ON THE CODIFICATION OF ADMINISTRATIVE PROCEDURE IN GREECE

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This report aims at providing insight as regards the codification of administrative procedure law in Greece. Its structure adheres to the instructions of the General Rapporteur, Prof. Jean-Bernard Auby, with a view to assisting him in the preparation of his general report on the *Codification of the Law of Administrative Procedure* for the 2nd Thematic Congress of the International Academy of Comparative Law (Taipei, 24-26 May 2012). It is divided into three parts: following an introductory section attempting to provide a definition of the concept of 'administrative procedure' (I), the second part sets out a succinct illustration of the main features of administrative procedure law (II) and the third part focuses on the presentation of the focal aspects of the Greek Administrative Procedure Code (III).

I. THE CONCEPT OF 'ADMINISTRATIVE PROCEDURE'

A. The scope of the term 'administrative procedure'

For the purposes of this work and given the absence of a statutory provision defining the term, 'administrative procedure' is understood to mean the actions of public authorities in order that an administrative decision is made. The majority of legal doctrine seems to agree on this definition, albeit with slightly different wording. *Professor Spiliotopoulos* prefers

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the term 'administrative process' to the term 'administrative procedure' in order to define *"... the actions of the administrative organs or individuals which are necessary for an administrative act to be issued"*[1], that is an act entailing the application of the legal rules developed by the legislature to particular situations or cases. In the French version of his handbook, the term *'procédure administrative non contentieuse'* is used to define *"... les normes impersonnelles d'application générale qui réglementent la constitution, la composition et le fonctionnement des organes administratifs, la compétence et les opérations des organes administratifs et des administrés, nécessaires à l'émission des actes administratifs"*[2]. In this sense, 'administrative procedure' refers to the actions belonging to the stages of production and application of administrative acts, and not to the regulation set out by them – even though the latter may ultimately be affected by the followed process[3].

According to this approach, the term 'administrative procedure' encompasses the rules and principles governing the status of administrative acts and the requirements that shall be fulfilled for their validity. Such rules and principles particularly concern: *(a)* the production, form[4], modification, revocation and abrogation of administrative acts; *(b)* the competence, constitution, composition and functioning of the administrative bodies issuing administrative acts; *(c)* the direct or indirect participation of individuals in the issuance process, (e.g. through the election or appointment of administrative organs, the filing of petitions, the exercise of the right of prior hearing, the submission of comments, the participation in debates concerning draft acts, the participation in referenda etc.); *(d)* the access to public data; *(e)* the conclusion, form, performance and termination of administrative contracts.

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[1] E. Spiliotopoulos, *Greek Administrative Law* (Athens/Brussels 2001) 101. See also A. Tachos, *Greek Administrative Law* (9th edn, Athens/Thessaloniki 2008) 647 [in Greek].

[2] E. Spiliotopoulos, *Droit administratif hellénique* (Athènes/Bruxelles 2004) 103.

[3] G. Siouti, Administrative Procedure, *in* A. Gerontas, S. Lytras, P. Pavlopoulos, G. Siouti & S. Flogaitis, *Administrative Law* (2nd edn, Athens/Thessaloniki 2010) 201-202 [in Greek].

[4] In the past, legal literature and case-law referred to the term 'form' so as to define not only the external characteristics of administrative acts but also the procedural requirements for their validity. See M. Stassinopoulos, *Administrative Law* (Athens 1957) 236 et. seq. [in Greek]; G. Siouti, The Concept of Administrative Procedure and its Difference from the Form of Administrative Acts, *Επιθεώρηση Δημοσίου Δικαίου & Διοικητικού Δικαίου* (=Epitheorisi Dimosiou Dikaiou & Dioikitikou Dikaiou – EDDDD) 1990, 21, 26 [in Greek], also published in *Justice and Law: Intellectual Tribute to Michail D. Stassinopoulos* (Athens/Komotini 2001) 531 [in Greek].

A broader definition of the term 'administrative procedure' has been proposed by *Professor Efstratiou*, who has taken account of the expansion of the activities of Public Administration in the last decades due to its involvement in many areas of the economic and social life. As a consequence, apart from issuing administrative acts, public authorities also carry out informal actions often specified by verbal or written guidelines, instructions, interpretative circulars etc., and consisting, for instance, in the organisation of their internal function or in the material provision of services. It has been argued, therefore, that the concept of 'administrative procedure' should be interpreted in such a way as to include these actions too[5].

B. The extent of the term 'administrative procedure'

Article 26 of the Greek Constitution[6] incorporates the doctrine of separation of powers. State authority is divided into the three traditional powers: *(a)* the legislative power, which is exercised by the Parliament, *(b)* the executive power, which is exercised by the President of the Republic and mainly the Government, and *(c)* the judicial power, which is exercised by the courts. Given the close connection of the term 'administrative procedure' with the 'administrative act', as determined above, government processes in the strict sense as well as judicial review procedures fall outside its scope. Specifically:

1. Exclusion of government processes

The Government or "Cabinet" consists of the Prime Minister and the ministers, each of whom is in charge of a particular ministry[7]. Govern-

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[5] P.-M. Efstratiou, The Law of Administrative Procedure, *EDDDD* 2005, 245, 249 [in Greek].

