

Five Models of Administrative Adjudication†

Regulatory and benefit-distribution schemes 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. Such systems generally provide for three phases—initial decision, administrative reconsideration, and judicial review. However, the details of the various systems employed around the world are bewilderingly diverse, and different countries tend to invest most of their adjudicatory resources in only one of the three phases (and private parties who have a dispute with government tend to have more confidence in one of the phases than in the other two).

This Article proposes a methodology for classifying such systems. It identifies four key variables: combined-function agencies or separate tribunals, adversarial or inquisitorial procedure, judicial review that is either open to introduction of new evidence or closed to new evidence, and judicial review by generalized or specialized courts.

The Article identifies five models in common use around the world that involve different combinations of these variables. The United States, for example, uses combined-function agencies, adversarial procedure, and closed judicial review in generalist courts. On the other hand, the United Kingdom employs an independent tribunal to reconsider initial agency decisions. And France employs open judicial review in a specialized court. Each of these models can deliver accurate and efficient decisions while preserving fairness.

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Finally, the Article discusses transplants from one administrative adjudicatory system to another. There are numerous examples of successful transplants. The Article suggests that the United States should consider adopting a social security tribunal (similar to the tribunals in the United Kingdom and Australia) to replace the present system of adjudication of social security disputes.

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 the withdrawal of a license, or a 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.¹

By the term "administrative adjudication," I mean the entire system for resolving individualized disputes between private parties and government administrative agencies,² starting with an administrative investigation and the agency's preliminary or "front-line" decision,³ continuing through the process by which a private party challenges the front-line decision, and concluding with judicial review.⁴

A list of the types of administrative adjudicatory disputes would be nearly endless. Just to mention a few: Is an applicant for benefits disabled? Would a non-citizen be endangered if deported to her home country? Did a teacher sexually harass a student? Did a licensee commit environmental violations? Did a stock broker defraud consumers? If an agency denies a benefit or imposes a sanction or other regulatory order, then what? If wrongdoing is found, what are the consequences? Should a teacher be fired? Should a license be revoked? Should the agency levy a monetary penalty? Most of these

1. In most countries, administrative bodies resolve disputes between private parties (as well as disputes between private parties and government). Courts are sensitive to the risk that assignment of private party disputes to agencies threatens judicial powers. This paper does not discuss how different countries resolve this tension. Similarly, the paper does not discuss generalized administrative action such as rulemaking. Nor does it discuss disputes that are routed to courts rather than to administrative agencies for the initial decision, such as tort or contract claims against the government.

2. I use the term "agency" in the sense in which it is used in U.S. law, meaning a governmental unit (other than a court or a legislature) having delegated power to affect legal rights and obligations through rulemaking, adjudication, or similar functions. The term includes governmental units with various titles used throughout the world, including ministries and departments.

3. See *infra* note 8.

4. In many countries, adjudicatory decisions by government agencies are referred to as "administrative acts," "decisions," or "unilateral acts."

cases require the resolution of disputes about adjudicative facts,⁵ application of established law to the facts, or the exercise of administrative discretion,⁶ rather than issues of law or public policy.

The systems in place for resolving such disputes differ sharply around the world and are difficult to compare. This paper highlights five models in use by various countries that should facilitate such comparisons.

Administrative adjudication is an important subject and warrants more scholarly attention than it receives. Granted, adjudication is not the glamor area of contemporary administrative law. Today's cutting-edge scholarship focuses on administrative policymaking, cost-benefit analysis, accountability, public-private cooperation, networks, separation of powers, and similar important contemporary subjects.⁷ Adjudication is administrative law at the retail rather than the wholesale level. Agencies seldom use it to make policy or create precedents (although, of course, they sometimes do so).

Adjudication conjures up images of protracted proceedings with enormous records (in the regulatory sphere) or hallways packed with disgruntled applicants waiting for a rushed hearing before an impatient official (in the government benefit or immigration spheres). 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. The volume of administrative adjudications in most countries 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 I of this Article describes its methodology. Part II provides a detailed description of the five models as they are employed in a number of countries, and Part III explores the possibility of transplantation.

I. THREE PHASES, FOUR VARIABLES, AND FIVE MODELS

Most administrative adjudicatory systems have *three phases*:⁸

5. I use the term "adjudicative facts" to mean those that are specific to the parties to the case, as opposed to legislative facts that are of general application.

6. I use the term "discretion" to refer to an agency's ability to make choices between alternatives in the administration of a statute, such as in deciding the severity of a sanction.

7. See Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMP. L. 859 (2011).

8. Actually, adjudication normally has four phases rather than three. The three mentioned in the text are usually preceded by a preliminary investigation and a "front-line" decision by the agency staff. In the preliminary investigation phase, the

- Initial decision. By the initial decision, I mean the first agency proceeding that allows the private party a formal opportunity to present its case and challenge the “front-line” determination of the agency staff.⁹ The initial decision is legally binding (unless challenged at a higher level).
- Administrative reconsideration. Most administrative schemes include a provision whereby the initial decision can be reconsidered administratively, either by higher-level personnel of the same agency that made the initial decision or by a different agency.
- Judicial review. Most administrative schemes include an opportunity for the private party to seek review in a court of the initial decision or the reconsidered decision.¹⁰

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 adjudicating body a combined-function agency or a separate tribunal? A combined-function agency combines investigation, prosecution, initial decision-making, and reconsideration. A separate tribunal conducts reconsideration but does not engage in investigation or prosecution.
- Is the proceeding adversarial or inquisitorial? Adversarial proceedings resemble the trial-type process employed in U.S. or U.K. criminal cases—meaning a lawyer-controlled proceeding before a relatively passive and independent adjudicator. The trial is sharply distinguished from the investigation phase of the case. Inquisitorial proceedings resemble European or Latin American criminal process, meaning that an investigator assembles a dossier and comes to a conclusion about guilt or innocence. In inquisitorial systems, the initial decision phase is controlled by the investigators rather than the lawyers. The initial decision provides the private party a written or oral opportunity to change the minds of the investigators. Similarly, an inquisitorial reconsideration proceeding is unstructured and controlled by the reconsidering officials. Of course, no system is purely adversarial or

agency staff investigates whether an applicant should receive a benefit or whether an individual should be targeted for a sanction or other regulatory order, and makes a front-line decision accordingly. This sequence of investigation and front-line decision might be called “phase zero.” This Article will have little to say about phase zero, given that it is difficult to research, mostly unconstrained by law, and specific to the particular administrative scheme to which it applies. When the Article refers to the “three phases” of administrative adjudication, it therefore excludes “phase zero.”

9. See *supra* note 8 for discussion of the front-line decision.

10. For the purposes of this paper, the term “judicial review” includes “appeal.” Many countries distinguish the two, treating “appeal” as a remedy provided by statute and “judicial review” as non-statutory.

purely inquisitorial. Nevertheless, procedures can be arrayed on this axis and will tend to fall nearer either the adversarial or inquisitorial poles.

- Is judicial review open or closed? 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 the government can offer new reasons for its actions that were not adduced at an earlier stage. In other words, in an open system, the record does not crystallize until the judicial review stage. In a closed system, the parties cannot introduce new evidence, new reasons, or new arguments. The record has already crystallized either at the initial decision or reconsideration stage.
- Does a reviewing court have generalized jurisdiction or is it a specialized administrative court?

This paper identifies *five models* of administrative adjudication. The models describe different ways that countries shuffle these four variables in structuring the initial decision, reconsideration, and judicial review phases. Each of the five models involves a change in a single variable from previously described models. The adjudicatory systems of the countries or supranational entities whose systems are discussed in this Article (the United States, the European Union, the United Kingdom, Australia, China, Argentina, Japan, France, and Germany) can be described by reference to one of these five models.

