

Administrative procedure as a key factor in development of control over administrative power - a European perspective

Assistant professor **Robert SIUCIŃSKI**¹

Abstract

European Parliament resolution of 9 June 2016 and ReNEUAL Model Rules on EU Administrative Procedure constitute two attempts to answer to the lack of transparency and protection of citizens' rights in decision-making process before administrative bodies. Despite that, EU still has not adopted a legally binding act regulating administrative proceedings before its all authorities. The key for understanding this situation is a constitutional shape of EU institutional system with Commission as the biggest administrative power which blocks legal initiative at that field. It brightly contrasts with a long tradition of codification of administrative procedure in the vast majority of member states. Furthermore, nowadays we have to deal with a new wave of codifications. That arrives not only to countries with well-established achievements but extends on those usually reluctant to that kind of provisions. The analysis of factors which led to current state of affairs requires therefore the extensive use of comparative and historical method. However, the results of research can have a crucial importance for understanding of EU administration and may be used in future for amelioration of procedural law.

Keywords: administrative procedure, European Union administrative law, Europeanisation, codification of administrative procedure

JEL Classification: K23, K41

1. Introduction

Despite the fact, that we live in the time of the Internet and widespread access to electronic databases of legal acts² as well as case law of administrative tribunals and courts on national³ and European level,⁴ these capabilities are not yet fully utilized, at least not for comparative research of the widest, most universal character. Although the current way of conducting research is changing and is no longer limited to the United States and Western Europe, existing studies are still incomplete and/or contain errors (misunderstandings, intellectual shortcuts).⁵ Even

¹ Robert Siuciński - University of Lodz, Poland, rsiucinski@wpia.uni.lodz.pl.

² Like Polish isap.sejm.gov.pl or EU's portal eur-lex.europa.eu.

³ Almost all judgments of Polish administrative courts are published in Central Database (CBOSA) correlated with website of the Supreme Administrative Court (*Naczelny Sąd Administracyjny*), orzeczenia.nsa.gov.pl.

⁴ For EU is CURIA on <https://curia.europa.eu>.

⁵ Treating the entry into force (or publication) of statutes as the date of its adoption is only one of examples of that inconsistency. The recent monographs are not free from them: Jean-Bernard Auby, *General Report [in] Codification of Administrative Procedure*, ed. Jean-Bernard Auby, Bruylant, Brussels 2014, p. 4 repeated by Paul Craig, Giacinto della Cananea, Diana-Urania Galetta, Oriol

if we converge the most important ones, we will be far away from getting a coherent view.⁶

The language barrier remains a significant problem. In recent centuries English has gradually taken over from the French as the most important language in the world, although in many areas this thesis can still be regarded as controversial,⁷ and certainly will be questioned by the French themselves. However, regardless which side we support, it is indisputable, that both Anglosphere and Francophone countries traditionally rejects the idea of codification of administrative procedure. It is changed only a little bit by the American Administrative Procedure Act (APA) and French Code of relations between the public and administration⁸ (CRPA). The first one relates more to rulemaking than decision-making. The second one effective by a few years, but maybe in future its influence will increase.

The Italian school, which, as a result of works written by, Massimo Severo Giannini, Aldo Sandulli (as well as Feliciano Benvenuti, Mario Nigro and later Sabino Cassese),⁹ first began to seriously use the comparative method and exerted

Mir, Jens-Peter Schneider, Ulrich Stelkens, Marek Wierzbowski, Jacques Ziller, *Administrative procedure acts: history, features, and reception* [in] *ReNEUAL Model Rules on EU Administrative Procedure*, eds. Paul Craig, Herwig Hofmann, Jens-Peter Schneider, Jacques Ziller, Oxford University Press 2017, pp. 1-2.

⁶ Jean-Bernard Auby (ed.), George Bermann (foreword), *Codification of Administrative Procedure*, Brussels 2014; Jean-Bernard Auby (ed.), *Droit comparé de la procédure administrative/Comparative Law of Administrative Procedure*, Bruylant, Brussels 2016; Giacinto della Cananea, *Due Process of Law Beyond the State. Requirements of Administrative Procedure*, Oxford University Press 2016; Paul Craig, Giacinto della Cananea, Diana-Urania Galetta, Oriol Mir, Jens-Peter Schneider, Ulrich Stelkens, Marek Wierzbowski, Jacques Ziller, *Administrative procedure acts...*, *op. cit.*, p. 1-23; Santiago González-Varas Ibáñez (ed.), *Derecho administrativo en Iberoamérica*, Instituto Nacional de Administración Pública, second edition, Madrid 2012, and more analitic Jaime Rodríguez-Arana Muñoz, Libardo Rodríguez Rodríguez, Maria del Carmen Rodríguez Martín-Retortillo (eds.), *Curso de Derecho Administrativo iberoamericano*, Instituto Nacional de Administración Pública, Granada 2015; Zbigniew Kmiecik (ed.), *Postępowanie administracyjne w Europie*, Wolters Kluwer, second edition, Warsaw 2010.

⁷ Matthias Ruffert, *Remarks on the language of the administrative law scholarship in the EU* [in] *Research Handbook on EU Administrative Law*, eds. Carol Harlow, Päivi Leino, Giacinto della Cananea, Edward Elgar 2017, p. 69.

