File: Oxford Handbook—PDF

CHAPTER 35

A COMPARATIVE APPROACH TO ADMINISTRATIVE ADJUDICATION

Michael Asimow*

ABSTRACT: Administrative schemes of regulation and benefit-distribution give rise to large numbers of individualized disputes between government agencies and private parties. Every country needs a system of administrative adjudication to resolve such disputes accurately, fairly, and efficiently. Generally, all such systems provide for a front line determination, an initial decision, administrative reconsideration, and judicial review. However, the details of the various systems are bewilderingly diverse. This chapter proposes a methodology for classifying such systems. It identifies four key variables: combined function agencies or separate tribunals, adversarial or inquisitorial procedure, closed or open judicial review, and judicial review by generalized or specialized courts. The chapter identifies five models in common use around the world that involve different combinations of these variables. Finally, the chapter discusses the utility of transplants from the adjudicatory system of one country to another.

I. INTRODUCTION

All schemes of government regulation and distribution of benefits generate disputes between the government and private parties. These disputes may concern a rejected application for government benefits, a sanctioning decision such as a civil penalty or revocation of a license, assessment of a tax deficiency, or a

* Visiting Professor of Law, Stanford Law School. Professor of Law Emeritus, UCLA School of Law. Asimow@law.stanford.edu. An earlier and longer version of this chapter was published as 'Five Models of Administrative Adjudication' (2015) 63 AJCL 3. AJCL has given permission for use of portions of that article in this chapter.

regulatory action that compels a private party to take some action or refrain from some action. Administrative law must prescribe a system of adjudication that resolves such disputes in an accurate, fair, and efficient manner.

The term "administrative adjudication" means the entire system for individualized agency decisionmaking arising out of disputes between private parties and government agencies. For this purpose, the term "agency" means a governmental unit (other than a court or a legislature) having delegated power to affect legal rights and obligations (including governmental units with various titles such as ministries and departments).

The adjudicatory process begins with an administrative investigation of a claim or a violation and the agency's preliminary or "front line" determination, continuing through the process of an agency's initial decision, reconsideration of that decision, and concluding with judicial review.[1] The systems in place for resolving such disputes differ sharply around the world and are difficult to compare. This chapter highlights five models in use by various countries that should facilitate such comparisons.

---

[1] In many countries, adjudicatory decisions by government agencies are referred to as "administrative acts" or "decisions" or "unilateral acts." In his magisterial comparative work, Peter Cane makes use of different terminology than the process described here. Cane distinguishes "implementation" (which consists of agency investigation, initial decisions, and agency reconsideration) from adjudication (which consists of tribunal decisions and judicial review). Cane 2016, ch. 9.

The outcome of most administrative disputes is not very important to the government, but every one of them is vitally important to the private party who challenges the government. Probably, the volume of administrative adjudications vastly outnumbers the cases heard in the regular courts. For these reasons, administrative adjudication is deserving of scholarly attention. Comparative law helps scholars and policymakers to better understand their own administrative adjudicatory systems and furnishes them with ideas for transplanted procedures that might improve those systems.

Part II of this chapter describes its methodology. Part III provides a detailed description of the five models as they are employed in a number of countries. Part IV explores the possibility of transplantation and Part V concludes.

II. FOUR PHASES, FOUR VARIABLES, AND FIVE MODELS

Most administrative adjudicatory systems have at least *four phases*.

- Phase zero—the "front line" determination. Most administrative disputes begin with a preliminary investigation. Agency staff determines whether an applicant should receive a benefit or whether a regulated party should be sanctioned. Based on this investigation, the staff denies the requested benefit or recommends imposition of the sanction. That is the front line determination. This phase might be called "phase zero." This chapter has little to say about phase zero, given that it is difficult to research, mostly unconstrained by law, and specific to each administrative scheme. Therefore, when the chapter refers to the three critical phases of administrative dispute adjudication, it excludes phase zero.

- Phase one—the initial decision. The initial decision occurs at the end of the first agency proceeding in which a private party receives an opportunity to challenge the front line determination.
- Phase two—reconsideration. Most administrative schemes provide for administrative reconsideration by higher-level personnel of the same agency that made the initial decision or by a different agency (often referred to as a tribunal).[2]
- Phase 3—judicial review. Most administrative schemes include an opportunity for the private party to seek review in a court of the reconsidered decision.[3]

[2] Some systems provide for two levels of reconsideration, one by officials of the same agency that made the initial decision and a second by an independent tribunal. These multiple reconsideration opportunities might each be counted as a phase.

[3] The term "judicial review" includes "appeal." This chapter does not distinguish judicial review and appeal, but many countries distinguish the two, treating "appeal" as a statutory remedy and "judicial review" as a non-statutory remedy.

There are *four key variables*. Each requires a choice. The first two variables relate to the initial decision and reconsideration phases. The second two relate to the judicial review phase.

