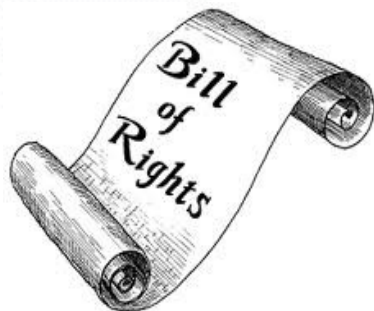




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## Europeanization of Legal Protection in (Individual) Administrative Matters

Conference

**Measures of Protection of Individual Rights in Public  
Administration, Their System and Effectiveness**

28–29 April 2016, Brno, Czech Republik



MASARYK UNIVERSITY  
FACULTY OF LAW

European Association  
for Public Administration  
Accreditation

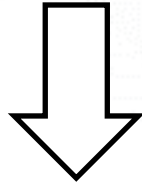
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# Basic notions on the subject



## A. **Administrative** matters & administrative law

- Administrative **procedures**



- **Legal protection** in administrative matters



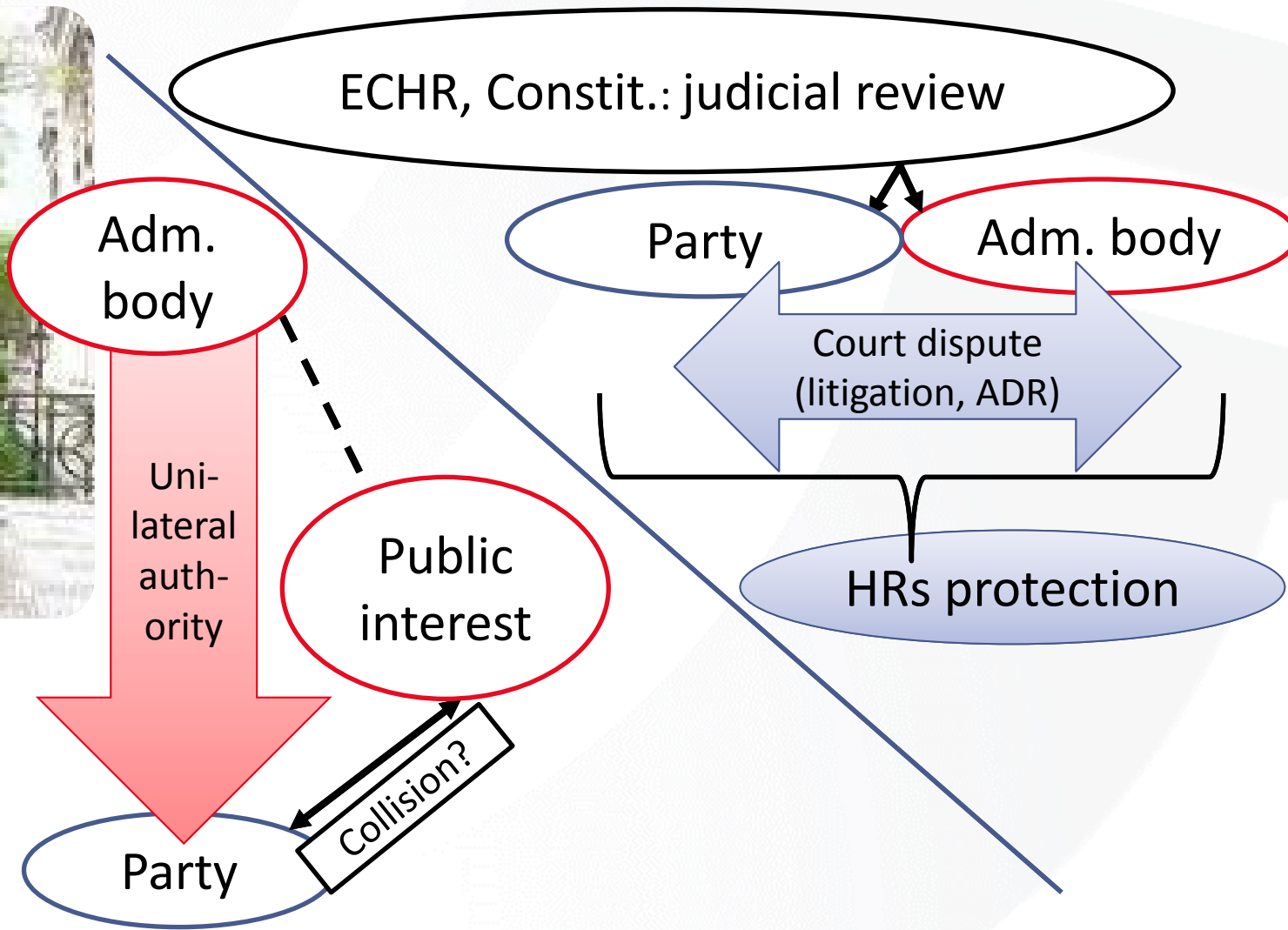
## B. **Europeanization**

# A.I Administrative matters from European perspective

As highly acknowledged by theory, regulation and case law =

1. **Administrative law: public** prerogatives vs. individual subjects, exercising public powers/authority – **regardless of**
  - ✓ **status** of PA or other branch of power or private body; or
  - supra- or sub- or a national **level of power?**
2. Interdependence of administrative **procedures & adm. justice** under a principle of the **division of powers**

# A.II Adm. matters as a conflict of public v. private interests



or

AP as a tool for public policies' implementation

# A.III Administrative matters from European perspective

As rather **divergent & controversial** by theory, regulation and case law

## 3. **Scope** of administrative procedures:

- In **individual**/single-case & **authoritative** decision making & ?
- In adm. decision making or also (*mutatis mutandis*) in adm. sanctions, civil service, etc.

## 4. **Aims** of administrative procedures: role of prevailing tradition ?





## B.I Europeanization is:

☞ *„a process involving, a) construction, b) diffusion and c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things' and shared beliefs and norms which are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic (national and subnational) discourse, political structures and public choices.“ (Cini, EU Politics, Oxford, 2007)*

