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About Europeanization of Domestic Judicial Review

Jean-Bernard Auby*

Full Professor and Director of the Center on Changes in Governance and Public Law at Science Po

1 Introduction

The purpose of this paper is, to suggest some reflections about the influence legal Europeanization currently exercises on national mechanisms that contribute to the judicial supervision of and resolution of disputes involving administrative bodies.

I believe that in order to give the topic its full meaning, the approach must be broad enough. Obviously, it must ignore the fact that some jurisdictions have administrative courts whilst in other jurisdictions it is the ordinary courts that dispose of administrative litigation. In the latter case, I will consider the specific procedures applicable to administrative cases. I will also take into account that in some systems non-judicial bodies, like the ombudsmen or quasi-judicial bodies such as the administrative tribunals in the British tradition, deal with a significant part of administrative litigation.

Furthermore, considering that in some countries specific jurisdictional mechanisms and substantive rules apply to contracts made by the public authorities and/or to non-contractual administrative liability, I will include these two litigation fields within the scope of my reflection.

By the use of the term 'Europeanization', I am referring to both the impact of European Union (EU) law and the European Convention on Human Rights (ECHR), not excluding some other instruments. Including consideration to those instruments generated within the EU system, such as the Aarhus Convention, or the Council of Europe, for example the Convention on Local Self-Government.

Therefore the question I will try to answer finally is to determine how profoundly national judicial review systems are affected by the European legal influence: are there systemic impacts (section 4). But the first question I will consider is why such an influence exists and in what ways it operates (section 2); the second one will be to inventory the aspects of national judicial review systems which are impacted by the European influence (section 3).

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2 The Existence of the Impact of European Law upon Domestic Judicial Review

2.1 EU Law

Rationale: the Non-Existent Paradox

It is clear that, initially, observers of the Community Law development did not expect it to have any impact on such issues as judicial review. Not only was this matter neither directly nor indirectly included in one of those European authorities were entitled to regulate. But rather it seemed to be exactly the kind of domestic affair concerned by the, soon admitted, principle of procedural autonomy. However, as we will see below, the impact became quite substantial.[1]

What could be seen as a paradox, is however not a real one. Generally speaking, the principle of procedural autonomy has proved to be a pretty weak protective net for domestic legal idiosyncrasies of the Member States.[2] This has showed to be particularly true in the field of judicial review, for various reasons which are not too difficult to delineate.

The fact is that the proper implementation of EU law depends very much on national judicial mechanisms through which administrative bodies are recalled to respect the Law. In association with at least two factors:[3] One is that, in the legal architecture of the EU, judicial enforcement of EU law belongs firstly and mainly to national courts: contrary to what one finds in the United States, but like in some European federal systems such as Germany or Belgium where the same courts administer 'federal' law and state law.[4] The other factor is that, due to the indirect administration principle, it is mainly through national administrative institutions and decisions that EU law and policies find the way of their implementation.

So that, in fact, national judicial review appears to be a decisive means of enforcement of EU law:[5] so much so that many EU rules are endowed with a direct effect which permits their use in confronting administrative decisions directly. Conversely, it is also a decisive forum for judicial supervision of EU illegal decisions, since it is mainly before national courts that people affected will be able to challenge them – even if only European courts have the right to declare them unlawful.

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1 An in-depth investigation of the impact on judicial review in the French system is provided by Jean Sirinelli in Jean-Bernard Auby & Jacqueline Dutheil de la Rochère 2014 (see: L'impact du droit de l'Union européenne sur le contentieux administratif, and La mise en oeuvre du droit de l'Union européenne dans le contentieux administratif).

2 Diana-Urania Galetta 2010.

3 See e.g. Jürgen Schwarze 2009, at I-51; Jan Jans, Roel de Lange, Sacha Prechal & Rob Widdershoven 2007, at 175 sq.

4 René Seerden & Frits Stroink 2002, at 345 sq.

5 See e.g. Jacqueline Dutheil de la Rochère 2009.

These are the reasons why EU law has come to impose constraints on domestic judicial review. Mainly requiring it to work in such a way that the respect of European rules would be ensured by its operation in an effective way, and with the same vigour as when the respect of national rules is at stake.

