

Developing Administrative Law in Europe:

Natural Convergence or imposed Uniformity?

Christiaan Timmermans*

Raad van State

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Introductory Remarks

It is a pleasure for me to participate again in a Seminar of ACA Europe. Speaking about convergence of national administrative laws in the EU, I would think that ACA is an important vehicle, if I may say so, contributing to a process of convergence.

According to the programme I am now supposed to present general conclusions from the debates we have had. I shall not do that. That would be much too ambitious, a *mission impossible*. I prefer to present some comments to the observations I have heard. Only at the end I shall attempt to draw some general, but fairly personal conclusions.

The theme of this Conference is the development of administrative law in Europe. That is a much wider subject than European Administrative Law alone. But the subtitle: “natural convergence or imposed uniformity” makes it clear that the focus is on the influence, the impact of EU law on that development. When we refer here to administrative law, in fact we have more particularly in mind the institutional and procedural branches of administrative law: rules on administrative procedures, including general principles of good administration, of good administrative behaviour, and also principles and rules concerning procedures before the courts on matters of administrative law.

We all seem to agree that the impact of European law in this particular context is real and important. At the same time this impact is disparate because it originates from multiple and highly different sources: Treaty law, including the Charter on fundamental rights, general principles of law, secondary EU legislation, partly of a more horizontal nature (non-discrimination, data protection rules), partly legislation enacted for specific sectors and then finally the case law of the ECJ. Hence, the question of whether a more general legislative initiative as now also requested by the EP, should not be taken to bring some order into all this.

* Former judge Court of Justice of the EU.

It is widely recognized that there exists an ongoing process of some convergence of national administrative laws on these issues fostered by EU law. Reference has more particularly been made to the development by the ECJ of general principles of Union law as the most important top-down influence enhancing the process of natural convergence. I shall of course not contest this. But two footnotes should be added.

Not only Top-Down, also very much Bottom-Up

First of all, this case law is not only top-down, it is at the same time very much also a product of a bottom-up process. Where else would the Court have been able to find the necessary material for developing these general principles than in the national law systems? Just as the legal remedies allowing access to the Union Courts have been grounded in the national legal systems. At the time, the system of remedies provided for by the (now defunct) Coal and Steel Treaty were generally seen as a victory of French administratif law (*Conquête du droit administratif Français*, was the title of an article in a French Law Review at the time, but, to be fair, accompanied by a question mark). This may be largely true. But the way in which the Court has interpreted these remedies is characteristic for its general approach in these cases: it does not simply take over and copy the concept from its national origin. It accommodates it to the specific requirements of the Union legal system, often at the same time drawing on other national legal traditions. Take for example the notion of *détournement de pouvoir* referred to in Article 33 of the Coal and Steel Treaty. When interpreting this notion the Court coloured and enriched the French concept of *détournement de pouvoir* with elements of the German notion of *Ermessensmissbrauch*. Of course, the Court itself by its mere plurinational composition is a living laboratory of comparative law. The development of general principles of law in the case law of the ECJ (sometimes also their reception by the national legal systems) is a fascinating process of cross-fertilization between national laws, Union law and again national laws with the ECJ as one of the agents for transmission. All this has been well analysed in academic writing.

What one reads less often, is that national courts by their preliminary questions and the motivation of those questions may confront the ECJ with legal gaps in the Union legal system and the pressing need to find a solution for those gaps. That need is pressing because sometimes one can read between the lines of the preliminary question that without an appropriate solution available in Union law, the national court will be obliged to find the answer in the national legal system with obvious risks for the uniform application of Union law. The language used to that effect can be quite explicit (the Solange decisions of the BVERFG).

The top-down in all this must therefore be nuanced. The finding of the law in these cases proceeds in close cooperation with the national courts. Examples are multiple: the proportionality principle imported from German law and now well generalized all over Europe; principles of due process and fair procedure, rights of defence, *nemo auditur* and estoppel, inspired by the common law or further developed under the impetus of that law after the accession of the UK and Ireland in 1973; the principle of transparency cherished by the Scandinavian countries. The ECJ is well aware of this process of mutual influence. In 2007 at the occasion of the 50th anniversary of the signature of the Rome treaties the Court organized a colloquium to which it invited the Presidents of the Supreme Courts of the Member States, precisely on this theme: the influence of national law and the jurisprudence of national courts on the interpretation of Union law; speakers during this event were Presidents of these Courts. It was an interesting bottom-up experience. Finally, the ECHR has of course played over the past 40 years also, and increasingly so, an important role as a source of inspiration.

