, it was stated that “the Administrative Procedure Act was adopted to provide, *inter alia*, that administrative procedures affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations.”¹⁸⁵

Political control of administrative rulemaking is exercised in part by the President and by Congress. Each President since Kennedy has utilised a somewhat more ambitious mechanism to achieve this aim, usually contained in Executive Orders.¹⁸⁶ The latter apply to executive branch agencies, not to the independent ones, and order some kind of regulatory impact, cost-benefit analysis, the implementation of which is to be overviewed by the President. It is noteworthy that their aim is the control of the bureaucracy; they create no legal rights for private persons with an interest in a rule.¹⁸⁷ Under present legislation, the President may exercise control through its Office of Management and Budget and the adjacent Office of Information and Regulatory Affairs, as seen above, according to the Unfunded Mandates Reform Act of 1995. This ability of the President to influence agency rulemaking is not impaired by the APA prohibition of all *ex parte* communications,¹⁸⁸ which is limited to the already small-range formal rulemaking. There is also no question about the legitimacy of presidential control over agency rulemaking. The issue was settled in the famous *Sierra Club* case¹⁸⁹, where it was held that under the American system of government, the authority of the President to control and supervise executive policymaking is derived from the Constitution, and government could not function effectively or rationally if key executive policymakers were isolated from the Chief Executive. However, the President’s power to control cannot surpass the limits based on statutory procedures; for example,

¹⁸³ See *Hornsby v. Allen*, 326 F. 2d 605 (5th Cir. 1964).

¹⁸⁴ See e.g. *United States v. Nixon*, 418 U.S. 683, 694–96 (1974).

¹⁸⁵ *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

¹⁸⁶ Davis, K.C./Pierce, R. Jr., *Administrative Law Treatise* vol. I (3rd ed., St. Paul, Minn. 1994), 351 et seq.; Strauss, P./Sunstein, C., *The Role of the President and OMB in Informal Rulemaking*, 38 Admin.L.Rev. 181 (1985); Gilhooley, M., *Executive Oversight of Administrative Rulemaking, Disclosing the Impact*, 25 Ind.L.Rev. 299 (1991).

¹⁸⁷ Strauss, P. L., *From Expertise to Politics: The Transformation of American Rulemaking*, 31 Wake Forest L.Rev. 745, 763 (1996).

¹⁸⁸ Sect. 557(D). Para. 551(14) of the APA provides that “*ex parte* communication” means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter. The only restriction the APA imposes with respect to *ex parte* communications is in para. 557(D)(1), which is limited to proceedings “on the record”, according to para. 557(A), which in turn depends on para. 554(A) and the third sentence of para. 553(C). The APA does not restrict *ex parte* communications in informal rulemakings governed only by para. 553; see *Marketing Assistance Program, Inc. v. Bergland*, CADC 1977, F.2d 1305, 183 U.S. App. D.C. 357; *Action for Children’s Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977).

¹⁸⁹ *Sierra Club v. Costle*, 657 F.2d 298, 400–410 (D.C. Cir. 1978); see also *Chevron v. NRDC*, 467 U.S. 837, 865–866 (1989).

the Office of Management and Budget cannot delay an agency rule beyond the statutory deadline for its issuance.¹⁹⁰

As far as congressional control is concerned, it has been deemed "... entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole, as expressed in statute, nor undermine applicable rules of procedure."¹⁹¹ Also, it has always been possible for Congress to respond to a certain rule by enacting a statute that reaches a different result. The situation is different, however, when it comes to the annulment of executive and administrative action by either or both Houses of Congress, known as the "legislative veto" practice¹⁹². The general presumption is that Congress is not thought of as being responsible for scrutiny over agency rules and regulations, that being the task of courts with their power to review.¹⁹³ The Supreme Court has also deemed this practice unconstitutional, as a patent violation of the separation of powers.¹⁹⁴ It has been maintained that most probably, this "signals the death knell of direct legislative attempts to review administrative rules and regulations."¹⁹⁵ However, despite all that, subtitle E of Title II of the recently enacted Contract with America Advancement Act¹⁹⁶ puts in place a regime for formal congressional review of all agency rulemaking. All rules, both legislative and non-legislative¹⁹⁷ (and in the case of major rules, also copies of their analyses made in the course of their making), must be brought before Congress for review, automatically upon their adoption.¹⁹⁸ If the appropriate committees in either House generate a resolution of disapproval and this is adopted by both Houses of Congress and signed by the President, the rule ceases to have legal effect and the agency may not adopt a similar rule in the future unless under delegation by subsequent legislation.¹⁹⁹

Germany

Some formal control guarantees are contained in the Constitution. Statutory regulations contain their legal basis, that is, the specific statutory provisions authorising their issue.²⁰⁰ This constitutional provision is said to serve the clarity of the law and hence, the rule-of-law principle. The finding of the legal basis, as well as the control of whether or not the rulemaker has exceeded the limits of delega-

¹⁹⁰ *EDF v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986).

¹⁹¹ *Sierra Club v. Costle* (note 189).

¹⁹² See Schwartz (note 32), 218.

¹⁹³ Schwartz/Wade (note 61), 90.

¹⁹⁴ *INS v. Chadha*, 462 U.S. 919 (1983).

¹⁹⁵ Schwartz/Wade (note 61), 220.

¹⁹⁶ Small Business Regulatory Enforcement Fairness Act sect. 251, 110 Stat. at 868.

¹⁹⁷ *Ibid.*, at 868-69.

¹⁹⁸ *Ibid.*, at 869.

¹⁹⁹ *Ibid.*, at 871-72.

²⁰⁰ Article 80 I 3 of the Basic Law.

tion, become easier for both the citizen and the courts.²⁰¹ Every statutory regulation must be signed by the issuing authority.²⁰² Also, constituent precondition for a statutory regulation is its publication²⁰³ in the Federal Law Gazette (*Bundesgesetzblatt*) if it is of substantial or permanent importance, or in the Federal Gazette (*Bundesanzeiger*) in the rest of the cases.²⁰⁴ Every statutory regulation must specify the date of its coming into effect; in the absence of such specification, the regulation is considered to come into effect on the fourteenth day after its publication.²⁰⁵

There exists no constitutional requirement that a statement of reasons accompanies a legislative act issued by the administration. Nevertheless, paragraph 66 of the Second Ordinance on the Federal Ministries (*GGO II*) suggests that a statement of reasons be added to a regulation, if the latter is not clearly understandable, or if such an addition is deemed generally advantageous. A statement of reasons is not merely recommended but rather required, in cases where the regulation needs the approval of the Federal Council, and is expected to have financial repercussions on the state budget, or on the price index and the general cost of living. These cases, however, concern only the internal, administrative rulemaking process, and have nothing to do with the interest of individual citizens to know the basis of the rules that affect them. This interest seems to be taken into account, albeit to a very limited extent, in section 3 of paragraph 66 of the Ordinances, which provides that the statement of reasons accompanying joint regulations must make clear the exact statutory basis that each separate regulatory provision possesses.²⁰⁶

As regards the production of the second form of delegated legislation, that is, of bylaws, the formal or procedural requirements that must be observed are determined in every specific case by the relevant statute or statutory regulation that governs the function of the autonomous body that issues them.²⁰⁷ The same applies for the issue of administrative regulations or guidelines. Especially concerning bylaws issued by the communes, the Basic Law contains some provisions respecting the issuing authorities. Article 21 1 requires that the latter are elected by the people in general, direct, free, equal and secret elections. Also, it is the individual constitutions of the member-states of the Federation that guarantee the autonomy of Universities and Higher Education Institutions and their resulting competence to issue bylaws.

²⁰¹ Achterberg (note 35), 320.

²⁰² Article 82 1 Basic Law.

²⁰³ Ibid.

²⁰⁴ See para. 87 GGO. Statutory regulations that regulate both federal and state affairs have to be published both in the Federal Law Gazette as well as the state gazette.

²⁰⁵ Article 82 2 of the Basic Law.

²⁰⁶ See Ossenbühl (note 37), 387, 418–419.

²⁰⁷ Achterberg (note 35), 331.

Administrative regulations or guidelines require no specific statutory authorisation,²⁰⁸ except for the case they are also addressed to, and are binding upon public authorities, which belong to a different hierarchical branch to the one, that the authorities they were originally issued by, are part of. As opposed to statutory regulations, the content, purpose, and scope of administrative guidelines need not be laid out in the relevant statutes. Accordingly, no particular form is required and also no general publication is necessary for their entering into force.²⁰⁹ However, it is being increasingly suggested that administrative regulations that produce an external effect should be published. This is regarded not as a prerequisite for their commencement, but as an obligation resulting from their ability to produce external effects and required by rule-of-law considerations.²¹⁰

Direct political control over German administrative rulemaking is exercised in the case of statutory regulations and administrative regulations by the two Houses of Parliament. Both the *Bundesrat* (the Upper House of the Federal Parliament)²¹¹ and the *Bundestag* (the Federal Diet or Parliament) get involved in the production of statutory regulations in many ways. Article 80 2 of the Constitution requires the consent of the *Bundesrat* for the majority of statutory regulations. These include, unless otherwise provided by law, all regulations issued by the federal government or a federal minister laying down basic rules for the use of facilities of the federal railroads, postal and telecommunications services as well as charges therefor, all regulations issued pursuant to federal laws that require the consent of the *Bundesrat* and the regulations executed by the *Länder* as agents of the Federation or as matters of their concern.

The laying of regulations before Parliament (*Bundestag*), which in different cases can offer its consent, correct, veto, or simply require notification of their issuance and the reasons therefore, is not unknown to German constitutional practice, although there is only one express provision in the Basic Law.²¹² Unlike their American counterparts, German courts have deemed the "legislative veto" practice constitutional. According to the relevant case-law, the doctrine of separations of powers is not violated because the legislative power of the executive does not belong to its original area of competence under the German constitutional order. This practice, however, should be limited to cases where the Parliament has a le-

²⁰⁸ It is argued, however, that even in the case of administrative guidelines there has to be an underlying legislative authorisation; see Currie, D., Separation of Powers in the Federal Republic of Germany, 41 Am.J.Comp.L. 201, 222–223 (1993).

²⁰⁹ The Federal Constitutional Court (*BVerfG*) has ruled that Article 80 of the Basic Law applies only to federal statutory regulations, not other forms of administrative action, such as administrative regulations and guidelines; see Ossenbühl (note 37), 458.

²¹⁰ Maurer (note 36), 617. The courts have so far left the issue open, see BVerwGE 61, 15 (1980).

²¹¹ The members of the *Bundesrat* are not directly elected; they are state ministers, appointed to the *Bundesrat* by the state governments, whose representation is proportionate to the population (Article 51 Basic Law).

²¹² Cf. Article 109 para. 4 sect. 4 GG, where it is provided that the *Bundestag* can revoke a statutory regulation concerning the obligation of the Federation and the states to maintain interest-free deposits in the German Federal Bank.

gitimate interest, on the one hand to delegate legislative power to the executive, but on the other hand to reserve the exercise of influence on the issue and content of the statutory instrument in important cases.²¹³

Finally, it is possible that parliamentary commissions are statutorily awarded hearing and consultative rights before the issue of regulations, although examples of this practice are presently found only at state, not at federal level.²¹⁴ Academic literature generally deems acceptable the involvement of such commissions in delegated legislation; it is divided, though, on the question of constitutionality of statutory provisions that require the consent of parliamentary commissions for the issue of regulations by the competent administrative authorities.²¹⁵

Greece

Germany and Greece enjoy very similar governmental-ministerial systems, and accordingly, the Greek rulemaking process is very similar to the German one. Some further remarks should be made with regard to the publication requirements. All administrative regulatory acts have to be published, otherwise they are considered non-existent.²¹⁶ This obligation derives straight from the Constitution: secret legal norms are inconsistent with the rule-of-law principle; citizens have to be aware of the laws that govern them, so that they know their rights and duties and be in the position to claim their enforcement by the courts. It follows that not even a statute may exclude regulatory acts from the publication requirement.²¹⁷ Even the regulations issued by the Ministry of Defense respecting the organisation, armament and equipment of the armed forces which are characterised as “top secret”, are reported to the relevant authorities and their legal recipients.²¹⁸ According to the Greek Constitution, every regulatory decree issued by the President or the ministers is published in the Government Gazette.²¹⁹ Administrative regulations of local application (like prefectural²²⁰ or police regulations²²¹) are

²¹³ BVerfGE 8, 274, 321 (1958).