Areas of Influence are Expanding

Over time, it also appeared that the parts of domestic judicial review that were subject to the European influence tended to enlarge. This can be explained by at least four reasons.

The first one is, simply, the fact that European policies and corresponding European regulations developed into new fields. Among which some are notoriously sources of abundant administrative litigation, in many Member States if not all: let us just mention, here, public procurement, and environment.

The second reason is that national administrations became increasingly involved in new implementation scenarios. For example co-administration and the open method of coordination, or transnational implementation like in the Schengen system, or implementation methods which take place in networks of European and domestic regulators. All situations where new forms of litigation, involve national administrative bodies and EU law implementation.

The third reason is that, in fact, it turned out that EU requirements directed to domestic judicial review did not cover only the situations in which national administrative bodies are, strictly speaking, implementing EU law. But, more broadly covered all situations in which they appear to be submitted to EU law. Indeed, as it is well known, the ECJ admitted that general principles of EU law apply not only when EU measures are made effective in Member States, but also when the latter derogate from EU measures, and whenever national measures fall within the competence of EU law.[6]

The fourth reason is related to the 'spill-over effects' of European influence. In some cases, domestic administrative judges who had to import new solutions deriving from EU principles in the field of EU law, then became convinced that these solutions deserved to be generalised and applied to purely internal litigation. A good example of such a 'spill-over effect' can be found, for example, in the way British administrative law adopted the principle of proportionality.[7]

Sources of Influence are Diversifying

At first, it was through the EU case law that there was contact with domestic judicial review, but eventually requirements concerning the existence and efficiency of domestic judicial review, involving the application of EU rules, came

6 ECJ C-5/88 *Wachauf*; C-260/89 *Elleniki Radiophonia Teleorassi*; C-273/97 *Sirdar*; C-368/95 *Vereinigte Familia Press Zeitungsverlags*.

7 See below.

more and more frequently from written secondary legislation. Some of the early examples of this were the directive 64/221 on migrant workers (imposing some kinds of remedies), directives 89/665 and 92/13 on public procurement (entirely dedicated to remedies), regulation 2913/92 laying down the European Customs Code (right to appeal against decisions of customs authorities) and so on.[8]

This has not prevented the influence of EU law from being, also, based upon some general principles, which inspired case law firstly, then were mentioned in legislation, and are nowadays reproduced and complemented by the Charter on Fundamental Rights. The most essential ones are those that impose domestic judicial review to treat cases involving EU law efficiently and with the same determination as pure domestic cases. Afterwards, other general principles also came into play that first had flourished in the jurisprudence,[9] in particular the right to appeal and the right to access to court:[10] both now proclaimed by the Charter in article 47.

2.2 The ECHR

Rationale: General Principles with a Wide Scope of Application

On the ECHR side of our topic, the rationale governing the influence on judicial review is in a sense simpler. It is quite natural, since the right of access to a judge and the right to a fair trial are enshrined in the ECHR as general principles: thus, judicial procedures are directly targeted by the convention.

It is true, however, that the provision mainly involved, article 6, is declared applicable only to civil adjudication for some aspects and to criminal adjudication for others. This led some early observers of the convention to admit that it had no bearing on judicial review. This has been contradicted for a long time now by the ECrtHR's jurisprudence, which has made clear that some disputes with administrative bodies have a civil character (most disputes of a pecuniary nature),[11] while some others have a criminal character (those related to administrative sanctions, for example).[12]

Conversely, one must not forget that the convention is meant to have only 'vertical' effects and not 'horizontal' ones. In other words, what it aims at disciplining is the public sphere, imposing on it the respect of various fundamental rights. Of course, legislators are targeted primarily but administrative authorities also are targeted, judicial review subsequently.

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8 Ton Heukels & Jamila Tib, in: Paul Beaumont 2002, at 111.

9 ECJ, C-432/05 *Unibet*; C-115/09 *Trianel*.

10 See e.g. Loïc Azoulai, in: Jürgen Schwarze 2010.

11 See e.g. ECrtHR 7 July 1989, *Tre Traktörer Aktiebolag v. Sweden*; 5 October 2000, *APEH Üldözötteinek Szövetsegé v. Hungary*.