⁸ *Code des relations entre le public et l'administration* of 23 October 2015, *Journal officiel de la République française* no. 0248 of 25 October 2015: *Rapport au Président de la République relatif à l'ordonnance n° 2015-1341 du 23 octobre 2015 relative aux dispositions législatives du code des relations entre le public et l'administration*, p. 19871, text no. 1; *Ordonnance n° 2015-1341 du 23 octobre 2015 relative aux dispositions législatives du code des relations entre le public et l'administration*, p. 19872, text no. 2; *Décret n° 2015-1342 du 23 octobre 2015 relatif aux dispositions réglementaires du code des relations entre le public et l'administration (Décrets en Conseil d'Etat et en conseil des ministres, décrets en Conseil d'Etat et décrets)*, p. 19895, text no. 3.

⁹ Lorenzo Casini, Sabino Cassese, Giulio Napolitano, *The new Italian public law scholarship*, *International Journal of Constitutional Law* 2011, Vol. 9, No. 2, p. 304-305. For detailed informations see Aldo M. Sandulli 1915-1984. *Attualità del pensiero giuridico del Maestro*, Giuffrè, Milan 2004; *Scritti scelti di Aldo M. Sandulli*, Giuffrè, Milan 2005; *Vita ed opere di Massimo Severo Giannini*, *Rivista trimestrale di diritto pubblico* 2000, no. 4, p. 955-1376; *Massimo Severo Giannini*, ed. Sabino Cassese, Bari 2010 and *Massimo Severo Giannini nel centenario della nascita*,

creative impact on many contemporary concepts, for a long time focused on the issues of substantive law and then European and global administrative law. This is to some extent due to the fact that the Italians, although fascinated by the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz, VwVfG*)¹⁰ have adopted a framework Law no. 241 of 7 August 1990 – New Norms in the Matter of Administrative Procedure and the Right to Access to Administrative Documents Law no. 241 of 7 August 1990 – New Norms in the Matter of Administrative Procedure and the Right to Access to Administrative Documents (*nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*)¹¹ relatively late, focusing on principles.¹²

As far as administrative procedural law is concerned, the oldest and most abundant wealth of literature is undoubtedly created in: Spanish together with Portuguese (in Spain, Portugal and successive Ibero-American and some African states), as well as German and Slavic languages, which continue similar, German or Austro-Hungarian, legal traditions. In the case of German language, the low level of mindshare when it comes to administrative procedure is caused by the fact that the German doctrine was related originally primarily to Austria and Prussia and to a lesser degree with smaller states. Only in last decades it has been strongly associated with West Germany and after 1990 united Germany. There is no coincidence when Eberhard Schmidt-Aßmann has admitted in the introduction to Polish edition of one of his most well-known works that law of administrative procedure in Germany is traditionally less important than in Austria and Poland and it should no longer be treated as a subsidiary for substantive law.¹³

On the other hand, the Slavic languages have long been dominated by the Russian language, whose most prominent users were, and to this day remain, skeptical for various modern forms of administrative control, including formal procedure and judicial review.

Taking that into consideration the paper will apply the comparative method based on juxtaposition of national solutions on administrative procedure in fullest possible extent. Complementary historical method will be used for analysis of certain legal regimes. Such a measures can show the scale and evolution of that phenomena and leads to many new observations. For the purpose of this paper administrative procedure are both procedure before administrative organs (authorities, bodies) and before administrative tribunals specific for common law

Rivista trimestrale di diritto pubblico 2015, no. 3, p. 833-1045.

¹⁰ Act of 25 May 1976, Bundesgesetzblatt I p. 1253. Consolidated text in the version of the notice of 23 January 2003 (BGBl. I, p. 102), which was last amended by Article 5 of the Law of 29 March 2017 (BGBl. I, p. 626).

¹¹ Gazzetta Ufficiale of 18 August 1990, no. 192.

¹² It is significant that in commentary to that act more than 400 pages pay attention to the general issues, Maria Alessandra Sandulli (ed.), *Codice dell'azione amministrativa*, Giuffrè, Milan 2017.

¹³ Eberhard Schmidt-Aßmann, *Ogólne prawo administracyjne jako idea porządku. Założenia i zadania tworzenia systemu prawnoadministracyjnego*, C.H. Beck, Warsaw 2011, p. XX. It is a Polish edition of *Das allgemeine Verwaltungsrecht als Ordnungsidee Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung*, Springer 2006.

countries, but not procedure before the courts when they examine claims in administrative matters (administrative dispute, judicial review, *procedimiento contencioso administrativo*). Moreover, I understand administrative procedure as an activity of administrative authorities for examination of law by preparation and adoption of administrative acts with external effect.¹⁴

2. Evolution of regulations

2.1 European Union

For several decades, a dynamic development of the European administrative space has been recognized, which can be best characterized as the growth of administration at EU level, with the consequent gaining of new powers. The escalation of the EU administration is illustrated by the increase in the number of institutions and their competencies and the creation of new agencies. It should be stressed that it operates under conditions of functional linkage with the network of national administrations and, at the same time, equips them with new possibilities for cooperation among themselves, where various forms of cooperation and convergence often occur without top-down interference. The structure of the European administration is a mixture of supra- and international, without a clear center. It is worth recalling that the intention of the creators of the economic union (like Jean Monnet, Robert Schuman or Charles de Gaulle) was not a creation of supranational administration, yet already in the eighties it counted two thousand officials. Till the turn of the century, it has grown tenfold, and now the European Commission alone employs around 32,000 officials¹⁵. The Treaty of Lisbon has opened a new chapter in the development of EU administrative law. The most important changes introduced were the addition of Title XXIV ("Administrative Cooperation") and Art. 298 to the Treaty on the Functioning of the European Union¹⁶, and to align the binding power of the Charter of Fundamental Rights¹⁷ with the Treaties. Despite this, the Union has still not adopted a legally binding act regulating administrative proceedings before all its organs. Undoubtedly, there is a need to continue research in this area. Among the issues that require analysis is a number of specific problems related to the ratio of the proposed codification at EU level and codifications of the Member States, the scope of its application for national administration when it carries out tasks belonging to the EU administration and the possibility of implementing such a solution in the event of a lack of commitment by the European Commission.