- **Process** – but also state-of-the-art through policies & norms
- **Top down** – but also bottom up convergences
- **Beliefs driven** – but also formal norms and institutions
- **EU** – but also broader European values, practices, rules, etc.

# B.II Europeanization in national & EU adm. matters

## Legacy / legal traditions:

- administration-centered (F)
- individual-c. (UK)
- **legislator-c. *Rechtstaat*** (D/A, CEE)
- ombudsman-c. (Scandinavia)

Broader **changes in society & PA**: complexity, globalization, privatization, delegations ...

**PA reforms/strategies:**  
national & EU driven

**1. Council of Europe**  
**Europeanization of national law & EU adm. law**

**2. EU**



*ECHR & CoE Recommendations*

*Case law of ECtHR & CJEU*

*Treaty of Lisbon  
(Art. 298, 51, 197, 352...)*

*Charter on fundamental rights  
(2010, Art. 41, 42, 43, 47...)*

*EU Ombudsman  
Code (2001-)*

*EP Resolution on EU  
APA (2013)/ReNEUAL*

**Good Administration**  
(open, efficient, independent & accountable ...)

# **B.III ECHR Art. 6 & 13 and EU Charter Art. 41 & 47**

☞ **Art. 6 Right to a fair trial**: 1- In the determination of his civil/ crimin. rights ..., everyone is entitled to a fair and public hearing within a **reasonable time** by an **independent & impartial tribunal established by law**. Judgment...pronounced **publicly**...

☞ **Art. 13 Right to an effective remedy**: Everyone whose rights and freedoms as set forth in ECHR are violated shall have an **effective remedy before a national authority**...violation has been committed by persons acting in an official capacity...

Remedy = administrative & judicial!

☞ **Art. 47 Right to eff. remedy**: Everyone whose rights and freedoms guaranteed by the law of the EU are violated has the right to an **effective remedy** before a **tribunal** ... with the conditions...

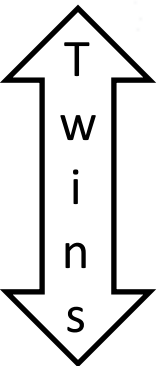
☞ **Art. 41 Right to GA**: 1. Every person has the right ... affairs handled **impartially, fairly, within a reasonable time**... 2. Includes: (a) **to be heard**...(b) **access to file**, (c) **give reasons**. 3. **damage** 4. **languages**...