²¹⁴ For instance, this occurs in Nordrhein-Westfalen before the issue of statutory regulations that concern the organisation of school education (see para. 26 sect. 1, first sentence of the SchVG Nordrhein-Westfalen).

²¹⁵ Isensee/Kirchhof (note 37), 413–14. For a discussion of the relevant constitutional law problems, see Kewenig, W., *Staatsrechtliche Probleme parlamentarischer Mitregierung am Beispiel der Arbeit der Bundestagsausschüsse* (Gehlen, 1970).

²¹⁶ Council of State 717/61, 8, 1062, 2160/62, 397, 1893/66, 735/70, 4957/1987.

²¹⁷ Council of State 1250/75, (1976) To S.83; 2411/1981; Areios Pagos 754/1978, (1979) To S.143.

²¹⁸ Article 2 para. 2 of statute 301/76. However, the Council of State has ruled that a statutory provision which prohibited the publication of regulations that might endanger the national defense (as are those respecting the armament, equipment, etc. of the army forces), is not unconstitutional; the Court based its decision on Article 14 para. 3c of the Greek Constitution which authorises the confiscation after publication of press that discloses information on matters of national defense (Council of State 2124/77, (1977) To S.632). See also decisions 2153/1978; 4250/1980.

²¹⁹ Article 35 para. 1 of the Greek Constitution.

²²⁰ Article 2 para. 1 of statute 301/1975. See also Decree 374/1976, 743/1984.

²²¹ Article 369 of the Town Police Order included in Royal Decree 12–3/28. 4. 1958.

published in the press or are bill-posted in the most public places of the local communes and are recorded in a book that is open to the public for inspection.

The control exercised over the rulemaking process is regulated directly by the Constitution. Every regulatory decree issued by the President on the basis either of specific or of general statutory authorisation and containing legally binding norms has to be submitted by the competent minister to the Council of State for control (who may also set a deadline for its completion), when it has reached its final draft form.²²² The Council of State itself has excluded from this procedural requirement the decrees that simply codify pre-existing law,²²³ those that ratify international treaties and concern the undertaking of an international obligation,²²⁴ those that ratify public law contracts²²⁵ and also those that concern the approval or amendment of the constitutions of private law foundations.²²⁶

The Council of State acts in this instance not as a judicial, but as a consultative executive organ. It performs a control of legality of the relevant regulatory decrees, i.e., it ascertains their conformity with the Constitution and the state laws. It also performs a control of their legal, linguistic and technical formulation. The administration is not legally bound to adopt the opinion of the Council of State, but it may not request a review of this opinion either; in practice, however, the Council's opinion is generally respected.²²⁷

The control of the regulatory decrees by the Council of State constitutes an essential procedural requirement, the omission of which renders the decree or the specific provisions that were not included in the submitted draft, voidable.²²⁸ The expiration of the deadline set by the responsible minister for the control of the decree is of no legal significance, as long as it was reasonable.²²⁹

England

The procedure governing the making of delegated legislation is generally informal. As far as statutory instruments are concerned, the procedure for their making is governed by an official manual published by the Statutory Publications Office, called the Statutory Instruments Practice.²³⁰

²²² Article 95 para. 1d of the Greek Constitution; the whole procedure of control is regulated by Article 15 para. 1 of statute 170/1972, as amended by Article 1 para. 6 of statute 1968/1991.

²²³ Council of State record 20/77, (1977) To S.168; also 20/78, (1978) To S.225.

²²⁴ Council of State record 596/77, (1977) To S.477.

²²⁵ Council of State record 1228/77, (1978) To S.408.

²²⁶ Council of State record 770/77, (1978) To S.408. See also Articles 108, 110 of the Civil Code.

²²⁷ Dagtoglou (note 48), 99–100.

²²⁸ Council of State 2924/65; 2333–34/67.

²²⁹ Council of State 3275/70; 91/33.

²³⁰ Hayhurst, J.D./Wallington, P., *The Parliamentary Scrutiny of Delegated Legislation*, PL 547, 554 [1988].

Some provisions concerning publication and making of Statutory Instruments and Orders in Council, albeit not other forms of delegated legislation,²³¹ are set down by the Statutory Instruments Act 1946. As regards the publication of Statutory Instruments, section 2(1) of the Act provides that immediately after their making, they shall be sent to the King's printer of Acts of Parliament and numbered in accordance with regulations made under the same Act. Exempted from the above requirement for publication according to the Statutory Instruments Regulations 1947, 1948 (No. 1) are: local instruments which connote local or personal or private Acts;²³² general instruments certified by the responsible authority to be a class of documents which would otherwise be regularly printed,²³³ unless the Reference Committee consisting of two or more persons²³⁴ directs otherwise; temporary instruments;²³⁵ bulky schedules;²³⁶ confidential instruments.²³⁷

Whether there is provision for publication or not, it seems that failure to publish a statutory instrument does not affect its validity. The reason for this can be found in the distinction that the Act itself makes between the making of the instrument and the issue of it,²³⁸ whereby the provisions for printing and publication are merely procedural; an instrument is deemed valid once it is made by the minister and laid before Parliament.²³⁹ In turn, an instrument is considered "made" by the minister at the point when the enabling legislation stipulates so. The Statutory Instruments Act provides only for the particular case when a statutory instrument is to be laid before Parliament after being made. In such case it must be laid before coming into operation. In all other cases, the statutory instrument is deemed "made" when it is enacted by the Queen in Council or signed by the competent ministerial authority.²⁴⁰

Beyond the provisions described above, procedural matters concerning rule-making are governed each time by the empowering legislation. If no such provisions are contained therein, the authorities must proceed as they think best.

²³¹ Such as statutory instruments issued pursuant to a pre-1948 statute, which are exempted from the publication requirements of the 1946 Act; instruments issued pursuant to a statute passed after the 1946 Act, where legislative power is not made exercisable only by statutory instrument; Orders in Council made by virtue of the prerogative (see chapter 1, sect. 1). The public can become aware of such legislation by newspaper publicity or the consultation of commercially published literature on the topic. See Garner's Administrative Law (8th ed. 1996), 86.

²³² Reg. 4(2).

²³³ Reg. 5.

²³⁴ Reg. 11(1).

²³⁵ Reg. 6.

²³⁶ Reg. 7.

²³⁷ Reg. 8.

²³⁸ Sect. 3(2) of the 1946 Act states: "It shall be a defense to prove that the instrument had not been issued by His Majesty's Stationery Office at the date of the alleged contravention unless it is proved that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged."

²³⁹ See Justice Streatfield in *R. v. Sheer Metalkraft Ltd.* [1954] 1 Q.B. 586. There has been opposite authority, of lesser gravity though, in *Johnson v. Sargent & Sons* [1918] 1 K.B. 101.

²⁴⁰ Allen, C.K., *Law and Orders* (3rd ed., London 1965), 114.

As regards bylaws made by local authorities for purposes for which specific provision is not otherwise made, rules for their making are found in sections 235 and 236 of the Local Government Act 1972. According to these, before coming into operation, bylaws have to be confirmed by the Secretary of State or any other authority specified by the enabling legislation. Before application for confirmation notice of the intention is publicised and copies of the bylaws are made available to public inspection – the latter obligation applies also after the confirmation. Different provisions, contained in the respective governing statutes, apply to bylaws issued by autonomous or semi-autonomous bodies, like the Civil Aviation Authority,²⁴¹ or statutory water undertakers.²⁴²

Political control of administrative rulemaking in England is mainly exercised by Parliament. Statutory instruments normally have to be laid before Parliament before they come into effect so that the MPs may raise issues about them; then they can be approved or disapproved but not amended. There is no general laying requirement, so this can be done in different ways, according to the provisions of the empowering statute. The instruments may be required to be laid before both Houses of Parliament or the House of Commons only; in some other cases (normally for regulations increasing taxes or charges)²⁴³, the statute provides for an affirmative (resolution) procedure which entails that the instruments shall not have any effect unless approved by resolution of the House(s); or the statute may provide for the negative (resolution) procedure, whereby the instruments will automatically become operative unless either House resolves to the contrary within forty days. Finally, in other areas they may be required to be laid in draft, or they may not have to be laid at all because the primary legislation has not provided for the matter, or it may be stated that an instrument made will expire at the end of a specified period unless approved by the House(s) of Parliament.²⁴⁴

In addition to the control of statutory instruments exercised on the floor of Parliament, there is also scrutiny by the Joint Committee on Statutory Instruments and also by the House of Commons Standing Committee on Statutory Instruments or Merits Committee. The former was set up by the Houses of Parliament in 1973 and its function is to perform a control of the technical legality of all statutory instruments (those laid before Parliament and also those not required to be laid), considering questions of clarity, effect, *ultra vires* and retroactivity, and ensuring that they are *intra vires* the parent statute, adhere to the conditions stated

²⁴¹ See sect. 29 of the Civil Aviation Act 1982.

²⁴² See sects. 17, 18 of the Water Act 1945. For a detailed account of the bylaw-making procedure, see Garner's Administrative Law (note 231), 100–105.

²⁴³ See Customs and Excise Duties (General Reliefs) Act 1979, sect. 17(4); Income and Corporation Taxes Act 1978, sect. 788(10).

²⁴⁴ See Craig (note 65), 250–252; Adonis, A., *Parliament Today* (2nd ed., Manchester 1993), 113.

therein and are drafted to achieve their stated purpose.²⁴⁵ The latter is concerned with the merits of the rules, that is, the substance of the legislation and whether it is acceptable in policy terms.²⁴⁶

The object of the system of parliamentary control of statutory regulations is to keep them under political control.²⁴⁷ In this respect, it enjoys a central role in the democratic process of government and if considered effective, it is also believed to influence the attitude of the courts towards challenges of delegated legislation.²⁴⁸ However, there is general agreement that scrutiny of delegated legislation is hardly one of Parliament's priorities. The constraints of parliamentary time, expertise and procedure combined with the increasing volume, scope and changing nature of statutory instruments do not permit every instrument of major importance to be debated and in general, render the effectiveness of the whole procedure questionable.²⁴⁹ In addition, although the role of the Joint and Merits Committees is generally considered useful especially as a warning to departments, it is still limited in the results they can achieve, since they have no means of ensuring that action will follow up on their reports.²⁵⁰

The Parliamentary Commissioner for Administration does not have jurisdiction over delegated legislation, and this applies equally to the preliminary stages of the making thereof. Once a statutory instrument has been made, the Commissioner may receive complaints about its operation and ensure that the relevant department is keeping the matter under review; the actual content of the rules, however, cannot be questioned. Where a statutory order is not an instrument, the Commissioner's powers appear to be wider, allowing an investigation of maladministration in the administrative process leading to the actual making of the order.²⁵¹

There is a different rationale behind the making and control of rules that are made by the administration in the exercise of their discretion and without express statutory authority. First of all, the formal provisions of parliamentary scrutiny do not apply and the control that Parliament has over administrative informal rules is generally of a very limited extent, since by definition, quasi-legislation is a substitute for legislation.²⁵² However, in the case of codes of practice, the enabling provisions in legislation often require a parliamentary procedure to be applied. This

²⁴⁵ See Joint Comm. on Delegated Legislation, Report, H.L. 184, H.C. 475 (1971–72).

