Administrative procedure, administrative democracy

Joana Mendes[1]

[Published in Jean-Bernard Auby (ed.) *Droit comparé de la procédure administrative* / *Comparative Law of Administrative Procedure*, Bruylant (2016), pp. 235-244]

1. Administrative procedure and access rights

Administrative procedures rationalise public action in various ways. They channel information, enable the decision-maker to weigh competing legally protected interests, and allow scrutiny of the choices made.[2] They also provide access points along the way, to citizens and persons affected, be it in the form of access to information or access to decision-making. In this way, procedures structure the relationships between decision-makers and legally affected persons and citizens. The extent to which they do depends on the breadth of access rights. The rationale of access rights also varies. Access rights may be constructed essentially with a view to ensuring compliance with law by giving access to holders of legally protected interests in a way that both allows them to protect those interests and collaborate with the decision-maker by providing information and views to which the administration would possibly not have had access otherwise. But they may also be designed in a way that would ensure that any citizen who wishes to participate has a voice in a given decision-making procedure and has equal opportunities of influencing outcomes.[3]

These two ways of conceiving access rights – i.e. informed by a rule of law rationale, or by a democratic rationale – are different but intimately related, in particular when it comes to procedures leading to the adoption of administrative rules. If one stresses the procedural protection of rights and legally protected interests, one ought to construct access rights in the light of legal administrative relationships, i.e. the legal bonds that, during a given decision-making procedure and following the adoption of the act, link the several legal spheres in which rights, privileges, duties and charges emerge as a result of the outcome of

[1] As indicated in the footnotes below, this text is based on ideas developed in previous writings of the author.

[2] See, further, E. Schmidt-Assmann (2008), "Pluralidade de Estruturas y Funciones de Los Procedimientos Administrativos en el Derecho Alemán, Europeo e Internacional", in J. Barnes (ed), *La Transformación del Procedimiento Administrativo*, Sevilla: Global Law Press, pp. 75-139, at pp. 76-77.

[3] J. Mendes (2011) "Participation and the role of law after Lisbon: a legal view on Article 11 TEU", *Common Market Law Review*, Vol. 48. No. 6, pp. 1849-1878, at p. 1862. A third rationale of participation, focused on the benefits that participation may bring to policy outcomes as well as to the acceptance and compliance with the decisions adopted, arguably does not require the enshrinement of procedural rights.

the procedure.[4] If however access rights have a "democratic inspiration",[5] they should be granted to the public without further specification, accompanied by procedural guarantees that ensure equal treatment irrespective of the interests they voice. In this case, the main purpose of access rights is to ensure a wide debate on solutions proposed by administrative decision-makers, rather than to enable the procedural protection of rights and legally protected interests. Now, even in theory there may only be a thin line diving these two rationales of access rights. In fact, the protection of one's legal sphere is an important dimension of individual freedom. In this light, access rights that ensure the procedural protection of substantive rights and legally protected interests of those concerned by administrative action is also a requirement of democracy. Access rights enable the protection of rights and legally protected interests that could be neglected in the political process.[6] But even if the two rationales partially overlap, the way procedural rules are designed would in principle still differ. Those that predominantly intend to ensure the procedural protection of affected persons will limit access to holders of rights and legally protected interests. Ancillary procedural guarantees – such as the duty to give reasons – should be constructed in a way that also pays heed to those legally affected interests.[7] On the contrary, as already pointed out, those that predominantly intend to ensure an exchange of views ought to involve the citizen, or the public at large, rather than the legally interested person and, crucially, ensure equal opportunities of influencing the outcome. In particular, due consideration ought to be given to those who disagree with the preferred orientation of the decision-maker and to those who, according to the latter's preferences, would be excluded from the procedure.[8] Beyond theoretical niceties, however, even in the cases in which the procedural rules are clearly designed in one or the other way, those seeking access to procedural rules will most likely use them for their own benefit. Decision-makers and Courts may – or may not – find enough reasons to prevent the use of procedural rules with a purpose different from the one

[4] In more detail, see J. Mendes (2011), *Participation in EU Rule-Making. A Rights-based Approach*, Oxford: Oxford University Press, Chapter 2, Section 2.5.

[5] J. Rivero (1965) "À propos des métamorphoses de l'administration d'aujourd'hui: démocratie et administration », in *Mélanges offerts à René Savatier*, Paris, Dalloz, pp. 821-833, at p. 822, 828.

[6] Mendes, "Participation and the role of law after Lisbon"*, cit.*, p. 1864. See further J. R. Pennock (1979), *Democratic Political Theory* (Princeton University Press), pp. 441-49.