Each country tends to rely *primarily on one of the three phases* (that is, initial decision, reconsideration, or judicial review) to achieve a fair and accurate result. Efficiency concerns 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 Article in modeling the administrative adjudication systems of many countries oversimplifies the details of the adjudication schemes in those countries. Oversimplification is an inevitable flaw of model-building in social science. It is necessary to abstract highly complex systems in order to compare and contrast them with examples in other countries. I hope that my description of these various adjudicatory systems does not distort their essential nature. Secondly, for political and historical reasons, the administrative adjudication systems of any given country cannot all be described by a single model. As discussed below, for example, the United States

has a dominant model, but each of the four other models can be found somewhere in U.S. administrative law.¹¹ I believe that the model I have selected to describe the system practiced in a particular country is the paradigmatic way that country has chosen to organize its administrative adjudication. It is the default that policymakers in that country will select unless there are strong reasons to depart from it. I now summarize the five models and in part II will discuss them in greater detail.

Model	Description	Countries
1	<ul style="list-style-type: none"> • Combined Function • Adversarial • Closed Review • Generalized Court 	<ul style="list-style-type: none"> • United States
2	<ul style="list-style-type: none"> • Combined Function • Inquisitorial • Closed Review • Generalized Court 	<ul style="list-style-type: none"> • European Union
3	<ul style="list-style-type: none"> • Tribunal • Adversarial • Closed Review • Generalized Court 	<ul style="list-style-type: none"> • United Kingdom • Australia
4	<ul style="list-style-type: none"> • Combined Function • Inquisitorial • Open Review • Generalized Court 	<ul style="list-style-type: none"> • China • Argentina • Japan
5	<ul style="list-style-type: none"> • Combined Function • Inquisitorial • Open Review • Specialized Court 	<ul style="list-style-type: none"> • France • Germany

Model 1—Adversarial Hearing/Combined Function/Limited Judicial Review

Under the first model, the agency that makes the initial decision and performs reconsideration is a *combined-function* agency. The initial decision occurs after an *adversarial* hearing presided over by a hearing officer (HO).¹² The HO works for the agency in question, but did not participate in the investigation or prosecution of the case the

11. See *infra* text accompanying notes 26–27.

12. In U.S. practice, the HO is frequently referred to as an administrative judge or an administrative law judge (ALJ), or by some other title (such as Immigration Judge). I discuss this issue of nomenclature *infra* text accompanying notes 20–21. In most countries, however, an administrative HO would not be referred to as a “judge” since only decision-makers in the judicial system can have that title.

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 (meaning no new evidence, arguments, or reasons) and the court does not substitute its judgment for that of the agency concerning matters of law, fact, or discretion. This model is typically employed in U.S. federal and state agencies.

Model 2—*Inquisitorial Hearing/Combined Function/Limited Judicial Review*

Model 2 is similar to Model 1, except that the initial decision and the reconsideration decision are inquisitorial rather than adversarial. There is no separation of functions, meaning the same person or persons exercise investigatory, prosecutorial, and adjudicatory functions. Proceedings at the initial decision level are considered part of the investigation. The decision-maker is active rather than passive, and assists unrepresented parties. Judicial review is closed. It takes place in a generalized court. This model is employed in cases decided at the level of the European Union (EU), but not in cases decided by the member states of the EU.

Model 3—*Tribunal System*¹³

Model 3 is like Model 1, except that the reconsideration decision is made by a tribunal that is separate from the investigating and prosecuting agency. This “tribunal” model is used in Australia and the United Kingdom, and in numerous countries whose legal system is derived from the United Kingdom.

Model 4—*Open Judicial Review*

The initial decision and reconsideration phases of Model 4 are like those in Model 2. However, judicial review is open, meaning that the court can consider new evidence, reasons, and arguments, and the court is empowered to substitute its judgment for that of the agency on factual and discretionary issues, as well as legal issues. This model is employed in China, Argentina, and Japan.

Model 5—*Specialized Court*

In Model 5, 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

13. In some countries, the word “tribunal” is used to refer to courts. I use the term to refer to an adjudicative administrative body that is independent of the agency that made the initial decision, but is not a court.

cases. This model is employed in France, Germany, and numerous other countries in Europe, Asia, and Latin America.

Obviously, the four variables could be manipulated to produce far more than five models. However, these five describe the adjudicatory systems that I have encountered, including those used by numerous countries that are not discussed in this Article.

Perhaps a concrete example will clarify how the five models might work in resolving an ordinary adjudicatory dispute. 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. One provision prohibits ferries from disposing of waste by dumping it into the water. Cap operates a ferry service under such a license. MT receives a complaint from Ed (a former employee of Cap), investigates the matter, and charges Cap with dumping waste into the water. This is MT's front-line decision.¹⁴

During the initial decision process, Ed testifies (orally or in writing) that he saw Cap dump waste into the water. Cap testifies that he fired Ed for incompetence the previous year and 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 the terms of his license and recommends that the license be revoked (as opposed to levying a financial penalty against him). MT or a tribunal reconsiders this decision and upholds it. Cap seeks judicial review. On review, 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, meaning that it is responsible for prosecution, investigation, adjudication, and reconsideration. It conducts a formal, trial-type, adversarial hearing presided over by a hearing officer (HO) who has not been involved in investigation and prosecution of Cap's case. The HO 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 the exercise of discretion concerning the 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.

14. See *supra* note 8.

It is conducted by MT investigators and prosecutors rather than by an HO.

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 review is open rather than closed. This means that the court has the 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 for MT's judgment.

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

II. DETAILED DESCRIPTION OF THE MODELS

This section of the paper 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—the United States*

The U.S. combined-function model derives from the struggle to regulate the railroads during the populist and progressive eras in the late 1800s and early 1900s.¹⁵ Various market failures made some form of regulation imperative. All sides of the struggle—including both railroads and shippers—pressed for federal regulation, which resulted in the creation of the Interstate Commerce Commission (ICC) in 1887.

Although the original version of the ICC was largely toothless (and what few teeth it possessed were soon pulled by the courts), by 1920 the ICC had emerged as the prototypical combined-function economic regulatory agency. It had broad authority to regulate the railroads, including the power to adopt regulations, set and regulate railroad rates, and disapprove mergers. The ICC adjudicated cases against railroads charged with violation of its regulations as well as disputes between shippers and railroads about the reasonableness of rates.

The ICC was a classic *combined-function* agency, meaning that it adopted rules, investigated, prosecuted, and conducted the initial decision and reconsideration phases. The U.S. Congress followed that model when it created the Federal Trade Commission (FTC) in 1914. The FTC was a policing agency with power to investigate, prosecute,

15. See Robert Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1197–1236 (1986). The ICC was abolished in 1995 and some of its functions were taken over by other agencies. *Id.* at 1318.

and adjudicate claims of unfair methods of competition. Legislatures adapted the combined functions model to countless regulatory and benefit-disbursing agencies at federal and state levels throughout the twentieth century and into the twenty-first.

Between 1906 and 1920, the ICC began to use hearing officers (HOs) to conduct the initial decision phase in railway rate cases. These initial decision proceedings were adversarial and resembled a lawyer-dominated civil trial. The HOs wrote detailed initial decisions which became final and binding unless reconsidered by the agency heads. Congress copied this combined-function hearing officer approach in subsequent statutes, such as the Federal Trade Commission Act.¹⁶

The Administrative Procedure Act (APA) of 1946¹⁷ preserved the combined-function agency, although New Deal opponents tried to strip the initial decision and reconsideration functions from the investigating and prosecuting functions. The adjudication provisions of the APA contemplate adversarial hearings conducted by HOs who work for the prosecuting agency but are organizationally separate from investigators and prosecutors.¹⁸ In 1978, the HOs governed by the APA received a new and cherished title—Administrative Law Judges (ALJs).

