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# Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity – Some Concluding Observations

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## 1 Introductory Remarks

Participating, again, in a seminar of ACA Europe has been a stimulating experience, particularly speaking about convergence of national administrative laws in the European Union (EU). I believe that ACA is an important vehicle contributing to a process of convergence.

According to the programme I am supposed to present general conclusions from the debates we had at the seminar. I shall not do that. For that would be too ambitious – a *mission impossible*. I shall instead present some comments, to the observations I have heard and only at the end will I attempt to draw some general, but fairly personal conclusions.

The theme of this seminar was the development of administrative law in Europe, which 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. Whilst we refer to administrative law here, in fact we particularly have in mind the institutional and procedural branches of administrative law. Hence the 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.

There seems to exist agreement that the impact of European law in this particular context is real and important. Yet at the same time this impact is disparate because it originates from multiple and highly different sources: Treaty law, including the EU Charter on Fundamental Rights; general principles of Union law; secondary EU legislation, partially of a more horizontal nature

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(non-discrimination[1], data protection rules[2]) and partially legislation enacted for specific sectors;[3] and then finally the case law of the ECJ. Hence, the question is whether a more general legislative initiative, as also now requested by the European Parliament (EP),[4] should not be taken to bring some order into all of this.

It is widely recognised that there exists an on-going process of some convergence of national administrative laws, on issues fostered by EU law. Reference has 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 side-notes should be added below be added.

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

First of all, this case law is not only top-down, but at the same time it is also very much 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. The system of remedies provided for in the (now defunct) Coal and Steel Treaty were generally seen as a victory of French administratif law (*UneConquête du droit administratif Français* – the title of an article in a French

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1 See for instance Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ* 2000 L180 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ* 2000 L303.

2 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *OJ* 1995 L281.

3 For instance Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, *OJ* 2007 L335; Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), *OJ* 2002 L108; Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version), *OJ* 2008 L24; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, *OJ* 2003 L156; Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, *OJ* 2012 L26.

4 See Resolution of 15 January 2013, 2012/2024 INI, P7-TAPROV (2013)4.

Law Review at the time)[5]. Whilst this may be predominantly true, the way in which the Court has interpreted these remedies is characteristic for its general approach to these cases. The Court does not simply take over and copy the concept from its national origin; rather the Court modifies the remedy to the specific requirements of the Union legal system, often simultaneously 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 *Ermessensmisbrauch*.[6] Of course, the Court itself, by its mere multinational 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 of this has been well analysed in academic writing.[7]

What one reads less often, is that national courts through preliminary questions, and these questions' motivations, may confront the ECJ with gaps in the Union legal system and a pressing need to find a solution to 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 its own national legal system, which obviously risks the uniform application of Union law. The language used to that effect can be quite explicit.[8]

Consequently, the top-down influence must be nuanced. As 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 very-much generalised 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

5 L'Huillier, Une conquête du droit administratif français: Le contentieux de la Communauté européenne du Charbon et de l'Acier, Recueil Dalloz 1953, Chronique XII, p. 63.

6 E.g. Cases 8/55 *Fédération Charbonnière de Belgique*, judgment of 29 November 1956, ECR English special edition p. 292, 2/57 *Hauts Fourneaux de Chasse*, judgment of 12 June 1958, ECR English special edition p. 199. See C.W.A.Timmermans, *De administratieve rechter en beoordelingsvrijheden van bestuursorganen*, Leuven 1973, p. 163.

7 See, among many more, Walter van Gerven, 'Bridging The Gap Between Community And National Laws: Towards A Principle Of Homogeneity In The Field Of Legal Remedies?' (1995) *CML Rev.* 701, Takis Tridimas, *The General Principles of EU Law*, Oxford 2006 2nd ed., 23 to 25.

8 See for instance the position of the Verwaltungsgericht Frankfurt as summarized in Case 11/70 *Internationale Handelsgesellschaft* (1970)ECR 1125 par. 2.

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 organised a colloquium, to which it invited and asked to be speakers 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. The colloquium was an interesting bottom-up experience. Finally, the ECHR has of course played an important role as a source of inspiration over the past forty years as well, and continues increasingly to do so.

Will the EU Charter of Fundamental Rights change this law finding process? It is true that the Charter will now logically be the starting point for interpretation, by the Court, on the rights and principles codified therein. The Court has already explicitly said so.[9] But the ECHR will remain an important reference, necessarily so because the Charter itself (Article 52, par. 3) obliges, in case of identifying Charter rights and Convention rights, respect to 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 foremost a bottom-up process.