[7] One could read in this light the requirement according to which the statement of reasons should also "enable the persons concerned to ascertain the reasons" for the measure adopted (a requirement that is intrinsically linked with facilitating judicial review – e.g. Judgment in *Acino v Commission*, Case C-269/13 P**,** EU:C:2014:255, para. 120).

[8] Mendes, "Participation and the role of law after Lisbon"*, cit.*, p. 1862.

that grounded its establishment. In the EU, the possibility to resort to the regulation on access to documents to circumvent access restrictions established by sector rules on access to the file by third parties in competition cases illustrates how the boundaries between different rationales may blur.[9] Rule of law and democratic rationales of access rights – already partially overlapping – may blend even more in practice.

2. Administrative democracy?

It may be tempting to construct a claim of administrative democracy on the basis of access rights to the administrative procedure. In fact, administrative democracy has been mostly understood to rely on mechanisms and procedures that ensure a link between citizens and the administration beyond those that representative democracy allows for.[10] Access rights would be necessary to uphold the idea of democracy in the development of the administrative function for two main reasons. First, in the realm of administration, "the link between the original holder of [democratic] power and [the person] that in fact exercises this power is so distant that it becomes wholly abstract".[11] Secondly, the distance between the origin of public power and its purpose allows a great variety of modalities that serve the purpose for which the administrative power was attributed.[12] Access rights would allow citizens and their representative associations to engage in public discussion and debates with public entities on the concrete direction and in the implementation of public policies.[13] The argument would be particularly fitting in those sites of power where representative democracy is weaker (the EU) or inexistent (international organizations).

The risks of too quickly reading "democracy" in access rights are however too important to be overlooked. Access rights are likely to be used by powerful corporate actors to influence decision-making for their own benefit and in detriment of weaker legally protected interests.

---

[9] The relationship between access to file, as provided in sector specific EU law, on the one hand, and Regulation 1049/2011, on the other, has been widely debated following the judgment of the General Court in *Verein für Konsumenteninformation (*Judgment of 13 April 2005, *Verein für Konsumenteninformation v Commission,* Case T-2/03, EU:T:2005:125). See, e.g., P. Leino (2011), "Just a little sunshine in the rain: The 2010 case law of the Court of Justice on access to documents", *Common Market Law Review*, pp. 1241-1246. The subsequent case law of the ECJ has curbed the resort to the access to documents regulation in these cases: see Judgment in *Commission* v. *Agrofert,* Case C-477/10 P, EU:C:2012:394, para 57-64, and Judgment in *Commission* v. *Éditions Odile Jacob*, C-404/10 P, EU:C:2013:808,106-198, and 121-122.

[10] J.-B. Auby (2011), "Rémarques préliminaires sur la démocratie administrative" in *Revue française d'administration publique*, n° 137-138, pp. 13-19, at p. 16.

[11] Rivero, "A propos des métamorphoses de l'administration d'aujourd'hui…", *cit.*, p. 822, 828.

[12] Rivero, "A propos des métamorphoses de l'administration d'aujourd'hui…", *cit.*, p. 829.

[13] Ibidem.

Even if that were not the case, it is most probably "representative organizations" – rather than citizens – that will access procedures; or, at least, these are the ones that are most likely to influence the outcomes, assuming that their capacity to engage in the debate that the decision-maker may wish to open is greater than that of the average citizen (think of information resources). At the very least, if there are no criteria by which one can establish the representative character of these organizations, the democratic value of their participation in the administrative procedure can hardly be defended.[14] Such criteria are a *conditio sine qua non* to give a democratic meaning to the input of interest representatives in decision-making procedures. Without them, and without further requirements of equality of access and treatment, the democratic potential of participation of representative organizations can and should be fundamentally contested.[15]

Access to decision-making procedures outside the mechanisms of representative democracy can only entail a promise of democratic legitimation if upheld by procedural rules that ensure minimum conditions thereof.[16] Procedural rules are needed to establish the necessary (but not sufficient) conditions that make democratic participation possible. The concrete way in which access rights are used may depend on how stringent the procedural rules are designed and, especially, on how decision-makers effectively apply them, as well as on the administrative and possibly also judicial mechanisms of overseeing their application.

