# AT RISK: NATIONAL ADMINISTRATIVE PROCEDURE WITHIN THE EUROPEAN UNION*

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> La nostra idea di Europa è fondata sulla diversità …
> La nostra Unione si fonda su cultura e interessi comuni, ma custodisce anche la diversità e la varietà del nostro continente. La diversità non ci fa paura. Noi stessi siamo la diversità. La diversità è nel nostro DNA. È il nostro bene più prezioso.
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> Federica Mogherini, 'Le sfide ai confini dell'Europa : Come rilanciare la politica estera e di sicurezza comune?' *Lectio magistralis per la consegna del Premio ISPI* (25.05. 2015).

*Abstract*

The paper analyses the risk of national administrative procedure within EU. In particular, it presents three different examples of an integrationist approach to administrative law and procedures. Focusing on the neglected principle of subsidiarity, the analysis proceeds in favour of democratic legitimacy and against the integrationism of the Court of Justice, with the aim of supporting a model based on procedural autonomy.

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**Introduction**

In an article on the development of European public administration written in 2004, Professor Mario Chiti wrote of 'the rise of a *multilevel* public administration in which the original Community scheme of the indirect, autonomous execution of Community policies by national administrations is being replaced by an administrative model of integration.'[1] His was not a lone voice.[2] Only four years later, Herwig Hofmann introduced the terminology of a shared 'European administrative space' or 'area in which increasingly integrated administrations jointly exercise powers delegated to the EU in a system of shared sovereignty'.[3] An integrated administration was materializing, in which both national and supranational administrative actors participated; the outcome was an increasing convergence of administrations and administrative practices at every level of the EU; a 'common European model' was seen as emerging.

It is no secret that I am not an advocate of European integration or of a European *ius commune*. I have never considered that belief in a pluralist Europe is inconsistent with a commitment to internationalism. In common with the High Representative, I believe in diversity. I believe that cultural diversity is 'valuable in its own right' and is 'a basic strength of the European enterprise'.[4] This is indeed recognised in the Preamble to the TEU, which promises 'to deepen the solidarity between their peoples while respecting their history, their culture and their traditions' and is repeated in the Preamble to the European Charter (ECFR), which guarantees respect for 'the diversity of the cultures and traditions of the peoples of Europe'. More closely relevant to our present subject-matter, Point 7 of the Protocol on the Application of the Principle of Subsidiarity and Proportionality stipulates that 'care [should] be

[1] M Chiti, *Forms of European Administrative Action*, 68 Law & Contemp. Probs. 37 (2004).

[2] See specially F Bignami, *Introduction,* and S Cassese, *European Administrative Proceedings*, in the Special Issue F Bignami and S Cassese (eds), *The Administrative Law of the European Union* 68 Law & Contemp. Probs. (2004) 1-239.

[3] H Hofmann, *Mapping the European administrative space*, 31 West Eur. Pol. 662 (2008). And see J Olsen, *Towards a European administrative space*, 10 JEPP 506–31 (2003).

[4] C Harlow, *Voices of Difference in a Plural Community*, 50 AJCL 339, 340 (2002).

taken to respect well established national arrangements and the organisation and working of Member States' legal systems'. In line with this, I believe that law and administrative procedure should not be treated as a form of transferable technology; they represent important cultural preferences and careless change may trigger unwanted side effects.

In this paper, I want to advance a case against the wide-scale Europeanization of administrative procedures. In Part I, I shall present three different examples of an integrationist approach to administrative law and procedures, representing three different routes towards procedural integration. In Part II, focusing on the neglected principle of subsidiarity, I shall consider the feasibility of a radically different approach. In Part III, I shall argue in favour of democratic legitimacy and against the integrationism of the Court of Justice, which overlooks questions of impact and enforceability. I shall argue for a more relaxed and diverse model, in which greater attention is paid to procedural autonomy.

**I. Paths to convergence**

As the starting point for this section, I want to take a second paper written by Mario Chiti in 1995,[5] in which he asked whether it was possible to identify universal principles of good government. Chiti was talking primarily of the building of the European Community both as 'a Community of Law, with new sources of juridical inspiration, its own institutions and the possibility of enforcing the new rules through the Commission and its own judiciary' and as 'the major expression of judicial universalism' in our times. In this framework, it was natural for 'a series of general principles considered universal' to emerge; equally it was natural that the principles should derive mainly from the jurisprudence of the European Court of Justice. The principles were designed to regulate administrative action and procedures with a view to achieving a balance between authority and liberty; they had at one and the same time to 'support the

[5] M. Chiti, *Are there universal principles of good government?*, 1 EPL 241, 244-5 (1995).

pursuit of the public interest while seeking to guarantee security for the affected individual'.[6]