- Is the reconsideration function conducted by a separate tribunal? A combined function agency combines the functions of investigation, prosecution, initial decisionmaking and reconsideration. A tribunal is an agency separate from the one that made the initial decision; the tribunal exercises the reconsideration function by conducting a de novo merits review of the dispute. A tribunal does not engage in investigation, prosecution, or initial decisionmaking.
- Is the proceeding adversarial or inquisitorial? Adversarial proceedings resemble US or UK criminal cases. An adversarial hearing is separate from the investigation phase of the case. In adversarial proceedings, the parties (or their lawyers) control the process of proof (such as determining the issues and the identity of witnesses). The decisionmaker is relatively passive and is independent of both prosecution and defense. Inquisitorial proceedings, on the other hand, resemble European or Latin American criminal process, meaning that an investigator assembles a dossier and comes to a

conclusion about guilt or innocence. The initial decision phase is controlled by the investigators rather than by the lawyers. In such systems, it is sometimes difficult to determine where the preliminary investigation and front line decision end and the initial decision begins, since the initial decision phase is intended to provide the private party a written or oral opportunity to change the minds of the investigators. Of course, no system is purely adversarial or inquisitorial. Nevertheless, procedures can be arrayed on this axis and will tend to fall nearer the adversarial or inquisitorial poles.

- Is judicial review open or closed? (See Asimow & Dotan, 2016) In an open system, either party can introduce new evidence in court (in addition to the evidence introduced during earlier stages) or the court can request the parties to produce new evidence. Either party can offer new arguments that were not advanced at earlier stages and government can offer new reasons for its actions. In an open system, the record does not crystallize until the judicial review stage. The court has full power to substitute its own fact findings and decide for itself how discretion should be exercised. In a closed system, the parties cannot introduce new evidence, new reasons, or new arguments. The record crystallizes either at the initial decision or reconsideration stage. In closed review, the court's power is *limited,* meaning that it must accept an agency's findings of fact and exercise of discretion if they are "reasonable."

- Does a reviewing court have generalized jurisdiction or is it a specialized administrative court?

This chapter identifies *five models* of administrative adjudication. The models describe different ways that countries shuffle these four variables. Each of the five models involves a change in a single variable from the previously described models. The adjudicatory systems of the countries or supra-national entities whose systems are discussed in this chapter can be described by reference to one of these five models.

Each country tends to rely *primarily on one of the three critical phases* (that is, initial decision, reconsideration, or judicial review) to achieve a fair and accurate result. Efficiency constraints require countries to make this choice. Countries cannot afford to invest resources equally in two, much less all three, of the phases. The phase that each country chooses as the recipient of most resources is likely to be the phase that private parties regard as providing their best chance to win the case.

At this point, I introduce some methodological reservations. First, the approach taken by this chapter in modeling administrative adjudication systems omits many details. Oversimplification is an inevitable flaw of model-building in social science. It is necessary to abstract highly complex systems in order to contrast them with examples in other countries. I hope that my description of these various adjudicatory systems does not distort their essential nature. Second, for political and historical reasons, the administrative adjudication systems of any given country cannot all be described by a single model. I believe that the model I have selected to describe the system practiced in a particular country is the paradigmatic way that country organizes administrative adjudication, but it is never the only model practiced in that country. I now summarize the five models. Part III discusses them in greater detail.

Model 1—*Adversarial hearing/combined function/closed judicial review/ generalized courts*

Under Model 1, the *same* agency performs the investigation, makes the front line determination, renders the initial decision, and provides reconsideration of that initial decision. I refer to such agencies as *combined function*. The agency makes the initial decision by first conducting an *adversarial* trial presided over by a hearing officer (HO). The HO works for the agency but did not personally participate in the investigation or prosecution of the case that the HO decides (this is referred to as "separation of functions"). The reconsideration phase occurs at a higher level of the same agency that rendered the initial decision. Courts of general jurisdiction provide judicial review of the legality and reasonableness of the agency decision. Judicial review is closed, and the court must accept reasonable agency fact findings and exercises of discretion. This model is typically employed in US federal and state agencies.

Model 2—*Inquisitorial hearing/combined function/closed judicial review/general courts*.

Model 1 is followed except that the initial decision and reconsideration phases are inquisitorial rather than adversarial. The agency does not separate its functions, meaning that the same person or persons exercise investigatory, prosecutorial, and adjudicatory functions. The investigators make the front line determination and then make the initial decision. Reconsideration occurs at a higher level of the same agency that made the initial decision. Judicial review is closed. It takes place in a generalized court that must affirm reasonable agency determinations of fact and discretion. This model is employed in cases decided at the level of the European Union (EU), but not in cases decided by the EU member states.

Model 3—*Tribunals*

Model 3 is like Model 1, except that a separate body known as a tribunal provides reconsideration of the initial decision. (In some countries, the initial decision is reconsidered within the agency that made the initial decision and that reconsidered decision is again reconsidered by a tribunal). The tribunal model is used in the UK and in numerous countries whose legal system is derived from the UK. General courts perform closed judicial review and must uphold reasonable factual and discretionary determinations.

Model 4—*Open judicial review*

The initial decision and reconsideration phases are like Model 2. Open judicial review takes place in a court of general jurisdiction. The court substitutes its judgment on factual and discretionary issues. This model is employed in numerous countries including Argentina and Japan.

Model 5—*Specialized court*

The initial decision and reconsideration phases are like Model 2, but the court that conducts judicial review is separate from the general court system and decides only administrative law cases. This model is employed in France, Germany and many other countries in Europe, Asia, and Latin America.

Obviously, the three critical variables could be manipulated to produce more than five models. However, these five models describe the adjudicatory systems that I have encountered.