We can now return to the point made above. The distance between the original holders of democratic legitimacy and holders of administrative power does require looking for complementary sources of democratic input beyond those offered by institutional mechanisms of representative democracy. Access to decision-making procedures can be one of those sources, if duly channelled by appropriate procedural rules that ensure the minimum conditions thereof. As a *complementary* possible source of legitimacy, access rights would contribute to making more effective "the primary representative and democratic

[14] Skeptical about the democratic role of organised interests in the EU, see B. Kohler-Koch (2012), "Post-Maastricht Civil Society and Participatory Democracy", *Journal of European Integration*, Vol. 34, No 7, pp. 809-24, at pp. 813-4.

[15] See, e.g P. Allott (2002) "European Governance and the Re-branding of Democracy", *European Law Review*, Vol. 27, No. 1, pp. 60-71, according to whom "governance by governments in collusion with something which they call civil society is a death-wish for democracy" (p. 68).

[16] See further, Mendes "Participation and the role of law after Lisbon", *cit.*.

connection of legitimation".[17] These links will be different in different constitutional settings. So also the space given to complementary sources of democracy should vary.

3. The European Union

3.1. Between normative promise and practical neglect

The provisions of the Lisbon Treaty that concretise democracy as one of the founding principles of the Union purport the creation of opportunities of participation – by "citizens and representative associations" (Article 11(1) TEU), by "civil society" (Article 11(2) TEU), by "parties concerned" (Article 11(3) TEU) – in addition to the representative links established between the citizens and the Union via the European Parliament and between the Member States and the Union via the European Council and the Council (Article 10(2) TEU). Irrespective of the concrete meaning one may attribute to the apparently incoherent provisions of Article 11(1) to (3) TEU, one may argue that, from a formal perspective, the democratic legitimacy of the legal acts of the Union cannot anymore rely only on a combination of the different institutions representing the "Union interest", the Member States and the citizens. At the same time, Article 10 TEU stresses the fundamental principle that the Court had stated in *Atlanta* in the mid-1990s, according to which "people should take part in the exercise of power through the intermediary of a representative assembly".[18] What sense should then one make of Article 11 TEU?

As argued elsewhere, Article 11 TEU enshrines participation as a constitutionally imposed duty and it defines normative standards that ought to shape participation procedures; but it also detaches participation from the predominant meaning that has prevailed in institutional practices.[19] Unless Article 11 is to remain effectively devoid of meaning, its provisions require a different approach to the institutional practices of participatory governance that have prevailed hitherto.[20] Participatory democracy is a now intended to be a complementary source of the Union democracy. As such, participation can no longer merely be an

[17] As stressed by the German Constitutional Court in its ruling on the Lisbon Treaty (BVerfG, 2 BvE 2/08, 30.6.2009), para 297. This Court's analysis was set against the background of its criticisms regarding the possibilities in the EU of representative democracy, the core content of which are "free and equal elections" (para. 270-1). The ruling has been criticized for its narrow, state-like views on democracy in the EU (see, e.g. D. Thym (2009) "In the Name of Sovereign Statehood: A Critical Introduction to the *Lisbon* Judgment of the German Constitutional Court', *Common Market Law Review*, Vol. 46, pp. 1795-1822, at pp. 1812ff).

[18] Judgment of 11 December 1996, *Atlanta and others v Council and Commission,* T-521/93, EU:T:1996:184, para 71.

[19] See, in detail, Mendes, "Participation and the role of law after Lisbon"*, cit.*

[20] The analysis in Mendes, "Participation and the role of law after Lisbon"*, cit.*, remains up to date.

instrument of policy delivery. Nevertheless, the conceptual link between Articles 10 and 11 TEU is unclear, as it remains largely unclear what complementarity may mean or require beyond the minimal observation that representative democracy does not exhaust the sources of Union democracy. Access rights – with the caveats indicated above – ought at least be considered as one way of concretising the indications of Article 11 TEU, in particular in the areas where the representative institutions indicated in Article 10 TEU are deprived of effective decision-making power, or have only limited formal possibilities of influencing the content of decisions. The same reasons that would advocate administrative democracy apply here, but also do the same risks and limitations. In view of Article 11, the principle according to which the exercise of power should be exercised at the EU level through the intermediary of a representative assembly is decidedly misplaced to deny participation rights in the adoption of non-legislative acts.[21] Participation could become a source of democratic legitimacy in a transnational polity that is undoubtedly made of States but whose decisions directly affects their nationals, where there are structural and functional interdependencies between the different levels of decision-making that mechanisms of representative democracy have failed to capture. Yet, *how* access rights can effectively acquire such a role is far from obvious. It will crucially depend on how they are designed and implemented.