²⁴⁶ On the precise function of the Merits Committee, see 853 H.C. Deb. col. 680 (22 March 1973). See also Beatson, J., *Legislative Control of Executive Rulemaking: Lessons from the British Experience*, 12 *Corn. Int'l.L.J.* 217–218 (1979).

²⁴⁷ Wade/Forsyth (note 65), 898.

²⁴⁸ Hayhurst/Wallington (note 230), 547–548, 566–573. On the same issue, see also Bates, T., *Parliament, Policy and Delegated Power*, *Stat.L.Rev.* 114, 119–20 (1986).

²⁴⁹ Allen (note 240), 136; Beatson, (note 246), 213–215, 222 (1979); Ganz, G., *Understanding Public Law* (2nd ed., London 1994), 49–50.

²⁵⁰ Craig (note 65), 253.

²⁵¹ See the opinion of the Attorney General in evidence before the Select Committee, Report from the Select Committee on the Parliamentary Commissioner for Administration (1968–1969 H.C. 385).

²⁵² Ganz (note 68), 26.

is of particular importance considering that sometimes codes of practice are given the force of law.²⁵³ There are also other ways, though not very tight, consistent or effective, in which quasi-legislative rules can be supervised by Parliament.²⁵⁴ They may become the object of parliamentary questions, of ministerial statements, of a possible examination by a select committee, or of an investigation by the parliamentary commissioner. Departmental committees can also perform a pre-legislative scrutiny of administrative rules by putting pressure on the minister to make amendments.²⁵⁵

3. Control of the rulemaking process by the public: the European preference to *ad hoc* solutions

Germany

German law lacks a general requirement for administrative rulemaking procedures open to public input. At constitutional level the right to be heard before the administrative authorities is not guaranteed directly by the Basic Law but is held to derive from article 103 para. 1 of the Basic Law which safeguards the right to have one's case heard before the courts, as well as from the constitutionally anchored principles of the rule of law and of human dignity.²⁵⁶ Being an expansion of the judicial doctrine of *audi alteram partem*, hearing rights in administrative procedure find application only in cases of adjudication and not in the exercise of legislative power. Furthermore, the right to be heard by an administrative authority is guaranteed by para. 28 of the German Statute for Administrative Procedure only for those citizens whose rights may be adversely affected by the individual administrative act to be issued and not by a normative act. Provisions concerning the process itself of making statutory regulations are found in the Code of Practice that governs the federal ministries. The same Code contains provisions for administrative guidelines as well.²⁵⁷ These require the ministries to inform interested organisations and to hold a hearing before a rule is issued. However, this Code of Practice has only internal, non-binding force and therefore establishes no legal hearing rights that can be judicially enforced. There is no requirement for general or detailed notice (like in the American case), nor for a statement of reasons for the final rule. It seems that administrative processes leading to the issue of a rule – whether that is a statutory or an administrative regulation – are not so heavily legalised. In fact, it is considered a common characteristic for both formal and in-

²⁵³ For examples of this practice, see Bates (note 248), 114, 120–122.

²⁵⁴ See Galligan, D.J., *Due Process and Fair Procedures* (Oxford 1996), 505.

²⁵⁵ Ganz (note 68), 31.

²⁵⁶ See Knemeyer, F.-L., *Rechtliches Gehör im Gerichtsverfahren*, in: Isensee, J./Kirchhof, P., *Handbuch des Staatsrechts VI*, 1271, 1297–1301.

²⁵⁷ Paras. 63 et seq., 67 et seq. of the GGO (*Gemeinsame Geschäftsordnung der Bundesministerien*). Paras. 76–78 GGO II contain provisions on administrative regulations.

formal administrative legislation that they can be issued rapidly and in an uncomplicated way, without observance of many procedural norms.²⁵⁸

With the exceptions that are presented below, Germany is generally reserved in according participation rights in rulemaking to private actors. It is assumed that only state authorities enjoy the general democratic legitimation to reach binding decisions. Allowing private interest groups to participate in the preparation of state decisions can cause irritations to this legitimation structure.²⁵⁹

On the other hand, there are several statutes, especially in the environmental field, that require the hearing of those concerned before the final promulgation of a formal regulation or guideline. The Federal Nature Protection Statute of 1976 gives a right to a hearing and a general opportunity to citizen groups to inspect the relevant expert opinions in *inter alia* "the preparation of ordinances and other sub-statutory regulations of nature conservation authorities",²⁶⁰ on the condition that these citizen groups constitute officially recognised, incorporated associations.

It is recognised by German courts that this provision accords certain associations the subjective, public law right to exercise influence on the rulemaking process. In case they are completely denied such an opportunity to participate, the resulting normative act must be declared void. If their participation occurs, still it is impeded by the authorities (by being denied, for example, full access to data or being allowed insufficient time to present their comments), the validity of the regulation depends upon the gravity of the omission, the expediency of having a hearing in the given case, as well as the gravity of the latter in the whole administrative procedure.²⁶¹

Other statutes in the environmental field state that the ministry "shall hear" representatives of those directly affected as well as representatives of the scientific community, the trade, industry and traffic sectors, and the responsible *Länder* authorities.²⁶² However, it is reported that these hearings are not usually open to the

²⁵⁸ Maurer (note 36), 617.

²⁵⁹ See Schmidt-Aßmann, E., Verwaltungslegitimation als Rechtsbegriff, 116 AöR 329, 355–366 (1991).

²⁶⁰ Article 29(1) of the Bundesnaturschutzgesetz (BNatSchG), revised text of 12 March 1987, BGBl. 1987 I, 889. *Länder* that have incorporated similar provisions in their nature conservation statutes include Bremen (para. 44 BremNatSchG 1979), Hessen (para. 36 HeNatSchG 1980), Hamburg (para. 41 HmbNatSchG 1981), Berlin (para. 39a NatSchGBln 1983), Saarland (para. 33b SNG 1987), Niedersachsen (paras. 60a–c NiedersächsNatSchG 1993) and Brandenburg (paras. 61–64 BbNatSchG 1992).

²⁶¹ Denninger, E., Verfassungsrechtliche Anforderungen an die Normsetzung im Umwelt- und Technikrecht (Baden-Baden 1990), 61; see also Supreme Administrative Court of Kassel (1988) NVwZ 1040. On the above criteria see BVerwGE 59, 48, 51–52 (1979). For general discussion of the consequences of procedural errors during rulemaking for the validity of administrative rules, see Hill, H., Das fehlerhafte Verfahren und seine Folgen im Verwaltungsrecht (Heidelberg 1986), 66 et seq.

²⁶² See e.g. para. 17(1) of the Chemicals Act – Chemikaliengesetz – ChemG of 25.7.94, BGBl. I 1703; BGBl. III 2129–15; para. 51 of the Federal Statute for the Protection from Emissions – Bundesimmissionsschutzgesetz – BImSchG of 14.5.1990, BGBl. III 2129–8; para. 60 of the Kreislaufwirtschafts- und Abfallgesetz of 27.9.1994, BGBl. I 2705, as last amended on 25.8.1998, BGBl. I 2455. For an account of such examples, see Hagenah, E., Prozeduraler Umweltschutz (Baden-Baden 1996), 114 et seq.

public, and they do not produce a public record.²⁶³ Even the testimonies of technical experts are generally not made public.²⁶⁴ Since many environmental guidelines set technical standards that affect the pollution control activities of private organisations, they should be publicly available to dischargers.

Town planning is another area where the participation of the individual is regulated in the most variegated and extensive manner, probably because it affects most directly everyone's vital space and quality of life. The German Federal Building Code (*Baugesetzbuch*)²⁶⁵ requires two stages of participation in both cases of preparatory, non-legally binding land-use plans (*Flächennutzungsplan*) and the more specified, legally-binding local development plans (*Bebauungsplan*) after they have been drafted and placed on public display. Paragraph 1 of section 3 of the Building Code demands as a general principle that the public is informed at the earliest possible stage and that it is given suitable opportunity to express itself upon and discuss the general aims and purposes of planning, the significantly different solutions considered for the re-design or the re-development of an area and the probable impact of the whole scheme (*frühzeitige Bürgerbeteiligung*). Paragraph 2 of the same section contains more detailed provisions requiring a procedure akin to the American "notice-and-comment" procedure (*Auslegungs- und Einwendungsverfahren*): citizens are offered the opportunity to express opinions and objections to the final draft plan, which is accompanied in the case of the land-use plan by an explanatory report and in the case of the building plan by reasons, and which clarifies the planning intentions of the competent municipal authorities. If the objections expressed lead to a revision of the draft plan, then the whole process has to be repeated.²⁶⁶

Only the procedure prescribed by paragraph 2 is subject to judicial control.²⁶⁷ However, although everyone (*jedermann*) is entitled to participate in the administrative process in question, not everyone enjoys a subjective right to participate that is enforceable in court, but only the one who is affected in his substantive, fundamental or other public law rights by the non-compliance with the above procedural provisions.²⁶⁸

At the local authority level, participation opportunities become more intense. In many German regions, institutions such as local assemblies and citizen initiatives have been given more power by local statutory provisions. Collections of citizens that satisfy certain numeric conditions, enjoy in some *Länder* the power to enforce on the local authorities decisions made by them on issues of great local importance. In other instances, they are given specific power by formal local authority decision to replace them in a concrete decisionmaking. Citizens have also many

²⁶³ See Rose-Ackerman (note 94), 66–68.

²⁶⁴ In fact, technical experts are subjected to the same duty of non-disclosure as public officials; see para. 61 of GGO I.

²⁶⁵ Bekanntmachung der Neufassung des Baugesetzbuchs vom 27. August 1997 (BGBl. I, 2141).

²⁶⁶ Paras. 3 III 2, 13 I 2 BauGB.

²⁶⁷ 215 I Nr.1 BauGB.

²⁶⁸ Brohm, W., *Öffentliches Baurecht* (München 1997), 245, 246.

opportunities to participate in the making of local planning or environmental regulations, principally with rights of record inspection and statement of objections.²⁶⁹

These devices of direct democracy are deemed to complete the institutions of representative democracy at local level, and also induce citizens who have otherwise nothing to do with party politics, to political action.²⁷⁰ Nevertheless, these institutionalised participatory forms have been criticised as presupposing such social conditions (like a certain educational level of the residents, time and money resources etc.), that do not always correspond to reality.

Greece

In the Greek legal system, there is no constitutional or general statutory provision that provides for a hearing of the interested persons or a statement of reasons as a procedural requirement for the issue of all kinds of administrative regulations and decrees. Article 20 para. 2 of the Constitution which states in a general fashion that "the right to a prior hearing of an interested person applies (also) for every administrative action or measure that is taken to the detriment of the person's rights or interests", is traditionally interpreted by courts and academic literature as being applicable only before the issue of individual acts.²⁷¹

However, with the enactment of certain particular statutes, Greece seems to be making a move towards subjecting the administration to more public control. Article 9 of statute 1943/1991 provides for the establishment of "committees of social control" in every ministry, consisting of representatives of working circles and of political parties, which have the duty to examine every issue relating to the most efficient running of the ministries and their supervised authorities and the best possible provision of services for the citizens, and also every proposal aiming at the improvement and simplification of administrative methods and procedures. The above statutory provision is based on the older statute 1735/1987 (art. 17) that first established these committees with the aim to increase the social consensus and acceptance in matters of public administration through the introduction of more democratic, transparent and participatory procedures in the public sector.²⁷² However, it has to be noted that at the time of introduction of this statute, the so-

²⁶⁹ See e.g., the Environmental Protection Statutes of Bayern (Art. 46 BayNatSchG); of Baden-Württemberg (para. 59 BWNatSchG) and of Rheinland-Pfalz (para. 28 RLPfLG). For the practice of local referendums, an important devise of direct democracy, see Frowein, J.A., *Les référendums. Aspects de droit comparé*, in: *La participation directe du citoyen à la vie politique et administrative* (Brüssel 1986), 97–121.