[6] The current Constitution came into force on 11 June 1975 and established Greece as a presidential parliamentary republic. It was revised in 1986 and 2001.

[7] Article 81 I of the Constitution. The issues concerning the composition and function of the Government are regulated by the relevant constitutional provisions and by Law 1558/1985 (Government Gazette no A 137/1985), as amended, which is contained in codifying Presidential Decree 63/2005 (Government Gazette no A 98/2005), as amended, and Presidential Decrees 184/2009, 185/2009 and 186/2009 (Government Gazette no A 213/2009), Presidential Decree 189/2009 (Government Gazette no A 221/2009), Presidential Decree 24/2010 (Government Gazette no A 56/2010) and Presidential Decree 96/2010 (Government Gazette no A 170/2010). For an overview in the English language, see Spilio-

ment's competence is twofold: it is entrusted with the definition and direction of the country's general policy, on the one hand[8], and with the exercise of public administration, on the other hand[9]. Most of its competences in the former case are of guiding character, lacking direct enforceability, and, therefore, the decisions taken in this respect do not seem to have the nature of an administrative act. These acts are defined as 'acts of state' (*κυβερνητικές πράξεις – actes de gouvernement*).

In the Greek legal order, the treatment of acts of state is connected with judicial review. Explicit reference to them is only made in Article 45 V of Presidential Decree 18/1989 on the Council of State[10], which stipulates that *"acts of state and orders pertaining to the exercise of political power shall not be challenged by an application for annulment"*. Due to the absence of a definition in this provision, the term 'act of state' is interpreted by the Council of State on an *ad hoc* basis. There are certainly arguments against the unconditional exemption of acts of state from judicial review, but currently this issue is of limited practical importance[11].

2. Exclusion of judicial review procedures

Even though administrative procedure and judicial review could be seen as complementary tasks for the function of public administration, the boundaries between them are clear. Administrative procedure constitutes the rules and principles applying to administrative bodies, as distinguished from judicial review procedures, which apply to courts.

Judicial review has evolved over a period of years into a system of constitutional and statutory doctrines that define its proper boundaries as system of oversight, furnishing an important set of controls on adminis-

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topoulos, *supra* note 1, 175-186; P.D. Dagtoglou, Constitutional and Administrative Law, *in* K.D. Kerameus & Ph.J. Kozyris (eds), *Introduction to Greek Law* (3rd revised edn, The Netherlands 2008) 23, 38-41. In the French language, see Spiliotopoulos, *supra* note 2, 59, 356.

8 Article 82 I of the Constitution.

9 Article 83 of the Constitution.

10 *Infra*, I.B.2., note 17.

11 For a thorough analysis, see among others G. Trantas, *The Acts of State Between the Protection of the Public Interest and the Control of the Discretionary Power of the Administration* (Athens/Komotini 1997) *passim* [in Greek]; Spiliotopoulos, *supra* note 1, 93, 178, 330; P.D. Dagtoglou, *Administrative Courts Procedure* (5th edn, Athens/Thessaloniki 2011) 72, 77, 119, 146 [in Greek]; Spiliotopoulos, *supra* note 2, 188-197; *idem*, *Handbook of Administrative Law 1* (14th edn, Athens 2011) 101-103 [in Greek].

trative behaviour[12]. Unlike the parliamentary oversight control[13], which essentially influences entire programs or basic policies, and the mediatory control exercised by the Citizen's Advocate (or Ombudsman)[14], judicial review regularly operates to provide relief for the individual person who is harmed by a particular administrative action[15].

Specifically, administrative justice in Greece consists of *(a)* the Ordinary Administrative Courts, which are organised in two instances (Administrative Courts of First Instance and Administrative Courts of Appeal)[16]; *(b)* the Council of State (*Συμβούλιο της Επικρατείας – Conseil d'Ėtat*) as an administrative court of first and last instance[17], and *(c)* the Court of Audit (*Ελεγκτικό Συνέδριο – Cour des comptes*), which, in addition to its advisory and auditing competences, is granted judicial competences on issues concerning public expenditure[18]. The Council of State has general jurisdiction over 'objective' administrative law disputes (*ακυρωτικές διαφορές*), except for certain categories, which may be subject to the jurisdiction of the Ordinary Administrative Courts in the first instance. The Ordinary Administrative Courts and the Court of Audit have jurisdiction over all 'substantive' administrative law disputes (*διαφορές ουσίας*), except for those made subject to the jurisdiction of the Council of State. In case of 'objective' administrative law disputes, the review is limited to the legality of the challenged administrative act, i.e. to the decision making process itself, whereas in case of 'substantive' administrative law disputes, the review extends to the merits. Furthermore, the current Constitution sets out the Supreme Special Court (*Ανώτατο Ειδικό Δικαστήριο*),

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12 See *infra*, II.A.1.

13 Article 70 VI of the Constitution, as specified by the Standing Orders of the Parliament.

14 Article 103 IX of the Constitution; Law 2477/1997 (Government Gazette no A 59/1997); Law 3094/2003 (Government Gazette no A 10/2003); Presidential Decree 273/1999 (Government Gazette no A 229/1999).