We are presently faced with a situation in which the status quo is no longer normatively sustainable, even if only assessed in legal-constitutional terms in view of the Lisbon Treaty provisions on democracy; but where the concrete implications of these provisions remain largely ignored, both in the academic debate and in the institutional practice. The Commission's position in this respect is paradigmatic. When asked by a member of the European Parliament "How does the Commission intend to flesh out Article 11 of the Treaty on European Union, which makes provisions for participative democracy? What measures are being prepared in connection with this Article?",[22] Mr Barroso replied in the name of the Commission: "L'article 11 prévoit les principes à mettre en œuvre par les institutions en ce qui concerne la démocratie participative. *Pour sa part la Commission a très largement anticipé dans sa pratique* (....). L'initiative citoyenne, qui est *le seul instrument législatif prévu*

[21] As the Court held in *Atlanta*, cit..

[22] Question for written answer to the Commission, Gilles Pargneaux (S&D), E-005223/2012, 23 May 2012 (available at http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2012-005223&format=XML&language=EN).

par l'article 11 TFUE, est opérationelle depuis avril 2012."[23] The Commission thereby has simply chosen to relegate the provisions of Article 11 TEU to mere rhetorical proclamation. The Commission has indeed set up mechanisms of participation way in advance of the Lisbon Treaty, but to read these through the lens of democracy dangerously dresses practices directed a policy delivery with a veneer of legitimacy they are deprived of. They lack the minimum requirements of voice and equal treatment indicated above.

3.2. Administrative procedure and complementarity: a minimal proposal

Procedural rules that would ensure those requirements could be a means to ensure that the Union's institutions, bodies, offices and agencies conduct their work in a way that is compatible with Article 11 TEU. Thus far, the institutions have largely ignored the external dimension of procedures that would have allowed them to structure their relationships with citizens and representative associations in compliance with the normative requirements of Article 11 TEU, both those explicitly determined (*public* exchange of views, *open and transparent* dialogue, *broad* consultations) and those that are inherent in the normative shift that Article 11 TEU purports.[24]

One important instance that illustrates where the EU institutions stand in this matter is the overhaul of the procedural legal regime of implementing acts and delegated acts, in the light of Articles 290 and 291 TFEU.[25] The procedures leading to the adoption of these acts have been approached in EU law and practice largely as a matter of the institutions, of the way they relate to each other and to the Member States. When formalised, they are predominantly directed at combining the intervention of the EU institutions, agencies, and committees, in a way that is, first, compatible with the Treaty; secondly, and crucially, that is consonant with the interpretation that each institution has of their institutional prerogatives under the Treaty; and, thirdly, that ensures the involvement of those who will be determinant in the implementation of the rules adopted (chiefly, the Member States). The Commission guidelines for the adoption of delegated acts does refer to the consultation of

[23] Réponse donnée par M. Barroso au nom de la Commission, E-005223/2012, 6 July 2012 (available at http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-005223&language=EN), emphasis added. On the Commission's practices of consultation, see the observations in Mendes "Participation in rulemaking: the European Union" in this volume.

[24] See Mendes, "Participation and the role of law after Lisbon"*, cit.*.

[25] The argument is developed in J. Mendes, "The making of delegated and implementing acts: legitimacy beyond inter-institutional balances" in C.F. Bergstrom and D. Ritleng (eds.) *Comitology and Commission Rule-making after Lisbon: The New Chapter*, forthcoming (OUP). It is only summarised here.

"stakeholders"; yet, not only the terms of consultation are fully determined by the Commission in a way that does not ensure a minimum threshold that could support a democratic meaning to consultation procedures, but also the Commission's main concern when addressing such consultations is to protect its institutional prerogatives vis-à-vis the Council.[26] In what concerns implementing acts, the Standard Rules of Procedure for Comitology Committees envisage that the committee's chair (a Commission representative) "*may* decide to invite representatives of other third parties or other experts" as observers who cannot be present nor participate in the voting of the committee; a simply majority of the component members of the committee may object.[27] Hence, the very possibility of participation and, crucially, the choice on who to involve are fully dependent on the Commission representative and on the members of the committee (Member State representatives) involved in the procedure. The relatively exclusive way in which participation would occur, if at all – attendance of committee meetings – indicates that opening up decision-making to external debate and scrutiny was unlikely the reason behind this provision. An external dimension of the procedures that would provide access to citizens or persons affected, in a way that would be informed by the provisions of Article 11 TEU, is therefore fully absent.