This may have been broadly true of the principles listed by Chiti - equality and the prohibition of discrimination; proportionality; the principle of legal certainty and the protection of legitimate expectations; the principles concerning the rights of the defence and other specific principles related to the concept of due process – although even then Chiti recognised that his chosen principles were not 'universal'. They were 'partly common to the Member States, partly typical of only some of them'; the proportionality principle was, for example, strongly represented in German administrative law but unrepresented in French and English administrative law. There may therefore be significant 'spill-over effects' from 'constitutionalizing' proportionality as a general principle of EU administrative law across the Member States.[7] Again, his chosen principles were expressed at a very general level and might be subject to very different interpretations. It is very possible to find agreement on symbolic values such as the rule of law or natural justice at an abstract level; it is in the implementation of these values inside specific legal orders that differences occur. A study made for the Swedish Presidency in the context of a possible Union-level codification of administrative procedure found , for example, that there was much general agreement on core principles in the 17 states studied but that the form in which they were incorporated into law differed greatly.[8]

It is important to take note of the context in which these words were written. It was a period when the Court of Justice was engaged in a clearly integrationist project; indeed, integrationism had recently been described by the Italian judge at the Court of Justice as 'a genetic code transmitted to the Court of Justice by the founding fathers'.[9] The Court was beginning to treat the Treaties as

[6] M. Chiti, *Are there universal principles of good government?*, cit. at 5, 247.

[7] See, eg, G Anthony, *Community Law and the Development of UK Administrative Law: Delimiting the UK 'Spill-Over' Effect*, 4 EPL 253 (1998); R. Rawlings, *Modelling Judicial Review*, 61 CLP 95 (2008).

[8] Statskontoret, *Principles of Good Administration in the Member States of the European Union* (2005).

[9] F. Mancini and D. Keeling, *Democracy and the European Court of Justice*, 57 MLR 175, 186 (1994).

constitutional in character; it was engaged too in establishing the primacy of the 'new legal order' that it had fathered[10] and in underwriting the doctrine of primacy by 'constitutionalizing' its general principles. The Court showed no concern over the legitimacy of outlawing well-established principles of member state administrative law as it did in *Johnston*[11] in respect of the right of access to the court and in *Heylens* in respect of the rights of the defence in administrative proceedings.[12] Underlying this approach was an implied assumption of 'levelling-up', which the French Conseiller d'Etat, Ronny Abraham, argued was a threat to minority cultures: 'It is not because an institution or rule is to be found only in one, or in a small number of countries, that it is to be adjudged bad; the majority is not always right.'[13]

At least at this early stage, the integrationist tendencies of the Court of Justice had generated little rebellion.[14] As Jospeh Weiler famously put it, the Court had been able 'to satisfy its main interlocutors'; it had achieved a 'quiet revolution' in which 'the growing involvement of the national judiciary in the administration of Community law, transforming doctrinal acceptance into *procedural* and social reality' had played a significant part.[15] By the early 1990s, however, American observers began to take note of the Court's integrationist tendencies. In a paper designed for an American audience, Martin Shapiro pointed to the integrationist effects of the Single European Act, which specifically authorised the Commission to challenge national regulations before the Court of Justice, to be decided by the Court's 'broad proportionality

[10] Case 26/62 *Van Gend en Loos v Nederlandse Administratie Belastingen* [1963] ECR 1.
[11] Case 222/84 *Johnston v Royal Ulster Constabulary* [1986] ECR 1651.
[12] Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097.
[13] R. Abraham, *Les principes généraux de la protection juridictionnelle administrative en Europe: L'influence des jurisprudences européennes*, 9 EPLR 577, 582 (1997) (my translation).
[14] But see the notable critique by H. Rasmussen, *On Law and Policy in the Court of Justice* (1986) and the revolt of the *Bundesverfassungsgericht* in *Internationale Handelgesellschaft Gmbh*, BVerfGE 37, 271 (1974); '*Solange II*' (1986) 73 BverfGE 339; *Re the Application of Wünsche Handelgesellschaft* [1987] 3 CML Rev 225.
[15] J Weiler, *A Quiet Revolution - The European Court of Justice and its Interlocutors*, 26 CPS 510 (1994). And see his debate with Judge Mancini: F Mancini, *Europe: The Case for Statehood*, 4 ELJ 29 (1998); J. Weiler, *Europe: The Case Against the Case for Statehood*, 4 ELJ 43 (1998).

discretion'.[16] Shapiro highlighted the significance of *administrative* judicial review, which would subject Member States to the Court's supervision on administrative-law questions. By applying EU procedural standards, such as the duty to give reasons or proportionality-testing, the Court could use procedural law to achieve substantive outcomes; it could, in other words, shelter constitutional behind administrative review.[17] This point is particularly relevant to my first case study.