Will the EU charter of fundamental rights change this law finding process? It is true that the Charter logically will now be the starting point for the interpretation by the Court of the rights and principles codified therein. The Court has already explicitly said so. But the ECHR will remain an important reference, necessarily so because the Charter itself obliges in case of identity of Charter rights and Convention rights to respect the Convention as a minimum level of protection. Moreover, one might expect that the input by the national courts through the preliminary procedure will also remain an important feature.

This was my first remark. The influence of Union legal principles on national administrative law is not only a top-down but also a bottom-up process.

Large margin of interpretation for Member States

My second comment. When Member States act within the scope of Union law, they have to respect the Charter and general principles of Union law. This gives a clear impetus to convergence. However, there is no question that because of this a uniform straightjacket is being imposed on Member States. As far as the Charter is concerned, it imposes a minimum level of protection not a maximum standard. Member States may go further.

In that respect, the two recent judgments of 26 February of this year in *Akerberg Fransson* (Case C-617/10) and *Melloni* (Case C-399/11) give an important clarification. In case Union rules do require implementation or execution by national rules (which is the normal scenario), there does exist in principle a margin for reviewing respect of national constitutional principles, provided that the level of protection provided for by the Charter and the primacy, unity and effect of EU law are not thereby compromised. In so far the judgment in *Akerberg Fransson*. It is remarkable that the Court after concluding that the case in hand falls within the scope of Union law (the most important part of the judgment) does not continue to

say that consequently the Charter must be respected. The order is being reversed. It is because Union law leaves room for national action, that this action may be subject to review of respect of national fundamental rights, but on the condition that the level of protection guaranteed by the Charter is not affected. In doing so, the Court shows respect for the national constitutional order. However, the Melloni judgment learns that the room for national review will disappear, when and in so far Union law itself specifically regulates aspects of fundamental rights protection.

This approach demonstrates respect for national constitutional principles. This will inevitably entail more divergence and less convergence. This is nothing new in the case law of the Court. Union law allows Member States to restrict the fundamental freedoms of movement, including that of Union citizens, in order to protect legitimate public interests. Longstanding case law demonstrates that Member States dispose in this regard of a large, sometimes very large margin of appreciation, also to uphold fundamental constitutional values (see the case law on betting, lotteries). Differences between Member States with regard to those values are no impediment. Even, the protection of a constitutional principle, which is particular to a Member State, may be justified. (The impossibility in Austria to register titles of nobility as part of a family name, *Fürstin von Sayn Wittgenstein*, case C-208/09). To quote from *Omega Spielhallen* (Case C-36/02): a national measure does not infringe the proportionality principle merely because the Member State has chosen a system of protection different from that adopted by another Member State.

In this context there is an interesting question to be raised. Article 52 of the Charter allows exceptions to the rights and principles of the Charter if and in so far as justified to protect legitimate public interests. If Member States have to respect Charter rights and principles they may also benefit from these exceptions. Would that also allow them a margin of appreciation to pay due regard to specific national constitutional values as in *Omega Spielhallen* and *Sayn Wittgenstein*? I would think so.

There exists still another factor allowing for divergence, more particularly with regard to rules of administrative procedures and court proceedings. I refer to the well-known principle of procedural autonomy. In the absence of Union legislation on these matters it is up to the Member States to enact the necessary rules provided they respect the principles of equivalence (no discrimination compared to purely national situations) and effectiveness (do not make the application of Union law excessively difficult or impossible). Obviously, this test also leaves a considerable margin to the Member States. Rightly so, I think. Why should detailed, uniform procedural rules be imposed on Member States as long as the basic principles are being respected? I admit that the relationship between this principle of procedural autonomy and that of effective judicial protection as a fundamental right, which is more intrusive and leaves less freedom of action to the Member States, is sometimes blurred in the case law. But this is not the moment to discuss that.

What I want to stress, and that was my second footnote, is that the top-down influence of the case law of the ECJ on fundamental rights and general principles should not be overestimated. It remains limited to the level of principles and general rules. Much room remains for national specificities.

Imposed uniformity?

I now come to the second part of the subtitle of our conference theme: imposed uniformity. Is there a need for EU legislation, a kind of general Code on administrative procedures, to give a helping hand to convergence or should we prefer the incremental process of natural convergence to continue?

We have heard that there are now two initiatives on the table. There is the recommendation of the European Parliament (EP), based on the Berlinguer Report, to establish a European Law of Administrative Procedure (EP draft). This is a request addressed to the European Commission to come forward with a legislative proposal on a Law of Administrative Procedure of the EU. It received a waiting answer from the Commission (let us first see whether there really exists gaps). Then, there is the ReNEUAL draft, which is not yet a finished product, but a work in progress. It is a product of a network of academics intended to become a joint project to be further developed in cooperation with the European Law Institute.

