The General Trends of EU Administrative Law

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I. General Introduction

The creation of European Administrative Law (hereinafter "EAL") results from interactions between the European legal order and those of the EU Member States.[1] Indeed, the EU has created a legal order in permitting mutual influences between national and EALs. This cross-fertilization process has led to the approximation of the applicable administrative legal rules and principles that make up EAL.

According to Susana de la Sierra, "European Administrative Law is the final step of a process, where various legal orders interact and produce principles or norms of general application in the territories where those legal orders apply."[2] Its inherent feature is its dynamic character in that it is influenced by its reciprocal interactions with the national legal orders. In line with these influences, one can also observe the increasing amount of mixed administrative proceedings.[3] Those proceedings demonstrate the willingness of the EU to maintain and use the national legal rules and structures, instead of absorbing them.

Another important aim of EAL is to strengthen the rights enjoyed by individuals vis-à-vis administrative authorities. There is a general trend, both in the Member States and in the European Community (the "Community"), to focus on the relationship between the citizen and the administration and to assert rights of the latter vis-à-vis the former.[4]

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1. JUERGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW, clxxxi (rev. 1st ed., Sweet and Maxwell 2006) [hereinafter SCHWARZE, EAL].

2. Susana de la Sierra, *The Constitutional Bases of European Administrative Law*, *in* WHAT'S NEW IN EUROPEAN ADMINISTRATIVE LAW? 29-41 (Eur. Univ. Inst. Dep't of Law, Working Paper No. 2005/10), *available at* http://www.iue.it/PUB/law05-10.pdf (last visited Sept. 12, 2007).

3. Giacinto della Cananea, *The European Union's Mixed Administrative Proceedings*, 68 LAW & CONTEMP. PROBS. 197, 197-217 (2004).

4. Klara Kanska, *Towards Administrative Human Rights in the EU: Impact of the Charter of Fundamental Rights*, 10 Eur. L.J. 296, 302 (2004).

As a consequence, a uniform set of judicially reviewable procedural requirements has been developed at the EU level.[5] This demonstrates that EU law is no longer limited to a set of substantive rights but also contains several procedural requirements. By 1963, the European Court of Justice (ECJ) had indicated that the Community administration must follow some rules related to "the requirements of sound justice and good administration."[6] Since then, the ECJ has developed an extensive set of administrative law principles that have been, to a large extent, derived from the administrative provisions of the Member States.[7].

Generally speaking, one can observe that the framing of fundamental administrative principles is aimed at strengthening "the principle of legality (or rule of law)" in the framework of administrative proceedings.[8] According to this principle, administrative authorities have to act exclusively within the limits set up by law. The judicially reviewable principles that limit the autonomy of the administration are thus essential guarantees for the respect of the rule of law.[9]

II. Interactions Between National Law and EAL: An Inherent Feature of the Latter

A. Impact of National Laws onto EAL

The reciprocal influence between national law and EAL is a well-known phenomenon that is widely accepted today.[10] Indeed, it is no longer contested that the EU has created a legal order in which mutual interactions between national law and EAL occur. Such interaction is characterized both by an administrative interconnectivity and an approximation of the applicable material administrative legal rules and principles.[11].

The development of EAL originally was characterized predominantly by French legal influences, and it is fair to say that today, all national legal orders have contributed to the development of the general principles of law by the judiciary.[12] It is worth noting that the process of Europeanization of administrative law is not merely a one-way street but offers an opportunity for every legal system to transfer its own values and principles into EAL.

B. Europeanization of National Administrative Law

Whereas the influence of national administrative laws in the process of creating EAL is widely recognized, the reverse trend, *i.e.* the fact that there is now a system of mutual interaction, has slowly come to the forefront of public opinion. Within this system, there is also an evident influence of EAL on national administrative laws that results in the Europeanization of national administrative law. Originally, the comparison of the admin-

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5. Juergen Schwarze, *Judicial Review of European Administrative Procedure*, 68 Law & Contemp. Probs. 85, 85-105 (2004) [hereinafter Schwarze, *Judicial Review*].
6. *Id.* at 91 n.28 (quoting Case 32/26, Maurice Alvis v. Council, 1963 E.C.R. 109, 123)
7. Schwarze, *Judicial Review*, *supra* note 5, at 85-105.
8. Kanska, *supra* note 4, at 299.
9. *Id.*
10. Schwarze, EAL, *supra* note 1, at clxxxvii.
11. *Id.* at clxxxii.
12. *Id.*

istrative legal principles in the various Members States resulted in the creation of EAL. This newly created European law has, in turn, begun to reverberate back onto national law by having a modifying influence.[13]