In administrative matters, however, the Court of Justice had brought into play the principle of national autonomy in matters of administrative and judicial procedure. In *van Schijndel*,[18] Advocate-General Jacobs insisted that the doctrines of primacy and effectiveness of EC law could not be absolute; the interest of litigants (in the enforcement of rights under Community law) must be balanced against other considerations such as legal certainty, sound administration and the orderly and proper conduct of proceedings by (national) courts. Legal systems, he argued, 'commonly impose various restrictions which, in the absence of a reasonable degree of diligence on the part of the plaintiff, will lead to full or partial denial of his claim'. But where was the line to be drawn? A complex and often contradictory case law evolved, evoking criticism from commentators. While some complained that 'the efficacy of Community law and, in particular, its capacity to be equally applied', was being undercut by the Court's 'sympathetic accommodation' to national procedures and by an inconsistent approach,[19] others argued that the trend towards integration and cultural uniformity was threatening national cultures unnecessarily.[20]

Writing more recently, Rolf Ortlep and Maartje Verhoeven have suggested an emerging distinction between 'direct' collisions of EU and national legal orders, where EU law and national law

[16] M. Shapiro, *European Court of Justice*', in A. Sbragia (ed.), *Euro-Politics: Institutions and Policymaking in the "New" European Community* (1991), 141-5.
[17] Ibid. And see M. Shapiro, *The Giving Reasons Requirement*, U. Chi. Legal F. 179 (1992).
[18] Opinion of A.G. Jacobs in Joined Cases C430, 431/93 *van Schijndel and van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705 at [31].
[19] C. Himsworth, *Things Fall Apart: The Harmonisation of Community Judicial Procedural Protection Revisited*, 22 EL Rev. 291 (1997).
[20] M. Hoskins, *Tilting the Balance: Supremacy and National Procedural Rules*, 21 EL Rev. 365 (1996).

provide different, incompatible legal regimes for the same factual situation; and 'indirect' collisions involving national procedural rules, such as time limits in which to initiate judicial proceedings, which can limit the effect of EU law in the national legal order. In the former case, the Court of Justice generally opts for primacy; in the latter case, there is more room for assessment and national rules that hinder the effectiveness of EU law may not have to be set aside.[21] In support of their thesis, the authors cite the well-known decision in *Kühne & Heitz*,[22] where the Court of Justice ruled that EU law did not oblige an administrative authority to re-open a final administrative decision when national law did not authorise this. The limitations placed by the Court on this application of procedural autonomy, however, were sufficient to render the principle itself exceptional and case law cited in later sections suggests that we are fast moving towards a counter-principle that would read (as drafted by John Delicostopolous):

> All procedural rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially; the effective enforcement of Community law are to be considered as measures contrary to Community law and must be declared inoperative.[23]

**1. Standardising health care procedures: a stroll through the Court of Justice**

EEC Regulation No 1408/71 was primarily intended to deal with social security benefits for migrant workers.[24] Under Article 22 of the Regulation, however, a worker satisfying the conditions of the competent state for entitlement for benefits can be 'authorised' by a 'competent institution' to travel outside his/her

[21] R. Ortlep and M. Verhoeven, *The Principle of Primacy versus the Principle of Procedural Autonomy found in 2012*, June 2012, Netherlands Administrative online Law Library.
[22] Case C-453/00 *Kühne & Heitz* [2004] ECR I-837.
[23] J. Delicostopolous, *Towards European Procedural Primacy in National Legal Systems*, 9 ELJ 599, 605 (2003).
[24] Regulation No 1408/71 (EEC) on the application of social security schemes to employed persons and their families moving within the Community, OJ L149 (05/07/1971), pp.2-5.

Member State of residence for 'treatment'. In *Kohll*, [25] this provision was read up by the Court of Justice as designed to allow an authorised person to go to another Member State to receive appropriate treatment '*without that person incurring additional expenditure*'.[26] The Court added that, although it had not been intended to regulate the question of reimbursement, the provision did not in any way prevent the reimbursement of costs incurred even where prior authorisation had *not* been granted.

Over time, a complex jurisprudence on the question of reimbursement settled that a prior administrative authorisation scheme must exist and be justified in terms of Articles 59 and 60 of the Treaty and that, to be justified, it must be based on objective, non-discriminatory criteria known in advance, 'in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily'. In *Smits and Peerbooms*, the Court added:

> Such a prior administrative authorisation scheme must likewise be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and *refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings*. [27]

This jurisprudence came to a head in *Watts*, which involved the British National Health Service (NHS). No formal procedures were in place under British law for claiming reimbursement in a case where the claimant (Mrs Watts) had been refused reimbursement of the costs of an operation in France by the NHS, for these purposes the 'competent institution'. She therefore relied solely on the provisions of Regulation No 1408/7. Once again requirements were deepened. Nine Member States made