²⁷⁰ For specific references to local authority ordinances and regulations, see Herbert, A., *Die Beteiligung von Vereinigungen am kommunalen Willensbildungsprozess* (Frankfurt a.M. [et al.] 1994), 17–19; Knemeyer, F.-L., *Bürgerbeteiligung und Kommunalpolitik* (Landsberg am Lech 1997).

²⁷¹ Lazaratos, P., *The Right to a Hearing in Administrative Procedure* (Athens 1992), 347–52 (in Greek).

²⁷² See the Parliamentary Report of Introduction to the above statute, pp. 5, 19.

cialist government was accused by the opposition of trying to impose unnecessary control mechanisms that could lead to the “policing” of the administration and to its control by the governing party.²⁷³ Even earlier, statute 1385/1983 had introduced the supervisory councils in the metallurgy sector consisting of representatives of the state, employers and employees, local government or other social groups. Finally, in the education sector we encounter the National Education Council, an “organ of popular participation” according to the founding statute 1566/1985, which has a very wide composition but mostly consultative duties.

At local level, legislative attempts to bring the citizens closer to the decision-making centres have taken the following character. Statute 1270/1982 gave for the first time the authority to local councils to divide their region in neighbourhoods and set up neighbourhood councils. The aims of the latter consist in the organisation and promotion of citizen participation in local affairs and in the general activation of the institution of local self-government. However, the competence of neighbourhood councils is only consultative; these organs do not enjoy any power of co-decision on the content of regulations issued by the local councils. What they may do, is state opinions and proposals on issues related to the education of the residents of the whole region, their health and welfare, and also on issues of environmental preservation, town planning, transportation and financial administration.²⁷⁴ In towns of no more than 10,000 inhabitants, as well as in those that do not have neighbourhood councils, the local authorities may call regularly a popular assembly to discuss matters of local importance.²⁷⁵ Finally, there has been some recognition of the institution of popular initiatives; issues raised before the region council by a certain number of people, have to be seriously considered and discussed and the relevant decision must be notified to the petitioners.²⁷⁶

As regards town planning, according to statute 1337/1983, interested citizens are called to participate in every possible and pertinent manner in the drafting of local building plans. Participation is not limited to the statement of objections, but extends to the expression of all viewpoints and the active contribution in the drafting itself.²⁷⁷ On the contrary, there is no provision for citizen participation in the initial phase of general preparation of structure, land use or development plans. It is supported that citizens should not be excluded from the phase of the initial conception and planning of this intervention when the general guidelines are being formulated, at least insofar as the latter concerns a specific locality.²⁷⁸ Greece should follow the German example of *frühzeitige Beteiligung* in this instance.

²⁷³ Parliamentary Records, Congr. N/ 25.9.87, 1590, 1594, 1601, Congr. NA/ 29.9.87, 1623, 1631, 1642, Congr. NC/ 1.10.87, 1725.

²⁷⁴ See Articles 60 et seq. of statute 1270/1982; now Articles 157–172 of the Greek City and Town Code (codifying Decree 410/1995).

²⁷⁵ See Article 121 of the Greek City and Town Code.

²⁷⁶ Ibid., Articles 153–155.

²⁷⁷ Paras. 2 and 3 of statute 1337/1983.

²⁷⁸ See Skouris, W., The Constitutional Position of Participation, in: Orientations in Public Law (Thessaloniki 1996), 169, 185–186 (in Greek); Pavlopoulos, P., Citizen Participation in Administrative Action, 34 *Dioikitiki Metarrythmisi* 51, 51–54 (1988).

Consultation in administrative regulation is based on custom rather than a general legislative provision.²⁷⁹ There is no general duty to consult or participate imposed by common law either.²⁸⁰

Whatever the name of the secondary legislation produced, there is a well-established practice of pre-adoption consultation with interested groups, whether its aim may be the attainment of a prior agreement with them, or more simply, the full prior knowledge of the interests affected. What governments usually do when contemplating and before finalising proposals for policy changes or legislation, is to publish, according to their discretion, consultative documents known as Green and White Papers respectively,²⁸¹ outlining the proposals and any other alternative options and containing the relevant material to support them.²⁸² By now it is accepted as a matter of course that representative bodies of industries, professions and occupations of all kinds will participate when regulations governing their affairs are made. To give an example, some town planning regulations as well as the Highway Code, have been preceded by a consultation stage.²⁸³

However, almost none of the British government departments or regulatory agencies conduct their rulemaking in a way akin to the American example,²⁸⁴ allowing regularly and consistently antecedent publicity of, and participation in the

²⁷⁹ Wade/Forsyth (note 65), 896. This was not always so. The Rules Publication Act 1893 required regulations to be published in advance of their adoption and imposed a limited legal duty on the rulemaking authority to consider any representations made within the forty-days period of preliminary publicity. The provision was proven ineffective and was repealed in 1946. It should also be noted that the Better Regulation Guide, a legally non-binding document published by the Cabinet Office in August 1998, urges all government officials involved in regulation to consult all affected groups including business, citizens' groups, voluntary organisations and the general public, both before and after formulating a regulatory proposal, and even if there is no statutory requirement to do so. It also provides specific guidelines for the conduct of these participation proceedings.

²⁸⁰ Justice Megarry was quite categorical in *Bates v. Hailsham* [1972] 1 W.L.R. 1373. On the other hand, there is common law authority (on the basis of the doctrine of legitimate expectations) for greater consultative rights where an individual argues that an established policy should be applied to a particular case, in circumstances where a public body seeks to resile from it (see e.g. *R. v. Liverpool Corporation, ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299).

²⁸¹ Theoretically, Green Papers announce tentative proposals for discussion with the public, outlining the different alternatives where the government has not decided its preference yet. White Papers outline firm government proposals for the implementation of a policy and invite public comment. In practice, however, the distinction is often blurred. See Jones, B. L./Thompson, K., *Garner's Administrative Law* (note 231), 52, fn. 19.

²⁸² Austin, R., *Freedom of Information: The Constitutional Impact*, in: Jowell, J., *The Changing Constitution* (Oxford 1994), 393, 420.

²⁸³ Ganz (note 249), 61.

²⁸⁴ With the notable exception of the Civil Aviation Authority, which has used extensively public, trial-type hearings (corresponding much more to the American pattern of legal rigour), both in deciding individual route licensing cases and in developing policies and rules. See Baldwin, R./McCrudden, C., *Regulation and Public Law* (London 1987), 46; Baldwin, R., *Regulating the Airlines, Administrative Justice and Agency Discretion* (Oxford 1985).

formulation of their policies as well as offering some form of legal protection.²⁸⁵ The truth is that any development of that kind depends on the goodwill of the individual regulator. Interest groups have often complained of omission of the issue of Green Papers, of insufficient time allowed for public reply and of a general unwillingness to initiate consultation procedures on draft regulations.²⁸⁶ Moreover, even if they adopt a certain level of consultation,²⁸⁷ public authorities are not obliged to defend rationally and respond to alternative views and positions presented;²⁸⁸ it is even statutorily provided that the requirement of statement of reasons for decisions does not apply to "schemes of a legislative and not executive character".²⁸⁹ The Hansard Society expressed serious concern at the absence of formal protections for participation in all forms of rulemaking and made also recommendations with the view to increase the openness and effectiveness of consultation procedures.²⁹⁰

However, particular statutes do impose duties of consultation and hearing of objections or of a public inquiry in some cases. Other acts set up advisory committees or councils representing a wide range of interests, which also have to be consulted before the making of regulations, as is the case with social security regulations. Where the statute says that consultation shall take place this will be usually held mandatory.²⁹¹ English courts have in general enforced consultation requirements strictly and have ensured that the agency does not just go through the motions when engaging in this process.²⁹²

Among the recent legislation, probably the most notable in establishing participatory procedures at a more general level constitute the Competition and Service (Utilities) Act 1992 and the Deregulation and Contracting Out Act 1994. The former amends the existing statutes through which utilities were privatised.²⁹³ The

²⁸⁵ See Lewis, N., Who Controls Quangos and Nationalized Industries?, in: Jowell (note 282), 199, 211.

²⁸⁶ Harlow, C., Back to Basics: Reinventing Administrative Law, P.L. 245, 251 [1997].

²⁸⁷ For example, the Securities and Investment Board, to which powers of rulemaking in relation to all those conducting investment business are conferred, uses extensively informal, notice-and-comment procedures. See Sched. 9, para. 12 of the Financial Services Act 1986; Black, J.M., Which Arrow? Rule Type and Regulatory Policy, included in Galligan, D.J. (ed.), *A Reader on Administrative Law* (Oxford 1996), 165, 173.

²⁸⁸ Harden, I./Lewis, N., *The Noble Lie: The British Constitution and the Rule of Law* (London [et al.] 1986), 236.

²⁸⁹ Tribunals and Inquiries Act 1971, sects. 12(1) and (4). Although there is no general statutory or common-law duty to give reasons in the determination of individual disputes either, legislation has several times imposed such duties, as under the Local Government Act 1988, sect. 20, the Tribunals and Inquiries Act 1992, sect. 10 and the Competition and Service (Utilities) Act 1992, sects. 1, 5(1), 6(1), 7(1), 11, 16, 17, 23, 34, 36.

²⁹⁰ Making the Law, The Report of the Hansard Society Commission on the Legislative Process (1992), 40–42.

²⁹¹ See e.g. *Agricultural, Horticultural and Forestry Industry Training Board v. Aylesbury Mushrooms Ltd.* [1972] 1 W.L.R. 190.

²⁹² See *inter alia* *R. v. Secretary of State for Social Services, ex p. Association of Metropolitan Authorities* [1993] C.O.D. 54.

²⁹³ Telecommunications Act 1984; Gas Act 1986; Electricity Act 1989; Water Industry Act 1991.

agencies are empowered to make regulations prescribing standards of performance only after consulting the parties likely to be affected by the regulations, thus placing emphasis upon the rights which consumers of services ought to have as against the service provider. In this sense it constitutes an application of the principles contained in the Citizen's Charter²⁹⁴, a political document that established a number of principles which should operate in the context of governmental service delivery.

The Deregulation and Contracting Out Act 1994 enables a minister to make "deregulation orders" to amend or repeal an enactment with the aim to remove certain statutory burdens on businesses, individuals etc. Before a minister makes such an order, he has to consult organisations representative of the interests substantially affected by his proposals and such other persons as he considers appropriate, in a public and open manner, accompanied by publication of the representations received and feedback of the Government's reactions. The minister must justify his reasons for the envisaged order and the procedures followed in an explanatory document containing a draft of the order. This important legislative development could possibly inspire the expansion of such consultative procedures in the preparation of other major regulations.²⁹⁵

At local authority level, the following should be noted. Legislative steps have long been taken in the area of local citizens' access to information. The Local Government (Access to Information Act 1985) provides for public access to local council, committee and subcommittee meetings, advance notice of their agenda and publicity of the related documentation, unless the "proper officer" deems the relevant information confidential or exempt.²⁹⁶ However, the power of local citizens to practically influence formal local authority rule- and policymaking is at the outset exhausted in the observation of the workings of the local councils and in the inspection of draft bylaws and other public documents, and does not include any possibility of real input in the actual process.²⁹⁷

The notion of public participation at a local level was very fashionable in the 1960s and 1970s, when it arose from the area of town planning. The so-called "Skeffington report" was published in 1968 advocating great public participation in the planning process. Later on, the Town and Planning Act of 1990 prescribed elaborate procedures for allowing the public to comment on the proposed plan before it was sent to the Secretary of State, although it placed the organisation and implementation of participation under the jurisdiction of the Secretary of State rather than that of the local government. Considerations of time and cost caused these lengthy provisions concerning participation to be subsequently removed

²⁹⁴ *The Citizen's Charter: Raising the Standard*, Cm. 1599 (1991).

²⁹⁵ Ryle, M., *The Deregulation and Contracting Out Bill 1994 – A Blueprint for Reform of the Legislative Process?*, 15 (3) *Stat.L.Rev.* 170, 179 (1994).