At this point, a concrete example might help to clarify the five-models approach. Suppose that Ministry of Transport (MT) in Country C licenses the operators of ferry boats. The licenses contain various provisions relating to safety and environmental protection, including a prohibition on disposing of waste by dumping it into the water. Cap has a license to operate a ferry service. MT receives a complaint from Ed (a former employee of Cap) that Cap dumps waste into the harbor. Staff members investigate the matter and charge Cap with illegal dumping. This is MT's "front line determination" (phase zero).

Cap denies that he has engaged in illegal dumping and demands that MT provide an initial decision process. During that process, Ed states (orally or in writing) that he saw Cap dump waste into the water. Cap states that he fired Ed for incompetence the previous year and that Ed has a grudge against him. Cap denies that any dumping ever occurred and testifies that all waste has been disposed of properly. Several of Cap's other employees testify that they never saw any dumping and that company policy prohibits it. The official of MT responsible for making the initial decision determines that Cap dumped waste in violation of his license and recommends that the license be revoked (as opposed to levying a financial penalty against him or suspending the license for a month). This is the "initial decision" phase (phase one). Higher level officials in MT or a tribunal (or both) reconsider this decision and uphold it. This is the "reconsideration" phase (phase two). Cap seeks judicial review. In the "judicial review" phase (phase three), there are no issues of law or procedure. The only issues are who is telling the truth—Cap or Ed—and, if the dumping charge is upheld, whether Cap's license should be revoked.

- Model 1: MT is a combined-function agency. It investigates, prosecutes, and conducts a trial-type adversarial hearing in phase one. An HO presides over this hearing. The HO was not involved in investigation and prosecution of Cap's case. The HO's decision revokes Cap's license. The head of MT reconsiders the HO's decision and upholds it. MT's decision is reviewed by a court of general jurisdiction in a closed proceeding. The court must sustain MT's decision (both the factual conclusions and penalty) if it is reasonable.
- Model 2: Model 2 is the same as Model 1 except that the initial decision and reconsideration phases are inquisitorial rather than adversarial. The hearing is treated as part of the agency investigation. It is conducted by MT investigators and prosecutors rather than by an HO who was not involved in investigation or prosecution.
- Model 3: Model 3 is the same as Model 1 except reconsideration is provided by a tribunal that is independent of MT.
- Model 4: Model 4 is the same as Model 2 except that judicial review is open rather than closed. This means that the court has power to receive new evidence or arguments from either side, and MT can introduce additional

reasons for its discretionary decision. The court has power to substitute its judgment on factual or discretionary issues.

- Model 5: Model 5 is the same as Model 4, except that judicial review takes place in a specialized administrative court rather than a court of general jurisdiction.

III. DETAILED DESCRIPTION OF THE MODELS

This section furnishes a more detailed description of the five models as they are employed in various countries.

A. *Model 1: Combined-function/adversarial hearing/closed judicial review in generalized court—US*

The US combined-function model derives from the struggle to regulate the railroads during the populist and progressive eras of the late nineteenth and early twentieth centuries. (Rabin, R. 1986) Various market and legal failures made some form of railroad regulation imperative. Both railroads and shippers pressed for federal regulation. Congress created the Interstate Commerce Commission (ICC) in 1887. By 1920 the ICC emerged as the prototypical combined-function economic regulatory agency. It had broad authority to regulate the railroads, including power to set rates and to punish railroads for violating its rules.

The ICC was a classic *combined-function* agency meaning that it adopted rules, investigated and prosecuted violations, and conducted the initial decision and reconsideration phases. Federal and state legislatures adapted the combined functions model to countless regulatory and benefit-disbursing agencies throughout the twentieth century and into the twenty-first. The ICC used HOs to conduct adversarial, trial-type hearings at which private lawyers opposed ICC staff counsel. The HOs wrote detailed initial decisions which became final unless reconsidered by the agency heads.

The Administrative Procedure Act (APA) of 1946 preserved the combined-function agency. It calls for adversarial hearings conducted by HOs who work for the prosecuting agency. These HOs must be separated from investigators and prosecutors (an organizational technique referred to as "separation of functions").[4] In 1978, the HOs in agencies subject to the APA adjudication provisions received the new and cherished title of Administrative Law Judge (ALJ).

However, the majority of HOs employed by federal combined-function agencies are *not ALJs* because the hearings they conduct are not governed by the APA. They have many other titles such as administrative judge (AJ) or immigration judge. Nevertheless, procedural regulations of the employing

[4] See 5 USC §§554, 556, 557. The APA contains numerous other provisions that safeguard HO independence. See 5 USC §§ 3105, 5372, 7521

agencies almost invariably specify separation of functions and other provisions consistent with adversarial hearings. (Asimow 2019) [5]

The distribution of decisionmaking authority within combined-function agencies is relatively uniform, whether or not they are governed by the APA. As illustrated in the ferry boat hypothetical, an HO writes an initial decision after conducting an adversarial trial-type hearing. The decision contains detailed findings and reasons. The agency head reconsiders the initial decision after an adversarial round of briefing and argument. The agency head has full power to substitute a new decision in place of the initial decision. The "due process" clause of the US constitution,[6] as well as the provisions of state or federal APAs, guarantee the procedural fairness of both the initial decision and the reconsideration phases as well as the impartiality of the HO and agency heads.