[25] Case C-158/96 *Kohll* [1998] ECR I-1931.
[26] *Kohll* at [5] (emphasis mine).
[27] Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473 at [90] (emphasis mine). See also Joined Cases C-358/93, C-416/93 *Bordessa and Others* [1995] ECR I-361; Joined Cases C-163/94, C-165/94, C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821; Case C-205/99 *Analir and Others* [2001] ECR I-1271; Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509.

observations to the Grand Chamber in *Watts* and the English Court of Appeal took the unusual step of warning the Court of Justice in making its preliminary reference that its application of Article 49 EEC might 'involve the interference of Community law in the budgetary policy of the Member States in relation to public health, such as to raise questions with regard to Article 152(5) EC'.[28] This provides that Community action in the field of public health 'shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care'. Undeterred, the Court of Justice insisted that decisions must be individuated; that the *burden of proof lay on the competent institution* to establish that the waiting time did not exceed an acceptable period and that the claimant's medical condition, the history and probable course of his illness, the degree of pain s/he is in and/or the nature of the disability at the time when the authorisation is sought must be considered.[29]

The Commission now saw an opening to submit a proposal for a directive on patients' rights in cross-border healthcare, which included as Article 9 a resumé of the Court's jurisprudence[30] - 'a daring move' as an earlier attempt at codification of patient mobility rights had already failed.[31] The Dutch Government and European Parliament both raised concerns over subsidiarity, arguing that no harmonisation was necessary; it was culture rather than regulatory uncertainty that was the true regulator of cross-border health care travel and it was member state failure to implement existing case-law rather than the absence of a European framework that created problems.[32] Nonetheless, the Commission succeeded in pushing through a Directive that replicates the case law. It requires Member States to ensure that

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[28] Case C-372/04 *R(Yvonne Watts) v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325 at [41].

[29] Ibid at [68].

[30] Proposed Art. 9 of COM(2008) 414 final 2008/0142 (COD).

[31] W. Sauter, *The Proposed Patients' Rights Directive and the Reform of (Cross-Border) Healthcare in the European Union*, 36(2) Legal Issues of Economic Integration 109, 110 (2009). And see European Commission, Proposal for a Directive of the European Parliament and of the Council on services in the internal market 2004/0001 (COD) [SEC(2004) 21] COM (2004) 2 final/3.

[32] See P. Kiiver, *Legal Accountability to a Political Forum? The European Commission, the Dutch Parliament and the Early Warning System for the Principle of Subsidiarity*, 8 Maastricht Faculty of Law Working Paper 30-32 (2009).

administrative procedures regarding the use of cross-border healthcare and reimbursement of costs of healthcare incurred in another Member State are based on objective, non-discriminatory criteria that are necessary and proportionate to the objective to be achieved.[33]

Unusually, the European Parliament paid attention to the administrative procedures. It resolved that individual decisions regarding the use of cross-border healthcare and reimbursement of costs must be properly reasoned, subject on a case-by-case basis to review and capable of being challenged in judicial proceedings that include *provision for interim measures*.[34] These requirements too found their way into the Directive. This provided for an administrative procedure capable of ensuring that requests are dealt with objectively and impartially and easily accessible; that information relating to such a procedure shall be made publicly available at the appropriate level; and that time-limits must be publicised in advance. Decisions must be individuated and take into account the specific medical condition, urgency and individual circumstances. Finally, Article 9 provides that decisions regarding reimbursement must be 'properly reasoned'; subject to case-by-case review; and 'capable of being challenged in judicial proceedings, which include provision for interim measures'. As Wolf Sauter was quick to observe, these provisions extended and perhaps even misconstrued the procedural guarantees set out in the Court's case law, placing on the national institution a burden of proof so heavy that almost all reimbursement requests will now have to be met by national public services.[35] For Sauter, the process typified:

> the standard interaction between positive and negative integration: first national measures obstructing the freedom to provide services (in this case) are struck down by the

[33] Directive 2011/24/EU of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L 88/45 (04.04.2011).

[34] European Parliament legislative resolution of 23 April 2009 on the proposal for a directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare (COM(2008)0414 – C6-0257/2008 – 2008/0142(COD).

[35] W. Sauter, *The Proposed Patients' Rights Directive and the Reform of (Cross-Border) Healthcare in the European Union*, cit. at 31, 122-3.