One may claim that current European principles of administrative law not only influence the administrative law of the Member States in areas where they implement Community law on the basis of their own administrative legal rules (so-called indirect Community administration) but also in those areas where national administrative law is applied in a purely national domain of competence.[14] This process of mutual cross-influence favors development that could ultimately sow the initial seeds of a pan-European administrative law.[15]

A few examples of EU administrative law influences on national administrative law are as follows:[16]

- The possibility of injunctive relief has been recognized in many countries (United Kingdom following the Factortame case,[17] French State's Council, and Italian administrative courts);
- The development of the principles for the protection of legitimate expectations and legal certainty;
- The introduction of a right of access to information pertaining to the environment pursuant to the EC Directive 90/313, dated June 7, 1990, on the freedom of access to information on the environment;[18]
- Public procurement directives: According to the traditional German doctrine, competing bidders lacked standing to demand due respect for public procurement provisions because, in such proceedings, they did not have a subjective right that could be infringed upon. In order to implement the various public procurement directives, the German law has been amended to grant competitors a subjective right to get the public procurement provisions observed. As a consequence, the bidders can now have access to judicial and administrative review proceedings.[19]

These examples demonstrate that European law, which itself developed mainly from a comparison of the various administrative legal principles of the Member States, has in the meantime had strong repercussions on national law. This led to a gradual harmonization of the administrative legal standards in Europe.

C. Mixed Administrative Proceedings

According to the traditional model of administrative action, the Community administration is essentially a steering body that leaves the execution of European laws in the hands of national administrations.[20] In others words, this system implies that the common

13. *Id.* at clxxxvii.
14. *Id.*
15. *Id.* at cci.
16. *Id.* at cxc.
17. Case C-213/89, The Queen v. Sec'y of State for Transp. *ex parte* Factortame Ltd., 1990 E.C.R. I-2433.
18. Repealed by Council Directive 2003/ 4, 2003 O.J. (L 41) 26, 26-32 (EC).
19. Schwarze, EAL, *supra* note 1, at clxxxi.
20. della Cananea, *supra* note 3, at 198.

policies are specified by the Community's institutions while their implementation is generally entrusted, apart from notable exceptions such as competition law, to national authorities' care.[21]

Today, one can observe a major shift from this model since many decisions are now made through mixed administrative proceedings. These proceedings are composed of several phases, which require both national authorities and either the Commission or EU agencies to take part in the decision-making process. Today, the mixed administrative proceedings cover both legislative and executive spheres of the EU. With respect to the former, the European Commission and national government representatives have adopted numerous pieces of administrative rules within the framework of implementing powers delegated to the Commission using the so-called "comitology" procedure.[22]

Today, there are two main forms of mixed executive proceedings: "top-down" proceedings (for example, the granting of eco-labels), which end with measures taken by national authorities,[23] and "bottom-up" proceedings (for example, the registration of geographical information and "appelation contrôlée" for agricultural products), which end with measures taken by Community authorities.[24] Apart from these two proceedings, there are also "hybrid proceedings," which represent a mix of the "top-down" and the "bottom-up" proceedings.[25]

It is useful to note that mixed administrative proceedings are differentiated as a consequence of the variety of interests at stake. Some are general interests, such as sustainable development. Others are interests that are particular to individual Member States. Still others are private interests, such as those of genetically modified organisms and medicine producers, which Member States defend as if they were their own during the negotiations that take place at the Community level.[26] Practice confirms that such decisions are often negotiated.

In the multilateral relationships, it is the legislative rules themselves that provide for a negotiation phase aimed at reaching an agreement. More often than not, this postulates reciprocal concessions within the Council, which enjoys a position of preeminence, but at the Commission's initiative. Other negotiations take place between private parties and national administrations, such as national customs authorities.[27]

III. European Principles Relating to the Requirement of Sound Administration

A. The Principles Relating to the Requirement of Sound Administration

The EU has submitted itself to the principle of the rule of law, including the obligation to adhere to impartial and fair administrative procedure. As a consequence, the ECJ has