Federal or state courts of general jurisdiction provide *closed* judicial review. The courts must uphold an agency's reasonable fact findings and reasonable exercise of discretionary authority. In the federal system, the court must also uphold reasonable agency legal interpretations of ambiguous statutes[7] but state courts usually have full power to decide legal issues.

---

[5] Many important hearing schemes, including veterans' benefits and immigration, are not governed by the APA.

[6] US Const., art V (for federal agencies), art XIV (for state and local agencies).

[7] Chevron USA, Inc. v. Natural Resources Def. Counc., 467 US 837 (1984).

In the US, the most important of the three critical phases is the *initial decision*. Fewer resources are invested in reconsideration or judicial review, which are designed as checks against unreasonable or legally flawed initial decisions. Lawyers invest most of their efforts at the initial decision phase since it is improbable that they will overturn that decision on the basis of a factual or discretionary error at the reconsideration or judicial review phases.

As pointed out above, the actual details of a country's adjudicatory system resist being compressed into a single model. In the US, for example, it is possible to find adjudicating systems at federal, state, and local levels that are better described by Models 2, 3, 4 or 5 rather than Model 1. Model 1, however, is the US paradigm, meaning that it is the most characteristic method of organizing adjudication; it provides the default that is followed unless there are good reasons to depart from it.

B. *Model 2: Inquisitorial initial decision and reconsideration—European Union*

Member states in the European Union (EU) conduct most of the adjudication arising under their regulatory and benefit programs. The administrative adjudication system employed by most continental European countries conforms to Model 5. However, the EU situates the adjudication of cases in certain subject areas at the Union level rather than the member-state level. These include competition, government subsidies, trademarks, food safety, foreign trade regulation, and pharmaceutical licensing. The EU has no APA, and the procedures vary as between these six regulatory structures. (Asimow, M & Dunlop, L. 2009)

At the EU level, adjudicatory proceedings (both initial decision and reconsideration) are inquisitorial rather than adversarial. For example, in competition and merger cases, staff members of the Director-General for Competition of the European Commission (DG-COMP) who are known as "case handlers" conduct an investigation and issue a written "statement of objections." This is the front line determination. At the initial decision stage, DG-COMP provides an oral hearing to the enterprises against which the statement of objections is directed. The purpose of the oral hearing is to give private parties (targets and complainants) an opportunity to express their view of the issues and evidence in the case file. The hearing is considered to be part of the investigation, not a separate phase. The private parties do not control the hearing and cannot cross-examine adverse witnesses. The prevalence of inquisitorial decisionmaking in administrative adjudication is not surprising, given that inquisitorial criminal procedure is nearly universal in Europe. Following the oral hearing, the case handlers prepare a preliminary decision. It is submitted to other DGs for comment, to the Commission's Legal Service, and to an advisory committee, and may be revised as the result of these consultations. This is the initial decision phase.

The reconsideration phase is conducted by the College of Commissioners of the European Commission. The reconsideration process does not include a new hearing or an opportunity to introduce new evidence. The judicial review phase takes place in EU courts of general jurisdiction (the General Court and the European Court of Justice). Review is closed and the courts are relatively deferential on issues of fact and discretion. (Bernatt 2016)

The inquisitorial decisionmaking procedure for initial decisions at the EU level has undergone an interesting evolution. (Craig 2012, ch. 12, 13; Asimow & Dunlop 2016, 143-55) The EU courts created a set of protections for private parties that track British "natural justice." These protections assure adequate notice, a fair hearing, access to the Commission's file, and a statement of reasons. These innovations reflect a case-by-case process of lawmaking largely unsupported by statutory or treaty text. They occurred largely because of British objections to the EU's inquisitorial procedure at the time the UK joined the EU. Thus, these procedural reforms are an example of the transplantation of legal institutions from the adversarial UK system into the inquisitorial EU system. (Bignami 2005) The set of procedural protections erected by the EU courts have since been incorporated into the European Charter of Fundamental Rights and in turn into the Treaty on the European Union.[8]

As a result of the incorporation of natural justice norms into EU decisionmaking, the oral hearings provided in competition cases have become more formalized. Traditionally, oral hearings were conducted by the case-handlers. Under current regulations, however, the HO is a Commission staff member rather than the case-handlers. (Calvani & Leahy, 2018) The HO is not employed by the prosecutors (DG-COMP) and was not involved in the investigation or prosecution of the case. The HO organizes and conducts the hearing and resolves disputes about disclosure of material in the DG-COMP files. In general, the HO's task is to make sure that the parties opposing DG-COMP receive a fair hearing.

After the hearing, the HO submits an 'interim report' expressing conclusions 'with regard to the respect for the effective exercise of procedural rights.' The HO may also submit a separate report containing observations on the 'further progress and impartiality of the proceedings' and this report can contain substantive recommendations concerning the legal and factual issues in the case. The HO's 'final report' is attached to the initial decision by DG-COMP that is submitted to

[8] Art. 41 of the Charter provides for a 'right of good administration,' meaning that every person has a right to have his or her affairs handled impartially, fairly, and within a reasonable time by the institutions, bodies, offices and agencies of the Union. This includes a right to be heard, access to files, and protection of confidentiality.

the College of Commissioners. However, the HO does not render a preliminary decision on the merits of the case. That function remains with the case-handlers. Thus, the introduction of an independent HO entails a limited degree of separation of functions but does not alter the fundamentally inquisitorial nature of the initial decisionmaking process in competition cases.