> Court, and then the need arises for reregulation to fill the gap left, providing sufficient consensus for a more liberal community regime to emerge.[36]

We should note the important part played by procedural integration at each stage in the process, as procedural rights for individuals are first introduced and then steadily ratcheted-up by the Court of Justice and spread through the Community in a case law covering the public health services of several Member States. At a later stage, they are adopted as part of an *acquis*, then transformed and extended in legislation that adds rights to reasoned decisions, transparency and accountability, reinforced by the right to judicial review. As the Directive is not a mere codification of the case law, there is room for further centralisation through the extension of cross-border rights to home treatment, creating the potential for further intrusive transformation of national healthcare systems.[37] To put this slightly differently, a sort of 'shared' welfare system has been introduced, permitting users to receive services in other parts of system subject to judicially-constructed conditions. Equally, the cursory dismissal of the argument from the English Court of Appeal concerning infringement of the restriction in Article 152(5) TEC without any serious consideration of subsidiarity is highly significant.

**2. Asylum procedure: unwilling approximation**

The integration of member state asylum procedures cannot be questioned on grounds of legitimacy. It was the European Council at Tampere that called on the Commission to prepare a communication on approximation of standards for asylum applications. This was to include a first phase establishing '*common standards* for a fair and efficient asylum procedure', which would lead in a second phase to 'a *common asylum procedure* valid throughout the Union'.[38] Article 63(d) TEC, agreed at Amsterdam,

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[36] W. Sauter, *The Proposed Patients' Rights Directive and the Reform of (Cross-Border) Healthcare in the European Union*, cit. at 31, 126-9.

[37] W. Sauter, *The Proposed Patients' Rights Directive and the Reform of (Cross-Border) Healthcare in the European Union*, cit. at 31, 128.

[38] Conclusions of the 1999 Tampere European Council at [14], [15] (emphasis mine).

gave the Council five years to take measures relating to 'minimum standards on procedures in Member States for granting or withdrawing refugee status'. Apparent consensus, yet a general lack of enthusiasm for the project can be observed. The word 'minimum' recurs throughout the texts and it has been suggested that some Member States saw an opportunity to minimise conformity with international refugee law. [39] Others, notably Sweden and Denmark, strongly objected to aspects of the EU Joint Position on the ground that it involved 'levelling down'.

Against such a background agreement would clearly not be easy. The Commission deliberately left the choice of form and manner to Member States by choosing a directive as the most appropriate way forward; moreover, in a working document issued prior to drafting, it went so far as to ask Member States what level of harmonisation they wished for, which procedural issues they wished 'to preserve and strengthen' and which they did not.[40] The resulting Asylum Procedures Directive 2005 (APD)[41] confirmed agreement on a number of procedural standards, including some, such as rights to an interpreter, access to a legal adviser and a degree of legal representation, which would be costly and might be difficult to implement. The asylum decision was to be taken on the basis of a personal interview, 'individually, objectively, and impartially, and after an appropriate examination'. It must be given in writing and must state the reasons for rejecting the application in fact and in law. Significantly, the Directive specifically provided that asylum applicants have the right to 'an effective remedy' against all asylum decisions thus opening the way to judicial review by the CJEU. It is fair to summarise the copious and complex case law as amounting with a few exceptions to 'light touch review'.[42]

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[39] G. Goodwin Gill, *The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam*, in E. Guild and C. Harlow (eds), *Implementing Amsterdam* (2000), 153.

[40] J. van der Klaauw, *Towards a Common Asylum Procedure?* in *Implementing Amsterdam*, cit. at 39; Commission, *Towards common standards on asylum procedures*, SEC 271 final (03.03.1999).

[41] Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326 (13.12.2005) pp. 13–34.

[42] Notably Case C-69/10 *Samba Diouf* [2000] ECR I-7151 (Luxembourg). But contrast Case C-277/11 *MM v Minister for Justice, Quality and Law Reform* [2012]

So far so good. But in 2010 a Commission report revealed that transposition of the 2005 Directive was still incomplete in some Member States and incorrect in others; there were 'flaws' in the application of central provisions of the Directive, such as the requirements for personal interviews, legal assistance and representation; the provisions on accelerated examination procedures and effective remedy were not being complied with.[43] An empirical study conducted by the Office of the UN High Commissioner for Refugees (UNHCR) confirmed the deficiencies, revealing – as might have been expected -significant divergences in asylum practice across the EU and gaps in law and practice in the implementation of the APD. The APD had not in short:

> achieved the harmonization of legal standards or practice across the EU. This is partially due to the wide scope of many provisions, which explicitly permit divergent practice and exceptions and derogations. It is also due, however, to differing interpretations of many articles (including mandatory provisions), and different approaches to their application. In some areas the minimum requirements of the APD appear not be fully met, whether in law or practice. [44]

The UNCHR concluded that there was a 'need to develop and adopt a second generation legislative act' introducing 'simplified procedures'.[45]

In the light of the Stockholm Programme, which had underlined the need for a common asylum procedure and uniform

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ECR 744 (Ireland), giving rights to representation on the basis of Art 41 ECFR. For a comprehensive examination of the case law, see M Reneman, *Speedy Asylum Procedures in the EU: Striking a Fair Balance between the Need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy*, 25 Int'l J. Refugee L. 717 (2013).