# Key impacts of Europeanization in adm. matters and legal protection: EU & national levels

1. Redefined **ratio (aims)** of administrative procedures
2. Broadened **scope** of administrative procedures
3. **Codification** and its **modernization** of (general) adm. procedure = **Administrative Procedure Act (APA)**; with
  - **Holistic** approach = all adm. activities, acts, fields ...
  - **Generalization** = principles!;
  - **Simplification** = removal of administrative barriers.
4. Interconnectivity between **adm. procedures & justice**  
& ... **non legal impacts** (e.g. on organization of PA, IT), etc.

# 1. Ratio of CoE/EU driven administrative procedures



- **Human rights' protection = AP's value *per se***
- **Public policy/interest's effective implementation = AP as a mean for substantive (laws) goals**



Traditional

Administrative law in terms of „**Good Administration**“:

- 1. prevents from arbitrary** public authority & protects HR
- 2. guarantees authority** to implement **public interest**

& new

- 3. Dialogue, economic progress ... = service-mindedness**
- 4. European standardization & cooperation**



## 2.1 Scope of CoE/EU driven administrative procedures

- ✓ **Individual/single case & authoritative** decision making & ?
- **? General** (rule making) administrative decision making
- **? Contractual** administrative relations/acts

### ➤ ReNEUAL Role Model Rules 2014 -

Book	<a href="http://www.reneual.eu/">Http://www.reneual.eu/</a>	No./Art
I	General Provisions	4
II	<b>Administrative Rule-Making</b>	6
III	<b>Single Case Decision-Making</b>	36
IV	<b>Contracts</b>	39
V+VI	Mutual Assistance + Adm. Info Management	6+41

## 2.II Generations of adm. procedures (Barnes, 2008-)

Type of process	Ground	Method of problem-solving/competences
<b>Ind. authoritative decision-making</b>	Division of powers since 19th century	<u>Judicial/Legal</u> knowledge
Executive-adm. implementationa l decision-making	Co.decision-making at national and EU levels after WW2	<u>Normative / Legal</u> knowledge, organizational, managerial, etc. skills
<b>Public policy cycle, societal dialogue</b>	<u>Coordination of interests</u> at policies' <u>design &amp; implementation</u>	<u>Administrative</u> Altruism, (human) dialogue, multitasking, ADR, e-communication...



**Good Administration = participatory + efficient**



## 2.III Scope of CoE/EU driven administrative procedures

✓ **Administrative & authoritative** decision making – BUT?

**Administrative v. civil** law:

- ? Real acts & services of general interest?
- Concessions ...
- ? Civil service, etc.

**Administrative v. criminal** law:

- ? Adm. sanctions
- ? Misdemeanors
- ? Taxes
- ? Inspections ...

ECtHR case law does NOT follow the national regulation!





## 3.1 EU driven changes in codification of APs

1. Strive for a **codification** in all countries & EU
2. Of **general** AP = **APA/GAPA/Code**:



- **National** level & **EU APA** over EU institutions & spill-over effect
- Strive for **effective!!! realization of legal interests = ASAP** (legal certainty, proportionality, transparency, etc. = simplified & amicable proceedings)
- *Lex generalis v. leges speciales?* As little specifics as possible = de minimis rule & equal protection of rights, joint **fundamental principles** over detailed regulation

## 3.II EU driven changes - pro & contra unified (general) codification

- ✔ **Pro GAPA:** clarity/certainty; equality; coherence; PA's & sector specific antifragmentation ...
- ✔ **Contra:** necessity for flexibility according to the subject related procedures; differentiation of procedures according to its type (e.g. *ex officio* supervision usually requires stricter regulation as procedures initiated by request); most often special rules on appeal & other remedies!
- ✓ **Balance = complementary** regulation with admissible yet limited specifics = **proportionality**



# 3.III EU codification – EU law & CJEU case law

 EU law, e.g. **Directive 2006/123/EC** on services in the internal market

 Case law:

▪ **General:** C-453/00 *Kühne & Heitz* (2004)...