Under Model 2, if the critical issues in the case are factual, the most important of the three phases is the initial decision, rather than reconsideration or judicial review. If the dispute concerns legal interpretation rather than facts or discretion, the judicial review stage is the most important. The Union's reliance on the initial decision phase has become even more evident with the introduction of natural justice-like protections at the initial hearing, in particular the use of non-prosecutorial hearing officers in competition cases. Nevertheless, it can be argued that Model 2 provides inadequate protection for private interests, since phases one and two do not provide for neutral decisionmakers and phase three involves closed and limited judicial review.

C. Model 3: Tribunals—UK, Australia

Model 3 describes administrative adjudication in the UK and in countries whose legal system is derived from the UK. Under Model 3, the most important adjudicatory decision is made by an independent tribunal at *the reconsideration stage*.

In the UK, regulatory or benefits agencies make the front line determinations and initial decisions. Typically, initial decisions in benefit cases are based on interviews with claimants or evidence compiled from a claim form. The initial decisionmakers do not have professional backgrounds and the staff is subject to frequent turnover. Agencies are under pressure to make decisions quickly. Resources allocated to this function are quite limited. (Thomas & Tomlinson, 2016) There may be no clean dividing line between phase zero (investigation and front line decision) and the initial decision.

Some UK administrative schemes (including social security, immigration, tax, criminal injury compensation, and freedom of information) provide "administrative review" of initial decisions. Administrative review is conducted by a different official employed by the same public authority that made the initial decision. It is designed to catch errors in the initial decision. It is mostly based on the written file (although reviewers may telephone claimants). (Thomas & Tomlinson, 2019) Administrative review might be considered a fourth phase in cases where it exists. Administrative review has replaced tribunal review in many but not all immigration cases; it is a remedy that must be exhausted before proceeding to the Social Security tribunal.

In the UK, reconsideration is provided by a tribunal independent of the agency that made the initial decision. (Cane 2016, 329-34) Traditionally, each regulatory or benefit agency had its own matching tribunal. UK tribunals typically employ a large number of judges, many of whom are not lawyers. Cases are usually heard by several tribunal members sitting together. Tribunal hearings are typically inquisitorial when the private party is unrepresented but adversarial if the party is represented. (Thomas, 2013)

In 2007, the Tribunals, Courts and Enforcement Act (TCEA) restructured the UK's tribunal system. (Wade & Forsyth 2014, 776-783) TCEA merged most of the tribunals and provided them with a source of independent funding. The First Tier Tribunal (FTT) provides reconsideration of most agency decisions. The FTT is divided into six chambers that specialize in hearing cases having related subject matter. The Upper Tribunal (UT) provides a second level of reconsideration of FTT decisions with permission of either the FTT or the UT. UT review is granted only to consider points of law or issues raising an important point of principle or practice or for some other compelling reason. A UT decision can, in turn, be appealed to the Court of Appeal, but only on an important point of law and with permission of the UT or the Court of Appeal. The UT is defined by statute as a superior court and has power to award various judicial remedies. Therefore, the UT should be viewed as providing the first (and usually the only) level of judicial review of FTT decisions.

The traditional Australian system of adjudication follows the British model. At the initial decision level, Australian agencies generally provide an opportunity for review by an official who was not involved in the investigation of the matter. These initial decisions are reconsidered by tribunals. In 1976, Australia merged many separate tribunals into a single body known as the Administrative Appeals Tribunal (AAT).[9] (Cane, McDonald & Rundle 2018 ¶¶7.3 to 7.5; Asimow & Lubbers 2010) The AAT provides trial-type reconsideration hearings (called "merits review") for over 450 agencies and thousands of types of decisions. There are some specialized tribunals within the AAT structure, as in the case of social security, veterans' benefits, or refugees and migration; the AAT provides a second tier of reconsideration from decisions of some of the specialized tribunals. AAT decisions can be appealed to the Federal Court, but only on a question of law.

The UK and Australia invest most of their adjudicatory resources in the reconsideration phase. Private parties think the tribunal provides the best chance to win a favorable outcome. At the initial agency decision level, there are few procedural requirements; at the judicial review level, the narrow scope of review precludes courts from affording relief in most cases involving disputes of fact or discretion. Indeed, in the UK, the UT appears to have supplanted judicial review almost entirely.

9

D. *Model 4: Open judicial review—Argentina, Japan*

Under Model 4, the process of initial agency decision-making and reconsideration is relatively unstructured. Agencies may conduct an informal hearing or provide for a meeting between the private party and the agency staff. Agencies usually provide an opportunity to obtain reconsideration at a higher agency level. However, the important decision occurs in an open judicial proceeding that provides de novo review of factual and discretionary determinations. Countries that provide open judicial review have chosen to invest most resources in the judicial review phase. The underlying assumption is that administrative proceedings prior to judicial review have not crystallized the findings of fact; doing so is the responsibility of the reviewing court. Argentina, Brazil, Japan and China are examples of countries that employ variations of Model 4. (The Chinese system is discussed in Asimow 2015, 20-23)

In Argentina (Verbic 2016), the Administrative Procedural Law requires that, at the initial decision level, a private party must have an opportunity to inspect the administrative file, present written arguments and proofs, and receive a statement of reasons, but normally no hearing opportunity is provided. The head of the agency (usually a cabinet minister) reconsiders the initial decision after receiving written submissions.