[43] Report from the Commission to the European Parliament and the Council of 8 September 2010 on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2010) 465.

[44] UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations* (March 2010), at 4.

[45] Ibid, at 5.

status for asylum-seekers based on high protection standards and uniform procedural arrangements,[46] and of the Lisbon Treaty, which had called for 'a fundamentally higher level of alignment between Member States' asylum procedures', the Commission too had been pushing for closer integration. It published a plan for a text to set in place 'obligatory procedural safeguards as well as common notions and devices, which will consolidate the asylum process and ensure equal access to procedures' but, largely due to irreconcilable disagreement between Council and Parliament, the proposal had to be withdrawn.[47]

There was concern too over implementation. A further UNCHR study of Greece found long delays, improperly kept records and case files that did not record responses to even standard questions. At the appellate stage, summaries were cursory and negative decisions routinely standardized. There were no recorded minutes of the hearing so that 'it was not possible to ascertain the interpretation of the law applied by the appeal body or for that matter to deduce, from the decisions taken, whether the law was applied at all'. At the time of the study, there was a backlog of 19,015 appeals. The UNCHR recommended that governments should refrain from returning asylum-seekers to Greece for processing until further notice and repeated its admonition over training. [48]

Meanwhile the English Court of Appeal, faced with similar evidence, asked the Court of Justice whether it was obligatory to return the applicants to the place of first entry as the Dublin Convention required.[49] The Court replied that return could not be automatic; minor infringements of the asylum directives would not suffice to prevent transfer but substantial grounds for believing that there were systemic flaws in the asylum procedure

[46] European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, OJ C 115/32 (2010).

[47] Commission Communication, *Policy plan on asylum: an integrated approach to protection across the EU,* COM(2008) 360 final at [3.2]; Proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM(2009) 554 final; 2009/0165 (COD).

[48] UNCHR Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation", 15 April 2008.

[49] Joined Cases C-411, C-493/10 *NS v Home Secretary, ME and others v Refugee Applications Commissioner* [2011] ECR I-13331.

and reception conditions, such as the Court of Human Rights had found in Greece,[50] would be enough. As the Court of Appeal must have known, Greece is not alone. Advising the House of Commons of major changes in the administration of UK immigration services - declared by a previous Home Secretary to be 'not fit for purpose' – Theresa May, the Home Secretary, referred recently to 'historical backlogs running into the hundreds of thousands', 'a closed, secretive and defensive culture' and 'a vicious cycle of complex law and poor enforcement of its own policies, which makes it harder to remove people who are here illegally'.[51]

A new proposal from the Commission for a recast directive was now submitted and, after substantial amendment, became law in 2013.[52] The recast Directive follows the main outlines of the 2005 APD but unexpectedly includes numerous changes: mandatory training requirements, time-limits for registration and lodging of applications, personal interviews, reports and recording etc. While this in many ways represents 'an important improvement' and 'significant progress', the end product is - as the European Council for Refugees and Exiles (ECRE) has observed - both complex and malleable:

> [T]he recast Directive still allows for considerable flexibility for Member States in the interpretation and application of a number of its key provisions and maintains the possibility of applying a number of procedural concepts, which in ECRE's view, risk undermining asylum seekers' access to a full and thorough examination of their request for international protection in practice. Moreover, the overall legal complexity of the recast Asylum Procedures Directive

[50] *MSS v Belgium and Greece* ((2011) 53 EHRR 2.
[51] HC Deb col 1500 (26 March 2013) (Mrs Theresa May MP).
[52] Directive 2013/32/EU on common procedures for granting and withdrawing international protection, OJ L 180 (29.6.2013) p. 60. And see LIBE Report on the proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast) COM(2009) 554 final; 2009/0165 (COD) (Rapporteur Sylvie Guillem).

> risks compromising its correct transposition and implementation.[53]

Other aspects of the Directive, such as interview procedure, right to an effective remedy and the provisions on accelerated asylum, leave much to be desired. Significantly, the ECRE urged Member States to use their powers to adopt more favourable provisions to ensure that the objective of fair and efficient asylum procedures in the EU Member States is achieved.

This example, chosen by the author before the current refugee crisis led to widespread breakdown and disapplication of asylum procedure, shows how hard it is to achieve complete harmonisation of administrative procedures in the face of cultural diversity. Fifteen years after the Tampere declaration, phase 1 of the project it set in motion was arguably incomplete; phase 2 had hardly begun. Choice of a directive resulted in a text that was arguably too wide in scope, was open to differential interpretation, contained too many exceptions and depended on a consensus that was in practice lacking. At ground level, implementation proved well-nigh impossible in Member States that seemed to lack both the will to implement and the administrative structures to underpin effective execution. Thus a project aimed at convergence and simplification did not succeed in ending disparity and could be said to have resulted in greater complexity.