15 On judicial review in Greece see Spiliotopoulos, *supra* note 1, 268 et seq.; Dagtoglou, *supra* note 11, *passim*; Spiliotopoulos, *supra* note 2, 287 et seq.; *idem*, *Handbook of Administrative Law 2* (14th edn, Athens 2011) *passim* [in Greek].

16 Article 94 I of the Constitution; Law 702/1977 (Government Gazette no A 268/1977), as amended; Law 1406/1983 (Government Gazette no A 182/1983), as amended; Law 2717/1999 ratifying the Code of Administrative Courts Procedure (Government Gazette no A 97/1999), as amended.

17 Article 95 of the Constitution; Law 702/1977, *supra* note 16; Presidential Decree 18/1989 (Government Gazette no A 8/1989) as amended.

18 Article 98 of the Constitution; Presidential Decree 774/1980 (Government Gazette no A 189/1980), as amended.

whose jurisdiction consists in *(a)* the review of parliamentary elections and referendums; *(b)* the review of the constitutionality and the interpretation of provisions of legislative acts in case of conflicting judgments made by the three high courts (Council of State, Areios Pagos, Court of Audit); and *(c)* the resolution of disputes regarding the qualification of an international law rule as a 'generally accepted rule' in accordance with Article 28 I of the Constitution[19].

Unlike other jurisdictions the institution of 'tribunals' is so far unknown in Greece. The absence of such special entities – situated in between courts and pure administrative bodies and carrying out quasi-judicial functions – makes the scope of the term 'administrative procedure' even clearer.

II. Main features of administrative procedure law

A. The evolution of administrative procedure law

1. Historical underpinnings

The evolution of the law of administrative procedure as part of administrative law is associated with the evolution of the political system as well as with the system of legal protection against the Public Administration. Since the establishment of the modern Greek state in 1830 until well the mid-twentieth century, both the political and the judicial system have undergone continuous changes, which created a major obstacle to the development of administrative law into a separate and systematically treated subject.

During the first years of the modern Greek state, special provisions regulated the organisation and function of administrative bodies, whereas the judicial review of the Public Administration was entrusted to special administrative courts. The Court of Audit was first established in 1833, followed by the Council of State and the Administrative Courts in 1838. This system of administrative judiciary was abolished by the Constitution of 1844, which introduced a system of 'unitary jurisdiction' and transferred administrative law disputes to the jurisdiction of civil courts. Even though the following Constitutions of 1864, 1911 and 1927 in principle maintained the system of 'unitary jurisdiction', it is remarkable that the Constitutions of 1911 and 1927 provided at the same time for the estab-

[19] Article 100 of the Constitution; Law 345/1976 (Government Gazette no A 141/1976), as amended.

lishment of the Council of State as an administrative court with jurisdiction over certain administrative law disputes. This was eventually established by Law 3713/1928[20] and since then it has been the supreme administrative court of Greece. The system of 'unitary jurisdiction' was reformed by the Constitution of 1952, which provided for the general jurisdiction of ordinary administrative courts over administrative law disputes. However, despite the constitutional provision, only tax courts were set up as ordinary administrative courts with special jurisdiction. 'Unitary jurisdiction' was actually maintained until the fall of the military dictatorship and the subsequent enactment of the current Constitution of 1975, which introduced an integrated system of administrative justice[21].

The development of administrative law coincides particularly with the operation of the Council of State since 1929, the case-law of which has considerably contributed not only to the interpretation of the existing legal framework, but also to the establishment of general principles concerning the activity of the Public Administration.

2. Legal underpinnings

Throughout the course of its evolution, Greek administrative law – and in particular administrative procedure law – has been considerably influenced by French administrative law. French legal literature as well as the *principes généraux* developed by the case-law of the French Conseil d'État have inspired both Greek legal doctrine and the case-law of the Council of State, an institution based on the French model, too[22]. On the contrary, even though the Greek legal thought has been increasingly oriented towards the German legal tradition, it seems that German administrative law has been treated with scepticism. It can be argued, nevertheless, that the experience acquired by the early enactment of fundamental administrative law statutes in Germany, such as the Law on Administrative Courts (*Verwaltungsgerichtsordnung*) in 1960[23] and the Law on Adminis-

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[20] Law 3713/1928 (Government Gazette no A 273/1928).

[21] *Supra*, I.B.2. For a brief overview, see Spiliotopoulos; *supra* note 1, 269-271; *idem*, *supra* note 2, 286-291; Dagtoglou, *supra* note 7, 55.

[22] Professor Stassinopoulos, putting special emphasis on the impact of French administrative law, stated that: *"...la jurisprudence* [of the Greek Council of State] *est amplement redevable à la jurisprudence française, qui a donné toute la matière nécessaire pour solidifier son oeuvre, depuis 1929"*. See M. Stassinopoulos, "Long, Weil et Braibant, Les grands arrêts de la jurisprudence administrative" (note bibliographique), *RDP* 1970, 820, 828; J. Schwarze, *European Administrative Law* (Revised edn, London/Luxemburg 2006) 169.

