

## The Institutionalization of European Administrative Space

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Not so very long ago it was impossible to interest students of comparative politics in law and courts which they thought had little or nothing to do with the politics of the nations they studied. Simple propositions that were truisms among law and courts specialists, such as that litigation was an alternative form of interest group lobbying, were foreign to comparativists who largely stuck to the standard layman's view that courts are or ought to be "independent" and "neutral" that is separated from politics and policy making. Americanists, of course, knew better, but that generally was attributed to the peculiar place of the U.S. Supreme Court's power of constitutional judicial review in American politics. Three changes in the real world have now begun to persuade comparativists of the political functions of law and courts. One is the spread of successful constitutional judicial review to a large number of Western European states. If judges declaring laws unconstitutional is political in the U. S. it probably is in France, Germany, Italy and Spain too. The second is the political evolution – or lack of it – in the former Soviet Union and its former satellites. It has become far too evident that success or failure in building a working court system and rule of law is a crucial element in national political and economic development. The third new political phenomenon is the European Union. As American

specialists in comparative politics began to study the E. U., it became difficult for them to ignore the crucial role of the European Court of Justice in its development and the degree to which the E. U. itself was a structure of laws which owed its existence and evolution to innovations in law. Moreover, as these three great changes were taking place, the Gods of Behaviorism were marching along to the discovery of the “new institutionalism” in which formal rules were again seen as politically significant.

And so a chapter on the administrative law of the E. U., if I do it right, ought to be central to a volume on the “Institutionalization of European Space.” Formal legal rules as announced and enforced by courts are not the only kind of institutionalization but they are the prototypic kind.

Let us recall, step by step, the propositions put forward by the editors of this volume. An institution is a complex of rules and procedures. Rules prescribe behavior. Procedures are rules that determine how other rules are made. Rules vary in precision, formality and authority. Administrative law is a set of rules prescribing the proper rule making behavior for administrative agencies, that is administrative law is a key set of procedures. And these procedures are relatively precise, highly formal and very authoritative.

Next, social space is institutionalized when there exists a system of rules defining the actors and their appropriate interactions. Political spaces are those social spaces in which the actors claim the right to make authoritative rules for all social spaces. Public administration, that is the set of actors who seek to implement the declared policies of government constitute a political space. Government administrators make and enforce most of the authoritative legal rules under which we live. Administrative law is, quite literally, the institutionalization, that is the set of defining and organizing rules of this space.

Then, new institutions arise in part through endogenous change among actors, organizations and rules in which “skilled actors” play a particularly prominent role by providing “frames” of meaning in a particular policy space that define relationships between participants. Often new elements for such frames in one space are borrowed from other spaces. Public administration, and particularly that part of it involved in public regulation of private enterprise is a political space involving political executives, bureaucrats and bureaucratic organizations, private firms, and interest groups. Lawyers and judges are particularly privileged, skilled actors who provide the administrative law that frames the relationships between these participants. Changes in the administrative law of any given public regulation space are frequently the result of borrowing from the administrative law of other such spaces.

Finally, the development of trans-national rules is a profound institutionalization of the E. U. which is marked by the degree to which E. U. organizations govern through the promulgation of legal rules generated by deliberative procedures. The serious legitimacy problem of the E. U. is that its citizens perceive little chance to influence E.U. rule making, although initially business firms and more recently NGOs have achieved a considerable level of participation. E. U. administrative law is a set of rules that partially defines the deliberative procedures by which E. U. legal rules are made and largely determines the degree of knowledge of and participation in those procedures available to citizens, business enterprises and NGOs. Thus the administrative law of the E. U. and the lawyers and judges who create most of it, are central to the story of institutionalization of a European space that this volume endeavors to tell.

Constitutional law and administrative law are, then, the key forms of institutionalization of political space because they constitute the formal, authoritative relatively precise rules that govern

the making of all the other formal, authoritative, relatively precise rules of that space. The subject of this chapter, the administrative law of the E. U. is thus one of the two key stories of the institutionalization of the new European space.

Put in these highly abstract and rather denatured terms, this account of law as “institutions” tends to direct our attention away from law as a cultural phenomenon, a discourse with a literature, discourse, practice, and transmission mechanisms which have a relatively stable existence over time in human experience like music, painting, poetry and physics. Within each of the major cultural families of the world there is a particular body of thought about law that persists and evolves over very long periods of time. In all of these cultures a central feature of the body of thought about law is a belief that stability, predictability and precision are to be particularly valued in law, although these are not the only primary values. In most of these cultures too, law as an intellectual practice is consigned to a specialized, learned elite that is defined by knowledge of law as an esoteric body of knowledge. In traditional Chinese culture law was one of a dozen intellectual endeavors—all of which were practiced interchangeably by all members of the mandarin state, along with music, poetry, war, cooking, etc. In Islam law is an inseparable part of theology practiced by the body of the learned. In the West law becomes the most esoteric practiced by a separated sub-set of the learned, the lawyers.

Thus in Western political spaces we can expect to find the key form of institutional change, legal change, largely controlled by skilled actors employing mimetic techniques, that is producing changes that are incremental adjustments in existing traditions of law, either in their own or very closely culturally related legal spaces. While Picasso may borrow from African masks and Miro from Asian calligraphy to produce art startlingly new to European eyes, we can

expect their legal counterparts to produce what are for them comparably startling changes by borrowing legal forms or techniques from France or Germany or perhaps the U. S. or Australia for the new European political space. The story of E. U. administrative law is likely to be almost entirely a story of continuities because it is a story of Western law as well as a story of institutionalization.

In the Western administrative law tradition there are two basic dynamics, dialectics, tensions or paradoxes continuously at play. These dynamics are to a degree autopoietic. They are continuously present forces internal to law as a realm of thought that act upon the external stimuli presented to law. The first of these is the tension between rule and discretion. Law aspires to “justice” as well as stability and predictability. Fixed rules, as Plato notes, will not do perfect justice because of the infinite and continuously changing variety of human circumstances. Thus as polities encounter new circumstances they are prone to grant political executives discretion to deal with those circumstances. Yet even as the discretion is granted the urge to bring that discretion under rules is felt. Administrative law is an endless game of catch-up in which previously granted discretions are brought under rules, even as new discretions are granted, and no discretion granted is ever completely and finally reduced to rules. Those who make administrative law know that the goal is never perfect institutionalization because a perfect set of rules will never yield perfect justice.

The second dynamic is peculiar to Western democratic political spaces or ones aspiring to democracy. Administration is a doing. In the West we firmly believe that the doing of something should be assigned to those who best know how to do it. Expertise is legitimacy. It follows that public administration is done legitimately only by those who possess expertise, advanced

knowledge of the sorts relevant to public administration. Administration is governing. In a democracy the people must govern. Humanness is legitimacy. It follows that administration is legitimately done by any and all human beings not by a special set of experts.

Americans are familiar with this dynamic in the long conflicts between Hamiltonian or Federalist and Jacksonian or Democratic theories of public administration, the civil service “merit system” versus the “spoils system” and “rotation in office.” In contemporary terms we encounter “rational” or “efficient” or “scientific” or “cost-benefit” guided administration versus transparent and participatory administration. Put another way we quarrel about whether public administration is and ought to be a part of politics or independent and neutral. The legitimacy claim of experts is sometimes put in terms of public interest, public service or public order; the democratic claim in terms of “responsible” government. However put administrative law in democratic states always provides for both deference to administrative expertise and public knowledge and participation.

We often seek to combine and mask the two sets of tensions by talking of expert administrative discretion under laws made by elected legislatures and under the supervision of democratically selected political executives. We can certainly expect that any administrative law for the E. U. will exhibit the same two basic sets of tensions as all the other Western democratic administrative laws.