Nevertheless, one thing is to verify that the institutions continue to ignore the normative shift that Article 11 TEU postulates, quite another is to indicate how procedural rules could be a complementary source of democratic legitimacy of the legal acts of the Union – or, specifically, in the example given, of delegated and implementing acts. As defended above, to fulfill this purpose, procedural rules that would support participation would at least need to ensure voice and equal treatment. However, these requirements merely define the minimum threshold beyond which access to decision-making procedures can acquire a democratic meaning. Designing concrete rules implies struggling with complex trade-offs and deciding on costs and imbalances.[28] These rules would typically need to cover three aspects: notice of the act that opens the procedure to external scrutiny, opportunity to participation within an

[26] Commission, Implementation of the Treaty of Lisbon – Delegated Acts – Guidelines for the Services of the Commission, para 96; Council of the European Union – General Secretariat, Initiative to complement the Common Understanding on delegated acts as regards the consultation of experts, Doc. 6774/14 JUR 99-DELACT33-INST 121-PE 102, Brussels 21 February 2014, para. 4.

[27] Article 7(3) and (4) of the Standard Rules of Procedure for Committees (OJ C 206, 12/07/2011, p. 11–13), emphasis added.

[28] For one proposal intended to start the debate, see the ReNEUAL Model Rules on EU Administrative Procedure, Book II (Rule-making), available at www.reneual.eu.

adequate timeframe, and justification of the final choices in view of the interests voiced. All these requirements involve costs, but the latter is perhaps the most problematic: the decision-maker ought to explain whether and how it took into account the comments it received. It may disregard some or many as irrelevant, but according to which criteria? One answer may be: those criteria defined in the law that the decision-maker is intended to implement. Administrative decisions, whether of general or individual scope, ought to pursue the range of public interests that the 'parent' act defined as legally protected. In this light, the administrative decision-maker should assess the pertinence of the comments received via a participatory procedure on the basis of the extent to which they contribute to a better representation and composition of the interests the legislator set as goals in the given instance. Administrative procedures would thus link the concrete regulatory choices of administrators back to the legal framework under which they act. Participatory procedures would be a means of ensuring that the decision-maker has a proper representation of the legally protected interests affected by its decisions.[29]

From this perspective, participation of persons concerned or of the public would enhance representative democracy insofar as it frames the choices of the Commission (or of the Council, in the exceptional cases of Article 291 TFEU) according to the law. This is a minimal way of understanding complementarity. One would object that it amounts to nothing more than ensuring the legality of administrative action. While legality is a necessary condition of democratic administrative action,[30] there are possibly more suitable means of ensuring it. Yet, legality means here more than simple respect or faithful implementation of the meaning of law; it means *discovery of the meaning* of the law that binds the administration via procedures that, if ensuring equality of access and treatment of the participants, have at least a "democratic inspiration" by which citizens and persons legally concerned are involved not as subjects of a power exercised "in secret", or as holders of resources that are valued by the administration, but as persons that are given a voice in the administration of public affairs.[31]

[29] Also in Mendes, "The making of delegated and implementing acts", *cit.*.
[30] Rivero, "A propos des métamorphoses de l'administration d'aujourd'hui…", *cit.*, p. 825.
[31] Rivero, "A propos des métamorphoses de l'administration d'aujourd'hui…", *cit.*, p. 822.

In the case of delegated acts, in addition, participatory procedures could qualify the general claim that procedures support legislative control.[32] One could envisage a situation in which the information gathered by participants could be used by the Parliament to strengthen its control over the Commission's choices, thus possibly balancing the current weaknesses of the existing controls based on Article 290 TFEU.[33] More generally, participation in the making of delegated and implementing acts would allow the legislator to follow the process of making of rules and possibly influence their development.[34] It would enhance the possibility of public scrutiny over these decision-making procedures.

[32] McCubbins, Noll and Weingast (1987), "Administrative procedures as instruments of political control", *Journal of Law, Economics and Organization,* Vol. 3 No. 2, and Schmidt-Assmann, *Teoria General Del Derecho Administrativo como Sistema*, Marcial Pons, Madrid, 2003, pp. 27ff, and 359ff.

[33] This point is also made in Mendes, "The making of delegated and implementing acts", *cit.*, where those weaknesses are pointed out.

[34] S. Rose-Ackerman, S. Egidy, J. Fowkes, "The Political Economy of the Law of Lawmaking: The United States in Comparative Perspective", Paper Prepared for the *Conference on Comparative Administrative Law and Regulation*, George Washington University Law School, January 31-February 1, 2014, Washington DC**,** p. 7, referring to procedures in general.