### 3. Convergence through codification

A helpful starting point for discussion of codification is (once again) a paper by Mario Chiti, this time prepared for the European Parliament in the context of its initiative to codify the law on European administrative procedure.[54] The idea was not new; it has been around since the early1990s, when the two options of a statutory codification or a statement of general principle contained in a soft law instrument were discussed at an EUI workshop. At that point in time, the advantages of legislation

[53] ECRE, *Information Note on Directive 2013/32/EU on common procedures for granting and withdrawing international protection* (Brussels: ECRE, undated).
[54] M. Chiti, *Towards an EU Regulation on Administrative Procedure?*, 21 Riv. it. dir. pubbl. com. 1, 3 (2011).

were seen as being that it would follow the precedent of the majority of the fifteen existing Member States; that it would underpin legitimacy by allocating the normative function to the legislature; and that it would strengthen legal certainty, as rules are more precise and more specific than jurisprudential principles. There were precedents in sector-specific regulation: in competition, the famous 'Regulation 17/62' was in place and a codification was under way in the field of state aids.[55] In common law jurisdictions, Harlow indicated, soft law would perhaps be more acceptable even though it would tend to enhance judicial discretion.[56] Soft law was in fact the method later employed by the European Ombudsman and endorsed by the European Parliament as the *European Code of Good Administrative Behaviour*.[57]

Further action became realistic after the Lisbon Treaty introduced provisions that might serve as a legal basis. Briefly, TFEU Article 298 provides that 'the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration' and describes the implementation of EU law as a matter of 'common interest'. TFEU Article 197 authorises Union support for Member State administration but provides that no Member State shall be obliged to avail itself of such support. It also specifically excludes any attempt at 'harmonisation of member state law and regulation' in this field. Experts differ as to the scope and meaning of these ambiguous provisions, which are analysed exhaustively in Professor Chiti's paper. Chiti conceded that the way was now open for the Union 'to direct administrative action in the Member States' – a 'major expansion of the powers of the Union over the previous situation' that he did not entirely welcome. Tactfully, he advised the Parliament to avoid potentially intrusive interventions into national administrative law and procedure, arguing that the codifiers should aim for a 'euro-compatible outcome' in the shape of 'a law that is integrated in an original way with the national administrative laws; without eliminating their special

[55] See G. della Cananea, *From Judges to Legislators? The Codification of EC Administrative Procedures in the Field of State Aid*, 5 Riv. it. dir. pubbl. com. 967 (1995).
[56] See further C. Harlow, *Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot*, 2 ELJ 3 (1996).
[57] Available on the website of the European Ombudsman.

characteristics'. They should 'intervene only when necessary and as appropriate, both in order to respect the principles of subsidiarity and proportionality that govern the exercise of the powers of the Union, and not to freeze the positive administrative dialogue between the Union and the States'.[58]

Leaving legal competence aside, five options are available to a potential codifier in the field of EU administrative procedure:

(i) an Administrative Procedure Act (APA) applicable at both Union and national level;
(ii) a Union-only APA;
(iii) a soft law procedural code applicable to the Union;
(iv) a soft law procedural code applicable throughout EU administrative space;
(v) limited sector-specific codifications, as attempted by the Commission for asylum procedure and, more successfully in the field of public procurement.[59]

The options were explored at some length by members of the academic ReNEUAL project. Jacques Ziller made the case for a comprehensive APA, arguing that 'soft law instruments would miss the purpose of providing for sufficient homogeneity across institutions, bodies, offices and agencies and establishing default rules to fill the gaps in existing and future sector specific regulations'.[60] Ziller conceded, however, that the degree of detail would be a difficult issue. In the event, ReNEUAL opted for a set of model rules framed as six separate books, designed as a draft proposal for 'binding legislation' at Union level with the aim of reinforcing the general principles of EU law. But the European Parliament voted only for an elaboration of 'the fundamental principles of good administration' applicable at Union level in 'individual cases to which a natural or legal person is a party, and other situations where an individual has direct or personal contact

[58] 'Towards an EU Regulation' p. 4.
[59] See Directive 2014/24/EU on public procurement, OJ L94 (28/03/2014) and, more especially Directive 2007/66/EC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335 (20.12.2007) pp. 31–46, (the Remedies Directive).
[60] J Ziller, *Alternatives in Drafting an EU Administrative Procedure Law,* PE 462.417 (2011).

with the Union's administration'.[61] This format would clearly have little impact on the administrative procedure and practices of Member States.