The most important innovation of the adjudication provisions of the APA was a set of protections of HO independence.¹⁹ However, it is important to note that the majority of HOs employed by federal agencies are *not* ALJs, because the hearings they conduct are not governed by the APA.²⁰ For that reason, this Article refers to “hearing officers” rather than the more customary “administrative law judges.”

16. 15 U.S.C. §§ 41–58 (2012). See Daniel J. Gifford, *Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions*, 49 ADMIN. L. REV. 1, 4–5 (1997).

17. Pub. L. No. 79-404, 60 Stat. 237.

18. See 5 U.S.C. §§ 554, 556–57 (2012).

19. See 5 U.S.C. §§ 3105, 5372, 7521 (2012). ALJs are hired by a separate agency, the Office of Personnel Management (OPM) through a rigorous process of testing and interviews, not by the agency for which they will decide cases. Once hired, ALJs enjoy life tenure without any probationary period, and cannot be removed except for good cause. Cases involving the discharge of ALJs for good cause are heard by ALJs working for a separate agency, the Merit Systems Protection Board. ALJs have no tasks other than deciding cases, and must be assigned to cases by rotation so far as practicable. They are not subject to performance evaluation. The APA contains a strict system of separation of functions, so that investigators and prosecutors on the agency staff (so-called “adversaries”) cannot engage in off-the-record communications about the issues in a given case with adjudicatory decision-makers (meaning either ALJs or agency heads).

20. For example, such important hearing schemes as veterans’ benefits and immigration are not governed by the APA. See Michael Asimow, *The Spreading Umbrella: Extending the APA’s Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1005–08 (2004).

The distribution of decision-making authority within combined-function agencies is relatively uniform, whether or not its processes are governed by the APA. As illustrated in the ferry boat hypothetical,²¹ an HO renders the initial decision after conducting an adversarial trial-type hearing. The HO is not personally engaged in the investigation or prosecution of the case (in other words, there is an internal “separation of functions”). The HO writes an initial decision that contains detailed findings and reasons. This decision becomes final unless either side seeks reconsideration.

The agency head carries out the reconsideration function, which is also adversarial. Prosecutors and investigators cannot engage in ex parte contact with the agency head. The agency head has full power to substitute a new decision in place of the initial decision.²² The reconsideration function is on the record made at the initial hearing; the parties file briefs and may engage in oral argument but normally cannot introduce new evidence. The “due process” clause of the U.S. Constitution,²³ as well as the provisions of state or federal APAs, guarantee the procedural fairness of both the initial decision and the reconsideration, and the impartiality of the HO and agency heads.

The APA did not change judicial review significantly. Federal or state courts of general jurisdiction provide *closed* judicial review. In other words, neither party can introduce evidence or arguments that were not introduced at the agency level, and the agency cannot supply additional reasons for its decision. 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 a reasonable agency legal interpretation of an ambiguous statute or regulation,²⁴ but state courts usually have full power to decide legal issues.

As mentioned above, a country tends to rely heavily on only one of the three phases of adjudication to reach a correct and fair result. In Model 1 countries like the United States, that phase is the *initial decision*, which frequently involves an adversarial trial-type hearing before a relatively independent HO. Far fewer resources are invested in reconsideration or judicial review, which are designed as a check against an unreasonable or legally flawed initial decision. Lawyers invest most of their efforts at the initial decision phase since it is improbable that the decision will be overturned on the basis of a fac-

21. See *supra* text accompanying note 14.

22. However, the reconsidering body is constrained in its ability to substitute different fact findings for those in the initial decision to the extent such findings were based on judgments of witness credibility. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

23. U.S. CONST. art. V (for federal agencies), art. XIV (for state and local agencies).

24. *Chevron USA, Inc. v. Natural Resources Def. Council*, 467 U.S. 837 (1984); *Auer v. Robbins*, 519 U.S. 452 (1997).

tual or discretionary error at the reconsideration or judicial review phases.

As also pointed out above, the actual details of every country's adjudicatory system resist being compressed into a single model. There are exceptions to every generalization. The design of adjudicating systems in place across the administrative law spectrum is shaped by historical circumstances and political struggles, rather than by mechanically following existing models. In the United States, for example, it is possible to find adjudicating systems at federal, state, and local levels that are better described by Models 2 to 5 than Model 1. I believe, however, that Model 1 is the paradigm in the United States, meaning the most characteristic method of organizing adjudication; it provides the default that is followed unless there are good reasons to depart from it. The next few paragraphs, however, illustrate the many exceptions to this generalization. The same is true for the other countries discussed in this Article.

First, the initial decision process in many benefit-providing agencies (particularly social security and veterans' benefits) is inquisitorial in certain respects. The government is usually not represented by a lawyer, so the HO is responsible for representing the interests of both parties, then deciding the case.²⁵ In this respect, these important adjudicating systems resemble Model 2 rather than Model 1.²⁶ The social security and veterans' benefits systems adjudicate more than one million cases a year, probably more than all of the other federal agencies combined.

Second, there are numerous tribunals in the U.S. system (meaning that the initial decision is reconsidered by a separate adjudicating agency). For example, in many states, reconsideration of initial decisions in benefit-distributing agencies (such as compensation of workers for industrial injuries or unemployment compensation) is provided by a separate tribunal. There are several tribunals at the federal level, including the Tax Court. These tribunals conform to Model 3 rather than Model 1.²⁷ At the judicial review level, open re-

25. *Richardson v. Perales*, 402 U.S. 389 (1971). The *Perales* decision upheld social security disability processes under due process and approved the multiple roles of the social security ALJs. The court did not discuss the APA, but the decision is generally understood to approve the ALJs' exercise of multiple functions under the APA as well as due process.

26. Adjudication at the local level often does not conform to the U.S. default model. Local governments decide vast numbers of cases, particularly involving licensing, land use, and environmental matters. Often there is no separation of powers (much less separation of functions) at the local level. Hearings are frequently inquisitorial rather than adversarial. Reconsideration may be provided by politically accountable bodies (like city councils).

27. In about half the states, a hybrid system has emerged, generally known as the "central panel." In a central panel structure, HOs do not work for the investigating and prosecuting agency. The HOs (usually called ALJs or some comparable title) work for a separate agency (the central panel), and each HO conducts the hearings and

view is rare but it does occur. Similarly, there are specialized courts that decide cases from specific agencies, such as the Court of Appeals for Veterans' Claims and the Court of Customs and Patent Appeals. Despite these exceptions, it seems fair to say that Model 1 is the *dominant* adjudicatory model in the United States.

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

Member states in the EU conduct most of the adjudication arising under their regulatory and benefit programs. The administrative adjudication systems employed by most continental European countries conform 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.²⁸

At the EU level, adjudicatory proceedings (both initial decision and reconsideration) are inquisitorial rather than adversarial. For example, in competition and merger cases,²⁹ staff members of the Director-General for Competition of the European Commission (DG-COMP) (referred to herein as “case handlers”) conduct an investigation and issue a written “statement of objections.” This is the front-line decision. 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 decision-making 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 a result of these consultations.

writes the initial decisions for many agencies. In this respect, the initial hearing resembles a tribunal system (discussed in Model 3). However, in central panel systems, the agency head usually retains the reconsideration power, which conforms to Model 1.

28. Michael Asimow & Lisl Dunlop, *The Many Faces of Administrative Adjudication in the European Union*, 61 ADMIN. L. REV. 131 (2009).

29. The EU published a helpful Manual of the procedures in competition cases. European Commission, *Antitrust Manual of Procedures*, EUROPEAN COMMISSION (Mar. 2012), http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf.

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 EU employs closed judicial review in courts of general jurisdiction (that is, the General Court and the European Court of Justice).