Certain historical waxings and wanings in our fondness for technology and thus for technocratic administration may be observed. A juxtaposition of Mark Twain’s The Gilded Age and The Education of Henry Adams will give us a quick fix on the last turn of the century peaking of enthusiasm for technocracy. Or one may look at the tremendous prestige of the Grand Ecole based French, and the Prussian civil services and the British diplomatic at that time. The 1930’s

experienced a momentary grand reunion of democracy and technocracy. The New Deal proclaimed government by experts under the direction of that apophysis of the demos, F. D. R. The Soviet Communist party ruled as the vanguard of the proletariat, vanguard because it was expert in that ultimate science Marxism, but based on the only demos worthy of the name. Mussolini was not only the popular leader, S.P.Q.R. but he made the trains run on time. (Germany, of course, was on another task entirely preferring madness to both democracy or technocracy.) This brief synthesis broke down after World War II. Strongly expressed conflict between technocracy and democracy and thus between discretion and rule are characteristic of contemporary politics and crucial to the evolution of administrative law and particularly to the relationships between administrators and judges.

An appreciation of these long-term dynamics of administrative law is particularly important in approaching the administrative law of the E. U. because that law is in its earliest stages of development and is as yet nine-tenths potential and one-tenth reality. In its initial phase the European Community essentially was a treaty-based attempt at a customs union distinguished by a peculiarly elaborate set of transnational organs designed to police it. The treaties contained many provisions specifying the design of these organs but almost no administrative law provisions. In its first round of judicial activism the ECJ was basically concerned with “constitutional” law. The quote marks, which I will now drop, are there to acknowledge the continuing debate over whether the Court really succeeded in transforming the treaties into a constitution and the customs union into a quasi- or nascent “federal” system. (The quote marks around federal for the same reason.) In any event, the principal ECJ decisions were bent on establishing the supremacy of E.C. over member state law and the legal compulsion of the freedom of movement of economic

resources across national boundaries provided for in the treaties. These decisions paralleled what Americans refer to as the federalism and commerce clause decisions of the 19<sup>th</sup> Century U.S. Supreme Court.

The first phase of the E.U. as a whole was the establishment of the common market and thus was essentially one of negative constitutional law, that is of using the treaty provisions to batter down the national laws of the member states that were barriers to free trade. The only initial positive functions of the E. C. were to be found in its agricultural and regional policies which consisted almost entirely of arranging transfer payments from some states and economic sectors to others. With the increasing perfection of the common market as a free trade and investment zone, the E. U. then entered a phase in which it enacted by statutory law—that is regulations and directives enacted by the Commission-Council—a great deal of government regulation of business enterprise. This large body of statutory regulation involved competition, the environment, health, safety and consumer protection. As member state business regulation, the variety and disparity of which hindered freedom of business enterprise across national boundaries, was partially swept away, it was partially replaced by E. U. transnational regulation.

This second phase of E. U. legal development has now been roughly completed. Although regulatory law is constantly being amended, the crucial problem for the Union is now not making new regulatory law but implementing the regulatory statutes it has enacted. Thus in legal terms the Union has moved through phases of constitutional law and statutory regulatory law, and administrative law has now come center stage. For administrative law is the law that prescribes the behavior of the administrative organs that implement regulatory law.

It is important to understand that this implementation behavior itself has strong law-



making components. First in order for a government administrator to determine whether a business enterprise is or is not in compliance with the regulatory statutes, the administrator must interpret the statutory law. Such “interpretation” of law necessarily involves a certain amount of making of law. A statute requiring that chain saws must be safe cannot mean that the saw must be absolutely safe. The only absolutely safe chain saw would be one that couldn’t cut wood. Just how safe it must be to meet the statutory requirement, whether safe enough to result in one serious cut every thousand or ten thousand hours of operation, is a question of statutory interpretation for the enforcing agency but also obviously a matter of agency law making. It must choose a thousand hours or ten thousand must and in doing so really makes the law of “safe” chain saws. Second, many regulatory statutes explicitly delegate to implementing agencies the power to make supplementary law making to fill in the details of the statutes sufficiently that they can be implemented effectively. Thus administrative law does not only prescribe how administrative agencies shall behave as regulatory, administrators, that is, as makers of highly particularized decisions about whether a particular private party must do to be in compliance with particular provisions of regulatory law. Administrative law also prescribes the procedures agencies must follow in making the laws they make.

As we have already noted, there is almost no such administrative law in the treaties themselves. Thus such law must be created either by statute or by the case law of the courts of the E. U. Here European lawyers confront two equal and opposite traditions. Most member states have long had relatively complete and detailed administrative law codes enacted by their legislatures as statutory law, although supplemented by case law. Most of the countries also have a system of administrative courts separated from the regular and constitutional courts and headed

by a highest administrative court. By far the most prestigious of these highest administrative courts is the French Council of State. France does not have an administrative code. Nearly all of its very elaborate administrative law is to be found in the case law of the Council of State which has been quite judicially active in reviewing French administrative acts. There has been some rather muted debate in the Union about whether to go the code or case law route. There is no administrative code. There is also no separate system of administrative courts. The administrative law of the E. C. is mostly in the case law of the E. U. Thus, as in so many other things, the generation of administrative law in the E. U. contains a number of disparate elements and is somewhat unique.

Earlier we noted that legal change is a kind of institutional change that is likely to be dominated by skilled actors employing mimetic techniques. That is likely to be particularly true where the law is generated case-by-case by a set of transnational courts of general jurisdiction with serious legitimacy problems. Such courts are hardly likely to invent brand new things. The obvious thing to do is to scan all of the law of all of the member states picking up whatever rules seem to work and enjoy fairly high levels of interstate consensus.

Given the particular historical circumstances, however, there is one more obvious thing to do: borrow from, or at least take cautionary lessons from, the U. S. But this tactic is far more obvious to E. U. judges than to the lay readers of this volume, so some further explanation is needed.

The administrative law of the U. S. underwent an enormous transformation from about the mid-1960's to the 1980's, both in doctrine and in the level of judicial intrusiveness into administrative affairs. This institutional change occurred largely through the case law of the

Court of Appeals for the District of Columbia and other courts but was confirmed and supported by the language of new Congressional statutes. In their typical fashion the courts did not openly admit that they were changing the law. Most of the judicial change occurred through judicial “interpretation” of the Administrative Procedures Act which had been enacted in 1946 and whose key provisions never have been amended. From that unchanging language the courts generated a host of new demands on the agencies and a new position for themselves as “partners” of the agencies in administrative decision making. Congressional confirmation came not through amendment of the APA to reflect the new case law but only indirectly through Congressional echoes of the new case law in new procedural provisions that Congress wrote into new statutes. (In the American legal system Congress writes special administrative law provisions into many of its substantive statutes. The APA is not an administrative code in the European sense but only applies when a particular substantive statute does not contain any relevant provisions on the procedural question at issue.) Precisely because Congress did not change the language of the APA and the judges as interpreters did not admit that they were changing it, the causes of the changes have not been clearly stated by the changers and must be reconstructed from the historical record.

Earlier we noted the tensions between rule and discretion and between technocratic and democratic administration. We also noted that the New Deal had overcome these tensions. From the late thirties until well into the 60's New Deal judges paid extreme deference to expert administrative discretion trusting to political executives chosen by a democratically elected President to supervise the technocrats adequately. As the New Deal consensus waned so did this judicial deference to administrative expertise.

As the New Deal waived a democratic political theory of pluralism replaced that of majoritarian democracy in the U. S. That theory used the interest group rather than the individual voter as the basic unit of the demos. A government decision was democratically legitimate if it were the result of a process to which all relevant groups had equal access. A correct decision was one that “satisfied” all of the participating groups, that is one that gave each group as much of what it wanted as possible given the desires of all the other groups. It was from this now dominant political theory that, beginning in the 60's, the courts generated a new administrative law whose watch words were transparency and participation. Groups could not participate equally unless governmental decision making was fully transparent to them all. Full participation by all groups was one of the methods of achieving complete transparency. Thus transparency and participation were mutually reinforcing democratic values from which administrative law norms were generated.

This pluralist theory and its administrative law derivatives provided channels of expression for the extremely strong reaction against technocracy that followed World War II Science, and technology had brought allied victory but in the form of atomic weaponry that threatened to destroy mankind. Science had become big science and the military-industrial complex. Technical experts, of whom the physicist had become the model, no longer were seen as standing above and beyond the political fray but instead as another interest group with its own, very expensive, demands made on and through the political process. This anti-technology sentiment could be seen not only in the fear of nuclear war and denunciation of the military-industrial complex but in the environmental and consumer movements that became the popular religion of the period. As technology destroyed nature and defrauded the people, technocracy was hardly to be trusted.