[23] Verwaltungsgerichtsordnung of 21 January 1960 (BGBl. I S. 17), as amended.

trative Procedure (*Verwaltungsverfahrensgesetz*) in 1976[24], enhances the opportunities for an enlarged influence of German administrative law in Greece, offering a new model of approach[25].

After the French example, the general principles of administrative law were initially recognised and confirmed by the case-law of the Council of State and have been consistently applied by courts – even though case-law is not considered to be a source of legal norms and the role of 'judicial precedent' is not familiar to the Greek legal system. Later, some of them were considered to have constitutional origins, while others were established by statute.

The basic principles of administrative procedure law are now included in the Greek Code of Administrative Procedure, which was promulgated in 1999[26]. Nonetheless, administrative procedure rules can also be found in other statutes and codes (e.g. Forestry Code[27], Civil Servants Code[28], etc.), and, to a certain extent, in administrative acts.

In addition to the sources of national origin, mention should be made of the importance of international law sources, and particularly the European Convention on Human Rights[29], as well as of the increasing influence of European Union law on administrative procedure law[30].

B. Fundamental orientations of administrative procedure law

1. The priority of the rule of law

Administrative procedure law is inspired by the idea of the subjection of the state to the rule of law and the effective guarantee of the freedom of

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24 Verwaltungsverfahrengesetz of 25 May 1976 (BGBl. I S. 1353), as amended.

25 See P.D. Dagtoglou, *General Administrative Law* (6th edn, Athens/Thessaloniki 2012) 41-42 [in Greek].

26 *Infra*, III.

27 Legislative Decree 86/1969 (Government Gazette no A 7/1969), as amended.

28 Law 3528/2007 (Government Gazette no A 26/2007), as amended.

29 The European Convention on Human Rights was ratified by Law 2329/1953 (Government Gazette no A 68/1953), and again, after the fall of the dictatorship, by Legislative Decree 53/1974 (Government Gazette no A 256/1974).

30 For a detailed analysis concerning the sources of administrative law, see Dagtoglou, *supra* note 25, particularly at 113 et seq.; A. Gerontas, *The 'Europeanisation' of National Administrative Law and Court Procedure* (Athens/Thessaloniki 2009), particularly at 103 et seq. [in Greek]; Spiliotopoulos, *supra* note 11, 35 et seq.

individuals[31]. Having its origins in the wider principle of the rule of law as well as in the doctrine of separation of powers[32], the principle of legality prevails in the regulation of administrative action. It dictates that the exercise of the governmental authority affecting individual interests must rest on legitimate foundations, meaning that powers exercised by public authorities must be based on legal provisions, whatever source the latter are derived from. It becomes clear, thus, that the executive does not enjoy a general or inherent regulatory power, which is to say that it cannot generate legally binding rules without first having been given authority to do so by the legislature[33].

Delegated powers often represent a duty that the delegate administrative authority must perform. This is the case of 'binding competence' (*δέσμια αρμοδιότητα*), under which administrative action shall be taken in a prescribed manner and form when the conditions precedent exist, while the administrative act that is to be issued shall have the exact content dictated by the delegating provision. On the other hand, delegated powers may contain elements moderating such legal constraints. This is the case of 'discretionary power' (*διακριτική ευχέρεια*), which leaves the delegate administrative authority a certain degree of freedom of decision and action. In this case, delegated power is endowed with a discretion whether to act, and, if, so, how to act. The rationale behind discretionary power includes the difficulty of providing a general rule that would apply to all circumstances. In this respect, according to a general principle of administrative law, there is a presumption in favour of discretion, meaning that administrative authorities are always granted discretionary power, unless otherwise provided. The exercise of discretion is governed by the principle of legality, too. It is important, therefore, to determine the scope of discretion of delegates in order to examine the validity of their acts. In addition

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31 See Articles 25 I and 50 of the Constitution, stating respectively that *"The rights of human beings as individuals and as members of the society and the principle of the welfare state of law are guaranteed by the State. ... Restrictions of any kind that, under the Constitution, can be imposed on such rights shall be provided either directly by the Constitution or by statute, by virtue of delegation* [by the Constitution]*, and shall respect the principle of proportionality"*, and that *"The President of the Republic shall only have the powers explicitly conferred to him by the Constitution and the statues that are consistent with the Constitution"*.

32 *Supra*, I.B.

33 Spiliotopoulos, *supra* note 1, 51-54; Dagtoglou, *supra* note 25, 140 et seq.; Spiliotopoulos, *supra* note 2, 47-50; Dagtoglou, *supra* note 7, 48-49; Spiliotopoulos, *supra* note 11, 87 et seq., with further references.

to the limits set out by the delegating provision, there are also limitations derived from general principles of administrative law (such as the principle of fair administration, the principle of supremacy of public interest, the principle of equality, the principle of proportionality, the principle of legitimate expectations etc.), whereas the misuse of discretion constitutes ground for annulment of the administrative act[34].

2. The importance of the procedural dimension

The priority of the rule of law entails the increased importance of the procedural dimension of administrative law. The close relationship between administrative law with constitutional law as regards not only the organisation of the state, but also the relationship of the state with individuals, has contributed to the characterisation of administrative law as 'concretised constitutional law', which applies to a great extent in the case of civil rights[35]. In this sense, administrative procedures constitute a formal guarantee of the rights of individuals through a practical application of the principle of legality. At the same time, such procedures provide a formal guarantee to the public interest, allowing and enabling the control of the administrative action.