²⁹⁶ Other statutory provisions seeking to render local government more open in its decisionmaking include the Community Health Councils (Access to Information) Act 1988, the Local Government Act 1992 and the Education (Schools) Act 1992.

²⁹⁷ See Articles 100A-G and 236 of the Local Government Act 1972.

from the main body of the Act, leaving, nevertheless, the Secretary of State still with important powers of direction of the participation process.²⁹⁸

In the recent decades, a significant amount of local policymaking has been undertaken by government with the exclusion of local authorities and the concurrent transfer of many of their powers to unelected local bodies of either the public or private sector.²⁹⁹ Obviously, if the role of the local authorities is downgraded, the nature and significance of local citizens' participation changes too, inevitably. It seems that the most noteworthy opportunities for participation have not originated at the local level in an effort to enhance democracy or the citizens' self-development. They have rather been devised by central government, when the latter sought to create a new policy in particular fields like education, housing etc., and in its attempt to give special voice to citizens in their role as consumers, or users of public services.³⁰⁰ From the point of view of empowerment of the citizen-consumer, the importance of provisions contained in e.g. the Housing Act, which established the duty of local authorities to consult with tenants over matters of housing management,³⁰¹ or the Education Act, which aimed to involve parents and "consumers" of education services in the determination of all kinds of educational affairs, should not be underestimated.³⁰² On the other hand, this move cannot really be seen to foster the full development of the individual in society. All in all, it is only down to the initiative of each local council to create opportunities in order to engage the local citizens in the regulation of all aspects of their lives.³⁰³

4. Intensified participation in particular policy areas: the example of English and German planning

In both England and Germany more opportunities for public participation seem to exist in the case of individualised policy contexts. In England an important feature of the administrative process is the public local inquiry. By this institution, an issue of both social and economic nature, usually in the fields of land-use planning, aviation, agriculture, health or housing, has to be decided by considering the best solution in the circumstances, among a number of different and defensible courses of action.³⁰⁴ Its most significant characteristic is the formality of the procedures, the object of which is to provide the opportunity to interested

²⁹⁸ This was done by the Local Government, Planning and Land Act 1980, regs. 23/81 and 22/84.

²⁹⁹ See Craig (note 65), 123; also, Birkinshaw, P., *Grievances, Remedies and the State* (2nd ed., London 1994), 125–126; Wilson, D./Game, C., *Local Government in the United Kingdom* (London 1994), 290.

³⁰⁰ On the subject, see, generally, Gyford, J., *Citizens, Consumers and Councils* (London 1994), 169 in particular.

³⁰¹ See sect. 27BA of the Housing Act 1985; also sect. 61 of the Housing Act 1988, on the requirement of the Secretary of State to consult with the local authority and hold a ballot of the tenants before creating a Housing Action Trust for the better management and improvement of housing.

³⁰² See e.g. sect. 8 of the 1980 Education Act; sect. 165 of the Education Reform Act 1988.

³⁰³ For various examples of such efforts, see Gyford (note 300), 170–180.

³⁰⁴ See Galligan (note 254), 457.

individuals and groups to raise objections and generally have a say before a ministerial decision turning more on policy than on law is made.³⁰⁵

A public inquiry can be of a small scale, when, for example, it involves a dispute between a landowner and a local authority. In this case the centre of gravity falls in establishing and assessing the facts relevant to a decision for or against the local authority, and the participation of the public serves primarily this aim. It may also be of a large scale, like in the case of a motorway, a new airport or nuclear power station, whereby issues of national policy and of central economic, social and environmental importance are raised. In this case, the participation of the citizens is deemed necessary due to the legislative nature of the decision involved, in the sense that it affects a large number of people and has wide-ranging future effects.³⁰⁶

The procedure employed at large-scale public inquiries is worth considering more closely, since many parallels can be drawn to the American example of rule-making procedure. Quite similarly, they commence with a general notice to the public and end with the minister's decision (taken on recommendation by the inspector), which has to be accompanied by reasons.³⁰⁷ The minister makes a policy judgment with his decision and is thus free to consult with other officials and disagree with the inspector's report because he takes a different view on a matter of fact, or to take into consideration new factual material except as to a matter of policy. In such cases he must afford those taking part in the inquiry an opportunity to make written representations within 21 days, or, in the latter case, re-open the inquiry.³⁰⁸ The public hearing itself is subject to the rules of natural justice but unlike the American procedures, it can include testimony by expert witnesses and departmental representatives and also cross-examination and requires the presence of barristers for the parties for the whole time. All this often makes the whole process absorb too much time, energy and resources and has caused grounds for general dissatisfaction among the observers of the public inquiry procedure.³⁰⁹

The equivalent of the public local inquiry in Germany can be sought in the so-called "legally-binding planning procedure" (*Planfeststellungsverfahren*). The openness of the planning procedures is generally guaranteed by paras. 72 et seq. VwVfG. These procedures aim at the concretisation of a project, on the basis of which a certain local plan with legal effects is declared permissible. Their special character lies in their so-called "concentrative" and "formative" effect.³¹⁰ The administrative act that concludes these procedures (*Planfeststellungsbeschluss*), replaces all decisions required by other statutes (building licences, approval by en-

³⁰⁵ Schwartz/Wade (note 61), 137.

³⁰⁶ Cane, P., *An Introduction to Administrative Law* (3rd ed., Oxford 1996), 200–201.

³⁰⁷ Ibid., sect. 10. This duty to give reasons has no application where the inquiry is held by or on behalf of someone other than a minister or a board presided over by a minister (Tribunals and Inquiries Act 1992, sect. 16(1)).

³⁰⁸ See Craig (note 65), 167.

³⁰⁹ See Asimov (note 141), 253, 263–265; Beatson, J., *A British View of the Vermont Yankee*, 55 Tul.L.Rev. 435, 448–462 (1981).

³¹⁰ Maurer (note 36), 418.

vironmental authorities etc.) and regulates all public law relations between the organisation responsible for the plan and those affected by it.³¹¹ According to the aforementioned provisions of the German APA, the plan, consisting of drawings and explanatory notes that define the project, the reasons for its initiation, and the affected land and constructions,³¹² is displayed for inspection for a month in the communes which it principally affects,³¹³ after it has been sufficiently advertised for at least a week.³¹⁴

In these procedures, there is provision for "individual interest participation" based on oral hearings. Anyone whose interests are or may be affected by the project has the right to raise objections against it for a period of two weeks.³¹⁵ Under the term "interests", should be understood not only legally protected interests, but also economic, social, and non-material ones. Once again, the interests affected have to be one's proper interests, so that, for instance, associations or citizen initiatives may not vindicate the interests of their members, even if they have declared in their charter the safeguarding of these interests as an association purpose. After the deadline for objections has expired, the authority in charge discusses them with those responsible for the plan, the relevant authorities and everyone affected as well as with the citizens that raised the objections, at a time and place specifically advertised.³¹⁶ In the case that the initially published plan changes in way that affects, either for the first time or to a greater degree, interests of third parties, the alterations are announced and they are given the opportunity to make their statement or raise new objections.³¹⁷ The public authority responsible for carrying out the hearings draws a statement on the results of the latter and puts it together with the plan as a whole, the position of the public authorities involved and the unsorted objections of the authority responsible for the realisation of the plan.³¹⁸ The whole procedure needs to be repeated in case the defined plan changes before its final adoption. It concludes with the aforementioned administrative act, issued by the authority in charge.

"Legally-binding planning procedures" appear equivalent to policymaking by the central executive since in both cases the various public and private interests involved have to be carefully balanced and the project's general impact on society has to be elaborately considered. An expansion of the open processes of planning to rulemaking at ministry level (whereby normally more secret processes are used) can thus be contemplated.³¹⁹

German courts have recognised the importance of more rational, open and pluralistic procedures in the area of plan-defining procedures. In the famous

³¹¹ Para. 75 sect. 1 VwVfG.

³¹² Para. 73 sect. 1 VwVfG.

³¹³ Para. 73 sect. 3 VwVfG.

³¹⁴ Para. 73 sect. 5 VwVfG.

³¹⁵ Para. 73 sect. 4 VwVfG.

³¹⁶ Para. 73 sect. 6 VwVfG.

³¹⁷ Para. 73 sect. 8 VwVfG.

³¹⁸ Para. 73 sect. 9 VwVfG.

³¹⁹ Denninger (note 261), 178–180.

Mülheim-Kärlich case³²⁰ which involved review of a single power plant licence, although the Federal Constitutional Court rejected the objection that nuclear power threatens the constitutionally protected rights to life and body inviolability, it stressed that public participation in nuclear power licensing procedures can prove necessary to protect fundamental rights and liberties. If the pertinent administrative authority fails to observe the procedural requirements set by statute in order to protect these rights, it is responsible for violating individual rights. The consequence that this decision could be deemed to carry in the rulemaking context could be formulated as follows: the less able the administration becomes to formulate sound rules and regulations because of the increasing complexity of technical problems, the more care it should be expected to demonstrate in the organisation and the general flow of the rulemaking process, in order to guarantee optimal protection of fundamental rights.³²¹ Finally, not only the protection of individual rights but also the proper course of the procedure as a whole through the balancing of all interests involved in the envisaged project has been used by courts as grounds for more open and balanced administrative processes.³²²

5. Comparative evaluation: the effectiveness of the existing system of participation; characteristics, problems and inefficiencies

Legal opportunities for participation can be traced in the economic, social, planning, and environmental fields at different degrees of intensity and regularity. In the European systems examined, participation is generally broader and more legalised in individualised policymaking contexts, but rather weak, unsystematic and not legally regulated in rulemaking contexts.³²³ As a consequence of the latter situation the representation of special, well-organised interests, often of an economic nature, seems to be favoured by the competent administrative authorities, and (with certain exceptions) procedures to guarantee the participation of the general public that could ensure the widest possible representation of individuals in their sole capacity as citizens seem to be neglected. This is best documented in the economic and social fields, which are often characterised by multifarious corporatist arrangements that make it possible for those groups that possess considerable bargaining power to reach, unofficially, decisions together with the administration on policy or regulatory matters.

This favourable treatment of special interests as against more collective ones is negative under a double point of view. First of all, the role that the ordinary citizen can play in the planning of administrative action is diminished, because it is made dependent on his adherence to a particular association or interest group.

³²⁰ BVerfGE 45, 297, 335 (1977).

³²¹ Denninger (note 261), 150.

³²² BVerfGE 61, 82 (1982); BVerwGE 75, 214 (1986).

³²³ The necessity to legally regulate participatory administrative processes has been emphasised in the German context by Schmidt-Aßmann, E., *Das allgemeine Verwaltungsrecht als Ordnungs-idee und System* (Heidelberg 1982), 45.

Moreover, it creates in the citizens feelings of hostility, to the degree they feel weak when faced with the “omnipotence” of the administrative machine. Secondly, the above-described practice underlines the differences and particularities among different categories of interests and does not contribute to their alignment towards the formation of a more general interest, one which is of political nature and common to all.³²⁴

It is certainly true that all kinds of interest groups can only represent, by definition, interests or beliefs shared by segments of the population and not by the entire community. However, every governmental regulation or policymaking should aim in principle to reach beyond particular concerns and acquire a broadest possible sense of the interests of all. It would make a big difference, if first of all, the same opportunities were open to “anyone” who might be interested to participate purely in their citizen status, and also if the contributions of all participant groups were properly weighed against each other according to the principle of equal treatment – this is where the representative power of each participant as well as the nature and importance of the different interests at issue, could legitimately play a role.³²⁵

Opening up administrative procedures to “anyone” who might wish to put one’s views forward, does not necessarily imply that all citizens would readily be accorded the right to participate no matter how weak their interest is. Common considerations of feasibility and the scope of administrative capacities that are disposed of every time should guide the definition of the nature of the “interest” that would entitle people to participate, as well as the extent to which their individual contributions should be taken into account.³²⁶

Still, there remain a lot of problems to be solved as regards participatory arrangements in European legal systems. Even when statutes accord consultation rights to groups or citizens when delegated legislation is made, there is often no requirement of publicity prior to the making of such legislation, with respect to the exercise of rulemaking itself, let alone to the different policy options provided by the administrative authorities. This improves once again the position of specific interest groups that have established relations with government, have better means at their disposal to receive information about contemplated regulatory action, or can afford both the time and money to participate in the usually lengthy proceedings. The situation is not made better by the fact that often it is left to the discretion of the administration to decide who exactly is to be consulted.