12 See e.g. ECrtHR 21 February 1984, *Oztürk v. Germany*.

Moreover, there is no such thing in the ECHR as a principle of procedural autonomy. Contrary to EU law, the ECHR does not start with the idea that national procedures must be respected, unless they contradict its principles. Nevertheless, the ECrtHR has admitted that the states have a margin of appreciation in the implementation of its principles. At the end of the day, both constructions may have similar outcomes.

Areas: the Scope of ECHR Influence is not Restricted to an 'Implementing' Area

The impact of fundamental rights included in the Convention is not limited to situations in which the states, which are parties, would be 'implementing' the convention. It covers all possible fields of state action, and, for the purpose of our questioning, all possible fields of administrative litigation as far as it comes into contact with one of the principles stated in the Convention.

To be honest, it may not make a big difference. We have recalled that, eventually, the ECJ jurisprudence came to apply EU general principles to all situations in which Member States appeared to be submitted to EU law. Finally, it is perhaps not so opposed to the ECHR application logics: what is the real difference between 'implementing a rule' and 'being in the scope of application of a rule'? On the other hand, general principles of EU law and the Charter only apply to situations otherwise subject to EU primary law or secondary legislation: this kind of prerequisite does not exist in the ECHR application mechanisms.

Sources: ECHR Influence is Entirely Based upon General Principles

This is a clear-cut difference with EU law. Firstly, the ECHR only contains general principles: it is not conceived as targeting a particular policy, like competition, environment or whatever. Secondly, no secondary legislation is attached to the ECHR, and the Council of Europe organs are not at all entitled to produce it.

Along with the ECHR, there are other treaties, which have been negotiated within the Council of Europe institutions, related to fundamental rights issues that may have some impact on domestic judicial review – like local self-government, protection of regional languages. But this is something a bit different: secondary legislation issued by the organisation organs vs. treaties prepared within the organisation and subject to the final decision of the states.

3 Impact on What, in Domestic Judicial Review?

Supposing that the influence of Europeanization on domestic judicial review would be just occasional and simply marginal would be a strong misapprehension. In fact, evidence of this influence can be found in a wide range of issues, and sometimes in rather strategic ones. A way of summarising the main impact points of it is to say that they are related to reviewers, remedies and procedure.

3.1 Reviewers

One could say that recent secondary legislation[13] would sometimes tend to favour alternative dispute resolution as a solution to administrative litigation occurring in the field of EU law. But the most striking consequences of the European influence affect the adjudicative institutions themselves.

European law has now imposed onto national institutions, in charge of dealing with administrative litigation, quite strict requirements of independence and impartiality. Here, EU law and the European Convention concur, but, as it is well known, it is from the latter, precisely its article 6, that the strongest admonitions have come, addressed to various national institutions.

Probably the severest one was the one concerning the Councils of State, which like the French, Luxembourg and the Dutch one[14] are the supreme administrative court and the main legal advisor to the government.[15] First impressions were that the Strasbourg Court was ready to prohibit absolutely this kind of association of functions, where article 6 of the convention would apply, since it places the institution in a typical conflict of interest position and alters its impartiality. Further on, the ECrtHR seemed to admit that the junction of adjudicative and consultative functions in the same institution was not in itself an infringement of article 6, but that the latter could only be considered as respected if, in every particular case, it was made sure that none of the judges had been involved previously, in the consultative activity.[16]

In fact, article 6 in its part concerning civil matters is a threat to all situations in which administrative courts or tribunals associate other functions with their adjudicative ones: for instance, where they also take part in legislative activities.[17] In the part concerning criminal matters, it forces administrative bodies – and notably independent agencies – with sanctioning powers to separate those of their organs which are in charge of prosecution, from those which have to decide on the infliction.[18]

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13 Such as Directives 2009/72 and 2009/73 on energy and 2008/6 on postal services.
14 See Rob Widdershoven, in: Jean-Bernard Auby 2010.
15 ECrtHR 28 september 1995, *Procola v. Luxemburg*, 2010, at 928.
16 ECrtHR 6 May 2003, *Kleyn*.
17 ECrtHR 8 february 2000, *McGonnell v. United Kingdom*.
18 ECrtHR 1st October 1982, *Persack v. Belgium* – Upsetting consequences in some French independent agencies, like the one which is in charge of regulating financial markets!