¹⁴ More about the meaning of the term 'administrative procedure' in Jean-Bernard Auby, *General Report, op. cit.*, pp. 2-3.

¹⁵ https://europa.eu/european-union/about-eu/figures/administration_en, consulted on 1.10.2020.

¹⁶ Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326 of 26 October 2012, p. 47.

¹⁷ Charter of Fundamental Rights of the European Union, Official Journal of the European Union C 326 of 26 October 2012, p. 391.

Because of this, the issue of potential EU regulation of administrative procedure is enriched by substantial questions of constitutional nature, such as: the legal basis for the regulation, the relationship to the *acquis communautaire* (including the current case law) and the division of powers between the European Parliament, the Council and the Commission. This discussion therefore addresses the important issues of the contemporary, multilevel and multicentre system of European public law.

New Article 197 TFEU highlighted importance and necessity of administrative cooperation. Union may facilitate the exchange of information and of civil servants as well as supporting training schemes. Moreover, the European Parliament and the Council receives a power to acting by means of regulations for establish the necessary measures to this end. However, text of the section 2 does not leave illusions that this exclude any harmonisation of the laws and regulations on the national level and that no member state shall be obliged to avail itself of such support. Crucial importance of this article has been limited.

In favor of codification on EU level speaks Article 298 TFEU, which in section 1 establish that: 'in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration'. According to the second section of that Article: 'European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.'

In the face of serious changes in the EU administrative law and almost in parallel with the entry into force of the Treaty of Lisbon, the Research Network on EU Administrative Law (ReNEUAL) was launched. The result of its many years of work, is the ReNEUAL Model Rules on EU Administrative Procedure together with an extensive, several hundred pages long, justification.¹⁸ It is worth noting that this work has been translated respectively into Spanish,¹⁹ Polish,²⁰ German,²¹ Italian,²² Romanian,²³ French²⁴ and partly Hungarian.²⁵ Thanks to this, it can be

¹⁸ Last version Paul Craig, Herwig Hofmann, Jens-Peter Schneider, Jacques Ziller (eds.), *ReNEUAL Model Rules...* Project was published earlier on the ReNEUAL website, http://www.reneual.eu/images/Home/ReNEUAL-Model_Rules-Compilation_BooksI_VI_2014-09-03.pdf, consulted on 1.10.2020.

¹⁹ Oriol Mir, Herwig C.H. Hofmann, Jens-Peter Schneider, Jacques Ziller (eds.), *Código ReNEUAL de procedimiento administrativo de la Unión Europea*, Instituto Nacional de Administración Pública, Madrid 2015.

²⁰ M. Wierzbowski, Herwig C.H. Hofmann, Jens-Peter Schneider, Jacques Ziller (eds.), *ReNEUAL Model kodeksu postępowania administracyjnego Unii Europejskiej*, C.H. Beck, Warsaw 2015.

²¹ Jens-Peter Schneider, Herwig C.H. Hofmann, Jacques Ziller (eds.), *ReNEUAL - Musterentwurf für ein EU-Verwaltungsverfahrensrecht*, C.H. Beck, Munich 2015.

²² Giacinto della Cananea, Diana-Urania Galetta, Herwig C.H. Hofmann, Jens-Peter Schneider, Jacques Ziller (eds.), *Codice ReNEUAL del procedimento amministrativo dell'Unione europea*, Editoriale Scientifica, Naples 2016.

²³ Herwig C.H. Hofmann, Jens-Peter Schneider, Jacques Ziller, Dacian C. Dragoș (eds.), *Codul renewal de procedură administrativă a Uniunii Europene*, Bucharest 2016.

²⁴ Jacques Ziller, Jens-Peter Schneider, Herwig C.H. Hofmann (eds.), *La codification de la procédure*

widely propagated and analyzed in a deeper way. The model is innovative because it is divided into six books, of which only one refers to the issue of individual administrative decisions, despite it being the focus of the majority of national procedural rules.²⁶ It is therefore a comprehensive reference to the various types of administrative activity.

It is, however, not possible to make such a comment by observing the codification projects prepared by the institutions of the Union. The European Parliament has already adopted a resolution on 15 January 2013 with recommendations to the European Commission on legislation governing the administrative procedures for institutions, bodies and agencies of the European Union (2012/2024(INL)).²⁷ This initiative referred to Article 298 of the Treaty on the Functioning of the European Union and Article 41 of the Charter. Although it was limited to issuing unilateral administrative decisions in individual cases and contained only some general indications, it did not meet the Commission's interest until the end of its mandate in 2014.