Yet the very religions of environmentalism and consumerism demanded a new round of highly technical government regulation of technologically advanced businesses. Only techno-crats could generate and implement this new regulation, but they could not be trusted to do so in ways that truly benefitted the demos. One answer was the new administrative law. Technocracy is essentially specialized, esoteric knowledge translated into political advantage. If the techno-crats were required to make everything that they knew known to everyone else that advantage would be reduced. And if the technocrats were forced to give a seat at the decision making table to everyone else, alternative and rival centers of expertise to check the technocrats would be generated. Moreover, a set of laymen, namely the judges, could be set to supervise the techno-crats on behalf of the general public. Judges are indeed expert but only at law. By education judges were fundamentally ignorant of all those technologies that armed and narrowed the perspectives of the technocracy. By office judges had the power to intervene against technocrats. The judge was the lay person armed—the true democrat. (Europeans must recall that American judges are elected or politically appointed not members of a career civil service.) By inventing and enforcing an administrative law of transparency and participation judges could counter the interests of technicians and bring expert discretion under rules.

Moreover judges were uniquely placed among laymen to simply tell experts that they were wrong. In a high tech world it is hard for the ignorant to tell the experts that they are wrong. We can't even read the equations on the black board let alone correct them. Judges who sense that the expert has just come to a conclusion that is wrong, crazy, out of proportion, against common sense, irrational need not play their ignorance against the experts' vast knowledge. Instead they need only say, no matter how much science you know, we are the experts on procedure and you

have made a procedural error so your decision, even if it is as scientifically correct as you allege it to be, cannot stand. Administrative judicial review is full of judicial substantive judgment parading as procedural monitoring.

All this may be very well, but what does it have to do with the institutionalization of the E.U. In the 60's and 70's the U. S. went through a huge change in institutionalization, that is in administrative law because renewed distrust in technocracy blossomed at the same time as a new round of government regulation of high tech business. Under the umbrella of pluralist political theory and its values of transparency and participation the judges became hyperactive in the subjugation of expert discretion to rules and the control of lay persons (themselves) over experts.

The perceived need for a big new round of regulation hit the U. S. in the 1960's and 70's because of increased environmental, health, safety and consumer protection concerns. Those same concerns were felt in individual European states at roughly the same time, but it is in the 80's that those concerns intersect with the new needs of the European Communities to complete the common market by enacting a huge apparatus of European-wide regulations. If during this same period Europe is experiencing a distrust of technocracy, the attractions of pluralist political theory and an attendant concern for transparency and participation, then one might reasonably expect the same changes in administrative law to occur in Europe around the turn of the century that had occurred earlier in the U. S.

Anti-technocracy themes have certainly been apparent in the domestic politics of a number of the member states of the Union most notably in the Green party in Germany. Recent French general elections have also featured a good deal of anti-bureaucracy rhetoric. More generally the move toward “free markets” and privatization expresses a rejection not of government in general

but of central planning which is necessarily largely technocratic. To be sure, part of the argument is that private enterprise is more expert than public. But another part is that of the invisible hand as superior to rule by experts. Of course the dialectic of expert versus demos never swings entirely to one side. The Italian political scandals inspired renewed calls for a government of experts rather than politicians, at least for the short term.

It is in calls for transparency, however, that anti-expert sentiment has most clearly manifested itself. Obviously the former Soviet empire, with its glasnost and perestroika slogans, makes transparency a central issue of change. The long British tradition of government secrecy has been vociferously attacked in recent years. Most notable of all, however, is the Union itself. Both popular and scholarly commentary on the Union bristles with the word transparency. The so-called democratic deficit is constantly addressed by calls for increased transparency. Much of the European Parliament's attempt to gain some leverage on the Commission is dressed in the language of transparency.

Along with these calls for transparency in Union governance has come a great deal of actual pluralist participation. The proliferation of formal interest groups and lobbying activity in Brussels has been much commented on. The comitology and independent agency decision processes have been defended on the grounds that they allow for high levels of group participation that will overcome what otherwise would be very serious transparency problems.

While transparency, participation and generally anti-technocratic themes have been endemic to European politics as they have to American in the post-World War II period, they become particularly active and politically relevant to the Union for certain special reasons.

First of all the very indirectness, peculiarity and complexness of Union decision making

processes acutely raises the problem of transparency. Most Europeans simply don't know how the Union works let alone what it is doing at any particular time on any particular matter. From its inception as the Coal and Steel Community the Union has been designed to particularly favor executive expertise over parliamentary democracy. The council is composed of political executives. The Commission is supposed to be a body of experts and wields far more direct legislative authority than do expert bureaucracies in the member states. Most of the dialogue between Commission and council occurs in communications between Commission experts and COREPER, the body of bureaucratic experts the Council has built for itself. Council members themselves are cabinet ministers who in most instances are far more spokespersons for the experts in their own home ministries than for their home parliamentary majorities.

Even more important in bringing actual political clout to Union transparency participation and pluralist concerns are the differences between Union and member state regulatory decision making processes. American regulation has always been rather legalistic and adversarial. Government regulators and corporate managers bargain in the shadow of the law about the letter of the law and as potential parties to litigation. Much of its bargaining goes on in open hearings. European regulation typically has been high corporatist. Government regulators and business managers meet in closed and confidential sessions and collaboratively work out regulatory compliance arrangements. Justice Frankfurter used to speak of administration as rounding off the rough edges of regulatory legislation. An awful lot of the rough edges of the laws of most European states get very much smoothed over in the tight little islands and long lunches of national regulatory processes.

When regulation moves from national capitals to Brussels some degree of opening and



distancing takes place. The change ought not to be exaggerated. A good lunch can be bad in Brussels too. And a French business executive can always find some fellow graduate of ENA in the Brussels bureaucracy to talk to. But lunch in Brussels is not so much a family affair for Italian managers as lunch in Rome would be. From being the most intimate of insiders in regulatory affairs in their own countries corporate managers become slightly outsiders in Brussels. The very growth of the lobbying industry in Brussels shows this. One does not need to hire lobbyists to conduct affairs that are entirely within the family.

So long as the corporate regulated were insiders to regulation they did not worry about transparency and participation. Those are things for outsiders to worry about. Indeed insiders want as little transparency and as limited participation as possible. But as corporate managers begin to feel a little less intimate, the charms of transparency and participation become more attractive.

Specifically for Union administrative law, all this means not only that generalized European anti-technocratic sentiment generally presses for pluralist, transparency and participation changes in administrative law but also that there are particular persons with particular money to hire particular lawyers to bring particular lawsuits designed to persuade particular judges to produce a new administrative case law of the Union which will guarantee those now less on the inside what they now need, transparency and participation. Thus it can be anticipated that European case law to some degree will go down the route traveled earlier by the American case law. Just as in the 60's and 70's American concerns for transparency and participation intersected a new round of environmental, health, safety and consumer regulation and produced a new administrative law so now European concerns for Union transparency and participation intersect

the round of new regulation that occurs when Union regulation must be invented to replace national regulation. So a new, or rather an initial, Union administrative law should emerge favoring transparency and participation.

One final American-European comparison is relevant. New case law emerges in part because litigants press for it but also in part because judges want to give it. In the U. S. in the 1950's federal judges were themselves overwhelmingly New Dealers appointed by President Roosevelt, and they confronted Washington agencies full of New Dealers. It is little wonder that New Deal judges deferred to the wonderful New Deal expertise of New Deal administrators. By the late 1960's a mix of Democratic and Republican judges faced agencies that were sometimes doing Republican and sometimes Democratic things. The end of the New Deal consensus was not only a generalized intellectual phenomenon affecting judges as well as others. It was a highly concrete, personal thing about what kinds of people were bureaucrats and what kind judges.

Moreover the American judges asked to make new administrative law were part of a general, all purpose federal judiciary headed by a Supreme Court that was, both an administrative court and a constitutional court. To U. S. federal judges, second guessing an expert bureaucracy and striking down an administrative act was not such a big deal, not when they were part of a court system that, from time to time, struck down whole statutes. Judicial activism in administrative review comes fairly easily to courts that are active in constitutional review. To put the matter slightly differently, it is not very difficult for judges accustomed to protect individuals from government violations of their constitutional rights to also protect them from violations of administrative procedural rights. It is not very difficult for courts which are accustomed to creating a case law of constitutional law rights to also create a case law of administrative law

rights.