During the past thirty-plus years, the inquisitorial decision-making procedure for initial decisions at the EU level has undergone an interesting evolution.³⁰ The EU courts have created a set of protections for private parties that track U.S. due process and British “natural justice,” ensuring 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. The decisions resemble the traditional U.S. or U.K. common law process rather than the traditional statute-based civil law process. These innovations occurred largely because of British objections to the EU’s inquisitorial procedure at the time the United Kingdom joined the EU.³¹ Thus these procedural reforms seem to be an example of the transplantation of legal institutions from the adversarial U.K. system into the inquisitorial EU system. The set of procedural protections erected by the EU courts have since been incorporated into the European Charter of Fundamental Rights³² and in turn into the Treaty on the European Union.³³ As a result of the incorporation of due process norms into EU decision-making, 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 hearing officer is a Commission staff member rather than a case handler. The HO is not employed by the prosecutors (DG-COMP) and has not been 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 party opposing DG-COMP receives a fair hearing.

30. See generally PAUL CRAIG, *EU ADMINISTRATIVE LAW* chs. 12, 13 (2d ed. 2012); Asimow & Dunlop, *supra* note 28, at 143–55.

31. See Francesca Bignami, *Creating European Rights: National Values and Supranational Interests*, 11 COLUM. J. EUR. L. 241, 259–92 (2005).

32. Charter of Fundamental Rights of the European Union, 2000 O.J. (C364), Dec. 18, 2000, repromulgated as amended in 2010 O.J. (C83) 389, Mar. 30, 2010. Article 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, a right of access to files, and protection of confidentiality. This provision of the Charter codifies decisions of European courts that built due process rights into European administrative adjudication.

33. Consolidated Version of the Treaty on European Union, 2012 O.J. C 326/13 at 391.

After the hearing, the HO submits an “interim report” expressing conclusions “with regard to the respect for the effective exercise of procedural rights.”³⁴ The HO may also submit a separate report containing observations on the “further progress and impartiality of the proceedings,”³⁵ and this report can contain substantive recommendations concerning the legal and factual issues in the case.³⁶ The HO’s “final report” is attached to the initial decision by DG-COMP that is submitted to 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 hearing officer entails a limited degree of separation of functions, but does not alter the fundamentally inquisitorial nature of the initial decision-making 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.³⁷ The Union’s reliance on the initial decision phase has become even more evident with the introduction of due-process-like protections at the initial hearing, in particular the use of non-prosecutorial hearing officers in competition cases.

C. Model 3: Tribunals—United Kingdom, Australia

Model 3 describes administrative adjudication in the United Kingdom (and in countries whose legal system is derived from the United Kingdom, such as Australia or Canada). Under Model 3 the most important adjudicatory decision is made by an independent tribunal at the *reconsideration stage*.

In the United Kingdom, regulatory or benefits agencies make the initial decisions.³⁸ The initial process of application and tentative rejection of applications for social benefits is conducted online. Those who wish to contest that front-line determination can request a spoken or written statement of reasons and can require that the decision be considered again by a different person.³⁹ Thus the initial decision

34. See Wouter P.J. Wils, *The Role of the Hearing Officer in Competition Proceedings Before the European Commission*, 35 *WORLD COMPETITION* 431 (2012).

35. *Id.*

36. *Id.*

37. Of course, if the contested issues involve legal disputes rather than factual disputes, as is not uncommon in competition cases, the judicial review stage may be the most important of the three.

38. I appreciate the assistance of Robert Thomas and Paul Craig with respect to U.K. procedure.

39. See Paul Craig, *Perspectives on Process: Common Law, Statutory and Political*, [2010] *PUB. L.* 275, 287–88. The Administrative Justice & Tribunals Council issued a critical report on the poor quality of initial decision-making in social insurance situations: *RIGHT FIRST TIME* (June 2011), http://ajtc.justice.gov.uk/docs/AJTC_Right_first_time_web%287%29.pdf. See Robert Thomas, *Administrative Justice, Better Decisions, and Organizational Learning*, *PUB. L.* (forthcoming 2015).

process in social insurance cases is inquisitorial rather than adversarial. In regulatory cases, the procedure for initial decision-making depends on specific statutes and regulations.⁴⁰ In general, the rules of natural justice probably do not apply (or at least do not strictly apply) to the initial decision stage, so long as the government supplies a full merits hearing at the reconsideration stage or in court.⁴¹

In the United Kingdom, reconsideration is provided by a tribunal independent of the agency that made the initial decision. Traditionally, each regulatory or benefit agency had its own matching tribunal. For example, a social security or immigration tribunal reconsidered initial decisions arising under the social security or immigration laws. U.K. tribunals typically employ a large number of judges, many of whom are not lawyers. Cases are heard by several tribunal members sitting together. Tribunal hearings are typically adversarial in nature.⁴² The Tribunals and Inquiries Act (1958) required tribunals to provide written fact findings and it created a Council on Tribunals to research and report on the tribunal system.⁴³ Tribunal decisions were subject to statutory rights of appeal and to common law judicial review. Both forms of review were largely limited to questions of law.⁴⁴

In 2007, the United Kingdom enacted the Tribunals, Courts and Enforcement Act (TCEA), which wholly restructured the tribunal system.⁴⁵ TCEA merged most of the tribunals and provided independent funding for them (previously tribunals were funded by the agencies whose cases they decided). The First Tier Tribunal (FTT) provides reconsideration of most agency decisions. FTT is divided into six

40. See Nuno Garoupa et al., *The Investigation and Prosecution of Regulatory Offences: Is There an Economic Case for Integration*, 70 CAMBRIDGE L.J. 229, 238–40 (2011) (separation of functions in making initial decisions in financial market cases).

41. See H.W.R. WADE & C.F. FORSYTH, *ADMINISTRATIVE LAW* 442–44 (10th ed. 2009).

42. See Robert Thomas, *From “Adversarial v. Inquisitorial” to “Active, Enabling, and Investigative:” Developments in UK Administrative Tribunals*, in *THE NATURE OF INQUISITORIAL PROCESSES IN ADMINISTRATIVE REGIMES* 51 (Laverne Jacobs & Sasha Baglay eds., 2013). Thomas observes that procedures vary as among different tribunals. Social security proceedings tend to be more inquisitorial, given that most private parties and frequently the government are unrepresented. Immigration and asylum proceedings strike a balance between adversarial and inquisitorial procedure.

43. Tribunals and Inquiries Act, 1958, 6 & 7 Eliz. 2, c. 66 (U.K.).

44. The meaning of the word “law” for judicial review purposes is quite broad and includes questions of application of law to fact, serious factual errors, jurisdictional fact, and abuse of discretion. Under exceptional circumstances, facts not introduced at the administrative level can be considered by courts. See WADE & FORSYTH, *supra* note 41, at 793–800; Paul Craig, *Judicial Review, Appeal and Factual Error*, [2004] PUB. L. 788.

45. See WADE & FORSYTH, *supra* note 41, at 776–83.

“chambers” that specialize in hearing cases having related subject matter.⁴⁶

The Upper Tribunal (UT) contains four “chambers.”⁴⁷ 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, rather than as providing a second level of reconsideration. UT review is granted with permission of the FTT or the UT only with respect to points of law that raise 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 only with permission of the UT or the Court of Appeal.⁴⁸ It is also possible to secure closed judicial review in the High Court⁴⁹ of UT’s refusal to hear an appeal from the FTT, but again only if the case presents an important legal point.⁵⁰

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. That review process often furnishes an opportunity for the private party to make written submissions and sometimes for a meeting or a phone call between the private party and the reviewer.⁵¹

These initial decisions are reconsidered by tribunals. Traditionally, Australia provided a separate tribunal for each agency. In 1976, it merged them into a single body known as the Administrative Appeals Tribunal (AAT).⁵² The AAT provides trial-type reconsideration hearings (so called “merits review”) for over 400 agencies.⁵³ In some cases, including social security, veterans’ benefits, and migration, there are specialized tribunals; the AAT then provides a second level

46. *About Tribunals*, U.K. MINISTRY OF JUSTICE (2012), <http://www.justice.gov.uk/about/hmcts/tribunals>. Elaborate regulations prescribe the procedures to be followed by FTT. See Craig, *supra* note 39, at 289–93.