However, apart from the self-engagement of the Public Administration with regard to the exercise of the executive power and the provision of guarantees to the citizens that their rights and interests will be respected, there has also been a growing need for simplification and acceleration of the administrative action. In this respect administrative procedures have been criticised as merely formal and cumbersome, ultimately enhancing bureaucracy and inefficiency in the function of public sector. Simplification and acceleration, nonetheless, entail the reduction or even the avoidance of forms, deadlines and procedural constraints in general, namely the elimination of the mentioned guarantees. The conciliation of these two opposing elements constitutes one of the main debates in the field of administrative procedure law nowadays.

Another issue at stake worth mentioning before completing this section is the 'publicity' of administrative action. Even though full publicity may

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[34] Spiliotopoulos, *supra* note 1, 97-99; Dagtoglou, *supra* note 25, 163 et seq.; Spiliotopoulos, *supra* note 2, 99-102; Dagtoglou, *supra* note 7, 49; Spiliotopoulos, *supra* note 11, 153-157, with references to legal literature and case-law.

[35] See F. Werner, Verwaltungsrecht als konkretisiertes Verfassungsrecht, *DVBl.* 1959, 527; Dagtoglou, *supra* note 25, 27.

increase transparency, it has been argued that it can often be unnecessary and at the same time harmful to both the public service and the rights of other citizens. For this reason there has been proposed a sort of 'moderate publicity', which can be achieved through the participation of any interested citizen in the administrative action and, in particular, through the exercise of the rights to be heard and to have access to the public documents concerning the specific case. Such 'moderate publicity' during the different stages of the preparation for the issuance of an administrative act has been considered as enhancing the confidence of citizens and enlightening the Public Administration, contributing thus to the proper and effective exercise of its powers[36].

III. The Greek Administrative Procedure Code

A. Historical background of the Administrative Procedure Code

1. The debate about making a code

Historically, the changeable character of administrative law due to the influence of the prevailing political situation[37], combined with the administrative overregulation, was the main obstacle to the codification of administrative procedure law in Greece. It was argued, moreover, that the strict determination of a procedural framework would result in the inflexibility and, ultimately, in the inefficiency of the administrative action. In the same spirit the codification of administrative procedure law was considered unnecessary in view of the existence of an integrated system of judicial review, given also that the administrative action, apart from certain constitutional provisions and special statutes, was mainly governed by general principles established by the case-law of the Council of State[38].

Despite the general cautiousness, *Professor Stassinopoulos*, a former President of the Republic and President of the Council of State, unoffi-

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[36] See M. Stassinopoulos, Draft 'Code of Administrative Procedure', *EDDDD* 1967, 113, 113-115 [in Greek]; *idem*, Un avant-projet de code de procédure administrative non contentieuse, *RHDI* 1968, 1, 1-3, where the main theoretical debates on administrative procedure law are concisely depicted.

[37] Professor Dagtoglou (*supra* note 25, 33-34) lays special emphasis on the 'political sensitivity' of administrative law.

[38] Siouti, *supra* note 4, 30; E. Prevedourou, The Codification of the General Principles of Administrative Procedure – Comparative Remarks According to Greek Law and EC Law, *EDDDD* 2001, 417, 417-418 [in Greek].

cially prepared a draft Administrative Procedure Code, which was first published in 1967[39]. Apparently inspired by the case-law of the Council of State and representing an attempt to conciliate the principle of legality with the need for simplification of the administrative action, the draft consisted of 92 articles and was divided into four parts, covering all stages of administrative procedure. The First Part begins with the definition of the terms 'administrative act', 'administrative organ' and 'collective administrative organ'. It then deals with issues concerning conflicts of competences, the delegation of competences, the consequences of the illegality of administrative acts, the incidental control of an administrative act by an administrative organ different from the issuing one, preliminary questions that may arise before administrative authorities and the crucial legal and factual regime when the administrative action has to be resumed. The Second Part governs the legal existence of administrative organs and the validity of the issued acts in case of illegal appointment, impediment, leave and suspension, as well as the constitution, composition and function of collective administrative organs. The Third Part contains provisions on deadlines, forms and specific procedures, while the Fourth Part regulates issues concerning the entry into force and the expiry of administrative acts (i.e. publication, retroactive effect, revocation, disuse), as well as administrative appeals, controls and hierarchical substitution. This pioneering proposal was never adopted, however.

2. The debate about the content of the code

Many years later and given the international trend towards a codification of administrative procedure law[40], a Committee on the Codification of Administrative Procedure was established by virtue of Article 76 VI of the Constitution and Article 8 I of Law 2225/1994[41]. *Professor Flogaitis* was appointed Chairman and *Professors Siouti*, *Gerontas* and *Lazaratos*, and *Doctors Papadopoulou*, *Ktistaki*, *Efstathiou*, *Mathaiou*, *Botopoulos* and *Tsevas* were designated as Members of the Committee. An integrated draft Administrative Procedure Code, taking critically account of foreign codes (such as those of Spain, Portugal, Italy, Switzerland, Austria, Denmark,

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[39] *Supra* note 36.