21. *Id.*
22. Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 Harv. Int'l L.J. 451 (1999) (discussing the basic principles of comitology).
23. della Cananea, *supra* note 3, at 199.
24. *Id.* at 201.
25. *Id.* at 203.
26. *Id.* at 207.
27. *Id.*

developed a uniform set of principles, the European Administrative Procedure. Apart from the Community institutions, the national administrations are also bound by procedural requirements when they implement Community law (indirect implementation). Those common procedural principles counterbalance the procedural autonomy principle, which has led to diversity among the national administrative proceedings.[28]

One can observe that, due to this development, the national administration autonomy in the implementation of EC legislation has been progressively reduced and framed by Community principles. At the time of the Treaty of Rome, the Member States enjoyed full autonomy concerning implementation of Community legislation. However, at a certain stage, a purely national procedure was no longer perceived as sufficient to guarantee an efficient implementation of common policies.

Therefore, in 1976, the ECJ outlined some limits to the national procedural autonomy in the *Comet* and *Rewe* cases.[29] According to these decisions, while the Member States had to deal with national procedures to enforce Community law in their domestic legal systems (procedural autonomy),[30] two requirements had to be met by Member States: the principle of equivalence[31] and the principle of effectiveness.[32] Apart from those obligations, the Member States have been left quite free in their procedural autonomy.

Finally, once the EU legal order has reached a certain level of complexity, European principles have been set up in order to establish stricter limits within the national autonomy. Today, even the indirect implementation of Community law must be regarded as a mix of Community and national elements.

"European administrative procedure law is built on two pillars: written law, in the form of primary and secondary law; and judge-made law created by the European Courts."[33] However, this second category is without any doubt the dominant one. As mentioned earlier, the ECJ has drawn inspiration from the administrative laws of the Member States. The principles so created cannot be viewed as a mere compilation or mix of the various national systems. Indeed, EU-made principles have an added value compared to the national principles. For example, the principle of transparency, originally understood as protecting the right to be heard by securing access to administration files, is now interpreted as a guarantee of the democratic character of the Community institutions.[34]

28. Schwarze, *Judicial Review*, *supra* note 5, at 86.

29. Case 45/76, Comet BV v. Produktschap voor Siergewassen, 1976 E.C.R. 2043; Case 158/80, Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v. Hauptzollamt Kiel, 1981 E.C.R. 1805.

30. There were no procedural rules on the Community level.

31. Remedies provided for by national courts for the enforcement of Community law have to be equivalent to those for the enforcement of national law; "such conditions cannot be less favourable than those relating to similar actions of a domestic nature." Comet v. Produktschap, 1976 E.C.R. 2043.

32. Conditions for remedies before national courts should not make the enforcement of Community law impossible in practice. "The position would be different only if those rules made it impossible in practice to exercise rights which the national courts have a duty to protect." *Id.*

33. Schwarze, *Judicial Review*, *supra* note 5, at 87.

34. SCHWARZE, EAL, *supra* note 1, at clxxxiv.

B. EAL and Human Rights Protection

Community jurisprudence has made a remarkable evolution since the first recognition of a need for proper procedural rules in the *Algera* case in 1957.[35] The importance of procedural guarantees for the protection of fundamental rights has been highlighted in *Unectef v. Heylens*[36] and *Stanley Adams v. Commission*.[37] In particular, the latter decision demonstrates that the Commission's failure to protect the confidentiality of information given by a natural person impairs the personal freedom and property interests of that person. *Stanley Adams* also illustrates that two or more procedural rights, there the company's right to obtain information in order to use its right to be heard and the natural/legal person's interest in secrecy and confidentiality, may come into conflict.[38]

To date, the Community courts have treated "good administration" as a principle that can imply certain duties on the administration but that does not entail corollary subjective rights, that is to say a right by means of which an individual can effectively demand that public authorities act in a determined way (positive subjective right) or abstain from acting (negative subjective right). In other words, "good administration" was referred to in judgments at the level of a principle rather than a right.[39]

The innovative feature of Article 41 of the Charter of Fundamental Rights (the "Charter") is that it provides for a set of subjective rights.[40] By enabling the assertion of such rights, the Charter has developed truly administrative human rights in the EU and has given a new dimension to European citizenship.[41] Generally speaking, one can identify a general move, also apparent in many Member States, to regard and "treat the administration as a *service* performed to the *benefit* of citizens."[42]

IV. Alternative Methods of Dispute Resolution – European Approach

A. The European Ombudsman

The doctrinal views confirm that the institution of the European Ombudsman could be viewed as offering a cheap, flexible, and accessible alternative to the traditional judicial review of the administrative procedure.[43]