47. *About Tribunals*, *supra* note 46.

48. See Mark Elliott, *Ombudsmen, Tribunals, Inquiries: Re-Fashioning Accountability Beyond the Courts* (2012), <http://ssrn.com/abstract=2133879>.

49. See generally WADE & FORSYTH, *supra* note 41, ch. 18. In order to obtain judicial review, it is necessary first to secure leave to do so. The High Court judges who provide judicial review of agency action are known as the Administrative Court.

50. See *R. (Cart) v. Upper Tribunal*, [2011] UKSC 28; Mark Elliott & Robert Thomas, *Tribunal Justice, Cart, and Proportionate Dispute Resolution*, 71 CAMBRIDGE L.J. 297 (2012). Judicial review in the Administrative Court is also available, obviously, for disputes between private parties and government for which no tribunal review is provided.

51. Michael Asimow & Jeffrey S. Lubbers, *The Merits of “Merits” Review: A Comparative Look at the Australian Administrative Appeals Tribunal*, 28 WINDSOR Y.B. ACCESS TO JUST. 261, 263 (2010).

52. *Id.* at 263–67.

53. The AAT can even consider evidence of facts occurring after the initial decision. See Margaret Allars, *The Nature of Merits Review: A Bold Vision Realised in the Administrative Appeals Tribunal*, 41 FED. L. REV. 197 (2013).

of reconsideration from some decisions of these specialized tribunals. AAT decisions can be appealed to the Federal Court, but only on a question of law.

The United Kingdom and Australia invest most of their adjudicatory resources in the reconsideration process provided by tribunals. That is the level that private parties regard as providing 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 United Kingdom, the UT appears to have almost entirely supplanted judicial review in courts of general jurisdiction.

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

Under Model 4, the process of initial agency decision-making and reconsideration is relatively unstructured. Agencies may provide an informal hearing or at least a meeting between the private party and the agency staff and some opportunity to obtain reconsideration at a higher agency level. However, the important decision occurs in an open judicial proceeding. When a country permits open judicial review, it is likely that it has chosen to invest its resources in the judicial review phase rather than the initial decision or reconsideration phases. 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. China, Argentina, and Japan are examples of countries that employ variations of Model 4.

In China,⁵⁴ central, provincial, and local government agencies make a vast number of adjudicatory decisions. Recent Chinese legislation provides procedural protections at *all three levels*—initial decision, reconsideration, and judicial review.⁵⁵ As a practical matter, however, only a relatively small number of people who are adversely affected by agency decisions use any of these procedures; most resort to an informal but well-organized *petitioning process* (“*xinfang*,” sometimes called “letters and visits”) to responsible officials that has existed throughout Chinese history but is ineffective in furnishing redress to individuals harmed by illegal government action.⁵⁶

54. I express my appreciation to Jin Weifeng, Wang Xixin, Zhou Hanhua, and He Haibo for their assistance with Chinese administrative law.

55. In addition to the laws summarized in the text, China has enacted an Administrative Licensing Law (2004) and an Administrative Enforcement Law (2011), both of which grant additional protections at the initial decision stage.

56. See generally Carl F. Minzner, *Xinfang: Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103 (2006). There are numerous *xinfang* bureaus in China that receive citizen complaints, and elaborate regulations describe how that

The Administrative Penalty Law of 1996 (APL)⁵⁷ applies to the initial decision phase. It requires that central and local agencies provide fair procedure when imposing “penalties.” For this purpose, penalties include disciplinary warnings, fines, confiscations, suspensions or rescissions of permits or licenses, and administrative detentions. APL provides that persons subject to penalties must receive adequate notice and “shall have the right to state their cases and the right to defend themselves.” The agency shall not impose a heavier penalty on parties simply because they tried to defend themselves.⁵⁸ In the case of serious penalties (such as large fines or license revocations), there must be a public hearing presided over by a person other than the investigator.⁵⁹

Under the Administrative Reconsideration Law of 1999 (ARL),⁶⁰ a party may seek *reconsideration* of many kinds of adverse agency decisions (not just penalties) by officials at a higher level of the agency that made the initial decision.⁶¹ The reconsidering body can take evidence and should consult files. It should listen to the views of

system is supposed to function. *Xinfang* serves many functions besides vindication of legal rights, such as providing information to government officials about corruption or other abuses at the local level. Minzner estimates that the *xinfang* system gives rise to about 11.5 million petitions per year, close to 100 times the 125,000 cases brought under the Administrative Litigation Law. However, only a tiny percentage of petitioners realize favorable results from using *xinfang*. *Id.* at 105–06 (reporting that only 0.2% of complainants received favorable outcomes from their petitions). Reform measures now under consideration in China may close off the *xinfang* process to petitioners whose cases could be considered under the Administrative Reconsideration Law, *infra* note 60, or the Administrative Litigation Law, *infra* note 63.

57. Xingzheng Chufa Fa (行政处罚法) [Law of the People's Republic of China on Administrative Penalty] (promulgated by Order No. 63 of the President of the People's Republic of China, Mar. 17, 1996, effective Oct. 1, 1996), *available in English at* <http://www.china.org.cn/english/government/207306.htm> [hereinafter Administrative Penalty Law].

58. Administrative Penalty Law arts. 6, 8, 31–32.

59. *Id.* ss. 39, 42. Whether local government agencies actually comply with these procedural requirements in practice is another matter entirely. Several distinguished professors argue that a comprehensive APA is necessary because existing procedural rights are not taken seriously by administrative agencies or even courts. Ying Songnian & Wang Xixin, *Between Dreams and Reality: Making of the Administrative Procedure Act in China*, 8–9 (2012) (paper published in Chinese; English-language version on file with the author).

60. Xingzheng Fuyi Fa (行政复议法) [Law of the People's Republic of China on Administrative Reconsideration] (promulgated by Order No. 16 of the President of the People's Republic of China, Apr. 29, 1999, effective Oct. 1, 1999), *available in English at* http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383562.htm [hereinafter Administrative Reconsideration Law].

61. The ARL applies to decisions relating to land and natural resources, infringements on managerial decision-making power, claims that an agency illegally raised funds or levied taxes on property, denials of permits or licenses, failures to perform statutory duties of protecting individual rights to person, property, or education, and failure to issue a pension or other social benefits. *Id.* art. 6. It also covers attacks on the legality of informal agency rules that form the basis of the disputed action. *Id.* art. 7. See Wei Cui, *Foreign Administrative Law and International Taxation: A Case Study of Treaty Implementation in China*, 64 ADMIN. L. REV. 191, 213–15 (2012).

the applicant, the agency, and third parties. The respondent agency must explain its actions, and the applicant is entitled to a copy of this document. The reconsidering agency may set aside a decision if “the main facts are not clear and essential evidence is inadequate” because of a legal error or violation of established procedures, or because “the act is obviously inappropriate.” Reconsideration is free of charge.⁶²

Finally, the Administrative Litigation Law of 1989 (ALL)⁶³ provides private parties with a judicial remedy for virtually all adjudicatory agency action that adversely affects them.⁶⁴ Under the ALL, a court of general jurisdiction conducts an open inquisitorial trial of the issues in the case. The judges shall not be subject to interference by anyone. The government agency has the burden of proof. The trials are normally open to the public, and there is a collegial panel of judges or judges and assessors.⁶⁵ The court has the power to overturn an agency’s factual and discretionary determinations.⁶⁶

The ALL provided a major step toward a Chinese rule of law.⁶⁷ It is particularly remarkable in light of China’s Confucian and Maoist history which discouraged challenges to authority.⁶⁸ The ALL represents a significant commitment of judicial resources. About 125,000 cases a year are brought under the ALL, and about ten to twenty percent result in a favorable determination for the private plaintiff.⁶⁹

62. Administrative Reconsideration Law arts. 3, 22–23, 28, 39.

63. Xingzheng Susong Fa (行政诉讼法) [Administrative Litigation Law of the People’s Republic of China] (promulgated by Order No. 16 of the President of the People’s Republic of China on Apr. 4, 1989, effective Oct. 1, 1990), available in English at <http://www.china.org.cn/english/government/207335.htm> [hereinafter Administrative Litigation Law]. The ALL is also known as the Administrative Procedure Law.