Consequently, in the new term of the European Parliament it was decided to return to this idea. Since 2015, a number of studies and analyzes have been performed by the Committee on Legal Affairs (JURI). We also observed an increased activity of MEPs aimed at activating the Commission. This resulted in the adoption of the European Parliament resolution of 9 June 2016 on the open, efficient and independent administration of the European Union (2016/2610 (RSP)) and its accompanying draft of an EP and Council regulation²⁸. The EP's official interpellation with the Commission indicates that the aim of the project is to complement existing shortcomings and to increase clarity and consistency in the interpretation of existing legislation, which would benefit citizens and businesses, the administration and its officials, and expresses the expectation that the Commission will address this issue within the agenda for the year 2017.

Efforts undertaken by the European Parliament to codify EU administrative procedures are certainly worthy of praise. Nevertheless, the whole process is shaken by the unwillingness of the Commission to adopt legally binding regulations. The ordinary legislative procedure referred to in Article 298 section 2 TFEU assumes the adoption of a regulation by the Parliament and the Council within a certain consensus, but it requires the initiative of the Commission. In the present situation, we are dealing with a curious state in which the legislative

administrative de l'Union européenne. Le modèle ReNEUAL, Bruylant, Brussels 2017.

²⁵ *A ReNEUAL modellszabályok koncepciójának összefoglalója* [in] Gerencsér Balázs, Berkes Lilla, Varga Zs. András (eds.), *A hazai és uniós közigazgatási eljárásjog aktuális kérdései. Current Issues of the National and EU Administrative Procedures (the ReNEUAL Model Rules)*, Budapest 2015, pp. 519-544.

²⁶ Jens-Peter Schneider, *The ReNEUAL Codification Project - Book III* [in] *The Model Rules on EU Administrative Procedures: Adjudication*, ed. Matthias Ruffert, Europa Law Publishing, Groningen 2016, p. 2 and 15.

²⁷ Official Journal of the European Union C 440/04 of 30 December 2015, p. 17-23.

²⁸ Text on <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0279+0+DOC+PDF+V0/ /EN>, consulted on 1.10.2020.

process was reversed. The European Parliament has already served the Commission with a draft of the regulation, but it remains passive. It should therefore be regarded as the most serious obstacle for this seemingly righteous initiative. Of course, we cannot forget that the Council is also involved in the legislative process. I assume that it is also interested in adopting the regulation under Article 298 TFEU, as it represents the Member States, the vast majority of whom have long since adopted the relevant legislation. So why cannot the Union uphold the same procedural guarantees in the administrative proceedings that its members adhere to? This question remains open and is waiting for the Commission's position to be changed.

2.2 National level - example of Poland

After regaining independence in 1918 on the territory of Poland was applied the Austrian and German legislation on the field of administrative procedure for some years. Polish codification had some relation with activities of the public authority for the unification of the system of law. The tendencies aiming at the unification of Polish administrative law are based on the legislation of previous invading countries (Russia, Germany, Austria) and some French institutions applicable during 19th century (like Council of State). It should be remembered that till the end of the First World War the Poles were judges of the Administrative Court formed in Vienna in 1875. The case-law of that tribunal created the basis of the codification of the administrative procedure in Austria and countries of the Austro-Hungarian succession. The experiences in judicature of the Administrative Court in Vienna and practices from the limes of Austro-Hungarian Monarchy were used in the 20th century while to prepare the following projects of codification in Poland. It is estimated that the codification of the administrative procedure formed in 1928, in some ways accepted Austrian patterns but it also included some original elements which were invented from the Polish theoretical thought. The Regulation of the President of the Republic of Poland (with force of statute) had over one hundred articles. While working over the project there was a problem how far the activities of the organ of administration should be formalized in the scope of the administrative procedure. The conception of the detailed, full regulation won which also included the judicature from the earlier period.²⁹

After the Second World War the administrative courts were not re-establish despite the constitutional announcements. In the period of Stalinism judicial review of administrative action on the east side of Iron Curtain was even identified as a 'relic of the bourgeois system'.³⁰ The decodification in some areas of administrative procedure was also important problem. This has resulted in the appointment of the

²⁹ Janusz Borkowski, Agnieszka Krawczyk, *Kształtowanie podstaw prawa procesowego administracyjnego* [in] *Prawo procesowe administracyjne*, eds. Barbara Adamiak, Janusz Borkowski, Agnieszka Krawczyk, Andrzej Skoczylas, C.H. Beck, Warsaw 2014, pp. 56-59.

³⁰ Mirosław Wyrzykowski, *Sądowa kontrola decyzji administracyjnych w państwach socjalistycznych*, Wydawnictwa Uniwersytetu Warszawskiego, Warsaw 1978.

special commission for preparation of legislative draft in late fifties. As one of the most known experts of the Polish administrative law used to write the Code of Administrative Procedure has been regarded as the work of 'mature political deliberation and high legal culture'.³¹ This rating can be surprising as this Code was prepared in the times of 'real socialism', when the rights and liberties of an individual were being limited. The authors of the Code managed to disobey the political pressure and prepare a deeply well thought legislative project. This act regulates the administrative procedure according to the traditional pattern of activity at the dawn of the 20th century. Procedural guarantees were strengthened after creation of Supreme Administrative Court in 1980. The regulations of the Code deal rather with procedure of individual cases, settled in the form of a decision by the administrative organ (body). The party of the proceedings possesses numerous guarantees for the protection of its interests so called procedural guarantees. It is especially privileged because of the right to contest in the administrative and judicial regime of the decision issued.³²

For nearly a century administrative procedure in Poland have been regulated by statutory provisions. The Code of Administrative Procedure is treated in the general meaning as 'the act of procedural rights of the party'. It is also recognized as an instrument of streamlining and organizing the activities of administration. As a rule, it provides 'clear rules of the game' which content is constantly crystallized and developed by administrative courts.