It was apparent from the outset that the Ombudsman would perform a dual role. On the one hand, when investigating complaints, the Ombudsman considers himself a controller of Community administrative procedures, shedding light on procedures in which the liberties and rights of the EU citizens must be secured. By countering instances of maladministration and by attempting to ensure that certain general principles of proce-

35. Case 7/56, Algera v. Common Assembly of the European & and Steel Cmty., 1957 ECR 81).
36. Case 222/86, Unectef v. Heylens, 1987 E.C.R. 4097.
37. Case 145/83, Adams v. Comm'n, 1985 E.C.R. 3539.
38. Schwarze, *Judicial Review*, *supra* note 5, at 96.
39. Kanska, *supra* note 4, at 300.
40. *Id.*
41. *Id.* at 302.
42. *Id.*
43. Roy W. Davis, *Quasi-judicial Review: The European Ombudsman as an Alternative to the European Courts*, 1 Web J. Current Legal Issues (2000), *available at* http://webjcli.ncl.ac.uk/2000/issue1/davis1.html (last visited Sept. 12, 2007).

dure are followed for all European citizens, the Ombudsman seemed to have created a right to good administration even before it was officially codified. These duties of the Ombudsman are prescribed by law and exercised through formal proceedings. At the same time, the Ombudsman has developed a set of preventative measures against maladministration extending far beyond the official scope of his mandate.[44]

A formal definition of maladministration did not exist but has evolved through practice. A preliminary definition was published by the Ombudsman in its 1995 Report to the European Parliament: "[M]aladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it."[45] Breaches of principles of good administration, courtesy, efficiency, timeliness, and accuracy are all considered forms of maladministration. While the Ombudsman initially took the view that the definition of maladministration should not be codified, he has since developed rules for administrations to follow.[46] This previously elusive notion of maladministration has now been replaced with the *Code of Good Administrative Behaviour* (the "Code").[47]

The Code incorporates general principles of procedure common to all Community institutions. The European Ombudsman drafted this Code in 1997 and has been encouraging all Community institutions to adopt it ever since. The Code, approved by the Parliament in 2001 and published in 2002, represents a preliminary attempt to codify general rules on Community administrative procedure, albeit in a "soft law" form.[48]

The Ombudsman is certainly not a judge, given that the provisions governing the Ombudsman are distinct from those that govern the Court of First Instance and the ECJ. Nonetheless, one could argue that the Ombudsman's activities are quasi-judicial in character. This is because the Ombudsman not only plays a role in protecting the fundamental rights of citizens, but also because there are procedural rules for his activities that are similar to those of the courts. Furthermore, the Ombudsman enjoys an impartial, third-party status similar to that of a judge.[49]

B. Alternative Dispute Resolution Within the EU

The Ombudsman does not represent the only means of alternative dispute resolution (ADR) within the EU. Practices of both the executive and legislative bodies of the EU confirm the tendency to occasionally use ADR within their competences. With respect to the former, the European Commission is willing to increase the use of alternative methods of dispute resolution, such as mediation, in its contractual relationships. For instance, an optional mediation clause has been introduced in Commission contracts.

Alternative methods of dispute resolution are also encouraged by European legal instruments in the framework of criminal law. The EU legislation regarding the standing of victims in criminal proceedings is certainly one of the best examples in this respect. Article 10 of the Council Framework Decision on the standing of victims in

44. Simone Cadeddu, *The Proceedings of the European Ombudsman*, 68 Law & Contemp. Probs. 161, 162 (2004).

45. *Id.* at 175.

46. *Id.*

47. *Id.* at 163.

48. *Id.*

49. *Id.*

CRIMINAL PROCEEDINGS[50] concerns penal mediation in the course of criminal proceedings. It defines "mediation in criminal cases" as: "the search, prior to or during criminal proceedings, for a negotiated solution between the victim and the author of the offence, mediated by a competent person."[51]

V. Conclusion

The goal of this paper has not been to compare European and American systems of administrative law. However, one may observe that both systems now have a common feature: in both legal systems, administrative law represents the combination of classical administrative proceedings and alternative methods of dispute resolution. But with respect to ADR, the American system is far more elaborate than the European system as far as the variety of methods employed.

50. Council Decision 2001/220/JHA, 2001 O.J. (L 82) 1, 1-4 (EC).
51. *Id.*