3.2 Remedies

Available Actions and Powers of Courts Vis-à-vis Administrative Authorities

Clearly, by various ways, the cumulative influence of EU law and of the European convention pushes the domestic judicial review systems to open the scope of available remedies and to strengthen the powers of administrative judges in their relations with administrative authorities. A lot of illustrations of this can be mentioned, among them the following ones.

a) The European influence exercises a constant pressure towards the expansion of remedies available to the citizens. The main reason for this is that both corpuses admit as a basic principle the right of access to a judge. In the law of the convention, it is included in the article 6's right to a fair trial, and in EU law, it has been recognised by jurisprudence as a general principle.[19]

In line with this, European law finds it sometimes difficult to agree with national laws when they accept that some highly political governmental decisions are not justiciable. Without prohibiting in an absolute manner this kind of immunity, the European jurisprudence is reluctant,[20] leading some domestic courts to reduce the scope of immune acts accordingly.[21]

Another factor of the expansion of remedies under the pressure of European law came from the 'Francovich[22] – Brasserie du Pêcheur'[23] jurisprudence. This led national systems to accept a state liability due to legislation: in some of them, it was previously totally unknown, in others where it existed, it had to be adapted to the ECJ requirements. A bit later, the 'Köbler' jurisprudence,[24] as well as the Strasburg jurisprudence concerning the reasonable time within which courts must decide,[25] meant state liability deriving from adjudicative activities had to be accommodated – or adjusted in Member States where it existed before.

b) Generally speaking, EU law has so far contributed to enhance the powers of administrative courts. Thus, by the 'Factortame' judgment,[26] the ECJ imposed that administrative courts would be recognised as having the power of issuing

19 See e.g. Mariolina Eliantonio 2008, at 29 sq.; Jan Jans, Roel de Lange, Sacha Prechal & Rob Widdershoven 2007, at 186 sq.; Eleftheria Neframi, 'Le droit au juge', in: Auby 2010, at 553.
20 See e.g. ECJ C-222/84 15 May 1986, Johnson. See also Ruiz-Jarabo Colomer, Opinion in Case C-284/05.
21 This has been the case of the French Conseil d'Etat: see Jean Sirinelli, in: Jean-Bernard Auby & Jacqueline Dutheil de la Rochère 2014.
22 ECJ C-6/90 and C-9/90, 19 November 1991.
23 ECJ C-46/93 and C-48/93, 5 March 1996.
24 ECJ C-224/01, 30 September 2003, *Köbler*.
25 See e.g. ECrtHR 2 March 2004, *Favre v. France*.
26 ECJ C-213/89 19 June 1990.

injunctions to public bodies in order to force them to respect community rules. This imposed a severe adjustment constraint to some systems, like the British one, in which judges previously had very limited power to address injunctions to governmental bodies.

Some European orientations have had as an outcome to reinforce the legal strength of judgments made by administrative courts and their power of sanctioning illegalities. This has certainly been the case of the Strasbourg jurisprudence on legislative interference with cases adjudicated or submitted to judges – for example through legislative validations –, restricting it to situations in which they will be motivated by strong grounds of general interest.[27]

Sometimes, European law conspires to emancipate judges from certain usual links. Such as, where the ECJ admits that a national court must not consider itself as bound by a precedent which would be contrary to EU law.[28]

On other occasions, the European jurisprudence acted as an inspiring model on issues where no European obligation was at stake. Thus, the French Conseil d'Etat was inspired by ECJ case law, when its jurisprudence allowed administrative courts to modulate the effects in time of the annulments they decide.[29]

One must add, though, that other orientations of European case law have led to a significant reduction of judicial powers. The efficient application of European law can indeed place under conditions the use of some of these powers: an example of it is provided by the judgment 'Inter-Environment Wallonie ASBL'[30] in which the ECJ determines the conditions subject to which a domestic court will be allowed – if permitted by its national law – to maintain certain effects of a national measure after having annulled it for absence of the environmental impact assessment required by the European directives.