[40] Cf. G. Langrod, The Recent Movement Towards the Enactment of Administrative Codes in Modern States, *EDDDD* 1972, 5 et seq. [in Greek], originally published in the French language in *Revue administrative* 1969, 631.

[41] Law 2225/1994 (Government Gazette no A 121/1994).

Finland, the Netherlands as well as the USA and Japan), was submitted to the Minister of Interior, Public Administration and Decentralisation on 1st May 1996, after two years of work. This draft consisted of 46 articles and was divided into six chapters, respectively titled *(a)* 'General Principles of Administrative Procedure'; *(b)* 'Procedure of Issuance of Administrative Acts'; *(c)* 'Validity of Administrative Acts'; *(d)* 'Administrative Contracts'; *(e)* 'Administrative Appeals'; and *(f)* 'Collective Administrative Organs'. Among the innovations introduced by the draft, one can discern the thorough consolidation and 'statutorisation' (i.e. the conversion into statute) of the general principles of administrative procedure, the extensive regulation of the right of access to administrative data, the explicit provision of cases of direct enforceability of statutory provisions delegating the issuance of administrative acts when public authorities fail to do so, the provision of specific deadlines for the revocation of administrative acts as well as the option of including an arbitration clause in administrative contracts.

The draft was, nevertheless, heavily criticised by the then-President of the Council of State. One of the main arguments against its enactment was that, in addition to the provisions of purely procedural nature, it also included many provisions of 'substantive' nature and undefined legal terms, whereas it introduced new general principles, not previously established by case-law. It was also argued that the introduction of the concept of the 'void' (by contrast with the 'voidable') administrative act could not comply with the 'presumption of legality' of administrative acts, which prevails in Greek administrative law and dictates that administrative acts are valid – regardless of any legal defect – until and unless they are annulled by a court judgment, revoked or abolished[42]. But the strongest criticism concerned the chapter on administrative contracts. It was supported that this should not be included on the grounds that the Council of State had not elaborated its case-law in this field so far; moreover, the draft seemed to adopt the freedom of contract in the public sector, which came to direct conflict with the system of priority of the unilateral action of the Public Administration that characterises public law[43].

Evidently, the debate this time was not about making a code, but about its content. The heavy impact of the mentioned arguments led to

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[42] On the presumption of legality, see G. Siouti, *The Presumption of Legality of Administrative Acts* (Athens/Komotini 1994) *passim* [in Greek].

[43] See V. Karakostas, The 'Code of Administrative Procedure', *Δελτίο Φορολογικής Νομοθεσίας* (=Deltio Forologikis Nomothesias – DFN) 1999, 643-647 [in Greek].

the withdrawal of the draft and to the establishment of a new Committee by virtue of Article 76 VI of the Constitution and Article 18 of Law 2503/1997[44]. Under the chairmanship of honorary justice *Makridis* and consisting mainly of judges – with the exception of *Professor Spiliotopoulos* – this Committee reviewed the draft prepared by the Flogaitis Committee and submitted a new draft Administrative Procedure Code in December 1998. This was fully adopted by the Parliament and ratified by Law 2690/1999[45].

According to its Explanatory Report, the enactment of the Greek Administrative Procedure Code follows the international trends towards the systematisation of the rules governing modern administration and the application of the fundamental principles of transparency, equality and respect of personality. Main objective of the Code is to ensure legal certainty and the confidence of citizens, on the one hand, and to enhance simplification, acceleration and flexibility, ultimately contributing to the efficiency of the function of the Public Administration, on the other hand. In order to achieve these goals the Code is essentially limited to purely 'procedural' rules, omitting most of the 'substantive' rules proposed by the Flogaitis Committee. For the same reason it adopted the current terminology, avoiding including, where possible, definitions of terms, so that the latter can be further elaborated by case-law.

B. The structure of the Administrative Procedure Code

The Greek Administrative Procedure Code consists of 33 articles and is divided into six chapters. It includes rules previously dispersed in various statutes and, thus, not easily accessible, as well as rules established by the case-law of the Council of State. Its content is based on the concept of 'administrative act', in the sense of both 'regulatory' (or 'general') and 'individual' administrative acts[46], but with emphasis on the latter.

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44 Law 2503/1997 (Government Gazette no A 107/1997).

45 Law 2690/1999 (Government Gazette no A 45/1999), as amended.

46 The distinction between 'regulatory' and 'individual' administrative acts is based on their content, on the one hand, and on the plurality or singularity of the persons affected by them, on the other hand. 'Regulatory' administrative acts establish a general and impersonal rule, while 'individual' administrative acts establish a specific and individual rule.