▪ **On legal remedies in AP:**

i. *C-76 Hoffmann-La Roche v. Commission* (79) & *C-222/84 Johnston v. Chief Constable of the Royal Ulster Constabulary* (86) = **effective!**

ii. *C-234/04 Kapferer* (16.3.06) = no EU interference national

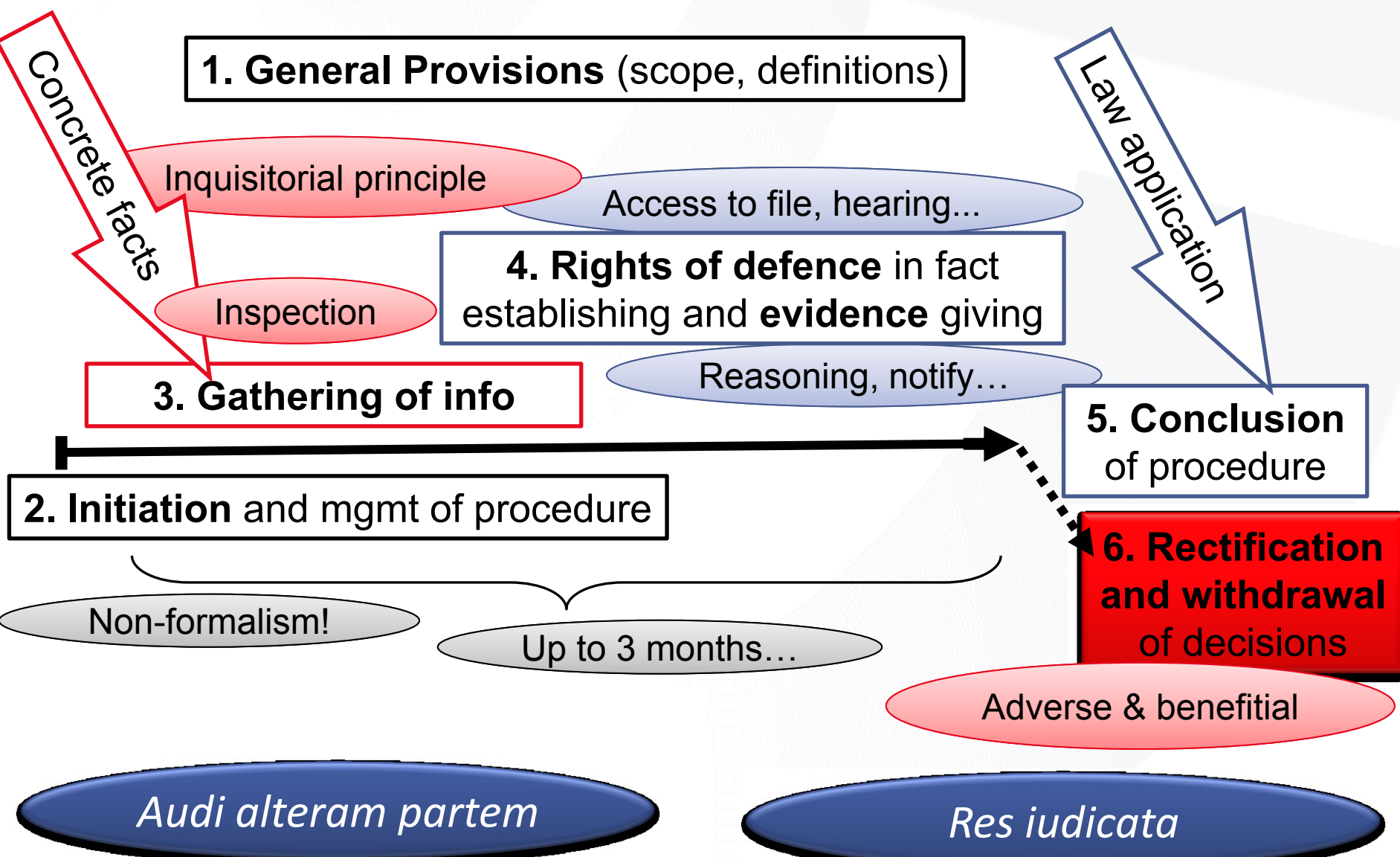
iii. *C-199/05 Lucchini* (18.7.07) = primacy of EU over national EU!

iv. *C-507/08 EC v. Slovakia* (22.12.10) = EU primacy only if before finality and if equivalence & effectiveness affected EU conditionally

v. *C-603/10 Pelati v. Slovenia* (18.10.12) = as long as EU effectively ...