Bases and Intensity of Review

It is clear that legal Europeanization has affected the system of norms in relation to which administrative courts decide whether a challenged administrative decision is lawful or not. The ambit of this was enlarged to the whole range of European rules – directly in regards to EU law while the convention needed some form of transposition in some countries like Great Britain.[31] The organisation of it – its hierarchical arrangement – has profoundly been ques-

27 See e.g. ECrtHR 28 October 1999, *Zielinski v. France*.
28 ECJ 29 octobre 2010, *Elchinov*, C-173/09.
29 Conseil d'Etat, 11 May 2004, *Association AC*.
30 ECJ 28 February 2012, C-41/11.
31 Where the Human Rights Act, 1998, has become a pillar of judicial review: see e.g. Peter Leyland & Gordon Anthony, *Administrative Law* 2009, at 182 sq.

tioned by the surge of these rules. Administrative courts had, along with constitutional courts, to deal with the combination of European rules with constitutional ones, and they seem to have adopted the solution on which most constitutional courts converge, under the main inspiration of the German Constitutional Court's 'So Lange' jurisprudence.[32] The meaning of some standards which play an important role in judicial review of administrative decisions, such as 'general interest', 'public order'[33] and so forth has clearly been affected by European jurisprudences, since these concepts play an essential role both in the law of the convention – they condition the admission of restrictions to the rights protected by the convention – and in EU law – where they also delimit possible deviations from the basic principles.

European law has also put pressure on national administrative courts, in the sense of heightening the intensity of their review where fundamental rights recognised by European law are at stake: this standard of review being, in fact, common to EU law and the law of the Convention. This led them to adopt a proportionality review: which had sometimes been ignored in their system, that remained deferent to the administration and, like in the British law, would just admit administrative decisions to be quashed for substantive reasons where they could also be considered as 'unreasonable'. As already mentioned, British judges considered, later, that proportionality was worth enlarging to the whole scope of judicial review, not only in the field of EU law implementation.[34]

3.3 Procedure

Access to Court

From time to time, European law imposes an enlargement of standing before administrative courts. Based upon the general principle of right of access to a judge, which we have already mentioned, European requirements such as that are sometimes explicitly provided for in written legislation. Let us mention, here, the Aarhus directive about environmental legislation, and the procurement directives as to challenges by competitors.

On several occasions, the ECJ touched on the issue of time limits in judicial review. In 'Rewe',[35] it ruled that time limits had to be reasonable. Then in

32 The French Conseil d'Etat took this stance in a 2007 judgment ('Arcelor').

33 See e.g. Marie Gautier, 'L'ordre public', in: Jean-Bernard Auby 2010, at 317 sq.

34 See Patrick Birkinshaw 2003, at 327 sq.; Jürgen Schwarze, 'The Role of General Principles of Administrative Law in the Process of Europeanization of National Law: the Case of Proportionality', in: Luis Ortega 2005, at 25 sq.; Jan Jans, Roel de Lange, Sacha Prechal & Rob Widdershoven 2007, at 142 sq.

35 EJC C-33/76, 16 December 1976.

'Emmott',[36] that, under some conditions, when a Member State has not properly transposed a directive, the time limit will only start from the time the directive is properly transposed. Followed by 'Uniplex',[37] that for the sake of procurement directives application, 'the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement'.

Interim Measures

Concerning interim measures susceptible to be issued by domestic administrative judges, European law has a double-edged concern. It is keen to encourage the development of the powers domestic courts have in this respect, as long as it will permit a more effective implementation of its rules. This is one facet of the 'Factortame' case, already mentioned.[38] Similarly, the procurement directives have forced several national systems to introduce new procedures allowing the judges to paralyse, within short delays, the making of procurement contracts as infringement of competition rules applicable in this field.[39]

On the other hand, European law will sometimes object to the use of interim powers, recognised by administrative judges in their national law, when it could put obstacles in the way of implementation of EU rules. Thus, in its 'Zückerfabrik' jurisprudence,[40] the ECJ laid down the conditions under which EU law could accept that domestic courts suspend provisionally a national administrative decision implementing a European one. In a judgment of 2006,[41] the ECJ decided that a national rule arranging for the automatic suspension of a decision ordering the reimbursement of unlawful state aid was contrary to EU law.

Other Issues

Among the other procedural issues related to judicial review, is the question of whether domestic administrative judges are supposed to raise ex officio the argument of unlawfulness for contrariety with EU rules. Finally, the ECJ decided

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36 EJC C-208/90, 25 July 1991.