64. For discussion of the history of the ALL, see Michael Palmer, *Compromising Courts and Harmonizing Ideologies: Mediation in the Administrative Chambers of the People’s Courts in the People’s Republic of China*, in *NEW COURTS IN ASIA* 251 (Andrew Harding & Penelope (Pip) Nicholson eds., 2010).

65. Administrative Litigation Law arts. 3, 11, 30–32, 45–46.

66. *Id.* arts. 54(2)(a) and (e) provide that the court can overturn a decision for “inadequacy of essential evidence” or for “abuse of power” as well as for errors of law or required procedure. I am informed that evidentiary inadequacy is the most frequently cited legal basis for invalidating administrative acts. Email from He Haibo to author (Nov. 6, 2012) (on file with author).

67. See Neysun Mahboubi, *Suing the Government in China*, in *DEMOCRATIZATION IN CHINA, KOREA, AND SOUTHEAST ASIA* 141 (Kate Xiao Zhou et al. eds., 2014). Mahboubi argues that despite its unrealized potential, the ALL has had important consequences, including the subsequent procedural laws discussed *supra* at text accompanying notes 57–62 and procedural innovation at local levels. He also contends that administrative litigation provides a space for adversarial contention between citizens and government, highlights specific instances of government misconduct, and encourages formation of interest groups consisting of litigants and lawyers.

68. See Tom Ginsburg, *Confucian Constitutionalism? Globalization and Judicial Review in Korea and Taiwan*, 27 *LAW AND SOC. INQUIRY* 763 (2002).

69. In about thirty to forty percent of cases, the plaintiffs withdraw the case before a judicial ruling. Some withdrawals are coerced, but in many cases the parties have negotiated a settlement. See He Haibo, *Litigation Without a Ruling: The Predicament of Administrative Law in China*, 3 *TSINGHUA CHINA L. REV.* 257 (2011).

The central government has begun to fund local courts, which should enhance judicial independence.

Nevertheless, the law on the books and the law in action diverge sharply when discussing judicial review of agency action under the ALL.⁷⁰ Many Chinese judges are poorly qualified, although the quality of the judiciary is improving steadily. It is difficult for plaintiffs to obtain legal representation in ALL suits, and courts are sometimes reluctant to accept ALL cases or to rule on them, especially if the issues are regarded as politically sensitive. Sometimes the judges are susceptible to local government or Communist Party influence in deciding specific cases.⁷¹ Judgments against the government are difficult to enforce. Party officials have become wary of judicial enforcement of administrative law norms and have sought to substitute mediation for adjudicated decisions. Retaliation against plaintiffs by officials who have been sued is not uncommon.⁷²

The Argentine system is broadly similar to that of China.⁷³ At the initial decision level, the Argentinian Administrative Procedural Law⁷⁴ requires that a private party have an opportunity to inspect the administrative file, present written arguments and proofs, and receive a statement of reasons, but there is normally no hearing. The head of the agency (usually a cabinet minister) reconsiders the initial decision after receiving written submissions.

The ministerial decision is then subject to open judicial review in a federal or provincial trial court of general jurisdiction.⁷⁵ The court independently decides the issues of law, fact, or discretion, without giving deference to the ministerial decision. Obviously, the process of open judicial review of administrative action requires a significant investment of resources. In Argentina, judicial review is the level

70. See Jonathan Kinkel & William Hurst, *Review Essay—Access to Justice in Post-Mao China: Assessing the Politics of Criminal and Administrative Law*, 11 J. EAST ASIAN STUD. 467, 479–88 (2011); Mahboubi, *supra* note 67.

71. See generally JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (Randall Peerenboom ed., 2010). The essays in this volume stress that progress has been made in securing decisional judicial independence in China. The degree of independence varies between different types of cases. See particularly Peerenboom's essay, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION, *supra*, at 69.

72. See Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935 (2011).

73. See Carlos F. Balbin, *MANUAL DERECHO ADMINISTRATIVO* (2011). I appreciate the assistance on Argentine law received from Juan Cruz Azzarri, Hector Mairal, Laura Monti, Joaquin Villegas, and other Argentine academics.

74. Law No. 19549, Apr. 27, 1972, [22] B.O. 411.

75. Argentina has specialized tribunals that furnish reconsideration in tax and public service cases; when a decision of a specialized tribunal is appealed in court, the review is closed rather than open. In the Buenos Aires area, some judges specialize in administrative law, even though they are within a court of general jurisdiction.

that counts, in the view of both public and private lawyers, rather than the initial decision or reconsideration phases.

Japan also follows Model 4.⁷⁶ However, because of the low volume of cases in which judicial review is sought (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 the most significant of the three phases of adjudication.⁷⁷ The poor chances of success, combined with the high costs of litigation, and a shortage of lawyers and judges, probably explain why so few prospective litigants in Japan bother to challenge bureaucratic decisions in court. There may be also cultural factors at play that discourage people from suing the government in Japan. Nevertheless, the present figures (about 4,000 cases per year) represent substantial increases from the years 1986 to 1995 when only a few hundred cases were brought each year.⁷⁸

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

A number of countries provide open judicial review of agency action in a specialized system of administrative courts.⁷⁹ France and Germany serve as the leading examples of administrative court sys-

76. Japan's Administrative Procedure Law (Gyōsei Tetsuzuki-hō, Law No. 88 of 1993, available in English at http://www.cas.go.jp/jp/seisaku/hourei/data/APA_2.pdf) provides for administrative hearings, and the Administrative Appeals Law (Gyōsei fufuku shinsa-hō, Law No. 160 of 1962) provides for reconsideration. Courts of generalized jurisdiction conduct open judicial review on issues of fact but overturn discretionary acts only for abuse of discretion. See Tom Ginsburg, *Dismantling the "Developmental State?" Administrative Procedure Reform in Japan and Korea*, 49 AM. J. COMP. L. 585, 599–606 (2001); Hitoshi Ushijima, *Administrative Law and Judicialized Governance in Japan*, in ADMINISTRATIVE LAW AND GOVERNANCE IN EAST ASIA 81 (Tom Ginsburg & Albert H.Y. Chen eds., 2009); MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW ch. 8 (1999). My thanks to Tsuyashi Koshikawa, Mark Ramseyer, and Joel Rheuban for their assistance on Japanese administrative law.

77. Only about 2,000 to 4,000 administrative cases per year are heard by the generalized courts that conduct open review. Only about ten percent of plaintiffs prevail. See Ushijima, *supra* note 76, at 92. In 2006, there were 2,093 new cases and 2,565 were decided. By 2012, the numbers had crept up slightly—4,783 cases filed, 4,840 decided. See *Shiho tokei nempo* [Annual Report of Judicial Statistics], tbl.4 (2012), available in Japanese at <http://www.courts.go.jp/sihotokei/nenpo/pdf/B24DMIN4.pdf>.