**EU equivalence & effectiveness**  
principles & **national autonomy**

# 3.IV ReNEUAL Model Rules: Single-case Decision Making



# 3.V Fundamental principles in European adm. law

(Galetta, Hofmann, Mir, Ziller, 2015)

1	<b>Rule of law</b> , clarity, legality, l.certinty, legitimate expectations
2	Equal treatment and non-discrimination
3	Public interest protection
4	Proportionality
5	<b>Good administration</b> , duty of care
6	<b>Impartiality</b> , fairness
7	<b>Participative democracy</b> , fair <b>hearing</b>
8	<b>Access to the file, information, transparency</b>
9	Data quality & protection
10	<b>Reason</b> giving
11	<b>Timeliness</b>
12	<b>Effective remedy</b>

The right is enshrined in Art. 47 of the Charter, in Art. 6 & 13 ECHR and recognised as a general principle of EU law is a key component to a legal system under the **rule of law**. According to this principle, neither the EU nor MS can render virtually impossible or excessively difficult the exercise of rights conferred by EU law, are obliged to guarantee **real & effective judicial protection** (C14/83) and are barred from applying any rule or applying any procedure which might prevent, even temporarily, **EU rules from having full force & effect** (C-213/89).



# 3.VI Fundamental principles EP Resolution on EU APA 2013

## 3. Recommendation (on the **nine general principles**)

1. Lawfulness : adm. act in accordance with the law... never arbitrary... by purposes... not ...by the public interest.
2. Non-discrimination and equal treatment
3. Proportionality
4. Impartiality
5. Consistency and legitimate expectations
6. Respect for privacy
7. Fairness
8. Transparency
9. Efficiency and service



4. Recommendation (on **ten rules**): initiation of procedure, acknowl. of receipt, impartiality, be heard, access to file, time-limits, **form** of decisions, reasons, **notification**, **indication of remedies**

5. Recommendation (on the **review and correction of own decisions**)

## 3.VII EU APA draft (2015-6) on remedies



**Art. 20 Remedies** 1. Administrative acts shall clearly state that an **administrative review is possible**. 2. Parties shall have the right to request an administrative review against administrative acts **adversely** affecting their rights and interests. Requests for administrative reviews shall be submitted to the **hierarchical superior** authority and, where that is not possible, to the same authority which adopted the administrative act. 3. Administrative acts shall describe the procedure to be followed for the submission of a request for administrative review, as well as the **name and office address** of the competent authority or the responsible member of staff with whom the request for review has to be submitted. The act shall also indicate the **time-limit** for submitting such request. 4. Administrative acts shall clearly refer, where Union law so provides, to the possibility of bringing **judicial proceedings** or lodging a complaint with the European **Ombudsman**.

# 3.VIII EU APA draft (2015-6) on remedies

## Art. 23 Rectification/withdrawal of adm.acts/**adversely** affect party

1. The competent authority shall rectify or withdraw, on its **own initiative or following a request** by the party concerned,
  - an **unlawful** adm. act which adversely affects a party = **retroactive** effect;
  - a **lawful** adm. act which adversely affects a party **if** the reasons that lead to the decision no longer exist; = **not have retroactive** effect.
3. Rectification or withdrawal shall take effect upon **notification** to the party.
4. Where an administrative act adversely affects a party and at the same time is beneficial to other parties, an assessment of the possible impact ...

## Art. 24 Rectification or withdrawal/**beneficial** to a party

- The competent authority shall, on its **own initiative or following a request** by **another** party, rectify or withdraw an **unlawful** adm. act which is beneficial to a party.
2. Due account shall be taken of the **consequences** of the rectification or withdrawal on parties who legitimately could expect the act to be lawful... 3. **retroactive effect only if done within a reasonable time. ...**
- **Lawful** adm. act which is beneficial to a party ... **if** the reasons that lead to the specific act no longer exist. Due account shall be taken of **legitimate expectations of other parties.**

## 3.IX Sigma Principles of PA (2014) - Accountability

Key requirement: Proper mechanisms are in place to ensure accountability of state adm. bodies, including liability and transparency.