37 EJC C-406/08, 28 January 2010.

38 Factortame judgment led to an extention of interim powers of administrative courts not only in Great Britain but also in Spain and the Netherlands: see Auby 2010, pp. 901 sq.

39 Typical example of spillover effects: soon after having transposed the directives into national rules applicable to contracts submitted to EU law, the French legislator decided to make the procedure applicable to all cases involving procurement contracts, even those which are outside the scope of application of the directives: Rozen Noguellou, 'L'européanisation du droit des contrats administratifs', in: Jean-Bernard Auby & Jacqueline Dutheil de la Rochère 2014, at 1163 sq.

40 ECJ C-143/88, 21 February 1991, *Zückerfabrik*; C-465/93, 9 November 1995, *Atlanta*.

41 ECJ 5 October 2006, *Commission v. France*, C-232/05.

not to impose a general obligation to raise the argument: it has just stated that the judges have such an obligation when it is imposed on them in similar cases involving only national law.[42]

Concerning the rules on evidence, it is worth mentioning that some directives impose an obligation to facilitate the proof of situations, which would be contrary to EU law. This is the case, for example, of the 2000 directive on discriminations.[43]

From the law of the Convention, still article 6, is derived a strong obligation of publicity of judicial debates.[44] This forced some of the Member States to get rid of traditional secrecy in the functioning of some jurisdictions. Thus in France, for example, in cases of the courts dealing with the public budget and accountancy issues, specifically when they decide on the infliction of sanctions on public officers.[45]

Due to the general principle of impartiality, France also had to transform dramatically one of its most traditional administrative courts' component institution, the 'commissaire du government'. As members of the court, but not of the adjudicating panel, they have the role of analysing publicly the case and proposing a solution. Up to recently, the 'commissaire du gouvernement' had two other characteristics which came to be considered by the ECrtHR[46] as incompatible with article 6 of the convention: he or she had the last say in the hearings, no one could answer them, and, though not belonging to the deciding panel, he or she took part in their final – secret – meeting. These two rules have been abandoned recently.

4 How Profound are the Consequences of Europeanization?

Converging Trends

It is clear that the pressure exercised by EU law and the convention on domestic judicial review, is of a very similar manner and pushes it forward in a converging direction, which can rather easily be delineated.

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42 Mariolina Eliantonio 2008, at 129 sq.
43 Mariolina Eliantonio 2008, at 177 sq.
44 ECrtHR 8 December 1983, *Pretto*.
45 Conseil d'Etat 30 November 1998, *Lorenzi*.
46 7 June 2001, *Kress*.

It forces domestic judicial review to be more efficient, less deferent vis-à-vis administrative authorities. It pushes to get rid of traditional limitations, immunities, and sometimes deeply rooted abstentions on the part of judges: as in the case of injunctions.

Interestingly, it contributes to a move towards 'subjectivization' of judicial review, which can be observed in some member states. The requirement of more efficient adjudication, combined with a growing concern for fundamental rights, makes that, in some systems administrative courts are more searching for concrete solutions to the harms caused by incorrect administrative behaviour.[47] Compared with traditionally, judicial review tending to be an essentially 'objective' business only – checking the conformity of an administrative act to superior norms.

It imposes functional and structural changes in order to reach high standards of impartiality. In line with this, some systems have had to restructure some ancient and revered parts of their judicial apparatus. This is what the British system had to do with the Lord Chancellor and the adjudicative functions of the House of Lords.

An important side effect of all this is that, as a whole, domestic administrative judges have certainly seen their authority and powers increase. As we have seen, the European quasi-systematic influence leads to this. And one must not forget that, like all national judges, administrative ones have conquered the right of making EU rules prevail over domestic ones: in other words, the right to confront administrative decisions they have to review to external rules rather than national ones. It is true that, in principle, this is not new in monist systems: but, nowadays, we are talking about a mass of European rules and principles susceptible to trump national legislation and general principles, not about the application of a specific treaty concerning one particular issue.

Future Additional Evolution

If we want to figure out whether such a thing as a common model of judicial review of administration is emerging, we must add to what we have already discerned some prospective considerations concerning what further factors of transformation could operate. One can suggest that three sets of elements must be taken into account here.