Unlike most of its member states the Union does not have separate administrative courts. Although the Court of First Instance to some degree specializes in administrative law matters, it hears some other matters as well and the Court of Justice handles the full range of litigation. The ECJ has been quite active in making “constitutional” law. It would not be a big step out of character for it to be activist in the field of administrative law as well.

Perhaps even more importantly, Europe has been experiencing a huge wave of judicial activism. The British judges have shown a greatly increased propensity to question administrative action, and the Parliament has recently something that looks amazingly like constitutional individual rights judicial review. All three of the varieties of French courts, civil, administrative and constitutional, now do things very comparable, and to some degree exceeding, judicial review in the U. S., Germany, Italy and Spain have quite activist constitutional courts. Indeed constitutional judicial review, which once appeared to be almost exclusive to English speaking federal states, is now as common in Europe, both Eastern and Western as in the lands beyond the sea. The European Court of Human Rights is just that and the ECJ itself purports to find a bill of rights somehow lurking somewhere in its constitution just as the French constitutional council has found one lurking in their’s. Accustomed to making all sorts of constitutional law, and surrounded by other courts doing the same, it shouldn’t be too hard for the ECJ to make some administrative law as well, particularly when, like the U. S. and European courts, the ECJ combines constitutional and administrative jurisdiction.

It might well be argued that the U.S. and the EU situation are so similar but time staged that we may expect the same results from the same causes in Europe that occurred in the U.S. but

a couple of decades later. No mimetic techniques necessarily would be involved, but only a parallel response to the perceived needs for transparency and participation. On the other hand, given the time staging, it might be argued that to the extent that EU administrative law is moving in U.S. directions, the innovations are the result of deliberate borrowings from U.S. judges by EU judges. Certainly at the personal level a number of EU judges have been very familiar with the American administrative law experience. Indeed I believe that response to U. S. experience can be read between the lines of a good deal of E. U. case law. But I also believe that the U. S. has been used far less as a model for change than a cautionary tale. E.U. judges have been moved toward transparency and participation by pressures internal to Europe and through legal techniques native to Europe. They have been more cautious in the changes they have introduced than they otherwise would have been because they, like many American observers, have viewed the American transformation as having gone too far in injecting the judiciary into administrative matters. Indeed, as the dreaded “adversary legalism” the American law may be seen as pluralism run riot with everyone suing everyone else constantly thus assuring perfect transparency and participation but at the cost of almost infinite delay and the investment of very excessive decisional resources in regulatory decision making. In the eyes of many Europeans the trick is to go a little way but not too far down the American path.

The ECJ at one point formally announced that it would build a bill of rights which is missing from the treaties by a comparative method, deriving EU human rights from those protected by the laws of the member states and by the European Convention on Human Rights. Given the sparsity of administrative law provisions in the treaties, the administrative law of the EU will have to be built up in the same way if it is to be created by case law. We have already

noted that there is a good deal of recent European experience tending toward judicial activism. At its origin the ECJ was modeled in many ways of the French Council of State. In a civil law world, the Council of State has always been a case law island. There is no French administrative code. French administrative law is the case law of the Council. Moreover, to the extent that a system of precedent or stare decisis has really existed all over the civil law world, it has generally been disguised and nowhere more so than in the regular French courts. In the opinions of the Council of State, however, the influence of precedent is very openly acknowledged and the ECJ follows the Council's practice. It has also been argued that the addition of English and Irish judges to the ECJ has led to more discursive, explanatory opinions. Moreover, because many of the important decisions of the ECJ are responses to requests from national courts for expositions of EC law, in which the ECJ does not and cannot simply say which party wins and which loses, the Court's opinions necessarily need be far more openly precedential than those of national appellate courts. There can be no pretense that every judge goes back directly to the language of the codes in every case. The national judges are not supposed to make their own interpretation of the treaties and of Council made regulations and directives but to follow the interpretations of the EJ. It follows that ECJ opinions must state their interpretations clearly. And precisely because the ECJ must state its interpretations clearly case by case for national courts, it becomes relatively clear when it is or is not following its own previous interpretations.

Thus in building up administrative case law the ECJ and the Court of First Instance can claim that in a sense they are compelled to do so by the peculiar judicial structure of the Union and that, in any event, they are following a practice employed by the most esteemed national administrative courts in Europe, not only those of France but of a number of other member states

which follow the Council of State model.

At the substantive level there are a good many common principles and even specifics among the administrative laws of the member states. Two such principles are of particular importance. About the only specific administrative law provision in the treaties is the requirement that all EU organs give reasons for all their actions. Such a giving reasons requirement exists formally in a number of member states constitutions and in many domestic administrative code and case law provisions. Thus the Court moves on both a firm textual and a rich comparative basis when it demands that EU organs give reasons.

The second principle, that of proportionality has no textual basis in the treaties or in the constitutions of the member states. It is derived from the case law of the member states, particularly of the French Council of State. Proportionality, however, can also be said to be an autopoietic feature of administrative and constitutional law, that is one inherent in the very nature of legal discourse. It is in the very nature of legal disputes that they frequently pit one legal right and good against another. In such instances the judge must “balance” or choose to give one right priority over another. It is a commonplace of constitutional law that no constitutional right is absolute. In the famous cliché, “my right to swing my fist ends at the other person’s jaw.” For instance, the right to privacy in one’s papers and effects must sometimes yield to the needs of the state in criminal prosecutions. The U. S. Constitution bans “unreasonable” searches not all searches. The right to free speech universally is acknowledged as limited by libel laws protecting the personal right to reputation.

If, however, in particular cases one right must be protected at costs to another, it must follow that the protection of one right should be at as little cost to the other as possible. Both,

after all, are goods. If we must take away some of the right to free speech in wartime so that the enemy will not receive information about when our troop ships are leaving port, we must be careful to take away no more of that right than is necessary to pursuit of the war effort. It will not do to ban radio commentary on the election campaign as we ban radio announcements of ship departures. In U. S. constitutional law we say that balancing doctrines are inevitably accompanied by least means doctrines. That is, if a court argues that government may infringe on right A in order to protect right B, the court will also say that the government must choose that means of protecting B which least infringes on A.

Using the same reasoning Europeans speak of proportionality. Government must employ means of achieving its legitimate goals proportional to what it may attain. Government may not impose disproportionate costs on individuals in achieving public benefits. Where individual rights are involved, only the lowest possible costs to them necessary to the protection of some other right or high priority state interest is likely to be seen as truly proportional.

If reason giving and proportionality are considerable commonalities among the domestic administrative laws of the member states, remedies are the great area of disparity. European public law has generally been very solicitous of state interests guarding them carefully against individual interests. The state's interests are, after all and by definition, public interests. The individual's interests are, by definition, public interests. The individual's interests are, by definition, particular and selfish. In many European states, individuals may not collect money damages from the state or such remedies are extremely constrained. In many, preliminary remedies like temporary injunctions pending the outcome of proceedings are unavailable. In many the individual may request that the application of agency rule to him or herself be judicially

quashed, but the court will not invalidate the rule itself even if it is unlawful so that the agency may go on applying it to others.

Thus in creating an administrative law for the European Union, the Union Courts can and have drawn on both American and European experience but that experience rarely dictates institutional outcomes.

So much for the windup. But what is actually happening? Have the ECJ and the Court of First Instance actually begun to make a new administrative law? Are they likely to make more? Are they institutionalizing transparency and participation in the administrative sector of European political space? The answers to these questions is yes.

### Giving Reasons

As we have seen about the only relatively specific administrative law provision of the treaties is the requirement that Union organs give reasons for their acts including their rule making acts. In the terms of this volume the giving reasons requirement is a procedure or rule specifying how other rules should be made. In conventional legal terms it is an administrative law rule in that it specifies how administrative agencies must act in making their decisions. It is a constitutional rule in the sense that it is found in the treaties that constitute the communities and then the Union rather than in a statute enacted by the Council.