3. Analytic view

3.1 Waves of codifications

The history of administrative proceedings in Europe dates back to the acquis of the 19th century Spanish, Prussian and Austro-Hungarian regulations in administrative matters. Actually, that can be classified as a 'prehistory' or by using of the proposed term as a wave 'zero' of codifications.

Austrian AVG was the inspiration for similar solutions in Central Europe in twenties and thirties. Genesis of this in the micro scale was the case law of first, modern administrative court. In the macro scale it becomes from reorganization of international relations and recognition of new states. They had a vital need to simplify, amelioration and unification of their administrations.

Another wave was created by American APA, maybe without external, but with strong internal impact. In that case lack of foreign reception is caused by Second World War.

At the turn of the fifties and sixties we may observe a renew interest in the codification of administrative proceedings. Decodification in Central Europe and discovery of administrative procedure on the West after war should be counted as a

³¹ Franciszek Longchamps, *Problem trwałości decyzji administracyjnej*, Państwo i Prawo 1961, No. 12, p. 910.

³² Zbigniew Kmiecik, *Zarys teorii postępowania administracyjnego*, Wolters Kluwer, Warsaw, 2014.

main reason of that. It looks strange that in the same period new laws were enacted (Spain, UK, Poland, Czechoslovakia, Hungary, Yugoslavia), some proposals were presented (Sweden, Italy, Belgium, Netherlands) or was initiated discussion which will lead to enactment of laws in the future (West Germany, Norway, Switzerland) in all over Europe. Primary and secondary phase should be distinguished. Of course, it can be argued that in authoritarian regimes such a solution were introduced because they political rulers realized the benefits of well-managed administration. However, it was possible to codify administrative proceedings only in countries that had such a tradition before the war, so it seems like something that we should expected. The greatest of all waves was ended by adoption of VwVfG and first Ibero-american acts. The second phase was especially an effect of Spanish influence on the Western Hemisphere. It was also the first, such an evident transatlantic correlation.

The next waves are the results of modernisation, political changes in Central and East Europe, as soon as international exchange of ideas.

3.2 Models of regulation

It should be emphasized that the majority of Iberoamerica countries have opted for statutory regulation, albeit varying significantly in terms of scope, degree of detail, obligations imposed on public administration bodies, or rights granted to entities involved in the proceedings. Notwithstanding I think that for description of all variants of regulation in the field of administrative procedure can be used the scheme admittedly elaborated as an effect of research on certain European solutions.³³ According to that four basic models of regulations of administrative procedure in Europe can be distinguished:

- 1) the model of developed classical codification,
- 2) the model of brief frame regulation,
- 3) the model of complex regulation,
- 4) the model of non-codified procedure.

The characteristic feature of the first model is the existence of developed, detailed and rather coherent and free from gaps and further references of the codification of administrative procedure. The assumptions of that model were directed by the Austrian AVG. Besides, that model of codification is reflected by German VwVfG and Polish k.p.a.

The second model of codification (the model of brief frame regulation) defined the general rules of administrative procedure, including various exclusions and reservations. In wide degree these rules are supplemented with more detailed regulations from other acts (*lex specialis*).

The model of a complex regulation tries to connect in one act different regulations when it comes to procedure regards the kind of procedure or even joins them with regulations of the organizational or substantial law. Perfect example of that construction is the Dutch Awb, which refers mainly to control procedures

³³ The scheme was proposed by Zbigniew Kmiecik, see *Wstęp* [in] *Postępowanie administracyjne w Europie*, ed. Zbigniew Kmiecik, Wolters Kluwer, Warsaw 2005. Since that this concept was modified several times. I use the version from Zbigniew Kmiecik, *Zarys teorii postępowania administracyjnego*, Wolters Kluwer, Warsaw, 2014, pp. 50-53.

(administrative and judicial)³⁴.

The essence of the fourth model, suitable for the systems of common law, is multi-layered structure, lack of concentration and diversity of the procedural rules. Courts and tribunals play an important role in clarifying and 'creating' these rules³⁵.

The presented models are a product of national legal tradition. In some degree they develop under the external conditions, such as European case-law and soft-law, or general conception of Alternative Dispute Resolution. Polish experiences show that it is not easy to introduce radical changes in the system which has been stabilized for a long time and has 'a stiff' and in addition rather traditional procedure.

4. 'Families' of the regulation of administrative procedure

4.1 Great Ibero-american family

The legal systems of the states of South and Central America, as systems of former colonies, are genetically linked to the Spanish and Portuguese systems.³⁶ The beginnings of the administrative law of the New World can be traced back to the Capitulaciones de Santa Fe issued by the Catholic Monarchs on 17 April 1492, just before Christopher Columbus's first expedition.³⁷ It should be borne in mind, however, that the intensive development of administrative law, and even more so of its procedural part, falls on the postcolonial epoch. Nevertheless, the strong historical, cultural, and linguistic links between the Iberian countries and the New World could not remain irrelevant in the process of the formation of administrative law, therefore Professor Santiago González-Varas Ibáñez classifies them into one legal family.³⁸ I use the term 'family' to describe the group of countries belonging to the same tradition, referring to the same core of institutions and aware of that by using effects of comparative research.