³²⁴ Pavlopoulos (note 278), 51, 55.

³²⁵ See Galligan (note 254), 473–4; also Cane (note 306), 365.

³²⁶ See Craig (note 65), 260. In the German context, the orientation of the administrative rule-making process (especially in the environmental area) towards the American model has been advocated by Lübke-Wolff, G., *Verfassungsrechtliche Fragen der Normsetzung und Normkonkretisierung im Umweltrecht* ZfG, 219, 244 et seq. (1991), von Lersner, H., *Verfahrensvorschläge für umweltrechtliche Grenzwerte*, NuR, 193, 196 et seq. (1990), Lamb, I., *Kooperative Gesetzeskonkretisierung* (Baden-Baden 1995).

Concerns of openness in this respect are better met when parliamentary acts make consultation a mandatory obligation and also name the persons or groups to be consulted. Again the American APA notice-and-comment procedures can provide a useful model for reform, to the extent they guarantee the publicity of notice and invitation-to-comment provisions and the open access of rulemaking procedures to anyone who might be interested to make use of them.

Furthermore, if it is agreed that the widest possible range of interests should *prima facie* be consulted, it must also follow that there should be safeguards to ensure that not only the most powerful groupings get their voices heard. This could also imply an obligation on the part of the administration to provide some sort of financial assistance for all those parties with an interest and a will to participate. Participant compensation in the sense of the agency payment of expenses that members of the public incur when they are involved in administrative proceedings is established practice in the American system.³²⁷ In Europe, selected interest groups have again preferential treatment: apart from self-financing interest groups (like businesses and unions), some groups are financed by the public authorities, whereby, nevertheless, cases of corruption and illegal funding are not rare.³²⁸

Even after citizens or associations have been consulted, there must be some proof or at least indication that their views have been taken into consideration. This is not intended to prove that the particular participants have actually managed to formulate a rule together with the administration. It rather implies that the administration provides some record to show, first of all, that the consultation has indeed taken place, and secondly, that proper consideration has been accorded to the various views expressed.

The choice to require the production or not of an administrative record as regards rulemaking proceedings leads to the question of how formal the participation process should be. Using again the American example, there seem to be three basic types of process rights available in rulemaking: trial-type hearings, notice-and-comment proceedings and an intermediate procedure involving a so-called "paper hearing". By allowing the submission of evidence and arguments, the examination and cross-examination of witnesses, fact-findings and the compilation of a record, trial-type hearings are ideal for exposing in detail the advantages and disadvantages of an issue and permitting the active involvement of the parties. On the other hand, they tend to be costly, time-consuming and unsuitable for the resolu-

³²⁷ See Tobias, C., Participant Compensation in the Clinton Administration, 27 Conn.L.Rev. 563 (1995). Since the 1970s agencies like the Federal Trade Commission, the EPA, the National Highway Traffic Safety Administration, and the Department of Energy began to use "intervenor funding" to help needy citizen groups to cover the costs of participation. Relevant statutory provisions authorising the use of funds for these purposes are found in 94 Stat. 376; 90 Stat. 2023 (1976); 94 Stat. 1681 (1980); S.Rose-Ackerman provides this information in Controlling Environmental Policy (note 94), 150–151 (fn. 61).

³²⁸ See Mény, Y., Government and Politics in Western Europe (2nd ed., Oxford 1993), 150–151. In Germany there have been frequent cases in the news involving the Greenpeace and misappropriation of public funds.

tion of complex issues.³²⁹ Notice-and-comment proceedings, as we have seen, do not guarantee that submissions will be properly considered by the rulemaking authorities. The middle-course of paper hearings could ensure the informality of the process itself, combined this time with the creation of a full record of proceedings, which, in turn, would open the way to judicial scrutiny.³³⁰

What always has to be borne in mind is that the determination of which – if any – participatory methods and means should be used on each occasion depends on multiple factors of political and economic nature. The substance or subject matter of the rule to be promulgated is the principal one, since it reflects different policy choices and determines also many technical and administrative aspects of the rule-making process, like the types and amount of information needed, the range of persons to be affected, etc., which in turn influence the weighing of values, like speed, limited costs or efficiency in administrative action, against considerations of process.³³¹

The same administrative values often justify the use of informal rules (like guidelines, interpretive rules, technical manuals), instead of formal regulations, to state or refine policy. As we have seen, procedural requirements mostly do not apply in their case. Such rules often escape publication or legislative scrutiny, leaving an increasingly large area of administrative action basically unchecked. There are many situations, however, in which even such rules appear to be dispositive of a person's case. Establishing some kind of a more general obligation to consult before the issuing of such rules, would seem to serve the purpose of providing control over a basically unchecked area of administrative action.³³²

The relevant debate emerged with particular intensity in the United States, where interpretative rules etc., are explicitly exempted from the notice-and-comment procedures prescribed by the APA.³³³ It is certainly understood that pre-adoption procedures for informal rules could cause confusion about which of the envisaged informal rules are going to produce a legislative effect, would greatly increase agency workloads, and would most probably discourage the adoption of that sort of rules altogether. The public would then be left facing undisclosed interpretations of law and secret policies.³³⁴ However, the values and benefits of public participation deserve to be weighed against any costs and practical difficulties of implementation and solutions then can be explored.³³⁵ Especially in the case of interpretative rules

³²⁹ On the debate about the merits and faults of trial-type proceedings, see Robinson, G.O., *The Making of Administrative Policy*, 118 U.Pa.L.Rev. 485 (1970).

³³⁰ See Galligan (note 254), 498–499.

³³¹ See Kerwin (note 6), 43–45; also Verkuil, P., *The Emerging Concept of Administrative Procedure*, 78 Colum.L.Rev. 258, 294 et seq. (1978).

³³² See Craig (note 65), 275.

³³³ See 5 U.S.C. para. 553(b).

³³⁴ See Bonfield, A.E., *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy under the APA*, 23 Admin.L.Rev. 101 (1971).

³³⁵ Among the solutions proposed by American authors are the possible reliance on the “good cause” exemption in order to selectively exempt interpretative rules and policy statements from participatory procedures (Bonfield, *ibid.*, 119); the requirement of postadoption notice-and-comment

with legislative effect, an American author has plausibly suggested that the agency should select the interpretative rules which it wishes to enjoy legislative effect and then apply the analogous participatory procedures.³³⁶

In conclusion, it seems appropriate to examine in a more general way the factors that affect not only the choice of a particular participatory mechanism, but also determine the expediency of participation altogether. These include the degree of discretion involved in every regulatory process (the more discretionary the regulation is, the more participation is needed)³³⁷; the amount of intensity of interest or controversy that the proposed rule is likely to generate, as well as the need for public support required for the efficient implementation of rules and regulations (in many cases it is useful to gain the acceptance of the members of the public concerned before the actual promulgation of rules.)³³⁸

Providing legal solutions to the problems involved with the construction of a coherent system of participatory procedures is not enough. Effective public participation depends mostly on conditions of a political nature, like the level of the political education of the citizens, the political maturity of the latter (which depends on a certain degree of literacy and culture) that enables them to make informed choices, and the desire on their part to abandon individualism and participate in the exercise of public power. Of course, people will tend to participate more if the basic structures for that purpose already exist, so that they feel confident that their involvement will have some real effect.³³⁹ It is believed that introducing a general clause in administrative legislation requiring and regulating public participation in the rulemaking process will help create a "culture of participation" that will guide citizens towards more involvement in the political process.³⁴⁰ Participation could then become in turn very educative in the sense of both the psychological aspect and the gaining of practice in democratic skills and procedures.³⁴¹

for the same rules (Asimov, M., *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 Mich.L.Rev. 520 [1977]).

³³⁶ Saunders, K.W., *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, Duke L.J. 346, 373 (1986).

³³⁷ The degree of discretion enjoyed by the administration does not only differ between administrative systems (the American and English administration dispose of far more discretion than the German and Greek ones, which are more pre-programmed by statute), but also between different levels of policymaking: the formulation of general policy on a certain issue involves much more discretion and consequently requires the consideration of a wider range of interests, as opposed to the formulation of policy that is focused on a narrow aspect of the same issue; see Galligan (note 254), 475.

³³⁸ See the report by E. Spiliotopoulos in the Council of Europe publication, *Forms of Public Participation in the Preparation of Legislative and Administrative Acts* (Strasbourg 1978), 123; also Kerwin (note 6), 83 et seq.

³³⁹ See Gould, C., *Rethinking Democracy* (Cambridge 1990).

³⁴⁰ It is believed that any apathy on the part of the public arises not because of an inherent unwillingness to become involved in the process that partly determines their standard of living and the nature of their society, but often stems from a governmentally reinforced conviction that there are no available means by which the citizen can affect decisionmaking; Fox, D., *Public Participation in the Administrative Process* (Ottawa 1979), 80.

³⁴¹ Pateman, C., *Participation and Democratic Theory* (Cambridge 1970), 42.

IV. Public Participation in Administrative Rulemaking as a Normative Value

1. Theoretical impediments prohibiting the incorporation of public participation in the constitutional systems examined

a) *The differing status of participation in the American and in the European legal systems*

It has hopefully become evident that public participation in administrative rule-making is only firmly enshrined in the United States. The APA imposes a variety of formal consultation and hearing requirements on rulemakers, and the courts play an active role in enforcing these requirements and in ensuring that rules made are supported by sound reasoning and that they do not conflict with the Constitution. On the other hand, in the European systems examined, there exists only a rudimentary legal framework that does very little to safeguard, control and promote the participation of the public in the making of administrative rules. Whereas all such systems have, since the beginning of the expansion of government, developed various mechanisms to involve regulated parties in rulemaking, that is those that will most directly bear the costs of the proposed rule, the patterns are markedly different when it comes to the involvement of the public or of representatives of broad-based interests – typically the intended beneficiaries of the legislation upon which the rule will be based. Administrative rulemaking does not pass through any significant public stage. Moreover, whatever consultation of the public takes place, is largely at the initiative of the lawmaker and with bodies of its choice. Judicial control of rulemaking does not achieve much in filling in the *lacunae* of the legislative framework, because of its *ad hoc* and low-key nature.

Much rulemaking in the United States is done by statutory regulatory agencies set up to administer government control over particular areas of economic and social activity. These agencies are staffed largely by technical experts and are designed to be relatively independent from political influence and control. They also had considerable difficulty in establishing their legitimacy as legislators for reasons that had to do mainly with the doctrine of separation of powers. It was appreciated at an early stage that governmental regulation involved the making of political choices and should therefore be politically legitimated. Requiring agencies to publicise their proposals and to hear and take account of objections was felt to inject a popular and political element into the rulemaking process. Judicial control contributed to this legitimising technique by adding a further element of publicity, as well as by giving a say to groups which may not have been properly consulted earlier.