The giving reasons requirement is a good example of the breath of law making discretion vested in courts that are authorized to do constitutional interpretation. At one extreme of interpretation a giving reasons requirement is a purely pro-forma, purely procedural rule in the narrowest sense of the word procedure. It says to the administrator, you may make any rule you



please in any way you please so long as along with the rule you issue a piece of paper with the word reason at the top and any set of words you want further down the page. A court that interprets a giving reasons provision in this way merely checks whether such a piece of paper did indeed accompany the administrative rule being challenged.

Such an interpretation is a plausible one in terms of the intentions of the authors of the text and/or its purported purposes. Even the bare requirement of giving reasons—any reasons—serves as a mild restraint on administrative discretion. An administration who is required to give reasons is unlikely to act as arbitrarily and capriciously as one who does not have to give any reasons at all. Out of considerations of sheer self-respect and preservation of the appearance of professional competence administrators are unlikely to offer reasons that are sheer gibberish or take decisions the only reasons for which would be sheer gibberish. The reasons given need not be the real reasons the decision was taken, but decisions are unlikely to be made for which no respectable reasons can be offered. The giving reasons requirement so interpreted grants maximum discretion to administrators but imposes some slight real restraint on that discretion.

Such an interpretation is, however, inherently unstable both in terms of the politics of litigation and the autopoietic dynamics of legal discourse. Legal discourse makes fundamental claims to rationality reasonableness, to making sense at least to those trained in the discourse. If an agency were to respond to a giving reasons requirement with a page titled reasons and followed by the first two pages of Moby Dick or the Oxford dictionary, how could judges stick to the most narrow interpretation of the giving reasons requirement. How could they say: we have checked off the procedural box “reasons supplied” because the reasons page is there; we don’t really care what it says on that page . Once the court begins to read the page, however, and to

say we check off the box “reasons supplied” because the reasons page is there and what is printed on that page does indeed constitute reasons, where is the stopping point? If the form of the language on the page is reason-giving but the reasons given by the administrator are clearly silly or flagrantly unjust. “We did it because our parents wanted us to.” “We did it because our astrologer advised it.” “We did it because it was the cheapest thing to do even though there was no chance it would work.” Once a court demands that the reasons given make at least minimal sense, it is difficult for the court to stop there. For litigators will immediately take the next step of seeking to show that the reasons given are bad or trivial or mistaken reasons and surely a giving reasons requirement cannot be satisfied by the offering of obviously wrong reasons. The EU, like most administrative law systems, recognizes that agencies will be judicially reversed for “manifest error.” [fn is at fn 2.03, p. 145] The only way for the litigator to demonstrate that the reasons offered in defense of an administratively constructed rule are wrong is to offer other reasons counter to the reasons given. Inevitably the judge will be confronted with a reasons conflict—some reasons in favor of the rule, some against it. There is a strong dynamic running from “there must be some reasons that make some sense” to “there must be good reasons,” to “there must be better reasons for the rule than against it.” Somewhere along that path of course the judge has begun to substitute his or her own policy judgments for those of the administrative agency required to give reasons. Almost inevitably a giving reasons requirement turns into a reasonableness requirement. Courts start with the procedural requirement that an agency do something, give reasons. They tend to end up with a substantive requirement, that the agency decision be reasonable.

There are stopping points along the path. A familiar technique of administrative judicial

review is for a court to reject only those agency rules that no reasonable person could accept. A court may say it will treat the giving reasons requirement as met so long as the agency can offer any reason for it that some reasonable person would accept no matter how heavy the weight of reasons on the other side and no matter whether the judge himself finds the reason given acceptable. Adopt such a rule, typically they say that it is adopted so as to avoid substituting judicial policy discretion for agency discretion. No matter how defensible such a rule is, however, in terms of court-agency relations or of democracy, it nonetheless runs against both common and legal sense. For it says that a judge will sometimes award victory to the side with less good reasons than the losing side has offered. For this reason not only is the absolute minimalist judicial interpretation of the giving reasons requirement inherently unstable but so is the next step of judicial deference to an agency so long as it can offer any sensible reasons at all.

Initially the ECJ did not adopt the absolutely minimalist position at least formally. Instead it early announced the following formula. Such a formula is quite demanding in the extent to which it requires rather full-scale explanation from EU organs. It deliberately stops very far short, however, of a judicial demand that the agency have better reasons for what it has done than its challengers can offer against what it has done.

The early cases show a clear pattern. Where, usually through staff carelessness, no reasons at all are offered, the challenger of an agency action on giving reasons grounds may win although even in such situations the Court will search hard for some excuse to find otherwise. Yet litigating lawyers rather consistently attached giving reasons claims to their other claims in challenges to agencies. And their claims took a particularly American form. In the 60's and 70's American drive toward transparency and participation, American courts had invented the so-

called “dialogue” requirement. In rule making proceedings the agency was required to respond to each and every point raised by each and every interested party. The American courts had built up this requirement out of two provisions of the Administrative Procedures Act, one requiring the agencies to give notice of proposed rules and receive public comments on them, the second that the agency publish a “concise, general statement of basis and purpose” along with the completed rule. This latter was the American form of a giving reasons requirement. EU litigators would claim that, even where an EU organ, usually the Commission, had given some reasons, it failed the giving reasons test because it had failed to respond to some particular objection to the proposed rule that had been raised by an outside party when it was considering the proposed rule.

EU lawyers often made this claim and just as often lost. It is possible that the lawyers were simply shotgunning, making every possible claim they could think of. If you are litigating against an agency decision it is easy to throw in a giving reasons claim along with whatever other claims you are making. It is also possible that the ECJ was consistently rejecting these claims out of inherent caution. It is far more likely, however, that both lawyers and judges were benefitting from American experience. The EU lawyers were making the claim just as American lawyers did, by pawing through all the past communications between regulating agencies and the regulated enterprises searching for any point raised by the regulated that hadn’t been met by the regulator. The U. S. Courts of Appeal had encouraged this strategy. In the process they had immensely increased transparency and participation. An indeed exhaustive dialogue was created between regulator and regulated and even those private groups not regulated themselves but favoring the regulation of others. This dialogue, however, was not only exhaustive but exhausting, adding considerably to the time and staff costs of the regulating agencies and to litigation costs and

delays. The EU lawyers could learn from their American counterparts. The EU judges could see just how much pushing giving reasons up to dialogue could add to the time and staff costs of new law making in a new legal system that needed a lot of new rules and was characterized by a very sluggish law making process. The J could also see how deeply a dialogue requirement, which appeared on its face to be purely procedural, actually projected American courts into administrative policy making. For once courts begin to demand that agencies give a counter reason for each reason offered by an opposing party, extremely strong pressure necessarily arises for courts to decide between the rival reasonings. The American experience was very dramatic and very well-known in European legal circles. It seems to me that the ECJ's consistent refusal to accept the litigators' invitation to move toward a dialogue requirement was greatly informed by the American experience.

As one tracks the ECJ cases over time, however, one sees not only the constant reiteration of the Court's rather demanding giving reasons formal but an increasing tendency on the part of the Court to devote part of its opinion to stating the reasons the agency has given and demonstrating at least summarily and sometimes at length that they are good reasons. Lawyers sometimes speak of the "negative pregnant." What if a court begins to say "We have examined the reasons the agency gave, and they are good. So we find the agency has met the giving reasons requirement." Isn't it also saying "If we found the reasons offered not good, we would find the agency not to have met the giving reasons requirement? When the ECJ began to actually discuss the substance of the reasons given, hadn't it crossed the Rubicon? If so, it had not crossed simply because the U. S. courts had crossed earlier and swept on to Rome. Indeed the American experience may well have slowed its advance. But given that the EU courts were

subject to the same outburst of new regulation and the same anti-technocratic pushes toward transparency and participation that American courts had experienced earlier, weren't they likely to move in the same direction.