The center of extraordinary correlation in Ibero-american family of administrative law is procedure, which evolution was influenced first of all by the

³⁴ See for example J. Dekker, T.G. Drupsteen, *Legal Protection Against Decisions of Public Authorities in the Netherlands* [in] Yong Zhang (ed.), *Comparative Studies on the Judicial Review in East and Southeast Asia*, the Hague – London – Boston 1997, pp. 211 and following.

³⁵ Zbigniew Kmiecik, *Zarys teorii postępowania administracyjnego*, Wolters Kluwer, Warsaw 2014, pp. 50-52.

³⁶ Jan Kleinheisterkamp, *Development of Comparative Law in Latin America* [in] *The Oxford Handbook of Comparative Law*, Mathias Reimann, Reinhard Zimmermann (eds.), Oxford University Press, New York 2008, pp. 264-267.

³⁷ Of course, this act do not consider that may exist any autochtonic regime, J. Kleinheisterkamp, *Development...*, pp. 263-264.

³⁸ Santiago González-Varas Ibáñez, *Introducción* [in] *Derecho...*, *op. cit.*, p. 20. About Spanish influence: Pedro Aberastury, *La influencia del Derecho procesal administrativo europeo (Francia, Alemania y España) en América Latina con especial referencia al Derecho administrativo argentino* [in] *Procedimiento y justicia administrativa en América Latina*, Christian Steiner (ed.), Konrad Adenauer Stiftung, Mexico City 2009, pp. 82-83.

subsequent codifications in Spain,³⁹ and to a lesser extent in Portugal. The first Spanish regulations of the end of the nineteenth century were also in force in the overseas territories.⁴⁰ The legislation on administrative procedures in Iberoamerica is very rich, and the process of regulating this area was initiated relatively early.⁴¹ From the analysis of the legal acts from the countries of the region, Allan Randolph Brewer-Carías has argued that there are certain "general principles" that determine the shape of the procedure, or even more broadly, affecting the entire system of administration. Starting from the principles common to public administration, through those of fundamental importance to administrative proceedings, to the principles that govern individual institutions of this procedure, the author enlisted and presented the principles dividing them into groups related to: the rule of law (e.g. principle of responsibility, principle of observance of the forms provided for by the law), structure (rules of a systemic nature - decentralization, coordination, cooperation), efficiency (effectiveness, efficiency, procedural economy), participation, officiality (*inter alia* inquisitiveness and objectivity), speed (including the principle of simplicity, compliance with deadlines, determination of the effects of administrative silence), administrative acts (*inter alia* respect for jurisdiction, determination of the consequences of issuing an act in violation of law), fair trial (rights of defense, right to be heard and informed of procedural actions) and protection of legitimate expectations, right of appeal (internal - administrative and external - to the court).⁴² The skeleton of the model law on administrative proceedings is clearly visible in this context. Central to this are the rights associated with good administration and administrative due process.

The issues of administrative procedure are therefore of major interest in the Ibero-american countries, resulting in legislative action. The idea of codifying general administrative proceedings has become widespread and it may soon be covering the entire region. All of Ibero-american laws relating to administrative proceedings, addressed to more than half a billion citizens, together with the laws in force in Spain and Portugal create the largest and oldest community of its kind in the world.⁴³ Drawing on the achievements of European systems is not limited to the incorporation of foreign patterns, but is creatively enriched, emphasizing the importance of new elements. The extremely dynamic convergence process, in particular the unification and regionalization of standards related to administrative procedures, makes the experience of the Ibero-american States an interesting

³⁹ Jesus González Pérez, *La ley chilena de procedimiento administrativo*, Revista de Administración Pública 2003, no. 162, p. 361, Allan Randolph Brewer-Carías, *Principios del Procedimiento Administrativo en América Latina*, Bogota – Mexico City – Buenos Aires – Santiago – Caracas – Lima 2003, p. XX, Pedro Aberastury, Hermann-Josef Blanke, *Palabras introductorias* [in] *Tendencias actuales del procedimiento administrativo en Latinoamérica y Europa. Presentación de la traducción de la Ley alemana de procedimiento administrativo*, eds. Pedro Aberastury, Hermann-Josef Blanke, Konrad Adenauer Stiftung, Buenos Aires 2011, p. 11.

⁴⁰ Javier Barnes, *Tres generaciones de procedimiento administrativo* [in] *Tendencias...*, *op. cit.*, pp. 119-120.

⁴¹ More about history Jesus González Pérez, *La ley chilena...*, *op. cit.*, p. 362-368; Allan Randolph Brewer-Carías, *Principios del Procedimiento...*, *op. cit.*, pp. XXXIX-XLIV.

⁴² Allan Randolph Brewer-Carías, *Principios...*, p. XLIV-L.

⁴³ Javier Barnes, *Tres generaciones...*, *op. cit.*, p. 120. That author uses the term "great family".

source of inspiration for other legal systems, also in Europe. Considering that French speaking countries remain without codification can be helpful for showing the potential of language as a force carrier for ideas.

4.2 Nordic tradition

Another 'family' of administrative procedure acts was formatted in North Europe (Norway, Sweden, Denmark, Finland, Iceland). Characteristic for them are simplicity, clear language concentrated on administrative due process, short but precise regulation, strong position of ombudsman, visibility of principles of transparency and openness, frequent use of comparative research of those systems.