47 This evolution was brilliantly described by Eduardo Garcia de Enterria, 2007.

The EU system is obviously on the path of a constantly more integrated administration.[48] A common administrative space is in the process of intense and rapid constitution. Moreover, it is important to realise that this process is not just a 'vertical one', i.e. consisting in a densification of functional links between national administrations and EU bodies. It is also growingly 'horizontal', connecting more and more domestic administrative bodies, leading them to act together, sometimes in conjunction with EU institutions. It suffices here to mention the networks of agencies of which the competition field provides the best possible example, and the operational linkages between national administrations implied by the implementation of the directive on services.

Partly because of this growing state of integration, partly for wider reasons concerning the general legal development of the EU system, European judges have entered into a constantly denser dialogue.[49] This is also true for top administrative judges as well as constitutional court judges. One can be sure that the extension of transnational administrative issues caused by the densification of 'horizontal' administrative relations will only foster this dialogue. A certain degree of cross-fertilisation between domestic judicial review systems can be expected here.[50]

On the other hand, nothing indicates that the EU could make a move towards adopting some general legislation concerning domestic judicial review – a move towards a 'common model' of judicial review.[51], [52] Not only is there apparently no legal basis in the treaties for such legislation, but also one can think that having it is by no means desirable. The high level of standards already imposed by EU specific legislation and case law, with the support of the law of the Convention, is probably sufficient to discipline the domestic side of EU policies implementation.

Future of Domestic Models

If we accept that there will probably be no such thing as a common European model of judicial review in the near future, then the question to be considered is what national models will become, whether they will be distorted or not by the European influence.

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48 See e.g. Hofmann & Türk 2009, at 1019.

49 See e.g. Bernard Stirn 2014, at 53 sq.; François Lichère, Laurence Potvin-Solis & Arnaud Raynouard 2004.

50 Andrea Carbone 2013; Camille Mialot 2010.

51 No question of this type can be raised on the convention side, of course.

52 As everyone knows, the making of a piece of general legislation concerning administrative procedure has been triggered by the EU Parliament in 2013, but it will certainly not enter into the judicial review field, or indirectly only, let alone in the one of domestic judicial review.

Putting things simply, one can say that European models of judicial review differ essentially on three aspects.[53] In some countries, administrative disputes are frequently brought to courts, while in others, they are mainly dealt with by non-judicial means: typically, in Scandinavian countries, due to the important role of the ombudsmen. Of course, there is then, the important difference between dualist systems – in which there is a separate administrative jurisdiction – and monist systems – in which there is a unique judicial apparatus, within which specific procedures and in general specific judges are dedicated to administrative litigation. The first version can be found in a majority of European countries, the second one has its strongholds in common law countries and also exists in some continental ones like Spain. Lastly, there are strong differences as to the scope of specific procedures applicable to administrative litigation. In some systems, it just covers judicial review strictly speaking, i.e. review of legality of administrative decisions – this is the case in the British system but also in some continental ones. While in others, such as in the French tradition, it also includes litigation concerning contracts made by administrative bodies as well as litigation concerning extra-contractual liability of the latter.

Is European influence eroding to some extent these divides? No, it seems. It is true that the European influence pushes towards more 'juridicization' of administrative relations, but, as we have mentioned, it is not always in order to put things in the hands of judges. Sometimes, European law fancies alternative dispute resolution devices. There is no sign that the European influence would favour monist systems over dualist ones. The contrary has been pleaded by some authors, with the argument that the EU system itself – and the law of the convention too – does not have a specific court for administrative litigation; yet it has not been confirmed that this has any impact on national systems. Concerning the scope of administrative litigation submitted to special procedures, one cannot say that the European legal construction would have had a significant effect on it, even if it can sometimes influence the concepts national systems use in order to draw the line around what is subject to the jurisdiction of administrative courts, as seems to be the case in Italy in the field of administrative liability.[54]

Final Considerations

This brief inquiry has, I believe, shown that the rather high degree of integration reached by the European legal architecture is logically reflected in a

53 Michel Fromont 2006; René Seerden & Frits Stroink 2002.

54 Giacinto della Cananea, 'L'influence du droit européen sur le droit public italien', in: Jean-Bernard Auby 2010, at 909 sq.

