Pluralism in European Administrative Law

The formal hierarchy of public law legal rules is being eroded and, as a result, is proving less and less useful as a framework for analysis. It is submitted that *pluralist* concepts such as *legal dialogue* and *legal competition* are far more useful for studying the reality of public law today. No longer is the formal hierarchy central, but the debate between the various actors at the various levels. In our view, the old idea, based as it is on the formal hierarchy of legal rules, that EU law has primacy over national law now seems far too simple.

It is important to appreciate that the influence of European law on the general rules and principles of national administrative law differs fundamentally from its influence on the specific and substantive areas of law to which acts of the administration often pertain, and particularly social and economic law. The doctrines that must be counted part of administrative law are often no more than *instrumental* in achieving its aims, an *aid* to implementing substantive Union law in specific areas. In other words, the impact on the general part of national administrative law is not primarily prompted by the desire to harmonise, unify, or coordinate these general parts 'as such'. The key question is: to what extent is this necessary to achieve a certain degree of harmonisation of substantive law and to guarantee legal protection to those upon whom substantive Union law confers rights? In any case, even in the post-Lisbon era, the Union is not competent to harmonise national administrative law further than necessary to achieve the substantive aims of Union law. After all, the Treaties, not even Articles 197 and/or 352 of the Treaty on the Functioning of the European Union (TFEU), still do not confer a general competence to harmonise national administrative law rules.

Thus even in the future there will continue to be a tension between, on the one hand, the desire to achieve some degree of harmonisation of topics such as judicial protection and enforcement (in order to ensure uniform application of Union law) and, on the other hand, the importance (from the perspective of national institutional or procedural autonomy) of not impinging unnecessarily upon national legal systems.

This does not, however, mean that no degree of harmonisation is being achieved at all. It is, but in a fragmented and ad hoc manner. The European lawmaker is achieving harmonisation in specific fields such as public procurement law, telecoms law, customs law and environmental law, and on matters such as:

- time limits for appeals
- access to the courts
- the duration of judicial and administrative proceedings
- the thoroughness of judicial review
- cost, etc.

It should be noted that this harmonisation, initiated by the Union lawmaker, is less about laying down unambiguous, uniform, hard and fast rules but rather

about the ground rules within the limits of which Member States' procedural autonomy can continue to manifest itself. Harmonisation directives set limits for the law of the Member States and determine, as it were, the bandwidth of their procedural autonomy. This harmonisation curtails possible excesses in some national legal orders. Or, to put it more politely, with this kind of directive the European lawmaker has ensured a degree of convergence of national administrative law rules without striving to achieve full uniform harmonisation. In other words, this is harmonisation 'by bits and pieces', with open-ended legislation which aims to achieve 'a degree of convergence'.

Precisely the open-ended nature of provisions such as these will ensure a continuous stream of questions in judicial practice about where exactly the European lawmaker has drawn the line. It is already evident that administrative courts in various countries are confronted with parties arguing that parts of their national procedural law are contrary to a certain directive. In our estimation, we will in the future regularly come across what could be termed 'judicial dialogue' and 'judicial competition', which will ensure a more far-reaching convergence of national administrative law than would appear at first sight to follow from the written text of the directives. National courts will refer to one another's decisions, whether in agreement or otherwise. It cannot even be ruled out that a new form of judicial precedent is emerging. Van Harten has coined the phrase 'national European law precedent' for the phenomenon of 'autonomous interpretations of European law by national courts that set precedents for future cases in a certain field of law'.[1]

This issue of REALaw contains a selection of papers from the Second REALaw Research Forum. Together, they provide a fascinating picture of the process of pluralism in the formation of law through legal dialogue and legal competition in European administrative law.

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1 H. van Harten, 'National Judicial Autonomy; The Example of National European Law Precedents in the Dutch Case-Law on the Free Movement of Services and the Freedom of Establishment', *REALaw* 2009, p. 135-153, in particular p. 139-140.