Both drafts start from a similar diagnosis: there exists a large variety of sectoral rules and principles on good administration produced from various sources (treaty law, EU Charter of Fundamental Rights, secondary legislation, case law of the Luxembourg Court, codes of good administrative behaviour established by the institutions and various EU bodies and agencies). Because of this variety citizens will have difficulty to know their procedural rights. Moreover there exist obvious gaps. So there is a perceived need for a coherent and comprehensive set of Rules.

There exist however great differences between both drafts.

The approach of the EP draft is more cautious, more political. It signals the increasing lack of confidence of Union citizens in the Union and its decision-making processes undermining the legitimacy of the Union. A European Administrative Procedure Act could be one of the answers to respond to the queries of the citizens. So, for the EP if one may say so, this is also an exercise in public relations. That may explain at the same time why the EP draft is in fact a mixture of rules and principles regulating administrative procedures and of principles of good administrative behaviour governing more generally the relations between the Union administration and the public. Another important difference is that the EP draft only applies to the Union administration, not to the Member States.

The ReNEUAL draft is much more of a legal nature, it is much more detailed (6 Books), more strict and also more ambitious. It is a real code on administrative procedure, not or not also a code on administrative behaviour. Its starting point is also much more severe: the present fragmentation of rules and principles together with the gaps that remain, bring the drafters to the conclusion that the imperative of an open, efficient and independent European administration (Article 298 TFEU) is not satisfied, nor the fundamental right to good administration granted by Article 41 Charter respected. That is a severe verdict indeed.

The ReNEUAL draft is intended to serve at the same time as a model for a EU Regulation and as a source of inspiration for national legislation of a general nature on administrative procedures. The term model rules should be taken literally: a model of good, if not best, law and practices.

The Model Rules concern administrative action, more particularly regulatory acts, decisions and contracts. So the rules govern procedures aiming at adopting *legal acts*, acts with legal consequences. They do not apply to more general, informal contacts between the administration and the public. They are not a code of good administrative behaviour. In so far, as already said, they are of a more limited scope than the EP draft.

The Model Rules apply in the first place to the EU administration in all its emanations (institutions, agencies, bodies etc.). But they also apply to Member States authorities when implementing Union law through administrative action. However, only the general principles defined by Book I apply to all administrative actions taken by Member states when implementing Union law. The specific rules on regulatory acts (Book II) and those on contracts (Book IV) only apply to the Union administration, not the national administrations. On the contrary, the rules on decisions (unilateral acts addressed to one or more individualized public or private persons to regulate one or more concrete cases) do apply to Member States administrations when implementing Union law. Why is this? Why limiting the applicability of the specific Rules to decisions only and not extend it to regulatory acts? According to the explanations given by the drafters in the Introduction regulatory acts may be excepted because from a qualitative point of view and maybe to a certain extent also from a quantitative one most of the regulations take place on EU level. (Is that really so?)

Book I enumerates the general principles of good administration applying also to Member States administrative action when implementing Union law (so including regulatory acts, decisions and contracts). These principles consist of the right to good administration (I suppose as defined in Article 41 Charter) and ten more principles of a fairly different nature. They range from general principles of law of a much wider scope than applying to administrative action alone (legal certainty, proportionality, legitimate expectations, access to justice), to lower ranking

principles of a more administrative nature, not necessarily to be qualified as legal principles (e.g. principles of participation, of efficiency and effectiveness, principles of transparency, service orientation, fair communication).

Whether it would be desirable to enact a general code on administrative procedures for the administration of the Union, that question I shall not discuss here. But, is there a need for introducing such Model Rules with regard to Member States administrative action when implementing Union law? Are there sufficient and sufficiently important gaps justifying legislative action? That analysis, as far as I know, has not been made.

The Model Rules could doubtlessly serve a useful purpose as a possible source of inspiration for the development of national administrative law. In doing so, they could foster the process of natural convergence. They could be used as a toolbox like the common frame of reference for European private law. That already provides sufficient reason to go ahead with this initiative.

However, enacting EU legislation to that effect is of course quite a different matter. Its need and desirability would require further debate, it seems to me. There are obvious risks to be considered: a risk of petrification, a risk of disrupting existing national regimes, a risk of accumulating different layers of sometimes overlapping principles and rules (take the principles of equality and non-discrimination in the EP draft that already exist in the Treaties, the Charter, secondary law and Codes of good administrative behaviour).

All this requires further consideration. Personally, I wonder whether at this stage it would not be wiser to await the evolution of the case law with regard to Articles 41 and 47 of the Charter, that is with regard to the right to good administration and the right of access to justice and effective judicial protection. This would be my personal, provisional conclusion. The Association would present an excellent venue to channel this debate.

Thank you for your attention.