significant degree of Europeanization of domestic judicial review. But, if legal integration means a certain amount of harmonisation – and Europeanization imposes a rather wide range of common standards in judicial review – it does not require at all a move towards a unification of the system. Not all federal systems have a unified judiciary (the USA for example have not) and the European system is less than federal, let alone the system of the convention. The fact that most of the implementation of EU rules and policies is left to national administrations does not alter this conclusion. It is probably wise to think that European unification cannot progress without rooting itself in those domestic institutions on which the trust of citizens in their state depends most. Like, in many countries, the mechanisms through which the rights of the citizens are protected against administrative abuses In these countries, these mechanisms are considered key elements in the balance of powers between the state and the people and essential pieces of daily democracy: it is wise not to upset them unless clearly necessary.

References

- Karen Alter, *Establishing the Supremacy of European Law, The Making of an International Rule of Law in Europe*, Oxford University Press 2001
- Gordon Anthony, *UK Public Law & European Law*, Hart Publishing 2002
- Jean-Bernard Auby (ed.), *L'influence du droit européen sur les catégories du droit public*, Dalloz, 2010
- Jean-Bernard Auby & Jacqueline Dutheil de la Rochère (eds), *Traité de droit administratif européen*, 2° éd., 2014
- Paul Beaumont, Carole Lyons & Neil Walker (eds), *Convergence and Divergence in European Public Law*, Hart Publishing, 2002
- Patrick Birkinshaw, *European Public Law*, Butterworths 2003
- Andrea Carbone, 'Different Remedies in the Judicial Review of Administrative Decisions', European Review of Public Law, vol. 25, 3/2013, p. 1225
- Jacqueline Dutheil de la Rochère (ed.), *L'exécution du droit de l'Union, entre mécanismes communautaires et droits nationaux*, Bruylant 2009
- Roberto Caranta and Anna Gerbrandy (ed.), *Traditions and Change in European Administrative Law*, Europa Law Publishing 2011
- Mariolina Eliantonio, *Europeanisation of Administrative Justice. The Influence of the ECJ's Case Law in Italy, Germany and England*, Europa Law Publishing 2008
- Michel Fromont, *Droit administratif des Etats européens*, Presses Universitaires de France 2006
- Diana-Urania Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?*, Springer 2010
- Eduardo Garcia de Enterria, *Las transformaciones de la justicia administrativa*, Civitas 2007

- Guido Greco, 'A proposito dell'autonomia procedurale degli Stati membri', *Rivista Italiana di Diritto Pubblico Comunitario*, n. 1/2014, p. 1
- Herwig Hofmann & Alexander Türk, *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, Edward Elgar 2009
- Jan Jans, Roel de Lange, Sacha Prechal &, Rob Widdershoven, *Europeanisation of Public Law*, Europa Law Publishing 2007
- Peter Leyland & Gordon Anthony, *Administrative Law*, Oxford University Press, 6th ed., 2009
- François Lichère, Laurence Potvin-Solis & Arnaud Raynouard (eds), *Le dialogue entre les juges européens et nationaux: incantation ou réalité?*, Bruylant 2004
- Camille Mialot, 'L'utilisation du droit comparé par le Conseil d'Etat, un changement dans la fabrique du droit', *Actualité Juridique Droit Administratif* 2010, p. 1
- Luis Ortega (ed.), 'Studies in European Public Law. The Europeanization of Public Law and the European Constitution', *Editorial Lex Nova*, 2005
- Luis Ortega, Luis Arroyo & Carmen Plaza, *Spanish Administrative Law under European Influence*, Europa Law Publishing 2010
- Jürgen Schwarze, *Droit administratif européen*, Bruylant, 2d. ed., 2009
- Jürgen Schwarze (ed.), *L'état actuel et les perspectives du droit administratif européen. Analyses de droit comparé*, Bruylant 2010
- René Seerden & Frits Stroink (eds), *Administrative Law of the European Union, its Member States and the United States. A Comparative Analysis*, Intersentia 2002
- Bernard Stirn, *Les sources constitutionnelles du droit administratif, Librairie générale de droit et de jurisprudence*, 2014
- Luisa Torchia, *Lezioni di diritto amministrativo progredito*, Il Mulino 2010