LEGISLATIVE REGULATION OF ADMINISTRATIVE PROCEDURES: THE ROLE OF THE BUND AND THE LÄNDER IN GERMANY

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1. Subsidiarity principle and competence to adopt rules in Germany's administrative procedure

Germany has a strong tradition of regional government dating back to the founding of the German Empire in 1871. Since unification in 1990, the Federal Republic has consisted of 16 *Länder*: the 10 *Länder* of the former West Germany, the 5 new *Länder* of the former East Germany, and Berlin.

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In this federation of 16 "*Länder*" each Land has its own government and administration and its own legislation regarding administrative procedure. In Germany we therefore have an administrative procedure law in every federal state (*Land*), as well as a general law on administrative procedure at federal level (*Bund*): the well known "*Verwaltungsverfahrensgesetz*" of 1976 (in the version re-published on 23/01/2003, in BGBl. I, p. 102 and last modified by article 10 of the Law of 17/12/2008, in BGBl. I, p. 2586 and art. 2 par. 1 of the Law of 14/9/2009, in BGBl. I, p. 2827)

At federal level, there aren't many state authorities besides the government. So, as a rule, the *Länder* implement federal law through their *Länder*-administration. In this regard, as far as the *Grundgesetz* is concerned, in article 74 GG concerning the subjects of concurrent legislation, there is no reference to administrative procedure, but only to "court procedure". This is why, following the general rules, competence in procedural matters should follow competence in substantial matters (principle of annexed competence - *Annexkompetenz*). But, as far as the so-called "Execution of federal laws in their own right" (*landeseigener Vollzug*) by the *Länder* is concerned, the new version of article 84 GG, as amended in 2006[1], clearly states that "*Where the Länder execute federal laws in their own right, they shall regulate the establishment of the authorities and their administrative procedure*", and that even if federal laws should provide otherwise it is only in exceptional cases, where there is a special need to adopt a uniform legislation for the entire territory of the Federation, that such a law, adopted with the consent of the *Bundesrat*, could exclude the possibility for the *Länder* to adopt a diverging legislation.

The situation is no different when the *Länder* execute federal legislation on behalf of the federal authorities (*Auftragsverwaltung*), since the *Länder's* general competence on administrative procedure has in any case been clearly admitted by article 1, par. 3 of the Federal Law on Administrative Procedure of 1976 (VwVfG), which states, more generally, that "*This Act shall not apply to the execution of federal law by the Länder where the administrative activity of the authorities under public law is regulated by*

[1] The Reform of 2006 is the most comprehensive reform of the *Grundgesetz* since its implementation in 1949.

a law on administrative procedure of the Länder". This provision is an application of the well known "subsidiarity principle" to the field of administrative procedure, and was introduced in the Federal Law on Administrative Procedure (*VwVfG*) only at the very end of the procedure for its approval, following a proposition by the *Bundesrat*. As a matter of fact, due to this provision and to the fact that every *Land* has adopted a law on administrative procedure, the scope of the *Verwaltungsverfahrensgesetz* is limited only to the "*bundeseigene Verwaltung*": i.e. administrative activities under public law of the Federal Government and public law entities, institutions and foundations operated directly by the Federal Government (article 1, para. 1, *VwVfG*).

Regarding the scope of the *Verwaltungsverfahrensgesetz,* it must also be stressed that, despite its unquestionable importance, administrative rulemaking is not included in it, since it concentrates on single administrative decisions (*Verwaltungsakt*) and administrative contracts (*Verwaltungsvertrag*). Consequently, Statutory Instruments (*Rechtsverordnung*), By-laws (*Satzungen*) and the different types of Circulars (*Verwaltungsvorschriften*) are all excluded from the scope of the Federal Law on administrative procedure (*VwVfG*).

2. The coordination process: simultaneous legislation (*Simultangesetzgebung*), static and dynamic reference (*statische und dynamische Verweisung*)

Even if in 1976 it was decided that, in compliance with the subsidiarity principle, the *Länder* should have the right to have their own rules on administrative procedure, at the same time it was clearly important for German citizens to have identical administrative procedure rules or at least very similar ones in the different *Länder*, in order to facilitate moving from one state to another or having commercial activities in several federal states. So, while deciding to leave the *Länder* free to adopt autonomous rules on administrative procedure, it was at the same time decided to try to coordinate the content of the laws on administrative procedure of the "*Länder*" with the content of the Law on administrative procedure (*VwVfG*) adopted at a federal level. In fact, as far back as February 1976 (the Law on administrative procedure of the Bund is of May 1976) the Ministries of Home

Affairs of the *Länder* made the unanimous decision that *Länder* should adopt laws on administrative procedure with a content identical to that of the *Bund*'s administrative procedure law. This is the well-known "decision on simultaneous legislation" (*Beschluss zur Simultangesetzgebung*) with which the Governments of the *Länder* have till now - and despite all problems - complied.

The coordination process has not always been very easy. But, in as far as the main important topics are concerned, thanks to this agreement it has until now been possible to guarantee widespread consistency in the field of administrative procedure in the Federal Republic of Germany.