1. First Chapter

The First Chapter is titled 'General Provisions' and consists of Articles 1-12. Complying with the 'organic' criterion, Article 1 states that the provisions of the Code apply to the state and the local government as well as to legal entities governed by public law, excluding from its scope legal entities that belong to the public sector but are governed by private law[47]. Article 2 establishes the principle of the *ipso iure* action of the Public Administration, meaning that public authorities have both the right and the obligation to act, regardless of the filing or not of petitions by interested parties. Articles 3 and 4 govern the process of petition filing and its treatment by administrative authorities, providing also for specific deadlines. Applying the principle of transparency, Article 5 regulates the right of interested parties to have access to administrative as well as to private documents and records that are kept in the offices of public authorities and are connected with certain proceedings. The access takes place through inspection of said documents in the offices of the record-keeping public authority or through the supply of copies. The right is exercised without prejudice to matters of confidential nature. Article 6 refers to the prior hearing of interested parties before the execution of administrative actions or measures that may affect their rights or interests, concretising the exercise of the right of individuals to be heard provided by Article 20 II Const. Another important provision is that of Article 7, which establishes the principle of impartiality of administrative bodies, a special expression of the general principle of the rule of law. Articles 8 and 9 regulate the substitution of administrative organs, the transfer of their competences and the authorisation for signature, whereas Article 10 concerns issues relating to time limits and deadlines. The First Chapter finishes with Articles 11 and 12 on the official certification of document copies and signatures and the obligation of public authorities to keep registers.

2. Second Chapter

The Second Chapter is titled 'Collective Administrative Organs' and consists of Articles 13-15, which govern issues concerning their constitution, composition, functioning and decision-making.

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47 See A. Tachos, *Commentary on the Code of Administrative Procedure* (4th edn, Athens/Thessaloniki 2009) 1 [in Greek].

3. Third Chapter

The Third Chapter consists of Articles 16-21 and is titled 'Administrative Act'. Although this Chapter covers most of the issues relating to the issuance process and the validity of administrative acts, it does not contain a definition of the term. According to Article 16, administrative acts shall be issued in written form and only in exceptional cases can they be verbal. The document of an administrative act shall indicate the issuing authority and the issuance date and contain the signature of the competent administrative organ. There shall also be mentioned whether the administrative act can be challenged by a special or quasi-judicial administrative appeal and, if so, the scrutinising authority, the deadline and the consequences if the interested party fails to file such appeal[48]. Article 17 provides for the reasoning of individual administrative acts[49]. The reasoning shall be clear, specific and adequate and in principle able to be concluded by the data contained in the file of the particular case, unless other provisions explicitly require that it be included in the document of the administrative act. The provisions of Articles 18 and 19 deal with the publication and the notification of administrative acts. Promulgation of regulatory administrative acts shall be effected by their publication in the Government Gazette, unless otherwise provided. By contrast, the promulgation of individual administrative acts is effected in principle by their signing and dating. It is provided, however, that they shall be notified to the interested party. Article 20 governs issues concerning the prior submission of opinions and proposals by administrative organs other than the issuing one, when this is required for the promulgation of administrative acts. Article 21 makes reference to the revocation of administrative acts, providing that the competence to revoke belongs to the authority that is competent to issue the administrative act. Same provision also stipulates that the revocation process can differ from the issuance process, unless the administrative act that is to be revoked is a lawful one or, in case of an unlawful administrative act, there has been an evaluation of facts.

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48 As to this requirement, see also *infra* note 50.

49 Regulatory administrative acts do not need reasoning, unless this is explicitly required by the delegating statutory provision. See Spiliotopoulos, *supra* note 11, 175, with reference to case-law.

4. Fourth Chapter

The Fourth Chapter consists of Articles 22-23 and is titled 'Administrative Contract'. The first provision states that administrative contracts shall be in written form, unless otherwise provided, whereas the proposal and the acceptance may be submitted in separate documents. According to the second provision, the administrative contract is considered concluded when the contract award is served on the counterparty.

5. Fifth Chapter

The Fifth Chapter, entitled 'Administrative Appeals – Petitions', consists of Articles 24-27. According to their provisions, individual administrative acts can be challenged by administrative appeals. The latter are divided into three categories: simple administrative appeals, special administrative appeals and quasi-judicial administrative appeals. Simple administrative appeals may be lodged either with the public authority that issued the administrative act ('application for redress') or with the hierarchically superior authority ('hierarchical appeal'), when the law does not provide for the filing of a special or a quasi-judicial administrative appeal. In case of success of an application for redress the challenged administrative act can be revoked or amended, while in case of success of a hierarchical appeal the challenged administrative act can be annulled. The Code does not set out specific deadlines for the filing of simple administrative appeals; it only requires that the scrutinising administrative authority notify the interested party of its decision within 30 days, unless a different – indicative, in any case – deadline is set out by special provisions. 'Special administrative appeals' may be lodged when provided by special provisions, which determine the scrutinising public authority, the deadline for their filing and other requirements. The review is limited to the legality of the challenged administrative act, which, in case of success, can only be annulled. The scrutinising administrative authority notifies the interested party of its decision within 30 days. Like 'special administrative appeals', 'quasi-judicial administrative appeals' may be lodged when provided by special provisions, which determine the scrutinising public authority, the deadline for their filing, etc. However, the review is not limited to the legality, but it extends to the merits of the challenged administrative act, which, therefore, can be annulled or amended in case of success. The interested party must be notified of the relevant decision within a 3-month deadline. The Code also provides that when filing an adminis-

trative appeal, the scrutinising public authority may suspend the execution of the challenged administrative act, either upon request by the interested party or *ipso iure*. When the filing of an administrative appeal is not provided, the interested party may refer to the issuing administrative authority by filing a petition under Article 4 of the Code[50].