78. See RAMSEYER & NAKAZATO, *supra* note 76, at 219. The increase might be explained by a 2004 amendment to the Administrative Case Litigation Law, Gyōsei jiken soshō-hō, Act No. 139 of 1962, available in English at <http://www.japaneselawtranslation.go.jp/law/detail/?id=1922&vm=04&re=02>, that permits declaratory relief against administrative guidance. The increase in administrative law cases mirrors a modest increase in the amount of civil litigation in Japan, attributable largely to an increase in the number of lawyers and judges and to the economic downturn. See Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation*, 35 J. LEG. STUD. 31 (2006).

79. 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 have created administrative law trial courts within the regular judicial system, but the decisions of these courts are reviewed by generalized appellate courts rather than specialized administrative courts.

tems.⁸⁰ These systems handle a quite 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 levels of adjudication.⁸¹

In a system of specialized administrative courts, parties have access to a set of judges who are experts 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 encourages a greater number of appeals than would occur if review is closed or is situated in generalized courts. On the cost side, the decision to create a specialized court system requires the expenditure of economic resources (such as a new infrastructure) that would be unnecessary if the general courts review agency actions. In addition, if there are dual court systems (administrative and general), problems are likely to arise as to which of them has jurisdiction over particular kinds of cases, thus necessitating some mechanism for resolving jurisdictional conflicts.

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.⁸² 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 judicial branch.⁸³ 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 thirty-eight administrative trial courts. Above them are

80. For a comparative treatment of administrative courts, see Bignami, *supra* note 7, at 891–86.

81. In France, roughly 175,000 cases are brought to the administrative court each year (with a twenty-four percent success rate). In Germany, roughly 125,000 cases are brought to the administrative court each year (with a twenty-six percent success rate). See ASSOCIATION OF THE COUNCILS OF STATE AND SUPREME ADMINISTRATIVE JURISDICTIONS OF THE EUROPEAN UNION i.n.p.a., TOUR OF EUROPE, http://www.juradmin.eu/en/eurtour/eurtour_en.lasso.

82. See Jean-Bernard Auby & Lucie Cluzel-Métayer, *Administrative Law in France*, in ADMINISTRATIVE LAW OF THE EUROPEAN UNION, ITS MEMBER STATES, AND THE UNITED STATES 61, 68 (Rene Seerden ed., 2d ed. 2007); BERNARD SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD 207–11 (1954); CE Sect., May 5, 1944, Rec. Lebon 133 (revocation of license to operate a newspaper stand by reason of misconduct requires the administration to provide notice and a hearing), translated into English as “Widow Trompier-Gravier” in SCHWARTZ, *supra*, at 324–44.

83. See generally Jean Massot, *The Powers and Duties of the French Administrative Judge*, in COMPARATIVE ADMINISTRATIVE LAW 415 (Susan Rose-Ackerman & Peter Lindseth eds., 2010); Auby & Cluzel-Métayer, *supra* note 82. French administrative judges furnish technical assistance to the government in drafting legislation and regulations and publicize their studies about improving the administrative process. Because the French administrative courts are situated in the executive branch, the term “judicial review” is probably a misnomer, but I have stuck with it; the French administrative courts certainly act like courts rather than like administrative reviewers. My thanks to Thomas Perroud and John Bell for providing assistance with French administrative law.

eight administrative courts of appeal, and above those is the Conseil d'État, which is France's Supreme Court for administrative law. 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.⁸⁴ In cases involving sanctions, as in the ferryboat example,⁸⁵ the courts provide "full jurisdictional review" meaning fully open review and the power to substitute judgment as to issues of facts and discretion.⁸⁶

The German administrative courts are lodged within the judicial rather than the executive branch of government.⁸⁷ The present version of the German Administrative Procedure Act was enacted in 1976, but its roots date back to the 1860s.⁸⁸ 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.⁸⁹ 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.⁹⁰

84. Eduardo Jordão & Susan Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, 66 ADMIN. L. REV. 1, 29–38 (2014) (general pattern of non-deferential review by French administrative courts); Auby & Cluzel-Métayer, *supra* note 82, at 78; L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW 261–67 (5th ed. 1998).

85. See *supra* text accompanying note 14.

86. Such sanctions are considered quasi-criminal and invoke the right to an independent and impartial tribunal under Article 6(1) of the European Convention on Human Rights (which covers the determination of civil rights and obligations as well as criminal charges). See CE Ass., Feb. 16, 2009, Rec. Lebon, Req. no. 274000 (Société ATOM) (holding that the ECHR requires full jurisdictional review in a case involving tax penalties).

87. I appreciate the assistance of Hermann Pünder in discussing German administrative law.

88. See Bignami, *supra* note 7, at 895; Meinhard Schröder, *Administrative Law in Germany*, in ADMINISTRATIVE LAW OF THE EUROPEAN UNION, ITS MEMBER STATES, AND THE UNITED STATES, *supra* note 82, at 94.

89. See Schröder, *supra* note 88, at 123–26; Verwaltungsverfahrensgesetz [VwVfG] [Administrative Procedure Act], May 25, 1976, BUNDESGESETZBLATT [BGBL.] I at 1253, in the wording last promulgated on Jan. 23, 2003, BGBL. I at 102, last amended by Viertes Gesetz zur Änderung verwaltungsverfahrenrechtlicher Vorschriften [VwVfÄndG], BGBL. I at 2418, §§ 24–29, 37, 39, available in English at <http://www.iuscomp.org/gla/statutes/VwVfG.htm>.

90. Schröder, *supra* note 88 at 125, 138–39; Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Court Procedure], Mar. 19, 1991, BGBL. I at 686, last amended by Gesetz, Oct. 10, 2013, BGBL. I at 3786, art. 5, §§ 68–80, available in English at http://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html.

The German system of administrative courts provides for open judicial review of administrative acts. The administrative court conducts an oral investigatory hearing and is required to provide detailed findings of fact and a statement of reasons. It can generally substitute its 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.⁹¹ There are three levels of the administrative court system—administrative courts, higher administrative courts, and the Federal Administrative Court. Review at the Federal Administrative court level occurs only in cases where there is doubt as to the correctness of the judgment or the case presents unusual difficulties. The German model has been transplanted to numerous European and Latin American countries.⁹²

III. EVALUATING AND TRANSPLANTING ADJUDICATORY SYSTEMS

This Article is descriptive, not normative. It does not take a position on which model is optimal. In my opinion, each of the models can 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).⁹³ All of them can meet the standards of the right of good administration as set forth in the Charter of Fundamental Rights of the European Union.⁹⁴ A good system of administrative adjudication is accessible by ordinary people, even to those representing themselves. The body making each of the decisions—initial, reconsideration, or judicial—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. Each of the five models can meet this standard.

It is easier to improve the adjudication system through incremental changes than by transplanting practices and institutions

91. VwGO [Code of Administrative Court Procedure] § 114. See Georg Herbert, *Administrative Justice in Europe—Report for Germany* (n.d.), http://www.juradmin.eu/en/eurtour/i/countries/germany/germany_en.pdf; Schröder, *supra* note 88, at 128–42, 32 (2001); MAHENDRA P. SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE 223–32, 242–43 (2001). As Singh reports, “[a]pparently the [administrative] courts seem to be working very well and people seem to be quite contented with the simplicity, expediency, adequacy and effectiveness of proceedings before them.” *Id.* at 243.

92. Bignami, *supra* note 7, at 896.

93. See Roger Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 591–93 (1972).

94. See *supra* note 32.

from other countries.⁹⁵ 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 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. Certainly, the rule of “if it ain’t broke, don’t fix it” is in play. A major change in even a troubled administrative practice might introduce still 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.⁹⁶ A common illustration of path dependence is the “qwerty” layout on an English language keyboard.⁹⁷ Qwerty may not be the best arrangement, but it is the most familiar one, and the costs of adopting a new layout probably outweigh the benefits of making a change. Thus, countries that utilize inquisitorial methods of justice in criminal law are likely to resist importation of adversarial approaches in administrative adjudication. Those accustomed to adjudication within the prosecuting or investigating agency are likely to resist stripping the agency of its adjudicatory function. Those who are used to judicial review in courts of general jurisdiction will question the creation of specialized administrative courts.