4.3 Heritage of Central Europe (or so-called Austro-Hungarian succession)

Apart from constant symptoms of non-codification, the result of the codification of the administrative procedure conducted in all countries of Central Europe is clearly positive. Nobody in my country, and I think nobody in that part of continent, can imagine the return to the legal state before codification. We should agree with an opinion expressed by a scholar with excellent knowledge in comparative public law that 'the country having the codified administrative procedure will never decide to return, because of some reasons, to the old system of partial arrangements the so called "procedural freedom" of public administration'.⁴⁴ Experience of proseguated six decades confirm that Georges Langord (in Poland known as Jerzy Stanisław) identified existing trends correctly, because the number of laws relating to general administrative procedure is raising consequently.

5. Conclusions

5.1 Need of larger analysis

Strong influence of Anglo-Saxon and French point of view is visible when the recent significant comparative analysis was almost commenced by the phrase "One could think that the codification of administrative procedure is rather recent practice - except from some marked historical references - and can only be found in a minority of systems."⁴⁵ It is symptomatic that three aforementioned 'families' are not included into the traditional comparative analysis, which concentrate on 'the most important' systems. When we add to them common law systems we will be still away from the heart of old-style Franco-German comparison. Furthermore, among these countries there are no founding members of EU. On the other hand, there are no countries with tradition of administrative procedure reaching before 1976 between Inner Six states. However, is unacceptable to treat as periphery

⁴⁴ Georges Langrod, *Genèse et lignes directrices de la réforme de la procédure administrative non contentieuse en Pologne*, „Revue Internationale des Sciences Administratives”, 1960, no. 4, p. 399.

⁴⁵ Jean-Bernard Auby, *General...*, p. 3.

dozen codifications of Central Europe, more than 600 millions of citizens of almost twenty Ibero-american societies with dynamic community of scholars or even 'only' five another statutes of wealthy Nordic countries with his ample achievements. This clearly shows how much has to change in the approach to comparative study of administrative proceedings.

5.2 Need for codification on EU level

In many countries, administrative traditions are long and strong enough that some of the basic standards have been guaranteed in constitutions. In some of them even the codification of administrative proceedings in the form of a separate statute (codification) was protected into the basic law (Spain, Portugal, Netherlands).

At the beginnings of 2010s there were 22 of 27 member states of the European Union with general law on administrative procedure⁴⁶. This proportion was consistently increasing in favour of codification since that day:

- in 2013 after accession of Croatia (23:5),
- 2015-16 in effect of French CRPA (24:4),
- after Brexit 24:3,
- if Romania adopt a project in that field - 25:2,
- in case of enlargement - all Western Balkans states and EFTA members have such a kind of solutions.

Today in EU without it are only Ireland, Belgium and Romania.

It is worth recalling that in Germany 'only' six of the sixteen states had adopted provisions on administrative procedure previous to the adoption of *VwVfG* on the federal level. They were mostly adopted in the period in which the discussion on the federal codification was under way. From that perspective it is undoubtedly the great contrast between the fact that, for its ever-growing administration, the Union has still not provided a clear, uniform and coherent rules of procedure. Statistic and current trends are cruel.

Proposition of European Parliament is example of frame regulation. After analysis of the term 'regulations' (plural) used in Article 298.2 TFEU one would expect not only the adoption of that proposition but also that will be the first step towards a full codification on EU level. Despite that enactment of ambitious act like *ReNEUAL* project in the near future seems like wishful thinking.

Bibliography

1. Allan Randolph Brewer-Carías, *Principios del Procedimiento Administrativo en América Latina*, Bogota – Mexico City – Buenos Aires – Santiago – Caracas – Lima, 2003.
2. Eberhard Schmidt-Aßmann, *Ogólne prawo administracyjne jako idea porządku. Założenia i zadania tworzenia systemu prawnoadministracyjnego*, C.H. Beck, Warsaw,

⁴⁶ 'Only' twenty from the perspective of *Law of Administrative Procedure of the European Union*, p. 20.