The initial decision is subject to open judicial review in a federal or provincial trial court of general jurisdiction. The trial court independently decides the issues of law, fact or discretion, without giving deference to earlier decisions. Obviously, the process of open judicial review of administrative action requires a significant investment of resources and it may generate a large volume of cases. Indeed, in Brazil, the judiciary is overwhelmed with administrative law cases because of weak systems of decisionmaking at the administrative level together with a failure to require exhaustion of administrative remedies. (Perlengeiro 2016). In Argentina and Brazil, judicial review is the level that counts, rather than the initial decision or reconsideration phases.

Japan also follows Model 4. (Ginsburg 2001, 599-606; Tsuji 2016; Ushijima 2009; Green & Nottage 2015, 63-76) In Japan, the judicial review phase is the most important. However, because of the low volume of cases (just a few thousand each year in a nation of 127 million people), it seems doubtful that private parties or lawyers view judicial review as a significant venue for gaining relief for clients. The poor chances of success, combined with high costs of litigation, and a shortage of qualified lawyers and judges, probably explain why so few prospective litigants in Japan bother to challenge bureaucratic decisions in court. (Ushijima, 92) In addition, the prevalence of "administrative guidance" may limit the opportunities for seeking judicial redress of administrative disputes. Finally, it is likely that cultural factors discourage litigation in general and administrative litigation in particular. (Wolff 2015, 187-91; email to the author from Yuichiro Tsuji, Sept. 7, 2018).

E. *Model 5: Judicial review in specialized courts—France, Germany*

France and Germany provide the leading examples of open judicial review of agency action in a specialized system of administrative courts.[10] These systems handle a substantial number of cases each year, which suggests that they are viewed by the public and by lawyers as the most important of the three phases of administrative adjudication.[11]

In a system of specialized administrative courts, cases are considered by judges who are expert in resolving administrative law disputes and sensitive to potential bureaucratic abuse. It seems likely that the existence of a specialized administrative court system employing open review enhances the legitimacy of the adjudicatory system and encourages a greater number of appeals than would occur if review is closed or is situated in generalized courts.

---

[10] There is an intermediate position between conducting judicial review of administrative action in courts of general jurisdiction or in specialized administrative courts. A number of countries (including some regions of Argentina) have created administrative law trial courts within the regular judicial system, but these trial court decisions are reviewed by generalized appellate courts rather than specialized administrative courts.

[11] In France, 195,625 cases were filed at the trial court level in 2014. *Administrative Justice in Europe—Report for France*. In Germany, 207,951 cases were filed at the trial level in 2015. The applicants were successful in 15.8% of the cases and partially successful in another 7.5%. Gunther 2018.

In France, at the initial decision level, agencies are required to provide a fair hearing before taking "negative" action. The procedures employed are inquisitorial in nature and include at least proper notice, a right to respond in writing, and a statement of reasons. (Auby & Cluzel-Métayer 2007) Depending on the scheme involved, the initial decision may be reconsidered at a higher level of the agency. The French administrative court system is part of the executive rather than the judicial branch. It dates back to the French revolution and reflects the idea that the executive branch should not fall under the control of the judiciary. There are 38 administrative trial courts. Above them are eight administrative courts of appeal and above those the Conseil d'État, which is France's Supreme Court for administrative law. (Massot 2010) The French administrative court model has been transplanted to numerous other European, African, and Asian countries.

French administrative courts are empowered to request the parties to produce additional evidence or explanations, so the review is open rather than closed. The administrative courts frequently overturn administrative decisions on the basis of non-deferential review of agency statutory interpretations and for manifest error of facts or of discretion or violation of the proportionality principle. (Jordão & Rose Ackerman 2014, 29-38; Auby & Cluzel-Métayer 78; Brown & Bell 1998, 261-67) In cases involving sanctions, as in the ferryboat example (see text at the end of

Part II), the courts provide “full jurisdictional review” meaning fully open review and the power to substitute judgment as to issues of facts and discretion.[12]

The German administrative courts are lodged within the judicial rather than the executive branch of government. The present version was enacted in 1949 but its roots date back to the 1860’s. (Pünder 2013, 951; Schröder 2007, 94) At the initial decision stage, the German APA calls for inquisitorial procedure, including an opportunity to inspect the file and to comment on the facts. The agency must furnish a statement of grounds. (Schröder 123-26) Before seeking judicial review, a party must seek administrative reconsideration from a higher level of the agency; the reconsidering authorities are required to consider the correctness of both the fact findings and exercises of discretion in the initial decision. (Schröder 138-39).