In 1991 they did. In civil law systems where stare decisis is formally eschewed, it is rarely possible to say that a court has reversed a long line of precedents because technically there is no line of precedents to reverse. Remember, however, that the ECJ more or less follows the model of the French Council of State which does operate a case law system. In the ECJ there are a number of advocates general who rank as judges. They make a presentation to the deciding judges which analyzes the law, including the past case law of the Court, and recommend an outcome to the case at hand. The Advocate General's opinion is published along with that of the Court. These opinions are frequently cited in academic writing and subsequent cases. In the 1991 giving reasons case, the Advocate General admitted that in a long line of previous decisions the Court had paid extreme deference to the reasons given by the Commission and other EU organs but argued that the Court ought to break with that line of precedents and engage in a far more searching examination of the reasons offered by the government in support of its actions. The Advocate General then argued that if the Court were to do so in the case before it, it would find for the complainant against the government on the grounds that the giving reasons requirement had not been met. The government in fact had given reasons, so it was quite clear that what the Advocate General had in mind was that the reasons given were inadequate. The ECJ engaged in an extended analysis of the reasons given and decided the case against the government on the grounds that the giving reasons requirement had not been met. That is about as close as any court on the continent is ever likely to come to formally reversing its (supposedly

non-existent) precedents. In the same year, the Court of First Instance, using a different set of legal categories, issued a parallel decision.

So the bridge has most definitely been crossed, but the American experience remains a cautionary tale. In a series of decisions on seemingly minor and highly technical matters the Union courts have put additional teeth in the reasons requirement. They have held that the courts themselves may raise giving reasons issues even if the parties challenging EU actions have not. [fn. 205, p. 146] Older case law tended to treat the giving reasons requirement as merely procedural in the sense that the “harmless error” rule might apply. Commission action in which reasons had not been supplied might not be annulled if the failure to give reasons did not actually harm the parties, reduce the court’s capacity to review the action or distort the outcome. In recent cases the Union courts treat the failure to give reasons as automatically resulting in a judicial annulment of the action taken [146-7]. Litigators have learned to make comprehensive giving reasons claims. [fn. 207, p. 146]

Following the ECJ’s shift in direction the CFI moved strongly, injecting extra lift into the giving reasons requirement by combining it with duty of care and manifest error. In *Automes II* the CFI said that if the agency failed to give detailed reasons the court could not perform its review function of determining whether the Commission had met its duty of care. Then in *Asia Motor France II* the CFI speaks both of “insufficient reasons” and “whether the reasoning is “well founded.” (143). It engages in a detailed analysis of the factual case made by the Commission. It then annuls the Commission decision, and it is not actually clear whether the annulment rests on “manifest error” or failure to give good enough reasons. Indeed the conflation of the two shifts giving reasons far from the procedural end and toward the substantive end of its range. For if the

CFI is indeed rejecting the reasons given because they contain manifest error it is doing substantive review of the reasons not just checking that some reasons have been offered. Subsequently the CFI has not offered this doctrinal combination again, but it does now frequently engage in detailed analysis of the reasons given. [145]

This shift toward substance is almost inevitable both in terms of the internal dynamics of administrative law and the characteristics of the CFI. Here again path dependency is at work to a degree. It is hard for any court to treat a textual giving reasons requirement as purely procedural, that is treating it as satisfied no matter how mistaken or disingenuous the reasons offered by the agency so long as they offer some. Moreover the CFI was created in large part because certain kinds of cases particularly in competition law matters, require the taxing of a good deal of evidence and the ECJ was essentially an appeals court unprepared to hear extended new factual evidence. The CFI was deliberately set up as a “trial court,” that is a court designed to hear evidence, to supplement the EU’s appeals court, the ECJ. If you set up a court that is supposed to be comfortable dealing with facts then it will deal with facts. And the more a court deals with facts the more it will be pushed toward substantive review. Where technical regulation is involved a court which doesn’t know the facts or must rely on the factual record compiled by the agency can fault the agency for not using the right procedures but can hardly say that the agency’s decision was substantively wrong. For substantive rightness or wrongness will depend almost entirely on the facts. Where a court has its own independent access to facts, it is in a position to say that the agency was wrong. Thus it is hardly surprising that a Union court specifically established in order to deal more extensively with facts than the ECJ does will push further into substantive judicial review than the ECJ does.



In the SIDE and Sytraval decisions the CFI has now employed giving reasons very much in the American style approaching “partnership” with the Commission. It engaged in its own extensive re-analysis of the facts before concluding that the Commission’s reasons for a discretionary decision were not good enough. Here giving reasons has grown from a purely formal procedural requirement—you may do what you want so long as you append a reasons giving segment to your decision—to a quasi-substantive one. You may do what you want only if you can give persuasive reasons in the light of the facts and the law for what you have done. “Giving reasons” verges on “reasonableness.” Of course we can also expect the typical American pattern in which when the judges disagree seriously enough with the agencies they will speak the language of Sytraval, and, when they don’t they will speak of judicial deference to agency fact finding.

#### Right of Defense

The judicial construction of a right of defense is another story of litigation, academic lawyers and judges building new institutions by bricolage of the sort noted in the first chapter from existing stocks of legal ideas and practices and within limits in part imposed by the nature of the materials. The new institutions are joint product of internal legal dynamics and broader environmental forces. As in many such stories the judicial construction is not done in opposition to but either in the absence of or in cooperation with the statutory law maker. And as in all such stories, the devil is in the details so that the lay reader must be willing to follow rather complex brickwork.

Administrative agencies do some work that looks like that of criminal investigators,

prosecutors and judges combined. A particular statutory scene may specify a rule and provide that a particular administrative agency implement it by investigating possible violations and then holding its own administrative hearing in which the agency presents the case against an accused rule violator and then itself decides the case and levies a penalty if the accused is found guilty. Where an agency engages in such a set of activities it is almost inevitable that a right of the accused to present some kind of case in his own defense will be raised. Such an institution is too well established in criminal procedures to be ignored in their administrative neighbors. Such a right of administrative defense, however, no matter what its origins, imports a certain amount of transparency and participation into administrative processes. It becomes one of the building blocks of an institutionalization of pluralism. But because of its origins its potential for contributing to such a pluralism is limited.

The initial treaties of the European Communities do not specify a right of defense. Initially the major activity of the Commission that looked something like criminal justice lay in the field of competition or anti-trust. Council statute specified rules against anti-competitive business behavior and authorized the Commission to investigate, prosecute, judge and levy penalties against such behavior. The statute did not mention a right to defense. The Community courts rather quickly created such a right by case law. It was not a difficult job. Such a right existed in both the criminal and the administrative law of all the member states. The Commission granted an opportunity to be heard in its competition proceedings. Lawyers for business firms convicted in these proceedings naturally put violation of right to defense claims in their armory when they appealed adverse Commission decisions to EC courts. Even the earliest cases arose not because the Commission as judge had refused to hear the defendants' case at all but only because it had

done something to improperly hamper that defense such as refusing to hand over a confidential document in its possession that might have aided the defense case. It is in this mode that the right to defense is a transparency as well as a participation claim. Litigators press for a right of defense; it is widely acknowledged in the broader legal environment; the legislature is silent but manifests no opposition; the administration itself is basically in favor and only quibbles over details; there really is no opposition.

Once established in competition law this right of defense tends to float free and become a general, abstract right in all areas of administrative implementation. This movement is largely a product of the internal dynamics of law itself. In the age of the positive welfare state penalties are difficult to seal off from benefits in legal thinking. The right to defense is first invoked where a criminal penalty like administrative sanction is invoked for violation of a legal rule. What if we get a statute that does not provide for a penalty, but provides for a government benefit but one that will be withheld from particular private entities for misconduct. There is still hearing in which the agency alleges and then judges misconduct. If the “defendant” is found “guilty,” it isn’t “fined.” But it still may have to pay back a lot of money to the government which it would have kept if found not guilty. Isn’t such a beneficiary entitled to a right of defense. If it is, what about a statute that provides a benefit but only to those who meet certain qualifications. The implementing agency denies or demands repayment of the benefit to X because it finds that X is not qualified. X is losing money because the agency has made a finding adverse to him. Isn’t X entitled to defend against that adverse finding. This has been the course of development by EU litigators and courts so that the right to defense including both the right to be heard and access to documents in the hands of the government necessary to building a defense has spread wherever

someone is worse off because of an adverse administrative finding that he otherwise would be.