- 2011.
3. Franciszek Longchamps, *Problem trwałości decyzji administracyjnej*, Państwo i Prawo 1961, No. 12.
 4. Georges Langrod, *Genèse et lignes directrices de la réforme de la procédure administrative non contentieuse en Pologne*, „Revue Internationale des Sciences Administratives”, 1960, no. 4.
 5. Gerencsér Balázs, Berkes Lilla, Varga Zs. András (eds.), *A hazai és uniós közigazgatási eljárásjog aktuális kérdései. Current Issues of the National and EU Administrative Procedures (the ReNEUAL Model Rules)*, Budapest, 2015.
 6. Giacinto della Cananea, Diana-Urania Galetta, Herwig C.H. Hofmann, Jens-Peter Schneider, Jacques Ziller (eds.), *Codice ReNEUAL del procedimento amministrativo dell'Unione europea*, Editoriale Scientifica, Naples, 2016.
 7. Giacinto della Cananea, *Due Process of Law Beyond the State. Requirements of Administrative Procedure*, Oxford University Press, 2016.
 8. Herwig C.H. Hofmann, Jens-Peter Schneider, Jacques Ziller, Dacian C. Dragoș (eds.), *Codul renewal de procedură administrativă a Uniunii Europene*, Bucharest 2016.
 9. J. Dekker, T. G. Drupsteen, *Legal Protection Against Decisions of Public Authorities in the Netherlands* in Yong Zhang (ed.), *Comparative Studies on the Judicial Review in East and Southeast Asia*, the Hague – London – Boston, 1997.
 10. Jacques Ziller, Jens-Peter Schneider, Herwig C.H. Hofmann (eds.), *La codification de la procédure administrative de l'Union européenne. Le modèle ReNEUAL*, Bruylant, Brussels 2017.
 11. Jaime Rodríguez-Arana Muñoz, Libardo Rodríguez Rodríguez, Maria del Carmen Rodríguez Martín-Retortillo (eds.), *Curso de Derecho Administrativo iberoamericano*, Instituto Nacional de Administración Pública, Granada, 2015.
 12. Jan Kleinheisterkamp, *Development of Comparative Law in Latin America* in *The Oxford Handbook of Comparative Law*, Mathias Reimann, Reinhard Zimmermann (eds.), Oxford University Press, New York, 2008.
 13. Janusz Borkowski, Agnieszka Krawczyk, *Kształtowanie podstaw prawa procesowego administracyjnego* [in] *Prawo procesowe administracyjne*, eds. Barbara Adamiak, Janusz Borkowski, Agnieszka Krawczyk, Andrzej Skoczylas, C.H. Beck, Warsaw 2014.
 14. Jean-Bernard Auby (ed.), *Droit comparé de la procédure administrative/Comparative Law of Administrative Procedure*, Bruylant, Brusells, 2016.
 15. Jean-Bernard Auby (ed.), George Bermann (foreword), *Codification of Administrative Procedure*, Brusells, 2014.
 16. Jens-Peter Schneider, Herwig C.H. Hofmann, Jacques Ziller (eds.), *ReNEUAL - Musterentwurf für ein EU-Verwaltungsverfahrenrecht*, C.H. Beck, Munich, 2015.
 17. Jens-Peter Schneider, *The ReNEUAL Codification Project - Book III* in Matthias Ruffert (ed.), *The Model Rules on EU Administrative Procedures: Adjudication*, Europa Law Publishing, Groningen, 2016.
 18. Jesus González Pérez, *La ley chilena de procedimiento administrativo*, Revista de Administración Pública 2003, no. 162.
 19. Lorenzo Casini, Sabino Cassese, Giulio Napolitano, *The new Italian public law scholarship*, „International Journal of Constitutional Law”, 2011, Vol. 9, No. 2.
 20. M. Wierzbowski, Herwig C.H. Hofmann, Jens-Peter Schneider, Jacques Ziller (eds.), *ReNEUAL Model kodeksu postępowania administracyjnego Unii Europejskiej*, C.H. Beck, Warsaw, 2015.
 21. Maria Alessandra Sandulli (ed.), *Codice dell'azione amministrativa*, Giuffrè, Milan 2017.

22. Matthias Ruffert, *Remarks on the language of the administrative law scholarship in the EU* in Carol Harlow, Päivi Leino, Giacinto della Cananea (eds.), *Research Handbook on EU Administrative Law*, Edward Elgar 2017.
23. Mirosław Wyrzykowski, *Sądowa kontrola decyzji administracyjnych w państwach socjalistycznych*, Wydawnictwa Uniwersytetu Warszawskiego, Warsaw 1978.
24. Oriol Mir, Herwig C.H. Hofmann, Jens-Peter Schneider, Jacques Ziller (eds.), *Código ReNEUAL de procedimiento administrativo de la Unión Europea*, Instituto Nacional de Administración Pública, Madrid, 2015.
25. Paul Craig, Giacinto della Cananea, Diana-Urania Galetta, Oriol Mir, Jens-Peter Schneider, Ulrich Stelkens, Marek Wierzbowski, Jacques Ziller, *Administrative procedure acts: history, features, and reception* in Paul Craig, Herwig Hofmann, Jens-Peter Schneider, Jacques Ziller (eds.) *ReNEUAL Model Rules on EU Administrative Procedure*, Oxford University Press 2017.
26. Pedro Aberastury, Hermann-Josef Blanke, *Palabras introductorias* in Pedro Aberastury, Hermann-Josef Blanke (eds.), *Tendencias actuales del procedimiento administrativo en Latinoamérica y Europa. Presentación de la traducción de la Ley alemana de procedimiento administrativo*, Konrad Adenauer Stiftung, Buenos Aires, 2011.
27. Pedro Aberastury, *La influencia del Derecho procesal administrativo europeo (Francia, Alemania y España) en América Latina con especial referencia al Derecho administrativo argentino* [in] *Procedimiento y justicia administrativa en América Latina*, Christian Steiner (ed.), Konrad Adenauer Stiftung, Mexico City, 2009.
28. Santiago González-Varas Ibáñez (ed.), *Derecho administrativo en Iberoamérica*, Instituto Nacional de Administración Pública, second edition, Madrid 2012.
29. Zbigniew Kmiecik (ed.), *Postępowanie administracyjne w Europie*, Wolters Kluwer, second edition, Warsaw, 2010.
30. Zbigniew Kmiecik (ed.), *Postępowanie administracyjne w Europie*, Wolters Kluwer, Warsaw 2005.
31. Zbigniew Kmiecik, *Zarys teorii postępowania administracyjnego*, Wolters Kluwer, Warsaw, 2014.