6. Sixth Chapter

The Administrative Procedure Code ends with the Sixth Chapter, which consists of Articles 28-33 and contains final and transitory provisions.

C. An assessment of the Administrative Procedure Code

The Greek Administrative Procedure Code, as eventually adopted, met criticism by a part of legal doctrine, including two members of the drafting Committee[51]. Apart from the relatively narrow and cautious approach as regards the scope of the Code, said Committee has been criticised for not having taken comparative account of foreign administrative procedure acts, as the Flogaitis Committee did. As a result, many contemporary issues already dealt with in other jurisdictions have not been addressed by the Code. Such could be, for instance: *(a)* the case of the total absence of specific provisions on the electronic form and signature of administrative acts and on inquiry and evidence proceedings and hearings, *(b)* the

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[50] As already mentioned, Article 16 of the Administrative Procedure Code requires that the option of filing a special or a quasi-judicial administrative appeal be explicitly indicated on the document of the administrative act. This is of particular importance, given that under Article 45 II of Presidential Decree 18/1989 the prior filing of a quasi-judicial administrative appeal – when provided – is a necessary procedural condition for the admissibility of an application for annulment before the Council of State, by which only the decision issued after the scrutiny of the quasi-judicial administrative appeal shall be challenged. However, merely the omission of this element (i.e. the option of filing an administrative appeal) from the body of the administrative act does not render this unlawful and, thus, voidable. According to the case-law of the Council of State, the application for annulment shall not be rejected when the interested party failed to previously file a quasi-judicial administrative appeal against the challenged administrative act, provided that the issuing administrative authority failed to include this option in the body of the administrative act. See judgment no. 2892/1993 of the Council of State (*Διοικητική Δίκη* 1994 [=Dioikitiki Diki – DiDik] 581), which depicts in a quite clear way the close relationship between administrative process and administrative courts procedure. See also E. Prevedourou, The Interweaving of Quasi-Judicial Administrative Appeals and Administrative Courts Procedure, *EDDDD* 1998, 12 et seq. [in Greek].

[51] See Karakostas, *supra* note 43, 646.

absence of a comprehensive treatment of contractual procedures as well as *(c)* the failure to encompass the enlargement of the notion of the 'interested party', particularly as regards proceedings concerning the regulation of environmental issues. In the same spirit, it has been considered that even the regulation of specific matters has been too abstract to solve the problems that existed before its enactment (e.g. the failure to provide specific deadlines for the revocation of administrative acts)[52].

On the other hand, one cannot ignore that the Administrative Procedure Code has been a first step towards the 'statutorisation' and, thus, the concretisation of some of the most important general principles of administrative law, previously established only by constitutional provisions or case-law. In this sense, it provided a clear set of applicable rules on the prior hearing of the interested party (Article 6) – which, in combination with the petition filing (Articles 3 and 4), constitute the main ways of direct participation of individuals in the process of issuance of administrative acts –, the principle of impartiality of administrative authorities (Article 7), the form and content of administrative acts (Article 16), the reasoning of individual administrative acts (Article 17) as well the provisions on the prior submission of opinions and proposals (Article 20), which have been considered to regulate some of the most essential issues of administrative law[53]. Undoubtedly, this has contributed to the enhancement of legal certainty insofar as possible as regards the said principles, since their establishment by case-law would be necessarily fragmentary, depending on the specific cases brought before the court. Of course, this could also constitute an argument against the comprehensiveness of the Code and in favour of a more extensive and detailed amendment[54]. Indeed, the Code does not eventually constitute an exhaustive piece of legislation; on the contrary, there are still special provisions about administrative procedure complementing it or deviating from it[55].

Apparently, the codification process in Greece was not a considerable occasion for a special effort in the sense of conceptualisation and theorisation of administrative procedure law. There is no doubt, nonetheless, that the enactment of the Greek Administrative Procedure Code filled a gap

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52 See Prevedourou, *supra* note 38, 421; Dagtoglou, *supra* note 25, 35-37; *idem*, *supra* note 7, 48-49; Tachos, *supra* note 47, XV.

53 See Karakostas, *supra* note 43, 647.

54 Cf. Dagtoglou, *supra* note 25, 37.

55 This is also shown by the wording of most of the Code provisions, very often stating that they are applicable "unless otherwise provided".

concerning the action of public administration and is welcome for this reason. It also seems that the draft Code prepared by the Flogaitis Committee in 1996 was too progressive to be accepted by the entire legal community at that moment, when a more detailed regulation of the administrative action was regarded as limiting its flexibility as well as leaving no room for jurisprudential creation and, finally, abolishing the traditional priority of case-law in the field of administrative law. However, the expansion of the administrative action in fields previously almost unknown, together with the increasing complexity of its object, may render a detailed regulation even more necessary in the short tem. All things considered, when the reluctance to a detailed regulation declines, the international experience as well as the Flogaitis Committee draft may be used as models for a revision of the Administrative Procedure Code, so as to face current challenges and at the same time achieve a balance between the opposing needs of flexibility and legal certainty. In this effort the Code in force will constitute the necessary basis for further development.