The German system of administrative courts provides for open judicial review of administrative acts. Administrative courts conduct an oral investigatory hearing and make detailed findings of fact and reasons statements. They can substitute judgment for agency fact findings (particularly findings relating to vague statutory terms) and can invalidate discretionary administrative acts for abuse of discretion or because the acts fail the proportionality test. (Günther; Schröder 2007; Singh

[12] Such sanctions are considered quasi-criminal and invoke the right to an independent and impartial tribunal under Art. 6(1) of the European Convention on Human Rights (which covers the determination of civil rights and obligations as well as criminal charges). See Société ATOM (Conseil d'Etat, 16 February 2009), holding that the ECHR requires full jurisdictional review in a case involving tax penalties.

2001, 223-32, 242-43). There are three levels of the administrative court system—administrative courts, higher administrative courts, and the Federal Administrative Court. The German model has been transplanted to numerous European and Latin American countries.

IV. EVALUATING AND TRANSPLANTING ADJUDICATORY SYSTEMS

This chapter is descriptive, not normative. It does not take a position on which model is optimal. In my opinion, Models 1, 3, 4 and 5 strike an appropriate balance between three elements customarily used to evaluate administrative law practices or institutions: accuracy (meaning that the adjudicators are likely to arrive at the correct result), efficiency (meaning the system must minimize delays as well as public and private costs), and fairness (meaning that the system is acceptable to those affected by it). (Cramton 1972, 591-93) Each of them can meet the standards of the right of good administration as set forth in the EU's Charter of Fundamental Rights.

A good system of administrative adjudication is accessible by ordinary people, even to those representing themselves. Each body must be adequately funded and staffed by officials who are capable and independent-minded. A good system delivers reasonably prompt decisions at a reasonable cost to the government and to private parties. At least one of the phases must provide for a neutral decisionmaker and de novo consideration of facts and discretion. In this respect, Model 2 may be suboptimal, since none of the three phases provide for a neutral decisionmaker who can provide de novo review of an agency's front line findings of facts and discretion.

It is easier to improve a country's adjudication system through incremental changes rather than by transplanting practices and institutions from other countries. Transplantation of administrative law institutions and practices from one country to another is difficult. Every country has constructed its administrative law from decades, perhaps centuries, of legal and political innovations and compromises. Legal cultures and constitutional frameworks (such as provisions for separation of powers) vary sharply and constrain the possibilities of change. Unlike fields such as commercial law, there is no compelling reason for a country to conform its administrative law to that of its neighbors or trading partners. Elites within each country, such as practicing lawyers, tend to fear change and resist the destruction of their human capital (that is, their knowledge of how the existing system can be made to work for clients). Government officials understandably fear institutional changes that may threaten their power or trigger confusion, political resistance or costly constitutional litigation. A major change in even a troubled administrative practice might introduce greater problems.

This resistance to change of deeply rooted governmental practices is a species of path dependence. Path dependence means that the way things have always been done is probably the way they will continue to be done, even if the existing practice is a suboptimal balance between accuracy, efficiency, and fairness. Thus, countries that utilize inquisitorial methods of justice in criminal law are likely to resist importation of adversarial approaches in the initial decision phase. Those accustomed to adjudication within the prosecuting or investigating agency (referred to herein as combined-function agencies) are likely to resist stripping the agency of its adjudicatory functions. Those who are used to judicial review in courts of general jurisdiction will question the creation of specialized administrative courts. Where closed judicial review is the norm, there will be resistance to proposals for open review.

Nevertheless, there have been numerous successful transplants in the history of administrative law. Just to mention a few, as discussed in Part III, the EU adopted significant elements of adversarial decisionmaking and natural justice after British accession. Numerous countries have borrowed the French and German administrative court models. Some countries enacted broadly applicable administrative procedure acts modeled on the US APA. US freedom of information laws have spread around the world, as has the Scandinavian ombudsman. The UK adapted the idea of a centralized administrative tribunal from Australia. Transnational bodies have borrowed administrative law principles from the US and from other countries.

A country might consider introducing tribunals for reconsideration of initial decisions if people come to question the fairness of combined-function agencies or believe that an open judicial review system is too slow and costly for deciding relatively small disputes. It might experiment with specialized administrative courts for reviewing particular types of cases that burden the general court system. It might test out adversarial approaches in order to strengthen the initial decision stage or inquisitorial approaches to make initial decisions less costly and formal. A careful employment of transplants can enable a country to optimize its own public law system without departing too sharply from that country's familiar procedural norms.

V. CONCLUSION

Every country must design a system for resolving the vast number of disputes that arise between private parties and government agencies. This vitally important system is the face of justice for millions of ordinary people. It should be designed to maximize utility by optimally balancing accuracy, efficiency, and fairness.

This chapter described five models employed by a broad range of countries. These models differ in their choice of whether the initial decision, reconsideration, or judicial review serves as the primary check against government error. These models also differ in the way that each country shuffles a limited set of variables:

combined functions agency or separate tribunal, adversarial or inquisitorial procedure, open or closed judicial review, and specialized or generalized courts. These choices are heavily path dependent and reflect each country's legal culture as well as political compromise.

This chapter does not express a normative preference between the models (although it questions the optimality of Model 2). There is no single clearly superior design for administrative adjudication, but every system could be improved by careful redesign and strategic borrowing from procedures employed in other countries, as well as by further protections for decisional independence and provision of an adequate level of staff and resources to get the job in a timely and efficient manner.