Nevertheless, there have been numerous successful transplants in the history of administrative law. Just to mention a few, the EU

95. The subject of transplantation in comparative law is controversial. I cannot enter into these debates here. Transplanted laws and institutions are always transformed in the receiving country because the two countries are likely to have a distinct legal history and culture. See, e.g., Toby S. Goldbach et al., *The Movement of U.S. Criminal and Administrative Law: Processes of Transplanting and Translating*, 20 IND. J. GLOBAL LEGAL STUD. 141 (2013). I argue here only that there are examples of apparently successful administrative procedure transplants, and that law reformers should pay attention to the ways that other countries have addressed the problems with which the reformers are concerned. See *infra* text accompanying notes 95–102.

96. See, e.g., Tom Ginsburg, Jonathan S. Masur & Richard H. McAdams, *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U. CHI. L. REV. 291 (2014).

97. See Oona A. Hathaway, *Path Dependence and the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 611 (2001).

adopted significant elements of adversarial decision-making and natural justice after British accession.⁹⁸ Numerous countries have borrowed the French and German administrative court models. Some countries have enacted broadly applicable administrative procedure acts modeled on the U.S. APA. Chinese decisions to adopt a litigation law were heavily influenced by western practices. U.S. freedom-of-information laws have spread around the world, as has the Scandinavian ombudsman model. The United Kingdom adapted the idea of a centralized administrative tribunal from Australia. Transnational bodies have borrowed administrative law principles from the United States and from other countries.⁹⁹ In turn, requirements of fair procedure in bodies like the World Trade Organization have been applied to domestic disputes.¹⁰⁰

So transplants are possible. A country might consider introducing tribunals for reconsideration of initial decisions if it feels that its judicial review system is poorly perceived by the population, as is apparently the case in Japan, or 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 could test out adversarial approaches in order to strengthen the initial decision stage or inquisitorial approaches to make the 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 the nation's familiar procedural norms.

As an example of potential transplantation, I have proposed that the United States consider experimentation with a social security tribunal.¹⁰¹ The successful experience with social security tribunals in the United Kingdom and Australia suggests that this is an idea that could work in the United States. There are obvious questions of scale, given that the U.S. social security system disposes of around 700,000 disability appeals each year.¹⁰² However, the British Social Security and Child Support Tribunal handles close to 400,000 cases a year *and*

98. See *supra* text accompanying notes 30–33.

99. Goldbach et al., *supra* note 95, at 168–77.

100. See Daphne Barak-Ezer & Oren Perez, *Whose Administrative Law Is It Anyway? How Global Norms Reshape the Administrative State*, 46 CORNELL INT'L L.J. 455, 468–72 (2013).

101. See Asimow & Lubbers, *supra* note 51, at 281–84 (2010); Michael Asimow & Jeffrey S. Wolfe, *Thinking Outside the Box: A New Social Security Tribunal*, 38 ADMIN. L. NEWS 5 (2013). A social security tribunal could be a first step toward a federal benefits tribunal. The benefits tribunal would adjudicate social security cases along with the veterans' benefits cases that are presently decided by the Veterans Administration and the black lung disease cases that are presently resolved by the Labor Department.

102. *Information about Social Security's Hearings and Appeals Process*, U.S. SOCIAL SECURITY ADMINISTRATION, <http://www.socialsecurity.gov/appeals/>.

*it decides them within an average of 22 weeks.*¹⁰³ Tribunals are not unknown in the United States. For example, the Tax Court functions well as a federal tax tribunal, and the states routinely use tribunals to make decisions in cases involving benefits such as unemployment compensation and workers' compensation.

The existing system of social security disability adjudication in the United States is highly dysfunctional. At present, initial decisions for social security disability claims are made by ALJs employed by the Social Security Administration (SSA). Reconsideration of ALJ decisions is provided by the SSA's Appeals Council. Judicial review occurs in the federal district court (and there is a heavy volume of such cases). Social security is plagued by an almost hopeless backlog of undecided cases, a problem that can only worsen as demographic changes increase the number of disability applicants. It often takes more than two years before these generally sick and unemployed applicants can receive a hearing. Moreover, there is deep distrust between the ALJs and SSA over various measures the SSA has taken to increase ALJ productivity and evaluate the work of the ALJs. Another problem is that there are not nearly enough ALJs to reduce the backlog, but the system for hiring more ALJs by the Office of Personnel Management is cumbersome and unsatisfactory in a variety of ways (not least because it provides a preference to military veterans which discriminates against women). Judicial review of thousands of social security cases in federal district court is burdensome to the judges and may represent a poor use of judicial resources.

A social security tribunal would remove the administrative judges from the SSA. The existing ALJs would move to the new tribunal and would continue to be protected against discharge without cause. However, the ALJs would no longer enjoy the elaborate provisions of their decisional independence presently provided by the APA.¹⁰⁴ As a result, the tribunal would be free to hire its own judges, taking the most qualified applicants without the constraints of the existing system and without the veterans' preference. It could insti-

103. U.K. Ministry of Justice, HM Courts & Tribunals Service, *Social Security and Child Support Statistics: 1 April 2010 to 31 March 2011*, at 4 (n.d.), <http://www.justice.gov.uk/downloads/statistics/mojstats/sscs-stats/sscs-stats-notice-march2011.pdf>. The social security tribunal uses mostly inquisitorial rather than adversarial methods. Thomas, *supra* note 42. Thomas states that the social security tribunal decides 450,000 cases per year, at an average of twenty-five weeks per case. Thomas, *supra* note 39, manuscript at 6.

104. The ALJ system was created in order to achieve decisional independence for the adjudicators (then known as hearing officers) in combined-function agencies. See *supra* note 19 (listing provisions protecting ALJ independence); Michael Asimow, *The Administrative Judiciary: ALJs in Historical Perspective*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 157; Paul Verkuil et al., *The Federal Administrative Judiciary*, 1992-2 ACUS REC. & REP. 777. This high level of protection for the decisional independence of the judges would not be needed if they worked for an independent tribunal rather than for a combined-function agency.

tute a probationary system so that new judges who failed to meet expectations could be easily weeded out. The tribunal would be allowed to use various management tools that are now precluded, such as evaluation of judges and peer review. The tribunal could employ temporary, retired, part-time, or even lay judges, until its backlog is whittled down. An infusion of new judges would allow the new tribunal to conduct hearings far more quickly than is possible with the limited corps of existing social security judges and it would permit them to operate in panels rather than solo. Another reform that could be introduced at the same time might be a social security appellate tribunal (like the United Kingdom's Upper Tribunal). If an appellate tribunal existed, Congress could then reduce the volume of social security cases that presently overload federal district courts. It might, for example, limit the review jurisdiction of the courts to questions of law rather than fact. In the alternative, there could be a specialized benefits court to review social security decisions (similar to the Veterans Court). All these ideas are essentially transplants from other systems that seem to be functioning well, yet they do not depart drastically from U.S. legal culture since they have existing U.S. analogues.

CONCLUSION

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

This paper has described five models of administrative adjudication systems 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. They also differ in the ways that each country shuffles a limited set of variables: combined-function agency versus separate tribunal, adversary versus inquisitorial procedure, open versus closed judicial review, and specialized versus generalized courts. These choices are heavily path dependent and reflect each country's legal culture, as well as political compromise.

This paper does not express a normative preference between the five models. There is no single clearly superior design for administrative adjudication; rather, every system could be improved by careful redesign and strategic borrowing from the procedures employed in other countries, as well as by further protections for decisional independence and an adequate level of staff and resources to get the job done.