The principles of fairness and loyal cooperation have therefore been, so far, the essential guidelines in the field. From a technical point of view the solution chosen by most of the *Länder* (16 *Länder*) in order to guarantee consistency as agreed, has been that of adopting "full laws" (*Vollgesezte*) on administrative procedure, which reproduce more or less the content of the Law on administrative procedure of the *Bund* (Baden-Württemberg, Bayern, Brandenburg, Bremen, Hamburg, Hessen, Mecklenburg-Vorpommern, Nordrhein-Westfalen, Saarland, Sachsen-Anhalt, Schleswig-Holstein und Thüringen). However, some of them chose a different solution, which consists in adopting a law containing only a few provisions and then a static or even dynamic reference[2] to the Law on administrative procedure of the *Bund* (Berlin, Niedersachsen, Rheinland-Pfalz und Sachsen).

3. The provisions of article 29 of Italian Law nr. 241/90 on administrative procedure

According to par. 1 of article 29, as amended by Law 69/2009 (Law n. 69 of the 18th June 2009, laying down "*Disposizioni per lo sviluppo economico, la semplificazione, la competitività nonché in*

[2] On the possible unconstitutionality of dynamic reference to a Law of the Bund and its reasons, for example Bayerisches Verfassungsgerichtshof, 31/1/1989, in NVwZ (1989), 1053: "*Eine dynamische Verweisung von einem Landesgesetz auf ein Bundesgesetz kann als "versteckte Verlagerung von Gesetzgebungsbefugnissen" unter dem Blickwinkel des Demokratieprinzips verfassungsrechtlich bedenklich sein, und zwar vor allen Dingen dann, wenn es sich um grundrechtsrelevante Regelungen handelt, bei denen der Gesetzesvorbehalt eine eigenverantwortliche Prüfung durch den zuständigen Gesetzgeber erfordert, oder wenn die verweisende und die in Bezug genommene Vorschrift zu ganz verschiedenen Rechtsbereichen gehören*".

materia di processo civile", in *Gazzetta Ufficiale* n. 140 of 19/6/2009), of Italian Law 241/90 on administrative procedure, only the provisions contained in article 2-*bis,* 11, 15, 25 par. 5, 5-*bis* and 6, as well as those in chapter IV-*bis,* apply to all public administrations. Those provisions refer to the consequences of the administration's delayed conclusion of procedures (art. 2-*bis*), to agreements integrating or substituting an administrative act (art. 11), to agreements between public administrations (art. 15), to the right to appeal decisions concerning right to access to documents (art. 25 par. 5, 5-bis and 6), as well as to all provisions of Title IV-bis concerning effectiveness, invalidity, withdrawal and rescission of administrative acts.

For all the rest, according to article 29, par. 2 - which was already introduced by Law 15/2005, following the federal constitutional reform of 2001 - the Italian Regions shall themselves regulate the subject-matters governed by the law on administrative procedure. In so doing, they shall comply both with the constitutional system and with guarantees to citizens regarding administrative action, as defined by the principles contained in the law on administrative procedure.

As this last paragraph was far from clear in its content, Law 69/2009 introduced two new paragraphs in article 29: par. 1 specifies – as we have already seen – which provisions shall apply to all public administrations, including Regional ones; par. 2-bis and 2-ter specify which provisions are to be considered as pertaining to the basic level of benefits/services (*livelli essenziali delle prestazioni*) referred to in article 117 par. 2m of the Italian Constitution, and cannot therefore be derogated *in peius.* Which means that, on the contrary, the Regions shall have the power to provide for higher levels of protection.

Para. 2-bis specifically considers as pertaining to the basic level of benefits/services, provisions regarding the public administration's duties to guarantee participation by interested parties in procedures, to identify the person in charge of the procedure, to conclude procedures within the established timeframe and to guarantee access to administrative documentation, as well as the provisions relating to the maximum duration of procedures. Finally Par. 2-ter also adds provisions concerning the declaration of the beginning of an activity and the "silence-equals-consent" principle.

4. Conclusions: a paradox?

As we have seen, in Germany we have a law on administrative procedure in every federal state (*Land*), as well as a general law on administrative procedure at federal level (*Bund*). But this does not seem to affect the uniformity of rules on administrative procedure throughout the entire territory of the *Bundestaat,* thanks to the effort constantly made by the *Länder* to coordinate their legislations on administrative procedure. Therefore there has not until now been a need for the federal lawmaker to implement – which he could, in accordance with the provisions of art. 84 GG[3] – provisions preventing the *Länder* from implementing norms on administrative procedure diverging from the Federal Law on administrative procedure (*VwVfG*).

On the contrary, Italy seems to be moving in quite a different direction. With Law 69/2009 national lawmakers felt the need to specify which provisions of the general law on administrative procedure should apply to all public administrations, regional and local ones too. Furthermore Law 69/2009 specified which provisions of the general law on administrative procedure were to be considered as pertaining to the basic level of benefits/services to be provided equally for all Italian citizens. All this seems to confirm the national lawmakers' fear of fragmentation and differentiation in standards at regional and local level. A fear that is also manifested in the Constitutional Court's attitude in its latest judgements[4].

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[3] Art. 84 par. 1 GG states that "*In exceptional cases, owing to a special need for uniform federal legislation, the Federation may regulate the administrative procedure with no possibility of separate Land legislation*".

[4] On this point, see the paper presented by Raffaele Bifulco, in this issue of IJPL.

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