Bibliography

Administrative Justice in Europe—Report for France, http://www.aca-europe.eu/en/eurtour/i/countries/france/france_en.pdf

Asimow M, 'Five Models of Administrative Adjudication' (2015) 63 AJCL 3

--'The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute' (2004) 56 Admin LR 1003

—and Dotan Y, 'Open and Closed Judicial Review of Agency Action: The Conflicting US and Israeli Approaches' (2016) 64 AJCL 521

— 'Best Practices for Evidentiary Hearings Outside the Administrative Procedure Act'(forthcoming 2019) – Geo Mason L R –.

—and Dunlop, L, 'The Many Faces of Administrative Adjudication in the European Union' (2009) 61 Admin LR 131

—and Lubbers JS, 'The Merits of "Merits" Review: A Comparative Look at the Australian Administrative Appeals Tribunal' (2010) 28 Windsor YB Acc. Just. 261

Auby J and Cluzel-Métayer L 'Administrative Law in France' in Rene Seerden (ed), *Administrative Law of the European Union, its Member States, and the United States* (Intersentia 2d ed. 2007)

Bernatt M, 'Transatlantic Perspective on Judicial Deference in

Administrative Law' (2016) SSRN 2648232, 28-38

Bignami, F, ' Creating European Rights: National Values and Supranational Interests' (2005) 11 Colum J Eur L 241

Brown, LN and Bell, JS, *French Administrative Law* 261-67 (OUP 5th ed. 1998)

Calvani T & Leahy J, 'A Larger Role for the Hearing Officer: A Modest Proposal' (2018) 6 J Antitrust Enf 213

Cane P, *Controlling Administrative Power: A Historical Comparison* (CUP 2016).

Cane P, McDonald L & Rundle K, *Principles of Administrative Law* (OUP 3d ed. 2018)

Chang Y, 'An Empirical Study of Administrative Appeal in Taiwan: A Cautionary Tale' (2014) 23 Transnat'l L & Contemp Probs. 261

Craig PP, *EU Administrative Law* (OUP 2d ed. 2012) [NOTE TO EDITORS—about to be replaced by a 3d edition 2018 or 2019]

--'Perspectives on Process: Common Law, Statutory and Political' [2010] PL 275

Cramton R, 'A Comment on Trial-Type Hearings in Nuclear Power Plant Siting' (1972) 58 Va L R 585, 591-93

Ginsburg T, ‘Dismantling the “Developmental State:”’ Administrative Procedure Reform in Japan and Korea’ (2001) 49 AJCL 585, 599-606

Green S & Nottage L, ‘In Defence of Japan: Government Lawyers and Judicial System Reforms,’ in Wolff L, Nottage L, & Anderson K, *Who Rules Japan? Popular Participation in the Japanese Legal Process* (Elgar 2015)

Günther, C, *Administrative Justice in Europe—Report for Germany,* http://www.aca-europe.eu/en/eurtour/i/countries/germany/germany_en.pdf

Jordão E and Rose-Ackerman S, ‘Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review’ (2014) 66 Admin LR 1

Massot J, ‘The Powers and Duties of the French Administrative Judge’ in Rose-Ackerman S & Lindseth P(eds), *Comparative Administrative Law* (Elgar 2010).

Perlengeiro R, ‘Contemporary Challenges in Latin American Administrative Justice’ (2016) 3 Brics LJ 21

Pünder H, ‘German Administrative Law in a Comparative Perspective’ (2013) 11 Int’l J of Constit. L 940

Rabin R, ‘Federal Regulation in Historical Perspective’ (1986) 38 Stan. LR 1189. , Schröder M, 'Administrative Law in Germany' in Seerden R (ed.) , *Administrative Law of the European Union, its Member States, and the United States* (Intersentia 2d ed. 2007)

Singh MP, *German Administrative Law in Common Law Perspective* (Springer-Verlag 2001)

Thomas R, 'From "Adversarial v. Inquisitorial" to "Active, Enabling, and Investigative:" Developments in UK Administrative Tribunals,' (Jacobs L & Baglay S (eds), in *The Nature of Inquisitorial Processes in Administrative Regimes* (Ashgate 2013)

—– and Tomlinson, J, 'Current Issues in Administrative Justice: Examining Administrative Review, Better Initial Decisions, and Tribunal Reform' (2016) SSRN 2940783

— and Tomlinson J, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals,' (2019) – PL –

SSRN 3254119

Tsuji Y, 'Administrative Action and the Succession of Illegality' (2016) 67 Tsukuba J Law & Pol 1;

Ushijima H, 'Administrative Law and Judicialized Governance in Japan' in Ginsburg T and Chen HY (eds.) *Administrative Law and Governance in East Asia*

(Routledge 2009) ch. 5.

Verbic F, 'An Overview of Administrative Justice in Argentina' (2016) 3 Brics LJ 57

Wade W & Forsyth C, *Administrative Law* (OUP 11th ed 2014)

Warnock C & Pedersen OW, 'Environmental Adjudication: Mapping the Spectrum and Identifying the Fulcrum' [2017] PL 634

Wolff L, 'When Japanese Law Goes Pop,' in Wolff L, Nottage L, & Anderson K, *Who Rules Japan? Popular Participation in the Japanese Legal Process* (Elgar 2015)

KEY WORDS

Comparative administrative law

Administrative adjudication

US administrative law

English administrative law

Judicial review of agency action