## 3 Large Margin of Interpretation for Member States

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 judgments of 26 February 2013 in *Åkerberg Fransson* (Case C-617/10) and *Melloni* (Case C-399/11) give an important clarification.[10] 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 in respect of national standards of protection of fundamental rights. Provided

9 Case C-279/09 *DEB* (2010)ECR I-13849 pt. 30.

10 See also the article of the President of the ECJ Vassilios Skouris, Développements récents de la protection des droits fondamentaux dans l'Union européenne: les arrêts *Melloni* et *Åkerberg Fransson* ( 2/2013) Il Diritto dell'Unione Europea 229.

that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not thereby compromised.[11] In so far, the judgment in *Åkerberg Fransson* is remarkable. The Court after concluding that the case 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 hence the order is being reversed. It is because Union law leaves room for national action, that this action may be subject to review in 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 states that the room for national review will disappear, when and in so far as Union law itself specifically regulates those aspects of fundamental rights protection.

This approach demonstrates respect for national constitutional principles and will inevitably entail more divergence and less convergence. Though 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 of a large, sometimes very large, margin of appreciation in this regard and also uphold fundamental constitutional values (see also the more recent case law on betting, lotteries etc.).[12] 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 (e.g. the impossibility in Austria to register titles of nobility as part of a family name, Fürstin von Sayn-Wittgenstein)[13]. To quote from Omega Spielhallen: a national measure does not infringe the proportionality principle merely because the Member Sate has chosen a system of protection different from that adopted by another Member State.[14]

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. Therefore while Member States acting within the scope of Union law have to respect Charter rights and principles, they may also benefit from these exceptions. This leads to the question: would that also allow Member States a margin of appreciation to pay

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11 Par. 29 of the judgment referring to par. 60 of the *Melloni* judgment.

12 For instance Case C-42/07 *Liga Portuguesa* (2009) ECR I-7633, Joined Cases C-447 and 448/08 *Sjoberg* a.o.(2010) ECR I-6921, Case C-203/08 *Betfair* (2010) ECR I-4695, Joined Cases C-186/11 and C-209/11 Stanleybet a.o, judgment of 24 January 2013 not yet reported; see also Floris de Witte, 'Sex, Drugs & EU Law: The Recognition Of Moral And Ethical Diversity in EU Law', (2013) *CMLRev.* 1545.

13 Case C-208/09 *Sayn-Wittgenstein* (2010) ECR I-3693.

14 Case C-36/02 *Omega Spielhallen* (2004) ECR I-9609, par. 38.

due regard to specific national constitutional values as accepted by the Court 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 for 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?

It is interesting to note that this principle of Member States' autonomy in the absence of specific EU legislation has seen its scope remarkably enlarged over the years, by the case law of the Court. Originally, limited to procedural rules only, it is now regularly applied also to substantive rules.[15] There is even a case, where the Court in controlling respect of a fundamental Treaty freedom (the right of establishment) has recourse to the principle of autonomy restricting its control to the tests of equivalence and effectiveness, instead of applying the normal test of restriction and justification.[16] Another interesting issue concerns the relationship between the principle of procedural autonomy and that of effective judicial protection as a fundamental right, the latter being more intrusive and leaving less freedom of action to the Member States. The distinction between both principles is sometimes blurred in the case law.[17] However, this is not the moment to discuss these questions any further.

What I want to stress, and what is my second side-note, is that the top-down influence of the ECJ's case law on fundamental rights and general principles should not be overestimated. It remains limited to the level of principles and general rules with much room remaining for national specificities.

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15 For instance Joined Cases 6/90 and C-9/90 *Francovich* a.o. (1991) ECR I-5357 par. 43, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* and *Factortame* (1996) ECR I-1029, paras 67 to 74, 83 to 90, Case C-591/10 *Littlewoods Retail*, judgment of 19 July 2012 not yet reported, paras 27 to 34.

16 Case C-378/10 *Vale*, judgment of 12 July 2012 not yet reported, paras 48 to 62.

17 For instance Case C-268/06 *Impact* (2008) ECR I-2483, Case C-63/08 *Pontin* (2009) ECR I-10467. There is other case law however clearly distinguishing both principles. See for instance Case C-12/09 *Mono Car Styling* (2009) ECR I-6653, Joined Cases C- 317 to 320/08 *Alassini* a.o. ( 2010) ECR I-2213; see also Case C-279/09 *DEB* (2010) ECR I-13849.

## 4 Imposed Uniformity?

I now come to the second part of the subtitle of the 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?

Two initiatives are now 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).[18] This request is addressed to the European Commission, who are to come forward with a legislative proposal on the 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 the product of a European wide network of academics and a first example, I think, in the field of public law of a project comparable in scope and ambition to the codes and general principles of European Private Law (developed by various academic networks existing already for a much longer time).