Precisely because it is a right to defense analogized from criminal law rather than a right to be heard or to participate in government decision or policy making processes, the right of defense is very far from a full-scale institutionalization of pluralist transparency and participation. The right to defense in EC administrative law was first limited to those directly sanctioned or denied a benefit. It did not extend to others who would be indirectly adversely affected by a government decision such as the competitor of two firms whose merger the Commission found did not violate competition rules. Gradually and sometimes aided by new Council statutes, the right of defense has been extended to many such indirectly affected parties, but generally only to those who can show a distinct and particular injury. The right is not “generally enjoyed by consumers or environmentalists who claim that a particular government decision adversely affects the buying public or the breathers of air. Almost certainly with U. S. experience in mind, the EU courts have been extremely leery of proclaiming “third party” right of defense, that is the right to documents and the right to be heard of parties who merely want the law to be implemented in a certain way rather than suffering a distinct and palpable injury from it being implemented one way rather than another.

“Third party” right of defense raises all the issues that “standing” raises in all administrative law systems. The more numerous those who have the right to be heard in administrative proceedings the longer and more costly they will be. The more people who can trigger court intervention by claiming they did not receive an adequate hearing from administrators, the more court intervention in administrative decision making there will be. The fewer people can claim a right of defense the less pluralist transparency and participation there will be. The general

environment has constrained the ECJ not to be too activist in creating a right to defense. Ut the Court's relative restraint in this relative restraint because in the intellectual realm of law the root of the right of defense is still negative protection against sanctions not positive participation in government policy making. Yet right of defense claims by litigators and right of defense doctrines by courts are part of the dynamic of building up a broader EU administrative law of transparency and participation.

### Judicial Review

If this were a study of judicial review a great deal more would need to be said because the process of institutionalization often has very significant consequences for the political relationship between those who make the rules and those subject to them. Here briefly are the central points. Reviewing courts have only a very limited scope for second guessing the substantive policy choices of administrators if the judges cannot see the facts and analysis on which the administrators based their decisions. Thus procedural rules that require administrators to submit a factual record to reviewing courts proving that the agencies have diligently gathered the facts and have good factual reasons for what they have decided actually increase not only the procedural judicial review powers of courts but their power to make substantive judgments as well. This is particularly true for the CFI which is set up to hear extended factual presentations and has shown a widely remarked tendency toward substantive analysis. Moreover the proliferation of judicially enforceable procedural rules also increases the capacity of courts which are reluctant to substantively challenge an agency directly to do so indirectly. Where nonexpert judges disagree with the substantive policies of expert administrators, the more stringent the procedural rules the

more opportunities for the judges to find procedural grounds on the basis of which to quash an agency decision with which their real disagreement is substantive. By doing so they not only shift the ground of contention to legal procedure on which they, not the agency, can claim superior expertise but also they soften judicial opposition from an absolute to a suspensive veto. The court in effect says: “Perhaps ultimately you may have the decision you want if you go back and make it all over again by proper procedures.” Judges often excuse their forays into substantive analysis by arguing that if they can show that substantive outcomes other than those at which administrators arrived appear equally or more plausible then the agency obviously has not listened to the regulated parties pushing for those alternatives or has failed to give persuasive reasons for the alternative it chose. In short because the court can say “If the alternative you choose is substantially wrong that probably means the procedures you used for choosing it were inadequate.” And because they can say that judges can also say “We have to do some substantive analysis ourselves in order to determine whether the procedures the agency used were adequate. Particularly in the recent case law of the CFI and ECJ in *Asia Motor France II* and the *Sytraval* cases the interplay of giving reasons, duty of care and manifest error present overlaps and confusions between procedural and substantive review that are likely to continue for some time to come.

Thus the judicially nourished growth of procedures (i.e., institutionalization) alerts us to the possible growth not only of judicial procedural power but of judicial power over the substance of the decision reached by the institutionalized processes. Our ears should perk up even more when in the midst of this judicial institutionalization process the EU courts begin to use the words “proportionality” and “manifest error.” In one case it spoke of “doubts as to whether the

[Commission decision] was appropriate and not unreasonable.” [cite at 128] Without bothering with doctrinal analysis it need only be said here that both those doctrines are announcements by courts that they will not strike down administrative decisions with which they substantively disagree a little but they will strike down those with which they disagree a lot. Both doctrines are mentioned frequently by the EU courts. Particularly in cases involving highly technical matters a court which might hesitate to find “manifest error” on the part of the agency may hint at manifest error but cast its decision in procedural terms of insufficient agency care in reaching the decision or insufficient reasons given. This is precisely what occurs in the famous TUM case. Cite Note [134 n 144] Moreover, as we have already noted, the giving reasons requirement almost inevitably turns into a giving good reasons requirement that inextricably mixes procedural and substantive review.

Substantive judicial review always comes down to how much of the benefit of the doubt judges will grant to administrators because of their expertise and because statutes grant them discretion. By institutionalizing administrative processes, EU judges have put themselves in the position to grant EU administrators less benefit of the doubt.

#### Duty of Care

As we shall see in a moment the ECJ may now be developing a whole new administrative law principle further subjecting administrative discretion to institutionalization. There is, however, an important preliminary point. We have already seen that the “right of defense” is difficult to extend to third parties themselves not directly adversely affected by an administrative decision because of its origin in an analogy to the right of defense in criminal proceedings. On the

other hand the giving reasons requirement easily floats free of such party considerations because the Court bases it not only on the parties' need to be able to determine whether they have been legally mistreated but also on the Court's need to be able to do effective judicial review. In the cases to be considered in a moment the ECJ tends to brigade duty of care with giving reasons and the "right of the person concerned to make his views known," a phrasing which moves as far away as it can from the criminal procedure origins of the right of defense. Obviously if an EU organ has a duty of care, that is a duty to administer carefully and diligently, it owes that duty to everyone in the Union not just "defendants." And, as noted the agency owes the duty to give reasons not only to the "defendant" but to the ECJ. Thus phrasing the right of defense as it does and running it together with a duty of care and a duty to give reasons tends to erode the distinctions between third parties and those directly affected and allow both to raise broad judicially cognizable objections to administrative decisions.

Now on to the duty of care itself. We have already noted that, given the paucity of treaty provisions and the absence of a Council enacted administrative code, the ECJ has announced that it is operating under general principles of administrative law. In two 1991 cases it announced that among those principles was one that required that where a Union organ exercised discretion it must act with "necessary care" or to "examine carefully . . . all the relevant aspects" of the matter. [Nolle & TUM] While there are technical quibbles about the actual grounds of the holding in the first case, effectively in both cases the Commission loses for failure to be careful enough and in both the Court combines this failure with failure to give good enough reasons. (Obviously if you have failed to be careful enough, you can't give good enough reasons, and your failure to give good enough reasons is one indication that you have not been careful enough.) The CFI quickly



picked up the duty of care doctrine (Nolle II).

How much care is enough care? In Nolle I the ECJ explicitly rejects a synoptic dialogue requirement. The Commission is not required to consider every point raised to it. It must only take “essential factors” into account. But by TUM the Court is speaking of a “duty . . . to examine . . . all the relevant aspects of the individual case [cite at 130].

The CFI has been moving this doctrinal initiative even further. In *Automes II* it speaks of “requisite care, seriousness and diligence” [fn cite para. 36]. This case involves competition proceedings. Then in the *SIDE* and *Sytraval* cases duty of care floats over into state aid cases, near neighbors both procedurally and substantively to the competition cases.

The so-called dialogue requirement if institutionalize is one of the most severe restraints on administrative action. It is a product of interests and values both internal and external to law. It begins in the right of defense in quasi-criminal administrative proceedings which we have already examined. The government must say to the “accused” in advance enough so that the accused can prepare something to say back as a “defense” at the trial. If we then add a pluralist democratic theory, a democratic decision is one in which each interested group has had its say. But it cannot say effectively to government unless government has told it what the government is thinking about. Thus the notice and comment rule making of American administrative law. The government must give sufficient notice of what it has in mind to allow outsiders to comment meaningfully. But it does little good for even on-notice outside groups to comment relevantly to government unless government really listens to their comments. The only way a reviewing court can insure that administrators have listened is to require them to respond to the comments they receive. The dialogue requirement is then a duty of government to say enough to private groups

to enable them to comment effectively and then respond to their comments to prove that they have been heard. Dialogue assures both transparency and participation.