The influence of interest groups in the United States constitutes another factor that contributed to the intensification of participatory requirements. Pluralism has always been strongly represented in the American political thought.³⁴² Although

³⁴² See e.g. Dahl, R., *Dilemmas of Pluralist Democracy: Autonomy versus Control* (New Haven 1982). However, there will be no attempt to analyse the conceptual foundations of participation theory.

it is hard to assess whether interest groups do exert a greater influence on policy-making in America than in Europe, the fact that much rulemaking in America is undertaken by agencies can lead to the conclusion that interest-group influence on American rule- and policymaking is more direct and substantial, than it is, for example, in Germany or Greece, where the most significant policymaking is still perceived to be undertaken by Parliament. Especially in the 1960s and 1970s it was strongly felt that this influence had to be regulated. The well-documented phenomenon of "agency capture" illustrates the way in which frequent, informal relationships between public bodies and private groups can subvert a formal regulatory scheme and make it work for the private interests of the regulated. It was partly this phenomenon that caused the federal courts to expand standing and participation rights in relation to judicial review and agency rulemaking, and take action to control contacts by private interests with agencies (*ex parte* contacts).³⁴³

In the European countries examined, the situation is much different. Most statutory rulemaking powers reside in officials or bodies that are not regarded as being politically independent. On the one hand, they are considered to act under authority delegated by Parliament and on the other, their function is mostly seen as that of filling in the details of the policy objectives laid down by Parliament in the enabling legislation. The legitimacy of political decisionmakers in Europe is not judged against the decisions they make, but is considered to derive from the mode of their selection.

The European democratic systems are based around a representative and responsible Parliament. Government is expected to make rules that give effect to policies declared in Parliament and legitimised through the electoral process. As long as the latter is fair and democratic and is regularly repeated, influencing or controlling particular decisions does not appear important. Parliament remains accountable for all rule- and policymaking, even when parts of it are delegated to other bodies. People participate in governmental policymaking through their elected representatives. More concretely, the representative character of the legislature introduces into the policymaking operation the diverse knowledge, interests and views of the constituencies, derived from the representatives' interchanges with members of those constituencies.

This is particularly apparent in Germany, where the courts and the academic community insist on the idea that people are to be represented in Parliament as a whole and not as an accumulation of all possible interests, whether sectional or broad-based.³⁴⁴ While they acknowledge that the call for direct participation is understandable and legitimate in a democracy, they fear at the same time that participation would compromise the formation of the collective, democratic will and

³⁴³ For analysis of the different theories of "agency capture", see Baldwin, R./McCrudden, C., *Regulatory Agencies: An Introduction, Conclusions: Regulation and Public Law*, in: *A Reader on Administrative Law* (Oxford 1996), 151, 156 et seq.

³⁴⁴ See BVerfGE 83, 50 (1990); also Jestaedt, M., *Demokratieprinzip und Kondominalverwaltung* (Berlin 1993), 366.

ultimately jeopardise the majority principle, on which representative democracy is based.³⁴⁵

Furthermore, European countries traditionally employ mechanisms other than participatory procedures in order to secure control over rules and rulemaking. In the English and German systems, these mechanisms consist mainly in the laying of regulations before Parliament and in the application of the doctrine of ministerial responsibility. In the Greek system, the minister is also responsible for regulations made by his department, but there is no laying requirement. Administrators are not considered to have any discretion in formulating rules and, therefore, the simple control of the technical legality of regulations by the Council of State is considered a sufficient guarantee for the quality and accountability of administrative rules.

As far as the English system is concerned, there are also other reasons that may account for the lack of attention given to public participation in rulemaking. Although governments do make a great many rules, they also often use alternative modes of rulemaking. Where economic activity remains in private hands and must be regulated in some form, negotiation or bargaining and self-regulatory schemes are very frequently preferred over regulatory legislation. All these practices, taken together with the notably tolerant British attitude towards discretion, signify an administrative system that operates informally and disfavours the formalisation and legalisation of administrative procedures.³⁴⁶

By contrast with British administrative traditions, the German system is noted for its formalism and its insistence on statutory confinement and control of administrative discretion, which is intensified by the possibility of an extensive material judicial control by courts of special administrative jurisdiction. This perception of the state derives from the German view of the rule of law. However, such a rule-of-law state has inherent political costs; these consist in the limited relation of the administrative function to the political decisionmaking process and in its lacking sensitivity towards the pluralistic social spectrum of interests.³⁴⁷

Moreover, the German perception of the rule-of-law principle places emphasis on the substantive correctness of administrative acts and generally considers issues of procedure to be of secondary importance. This constitutes one more reason why the German system has chosen not to legalise rulemaking procedures, despite its tendency towards formalism. Also, the fear that the establishment of participatory procedures would significantly delay administrative action has also contributed to the negative attitude of German constitutional theory, since timely administrative action is considered a constitutional rule-of-law requirement.³⁴⁸

³⁴⁵ Walter, R., *Partizipation an Verwaltungsentscheidungen*, 31 VVDSt. 147, 178 (1973).

³⁴⁶ For analysis of the reasons for the differences between the British and the American administrative law systems in the conduct of administrative rulemaking, see Asimov (note 141), 253, 266.

³⁴⁷ The idea of the "political costs of the rule-of-law state" was first expressed by Scharpf, F.W. in his study, *Die politischen Kosten des Rechtsstaates. Eine vergleichende Studie der deutschen und amerikanischen Verwaltungskontrollen* (Tübingen 1970).

³⁴⁸ See Bullinger, M., *Beschleunigte Genehmigungs- und Planungsverfahren für eilbedürftige Vorhaben*, in: Blümel, W./Pitschas, R. (eds.), *Reform des Verwaltungsverfahrens* (Berlin 1994), 130 et seq.

As far as the Greek system is concerned, apart from the traditional ideas of representative democracy that have hindered the constitutionalisation of public participation in rulemaking in all European systems examined, there are also strong historical and political reasons that prevented Greece from paying attention to the concept of public participation altogether. Although corporatist arrangements abound in administrative practice, the Greek state has not really supported an ideology of cooperation between citizens and the administration who could work together towards the attainment of the public interest. On the other hand, Greece went through a very long and difficult transitional period before finally finding its way to development; this hardly prompted the organisation of citizens in groups or associations through which they could actively pursue their direct participation in governmental affairs.³⁴⁹

b) The common constitutional impediment: due process or right to a hearing

Traditional theory regarding constitutional and political structures has prevented European legal systems from developing a comprehensive theory of public participation in administrative rulemaking. Apart from that, the constitutional principle of due process, natural justice or right to a hearing, common to both American and European legal traditions, has been rejected as a basis for the advancement of such a theory. When faced with a decision to grant or not a hearing, courts of all jurisdictions would draw a line between adjudication and rulemaking. Due process is regarded as essential in the former but not in the latter. This is mostly because courts are basically concerned with the protection of the rights and interests of the individual. Due process in adjudicatory situations is regarded as a means to defend and protect these rights or interests. The latter are thought to be more vulnerable to direct interference as a result of individualised, as opposed to generalised governmental action.

However, if we are willing to go beyond the narrow idea of the protection of individual rights or interests, to explore some broader justifications given for due process in the making of individual decisions, we shall find that such justifications may well apply in the rulemaking process too. Whether we accept that due process is necessary in adjudication in order to ensure the substantive justice of the final outcome,³⁵⁰ or in order to satisfy formal justice by ensuring that the legal order is impartially and regularly maintained,³⁵¹ or in order to protect human dignity which dictates that an individual is told why he is treated unfavourably and

³⁴⁹ See Pavlopoulos (note 278), 51, 56 (in Greek). In the last years, however, more and more citizen associations make their appearance, especially in the environmental field.

³⁵⁰ See, e.g., Resnick, D., Due Process and Procedural Justice, in: Pennock, J./Chapman, J. (eds.), *Due Process: Nomos 18* (New York 1977), 217–218.

³⁵¹ See Rawls, J., *A Theory of Justice* (Oxford 1973), 235, 238–239. In the German context the same idea is considered to serve the rule of law; see Maunz, T./Dürig, G./Herzog, R., *Grundgesetz: Kommentar* (München 1987), Article 20 para. 63.

is consulted about what is to be done with him,³⁵² we have no reason to reject similar justifications for rulemaking. In fact, we shall show in the next section that participation in rulemaking can in fact uphold substantive justice by preventing abuse of power and securing better outcomes, uphold formal justice by increasing the transparency, answerability and acceptance of governmental action, and contribute to the development of the individual as well.

However, the justification for participation in rulemaking does not have to be restricted to the values served by participation in adjudication. Participation in rulemaking serves a value of its own, which has not been emphasised by administrative law so far, because such an emphasis would conflict with the traditional constitutional expectations described in the previous section. This value is the legitimacy of government.³⁵³

2. Public participation as a means for enhancing legitimacy in government

Public participation can carry great weight in the rulemaking process. By enabling citizens to influence political events, public participation can increase the legitimacy of both rules and rulemaking authorities, and thus strengthen democracy. The reasons are evident. The ideal that in a representative democracy governmental decisions should reside, directly or indirectly, with the elected representatives has come under considerable strain.³⁵⁴ In all contemporary democracies, it is not Parliament that wields real power, but the executive, whose power has grown immensely over the years. In practice, Parliament no longer holds the legislative monopoly; the executive as well as independent agencies, fringe organisations, and even private entities enjoy more and more discretion in formulating rules. The importance of citizens' "primary participation", that is, the vote, has been reduced to a minimum. A greater regard for participation in rulemaking can constitute a valuable form of "secondary participation" for citizens in government.³⁵⁵

Public participation in rulemaking will lead inevitably to greater public explanation and accountability on the part of government. Traditional control mechanisms, like e.g. the process of laying regulations before Parliament, seems to be of little practical significance and thus constitutes an insufficient justification for the neglect of rulemaking procedures. The same goes for the doctrine of ministerial responsibility, which stipulates that a minister is always answerable to Parliament

³⁵² See Tribe, L., *Constitutional Law* (Mineola, NY 1978), 503. In the German context, see Maunz/Dürig/Herzog, *ibid.*, Article 103, para. 92. In the Greek context, see Stassinopoulos, M., *The Right of Defence Before the Administrative Authorities* (Athens 1974), 77–78.

³⁵³ For analysis of the different forms of legitimation under the German Constitution, see Schmidt-Aßmann, E./Hoffmann-Riem, W., *Verwaltungsorganisationsrecht als Steuerungsressource* (Baden-Baden 1997), 56–59.

³⁵⁴ See Benz, A., *Postparlamentarische Demokratie?*, in: Greven, M. (ed.), *Demokratie – eine Kultur des Westens?* (Opladen 1998), 201–221.

³⁵⁵ Craig, P., *Public Law and Democracy in the UK and the USA* (Oxford 1990), 166–173.

for regulations adopted by his department, but in reality does little to improve the quality of the increasing number of promulgated regulations, or their legitimacy in the eyes of the public. Also in Greece, the control of legality of regulatory acts by the President of the Republic or the control of the technical legality thereof by the Council of State may contribute indeed to the improvement of the drafting of rules, but seem virtually irrelevant as a technique to render administrative action accountable. Finally, all these control mechanisms occur *ex post facto*, and although they may, to some extent, serve as a caution to administrators for future rulemaking, the truth is that they cannot guarantee informed and fair rulemaking that results in sound and acceptable rules. In any case, administrators are normally not well-disposed toward making changes in already completed instruments.

Moreover, there are a number of administrative rules that escape even these traditional mechanisms of control because they are issued informally, either by the administration itself or by private parties. The call for control through participatory devices becomes even more central here.

Open government constitutes a prerequisite for genuine democracy. Participation presupposes openness in the workings of government, but it can also contribute itself in this direction by bringing more transparency into the state. The opening-up of administrative rulemaking processes to the people brings with it the opening of all kinds of important information channels from and towards the administration, thus rendering governmental action in general more predictable and comprehensible, and ultimately more reliable.³⁵⁶ Germany and Greece contain provisions in their constitutions that guarantee, respectively, the right of the citizens to inform themselves from accessible sources,³⁵⁷ and the obligation on the part of the administration to answer citizens' requests for information, as long as this is provided by law.³⁵⁸ Although these provisions do not explicitly guarantee participation rights, they could serve as some kind of psychological incitement to the legislators, the administration and the citizens of these countries to establish an open line of communication between state and citizens; they also provide the necessary grounds upon which the implementation of possible future provisions fostering participation could be based.