In 2012 RENEUAL has joined forces with the recently founded European Law Institute (ELI). Both organisations have decided to further develop the project as a joint project. One of the aims of the ELI is to take initiatives with a practical impact for the development of the law in Europe (that scope is thus much wider than European law only). The ELI brings together for that purpose legal expertise not only of academics, but particularly also of legal practitioners, judges, advocates, notaries, legal counsels of national and European administrations etc. The added value of the ELI contribution to the RENEUAL project is therefore, the critical eyes of the legal practitioners and their valorising comments towards the RENEUAL drafts.

Both the EP Recommendation and the RENEUAL draft start with a similar diagnosis: there exists a large variety of sectorial 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.

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18 See fn. 4.

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, the EP, if one may say so, is also an exercise in public relations. That may explain why the EP draft is at the same time 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 legal in nature, including being considerably 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. The RENEUAL draft is intended to simultaneously serve as a model for a EU Regulation and as a source of inspiration for national legislation concerning the 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 forms (institutions, agencies, bodies etc.). But, in the version submitted to the ACA Conference the model rules would 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 individualised 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 limit 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 an exception because from a qualitative point of view, and maybe to a certain extent also from a quantitative viewpoint, most of

the regulations take place on the EU level. I am not convinced this is really the case.

Albeit, in the revised version of the RENEUAL draft, presented to a Conference organised by the European Ombudsman on 19 and 20 May 2014 in Brussels, Book III on single case decision-making does not apply anymore to Member States. This also follows suggestions made during a workshop on the RENEUAL draft organised in February 2014, in Florence, by the ELI in cooperation with the European University Institute. This modification is to be welcomed. I do not contest that there may be good reasons to consider including also the Member States in situations where they are implementing EU law. However, to do so would not necessarily increase the political chances of a possible legislative initiative (to use an understatement). It would also raise a host of technical complications. Better to proceed step by step, as is good wisdom in EU decision-making.

Book I, in the version submitted to the ACA Conference, enumerated, in the operative part, 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 on a much wider scope than only those applying to administrative action alone (legal certainty, proportionality, legitimate expectations, access to justice); to lower ranking principles of a more administrative nature, not necessarily qualified as legal principles (e.g. principles of participation, of efficiency and effectiveness, principles of transparency, service orientation, fair communication).

In the revised version of the RENEUAL draft, presented to the Brussels Conference already referred to, these principles have been taken out of the operative part of Book I and placed into the Preamble of the Model Rules. However, the language used remains rather peremptory, including a public authority is 'bound to', 'shall have regard to' these principles. For most of these principles it is evident that they do apply (rule of law, proportionality, legal certainty, equal treatment, right to good administration etc.), but for others this is not so clear. It may also be less clear what the principles exactly imply (fairness, objectivity, efficiency, effectiveness, service orientation). One could say of course that a Preamble, even when using peremptory language, cannot impose legally binding obligations. Nevertheless, I think the drafting of the Preamble could be reconsidered in this respect.

Nonetheless, the question remains whether a legislative initiative on the EU level is now required or opportune? Ultimately, this is a political question.

However, what might still be needed, to allow an informed political assessment, is a comparative overview or comparative table taking stock of the existing general and sector specific Union rules on administrative procedures. This seems to me necessary for at least three reasons:

– Firstly, to get a clear view of the various sectors of Union administration that the Model Rules would apply to. Only on that basis will it be possible to pay due regard to the characteristics of these sectors.
– Secondly, a comparative analysis of the existing rules, and the level of protection they ensure, will be necessary to establish the real gaps.
– Thirdly, such an analysis will assess the need for and scope of an overhaul of existing Union legislation, which the adoption of Model Rules might entail. To give an example: Regulations 2988/95 (Protection of the Union's Financial Interests)[19] and 2185/96 (On the Spot Checks and Inspections)[20] are of horizontal application. They complement and supplement existing sector specific rules. Enacting Model Rules on investigations and inspections will necessitate reconsidering the articulation of the existing rules. The creation of three partly overlapping layers of rules would not really be helpful.

It will be for the Commission, I think, to produce this analytical material. But it might well be that the Commission is already preparing this, considering the follow-up to the Berlinguer draft of the European Parliament.

Whatever the outcome of a possible legislative process, work on the draft Model Rules should continue. Developing the Model Rules is not only a challenging exercise of comparative law for the academia, but the rules may also become a source of inspiration, fostering the process of natural convergence and initiating future legislation both on a national and European level. The Model Rules may serve as a toolbox, like the Common Frame of Reference for European Private Law. Overall these ideas already provide sufficient reason to go ahead with this initiative.

19 *OJ* 1995 L312.
20 *OJ* 1996 L292.