- Principle 1: The overall **organisation** of central government is rational, follows adequate policies and regulations and provides for appropriate **internal, political, judicial ... accountability**.
- P2: The right to **access public information** is enacted in legislation and consistently applied in practice.
- P3: Functioning mechanisms are in place to protect both the **rights of the individual to good administration and the public interest**.
- P4: **Fair treatment in administrative disputes** is guaranteed by internal administrative appeals and judicial reviews.
- P5: The public authorities assume liability in cases of wrongdoing and guarantee redress and/or adequate **compensation**.



# 3.X Key novelties in new or modernized APAs

- ☞ Converging ratio: public interest & citizens'/economy leg. interests
- ☞ Scope: also general, in services (real acts, SGI) & adm. contracts
- ☞ Rights of defence, **participation & transparency**
- ☞ Proportionality, *ex officio*, enforcement
- ☞ E-government, one stop shops ...
- ☞ Time limits
- ☞ ADR (mediation, etc.)
- ☞ **Reduction of AP remedies** /reason but *pro actione* & adm. justice

Principles

Simplify/

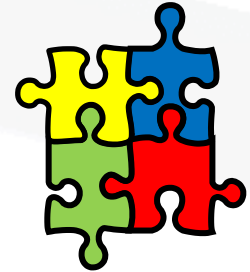
enforce


certainty &

compliance



# 4.1 Interdependence of adm. procedures & justice



- **Redefinition of procedure** due to its aims & scope  
     **complementary redefinition of judicial review**
- Or from contrary aspect:

**No (more) a role of a court-like system by A/PA = PA can and should concentrate on problem-solving & Good Adm. with individuals**

## 4.II Interdependence of adm. procedures & justice

- Interdependence in terms of **legal protection**:
  1. If AP mainly for win-win public & ind. interests' realization = judicial review takes over **more subjective protection** of rights
  2. Less remedies, grounds, timing etc. for their use in AP = **broader scope** by courts: **two-tiered, adversary & full/merit** jurisdiction... (cassation only for adm. silence or discretionary powers)
  3. If AP scope broadened = judicial protection of **all administrative / likewise acts** = incl. general, sanctions, etc. **by Adm. Court**



## 4.III Impediments to reduction of AP remedies & broadened adm. justice

! Beware of not overburdening courts due to

- Division of powers - adm. matters are executive!
- Assistance & reasonable timing - effective access to justice?



# Summary on Europeanization in adm.-legal protection

Based on strive/needs for:

- Legal certainty & other CoE and **European AL principles**
- **Eff. & equivalence of EU law**
- More **subjective** approach; APA as a tool for indiv. rights; **enforceability ASAP**
- Substantive v. **procedural** law
- Issues of **autonomy**: EU v. MS & state v. local entities
- Harmonization and **anti-fragmentation** ...

There are significant **impacts** on legal protection in AP/A:

- **Less remedies**, less grounds/ applicants, shorter time in APs ...
- *Materia* of **substantive law**
- No division extra/ordinary; *l.standi* = **a party**, *ex officio* exceptionally!
- **ADR** mechanisms
- Appeal within AP option/excl. but unconditional **judicial protection!**

**Prevailing in legal protection:** less extraord/*ex offio* remedies in AP but mainly adm. appeal, which rarely leads to *abrogatio* of adm. act

# Conclusions and discussion



- ☞ However, **convergence** does not mean **harmonization**, hence = still a lot of room for national values, goals and specifics!
- ☞ On the other hand,
  - One must follow **EU law and ECHR** &
  - Do not be blind for exchange of **good practices**.
- ☞ It is not sufficient to change law but to **assess impacts, train the people and monitor** results (regulatory feed back)
- ☞ Any systemic change needs **systemic approach and time!**

*Kapieren,  
nicht kopieren!*

*Festina lente!*