The dialogue requirement has a number of other consequences. It gets a lot of facts in the record and so allows courts to do more substantive review. It provides an incentive to private parties to act strategically by raising as many and as amorphous issues and allegations as possible, in the hope that government cannot or will have to take a long time to reply to them all. And it sets the stage for making impossibly synoptic demands on administration. It is only one step from saying “you must respond to all points raised by interested parties” to you must respond to all points that might have been raised,” that is, you the agency must show that you have made not a defensible or reasonable but a perfect decision.

The dialogue requirement is the ultimate in the “Americanization” of administrative law and one of the principal roots of the incredibly cumbersome and time consuming administrative policy making process that is a frequent cause of complaint in the U. S. It cannot be proven by quotations from the cases, but there can be no doubt that one of the reasons that litigators kept proposing and the ECJ repeatedly and explicitly rejected a dialogue requirement [fn 198 at 144 and 277 at 159] was European knowledge of the American experience. Yet if the values of pluralist transparency and participation are at the forefront, dialogue is awfully appealing. The European trick would be some compromise in which courts somehow required enough dialogue to get transparency and participation without getting the long delay resulting from strategic behavior. Indeed the U. S. Supreme Court had attempted something of the sort in the famous Vermont Yankee decision in which the justices accepted the “transformation” in administrative law wrought by the courts of appeal but tried to persuade them not to comb through the whole

administrative record and insist that the administrators respond to every last nit raised for picking by every last litigator.

In the Sytrival case, by combining reasons, care and manifest error standards with a fine tooth judicial reexamination of the administrative record, the CFI appeared to come close to accepting litigators' invitations to declare a full-scale dialogue requirement. The Pandora's box opened by the ECJ in *Nolle I TUM* [fn cite Nehl 133 and Swartze article cited there in note 141] appeared to burst forth. In *Automec II*, *Asia Motor France II*, *SIDE* and *Sytrival*, the CFI speaks of the duty of the Commission to investigate relevant facts and give sufficient reasons. It goes so far as to say that in particular instances the Commission would be "obligated to give a reasoned answer to each of the objections raised" by an outside complainant." (156) "The Commission's obligation to state reasons for its decisions may in certain circumstances require an exchange of views and arguments with the complainant, . . ." (Para. 78) There is even a move toward the ultimate synopticism. The Commission has an "obligation to examine objections which the complainant would certainly have raised" if the complainant had known what the Commission knew. (Para. 66)

The ECJ then responded in a very Vermont Yankee kind of way. That is, it expressed great unease with the prospect that the CFI would do what the U. S. courts of appeal had done but in the process it actually accepted much of the transformation. In the particular set of procedures at issue, the ECJ denied that a complainant, that is someone seeking to get the Commission to initiate a proceeding against someone else, had a formal right to be heard at the stage of initial Commission decision-making about whether to initiate a proceeding. The ECJ rejected specifically the term "dialogue." It also specifically rejected the CFI move to synopticism, that is

any requirement that the Commission consider points that the complainant would have raised if it had known enough to do so. The ECJ also sought to impede tendencies to conflate procedural and substantive review by chiding the CFI for failing to fully distinguish between giving reasons and manifest error review.

But the opinion of the ECJ shows clear signs of having been cobbled together from conflicting views on the Court some of which approve the basic stance of the CFI. The CFI formula, “to conduct an exchange of views and arguments with the complainants” is at one point in the ECJ’s opinion said to have no legal basis (para 58). But then the Court says that such a Commission obligation “cannot be founded solely” on the giving reasons provision of the Treaties. (para 59 emphasis added) And then it goes on to speak of the Commission’s obligation to “sound administration” and “diligent and impartial examination of the complaint which may make it necessary for it to examine matters not expressly raised by the complainant.” (Para 62) Thus the ECJ itself seems to be leaning giving reasons and duty of care together to move, as the CFI does, toward synopticism. The ultimate holding of the ECJ is to support the CFI annulment of the Commission decision. The ECJ does so on a giving reasons grounds because the Commission has failed to respond to a particular point raised by the complainant which the Court characterizes as “not secondary.”

So what is the upshot of *Sytrival II*? Like *Vermont Yankee* it expresses a mood of a higher court that a lower court has gone too far. Like *Vermont Yankee* it imposes no firm doctrinal barrier to the lower court continuing to do what it has been doing. Specifically it rejects a formal dialogue requirement and any necessity for the Commission to always literally engage in a dialogue. But either under giving reasons or duty of care or more likely the two together, the

Commission is declared to be under an obligation to respond to all “non secondary” points either raised or not raised by the complainant and to engage in an actual exchange of views when that is necessary to adequately considering all “non-secondary” points. It would be a foolish Commission indeed which on the basis of Sytrival II refused to prepare a record that showed that it had listened carefully to and responded seriously to all relevant points made to it including points that might or might not subsequently be considered “non secondary” by a court.

In the final analysis the ECJ supports transparency and participation about as much as the CFI does, allows the CFI to continue along the line of institutionalization it has been pursuing, but warns litigators that the courts will be alert to punish strategic behavior on their part, that is the raising of clouds to flimsy arguments and allegations in their complaints. Dialogue, but not the American babelogue, is required.

## Conclusion

Hans Peter Nehl, in his excellent book on EC administrative law, argues that the EU courts are concerned with efficient administration and the protection of individuals rather than pluralist democracy. He comes to this conclusion largely because he gives the duty of care rather than the giving reasons requirement pride of place in his story of the transformation of EU administrative law. As he notes, however, care and reasons march together in the jurisprudence of the EU, some sort of dialogue requirement lurks and the courts show a tendency toward substantive judicial review. Whatever the ultimate value priorities of particular judges, what is happening is an institutionalization, that is the construction of a set of enforced rules

(procedures), that compel transparency of administrative action, access of non governmental groups to administrative decision making processes and judicial, that is lay, checks on technocratic decision-making.

So far nearly all of this institutionalization applies specifically in realms of administrative quasi-adjudication or particularized decision making, that is to situations where the Commission must decide how a particular regulated party or how a particular person seeking a favorable decision from the Commission shall be treated. The EU has now entered a period in which the comitology process and the independent agencies, both nominally under Commission control, the national administrations implementing Union legislation, and the Commission itself are producing not only a great many particular decisions about particular individuals or business entities but also a great many rules and regulations that apply generally rather than only to a particular individual. These rules and regulations fill in the details of the legislation enacted by the Council such as how many parts per million of a certain chemical are allowed in smoke stack emissions or what gas can be used as a coolant in refrigerators. The major open question of institutionalization is how much of the administrative law developed for dealing with administrative adjudications will now be transferred to administrative rule making.

Most of the recent transparency and participation institutionalization we have been looking at occurs in a peculiar intermediate realm. Where administration is “prosecuting,” there are obvious “rule of law” reasons for maximizing transparency and participation for the defendant and few reasons for doing so for “third parties.” Where X is requesting the administration to “prosecute” Y because Y’s behavior is illegal and harms X, X is not exactly a mere third party. Where X is asking administration to make a rule favoring him but equally applicable to everyone,

X is a third party, but everyone is a third party. Or if you believe in democratic pluralism X and everyone else are first parties. Much of the new case law involves X asking administration to act against Y because Y is hurting X. What we have been seeing is a greater and greater tendency to see X not as a third party but as an interested party entitled to transparency and participation. It hardly needs to be spelled out that such complainant parties serve as a bridge between the rights of defense we might confer on defendants and rights we might confer on any group that had an interest in a particular administratively made public policy. The question is obviously: will the EU courts go on with the process of transferring transparency and participation institutionalization from particular administrative “defendants,” to “complainant” to interest groups? One’s prediction about this question depends in part on how much force is to be assigned to the autonomous dynamics of law, in part on how one assesses the strength of pluralist democratic ideology in Europe and in part on how one evaluates the other patterns of institutionalization depicted in this volume. At the very minimum it might be argued that a polity which exhibits so much angst about the democratic deficit, and so much difficulty in overcoming that problem by changes in legislative organs and electoral mechanisms, is likely to move in the direction of judicial, that is low visibility, incremental, democratic institutionalization of the administrative process in general and specifically in administrative rule (law) making.