Giving citizens a greater chance to participate in administrative rulemaking can improve the quality of rules made. Quality of rulemaking has a direct bearing on the rationality thereof. The idea of rationality as a value of policymaking was originally put forward by American authors, who suggested that when officials are delegated the authority to perform some prescribed function, to manage a programme, or to pursue some state objective, no matter how broad their discretion may be, they are obliged to justify their actions as means toward a goal within the scope of their assignment.³⁵⁹

³⁵⁶ This point has been brought forward by German theory; see Jestaedt (note 344), 136.

³⁵⁷ Article 5 para. 1 of the Basic Law.

³⁵⁸ Article 10 para. 3 of the Greek Constitution.

³⁵⁹ See Linde, H., Due Process of Lawmaking, 55 (2) Nebr.L.Rev. 197, 222 et seq. (1976).

Consultation of those to be affected can assist the rulemaker in designing a rule that will effectively and efficiently achieve desired policy objectives by providing detailed information about the circumstances in which the rule will operate.³⁶⁰ Even the content and tone of expressions from the public can help rulemakers find the optimum balance between the aspirations articulated in law and the reality expressed in programme operations.³⁶¹ While it is acknowledged that the relationship between public participation and final outcomes is not always clear or easy to assess, it is believed that at least one of the qualities of a good policy outcome is that it takes account of, and is influenced by the views of the citizens.³⁶² Even in the German context, where only the “substantively correct” rules are recognised as being valid, it is being increasingly admitted that it is a prerequisite for good decisions to have weighed all constitutionally protected and other affected interests against each other.³⁶³ And at a theoretical level, if we agree that the administration is bound by the principle of proportionality, that is to opt for the measure that is the least intrusive in the legal situation of the interested parties, then participation is required for the selection of necessary information and the assessment of the consequences of its action.³⁶⁴

If the quality or “rationality” of rules is enhanced, so will their authority and ultimately their acceptance by the public. As a prominent observer of American rulemaking has characteristically noted: “stupid rules do not beget respect”.³⁶⁵ Of course, the acceptance of rules issued after genuine public participation will be increased not only as a result of the improved quality of rules, but also because the public itself had the opportunity to co-determine their contents. Increased acceptance of rules can lead in turn to the reduction of friction between the administration and the public and consequently to less litigation before the courts.³⁶⁶

Reduction of friction is likely to result also among citizens themselves. It has been suggested that through participation processes citizens can acquire a better idea about the diverse interests existing in a society as well as the necessity to go beyond their particular interests and work towards the so-called common or public interest.³⁶⁷

³⁶⁰ Cane (note 306), 199.

³⁶¹ Kerwin (note 6), 162.

³⁶² Galligan (note 254), 472.

³⁶³ See Steinberg, R., Kritik von Verhandlungslösungen, insbesondere von mittlerunterstützten Entscheidungen, in: Riem, W.H./Schmidt-Aßmann, E. (eds.), *Konfliktbewältigung durch Verhandlungen*, vol. I (Baden-Baden, 1990), 295, 298. See also the German court decisions BVerfGE 53, 30, 75 (1979) and BVerwGE 60, 297, 303–307 (1982).

³⁶⁴ Schmitt-Glaeser, W., Partizipation an Verwaltungsentscheidungen, 31 VVDSt 179, 183 et seq., 221 et seq., 244 (1973).

³⁶⁵ Kerwin (note 6), 162.

³⁶⁶ For a detailed study of the concept of acceptance of administrative action in general, see Württenberger, T., *Die Akzeptanz von Verwaltungsentscheidungen* (Baden-Baden 1996).

³⁶⁷ See Habermas, J., *Theory of Communicative Action* (London 1984); Barber, B., *Strong Democracy: Participatory Politics for a New Age* (Berkeley, Cal. 1984); Hill, H., Integratives Verwaltungshandeln: Neue Formen von Kommunikation und Mitbewirkung, 18 DVBl. 973, 975–976 (1993).

Finally, the establishment of a general opportunity to participate would do fairness to the individual itself by giving effect to its fundamental right to self-autonomy and to free development of one's personality through participation in all aspects of the public sphere.³⁶⁸ The fundamental state obligation to protect human dignity demands also that the state does not treat citizens as "objects" or, at best, as passive recipients of governmental action, but instead gives them the real opportunity to contribute to the formation of the rules that govern their lives.³⁶⁹ Germany and Greece guarantee explicitly in their constitutions the right to free development of one's personality through participation in public life,³⁷⁰ and the protection of human dignity.³⁷¹ The establishment of public participation in rule-making could find additional bases on these provisions. It would also give guarantee and give effect to other related guarantees of individual rights, such as the right to peaceful assembly,³⁷² to form associations,³⁷³ the right to free speech and use of the media,³⁷⁴ and the right to unobstructed communication.³⁷⁵

3. The limits of participation

It might appear simple in the light of the above to make a general determination that participation is required to secure administrative responsiveness to citizen interests and, therefore, that all those who can make a competent contribution to the policy dialogue should always be included in regulatory processes. This approach still does not resolve important issues, such as how we decide which interests deserve to be accorded a participatory opportunity, or how we prevent more powerful groups from wielding coercive influence. A general answer to the first question could be that the introduction of a right to participate in rulemaking would serve to prohibit a blanket exclusion of parties affected by agency rulemaking. To the extent that it is feasible, statute should regulate some issues, while the ones left to the discretion of the administration should have to be reviewed by courts.

Participation may also cause dysfunctional consequences in the administrative process. The overburdening of the administrative rulemaking process is the one most frequently referred to. Although such a danger can not be denied, on the other hand it is not very clear that a form of mediation taking place amongst var-

³⁶⁸ The idea that the citizen finds his true realisation through participation in political life can be found in the Aristotelian view of politics. Among the contemporary authors, John Stuart Mill wrote in a similar vein; see Mill, J.S., *Utilitarianism, On Liberty, and Considerations on Representative Government* (ed. H.B. Acton, London 1972), 208–218.

³⁶⁹ In the Greek context, see Siouti, G., *The consultation process* (Athens-Komotini 1990), 49 et seq.

³⁷⁰ Article 2 para. 1 of the Basic Law and Article 5 para. 1 of the Greek Constitution.

³⁷¹ Article 1 para. 1 of the Basic Law and Article 2 para. 1 of the Greek Constitution.

³⁷² Article 8 para. 1 of the Basic Law and Article 11 para. 1 of the Greek Constitution.

³⁷³ Article 9 of the Basic Law and Article 12 paras. 1 and 6 of the Greek Constitution.

³⁷⁴ Article 5 of the Basic Law and Article 14 of the Greek Constitution.

³⁷⁵ Article 10 of the Basic Law and Article 19 of the Greek Constitution.

ious interested parties would always be more protracted than the formal bipartite adversarial process involved in an adjudicatory situation. Moreover, as it was previously explained, the involvement of affected parties in the rulemaking process may well increase the acceptance of an entire administrative scheme and thus facilitate its unobstructed implementation. In any case, ascertaining that participation does not only solve, but also causes problems in a legal system should not be enough to deter us from the endeavour to work towards the “ideal” of public participation in rulemaking, provided that we have good reasons to believe (and we showed previously that we do) that participation is, indeed, an ideal. Perfection is not in any event attainable in any type of governmental structure.³⁷⁶

Participation is one device at our disposal for rendering public power more accountable, the others being political checks, internal bureaucratic control and financial constraints. There may be regulatory areas where participation rights would not be of central importance, or worse, could hinder the realisation of the basic aim of the particular type of regulation, as it is perceived and determined every time by the administration.³⁷⁷ In other areas it might be preferable to exclude participation altogether for reasons of emergency regulation, or because the publication of a rule before it became effective would defeat the very purposes for which it was being promulgated.³⁷⁸

In any case increased public participation should not lead to a transfer or delegation of public power which would upset the institutional balance of powers and the general constitutional structure of each state.³⁷⁹ In this context German courts have ruled that even in cases where the power to make a regulation is delegated to private groups in the form of consultative committees or representative organs, the competent minister maintains full accountability for the decisions reached.³⁸⁰ Even in the United States, where the strongest form of public participation in the development of a rule is used in the form of negotiated rulemaking, it is the agency that finally publishes the proposed rule in the Federal Register and solicits public comment on the proposal through the traditional APA procedures. Of course it is not certain that increased public participation could actually lead to a weakening of the power of the administration; in fact there have been studies in the United States which support the view that the authority of the administration is actually increased by getting the public involved in administrative rule- and general decisionmaking.³⁸¹

³⁷⁶ See the argumentation of Craig (note 355), 124–134.

³⁷⁷ Note e.g. the example of welfare regulation in this respect presented by Craig, *ibid.*, 181.

³⁷⁸ We have previously seen that under the American APA, an agency can be excused from notice-and-comment rulemaking if it has “good cause” to do so.

³⁷⁹ For analysis of the constitutional limits of participation in the German context, see Menzel, H.J., *Legitimation staatlicher Herrschaft durch Partizipation Privater?* (Berlin 1980), 86 et seq. For similar comments made in the European Community context, see von Gerven, W., *The Legal Dimension: The Constitutional Incentives for and Constraints on Bargained Administration*, in: Snyder, F.G. (ed.), *Constitutional Dimension of European Economic Integration* (Dordrecht, Boston 1996), 75, 83.

³⁸⁰ See Ossenbühl (note 37), 415.

³⁸¹ See Shapiro, M., *Who Guards the Guardians?* (Columbia, GA 1988).

Decisions as to whether constitutional due process should apply in adjudicatory situations are themselves complex and difficult, requiring much balancing by the court. These problems could be all the greater in the context of a constitutional right to participate in rulemaking. Constitutional adjudication might be "... too clumsy a technique for the concocting of administrative experiments in participatory governance. In all likelihood it will be too slow to respond initially, too uninformed to be apt, and too slow again to make changes or adjustments."³⁸²

There may, therefore, be real problems with accepting participation as a constitutional requirement. Even if this is felt to be so, there is no reason why we should not follow the American example and make participation in rulemaking a statutory requirement. A general statute would set the procedural minimum to which government in the broadest sense possible should adhere. The courts should be entrusted with upholding this procedural minimum, so that the various gains caused by participation are not undermined. Beyond that, any additional procedural requirements should be a matter of specialised statutory law dealing *ad hoc* with a regulatory situation, or of unreviewable agency discretion.

V. Conclusion

In contemporary democracies the role of administrative rulemaking is so expansive that it could safely be supported that the health of democracy itself is depending in big part upon it. However, rulemaking by administrative bodies has not received the attention it warrants from legislators, courts and academics, even though it raises important issues concerning the citizen-state relationship. In the European systems examined, administrative rulemaking has been considered of secondary importance in comparison to the legislation produced by Parliament. In Germany, in particular, the traditional dogma that statutory instruments derive their legitimacy from the parliamentary legislation on which they ought to be strictly based, has hindered serious preoccupation with rulemaking and rulemaking procedures. But as the administration makes more and more use of rules with a decisive influence on private conduct, often without the possibility of any substantial, political or legal control, the need to seek an additional form of legitimisation becomes imperative.

It has been suggested throughout this article that public participation can perform a valuable legitimating function. This has been recognised most notably in the United States for a variety of reasons pertaining to the country's constitutional and administrative law and culture. By way of contrast, participation in rulemaking in the European countries examined has been more piecemeal. There are, however, also particular subject-matter areas in these countries where greater participation rights have been accorded. This fact places the generalisation of such procedural guarantees to broader policymaking contexts within the conceptual horizon of their public law.

³⁸² Mashaw, J., *Due Process in the Administrative State* (New Haven, London 1985), 255, 263.

This article is not based on the idea that participation is the panacea for all problems associated with rulemaking. It has been accepted that participation rights may be inappropriate or dysfunctional in certain areas. They should not, however, distract us from the more general benefits which can be served by enhancing participation.

The establishment of a general statutory regime for participation in administrative rulemaking is both a realistic and practical way forward. Such a regime can make an essential contribution towards more effective control of government in modern societies.