A soft law procedural code, on the other hand, could be much more influential. Even if published and applicable only at Union level, it could forward Professor Chiti's objective of 'euro-compatible pluralism'.[62] Such a text could follow the pattern of the US *Restatements of Law* which, according to the American Law Institute, are designed to indicate trends in the case law and on occasion to recommend what the law should be. *Restatements* are not binding authority but are highly persuasive. The attractions of this soft law approach are obvious. It has the advantage of flexibility and could, George Bermann argues, 'foster the evolution of national administrative law in the direction of bridging gaps between EU and national administrative law methods'.[63] Again, such a text would not need legislation; the format of an inter-institutional agreement could be used.

But Bermann warns too of a danger. Both Commission and Court of Justice have a record of imposing on Member States higher standards than are imposed on the Union. The Restatement approach could very well provide a green light for intrusion into national law either by the Commission, which could turn to the conditionality principle, asking for guarantees of quality and standards across all public administration settings. Similarly, it could turn to other semi-coercive soft law methods to 'level up', as, for example, the Open Method of Coordination, used for coordination purposes in the social policy area.[64] Again, such a document could be used by the CJEU as an interpretative benchmark in much the same way as the Charter was used before

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[61] Resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI) P7_TA-PROV(2013) 0004. adopting the Berlinguer Report to JURI, A7-9999/2012 PE492.584v02-00 (12 November 2012).

[62] 'Towards an EU Regulation', above.

[63] G Bermann, *A Restatement of European Administrative Law: Problems and Prospects*, in S. Rose-Ackerman and P. Lindseth (eds), *Comparative Administrative Law* (2010).

[64] J. Mosher and D. Trubek, *EU Social Policy and the European Employment strategy*, 41 JCMS 63 (2003); E. Barcevičius, J. Weishaupt, J. Zeitlin, *Assessing the open method of coordination : institutional design and national influence of EU social policy coordination* (2014).

the Lisbon Treaty made it binding with the status of the Treaties, a point expanded below.

## II. Taking subsidiarity seriously

George Bermann, in a study of subsidiarity that has never been bettered, situated his evaluation in a framework of direct effect and supremacy. Bermann saw the avowed purpose of the Court of Justice at the time of Maastricht as being to establish 'all those constitutional premises that it considered necessary in order for Community policy to be fully effective in the Member States'; it would be difficult to find 'a clearer example of instrumentalist judicial decision-making'.[65] Bermann blamed the Court of Justice for fostering integration at the expense of subsidiarity; its overriding objective was to 'strengthen the force and effect of Community law' and with this in mind it had 'taken virtually every opportunity that presented itself to enhance the normative supremacy and effectiveness of Community law in the national legal orders'.[66] Percipiently, Bermann noted that failure to take subsidiarity seriously was fuelling a demand for the idea among the European people, adding that the Court of' Justice had contributed to a sense of erosion of local political autonomy.[67] This is a point of particular relevance to our times.

The subsidiarity principle meant, on the other hand, that the Union institutions should refrain from acting, even when constitutionally permitted to do so, if their objectives could effectively be served by action taken at or below the Member State level.[68] Bermann deduced that the Member States had 'seemed inclined to make subsidiarity the standard power-sharing principle for matters that did not fall within the Union's exclusive competence' and that, viewed as a whole, the Maastricht Treaty 'reflected a strong linkage between the expansion of Community competences and the necessity of self-restraint in their exercise'.[69]

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[65] G. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 Col Law Rev. 331, 353 (1994).
[66] Ibid.
[67] Ibid at 277 and 401.
[68] G Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and US*, cit. at 65, 334.
[69] Ibid.

The drafters of the TEU had 'put language into virtually every new treaty chapter underscoring their intention that the Member States continue to exercise primary responsibility' and had taken 'similar precautions in areas expressly subjected to coordination, most notably the whole 'Third Pillar' area of justice and home affairs'.[70] Subsequent events support this interpretation. An interpretative Protocol was annexed to the Amsterdam Treaty,[71] while new provisions in the Lisbon Treaty were designed to reinforce subsidiarity by installing national Parliaments as watchdogs. These are not manifestations of an integrationist mindset.

But Bermann recognised that:

> even a subject plainly reserved as such to the states ... is transformed into a Community matter to whatever extent the federal policy branches find that the cross-border mobility of goods (or, by parallel reasoning, workers, services, or capital) would be advanced by bringing the various national rules on the subject into closer alignment with each other.[72]

In consequence, Bermann urged a balancing or proportionality test:

> Courts should more regularly ask whether the incremental gains in free movement that result from the Court's rejection of a particular Member State marketing rule are substantial enough to justify the Member State's loss of freedom to govern subjects that lie squarely within its sphere of competence.[73]

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[70] Ibid.

[71] Now Article 5(3) TEU and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

[72] G Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and US*, cit. at 65, 356.

[73] G Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and US*, cit. at 65, 401.

His points are amply illustrated in the *British American Tobacco* case,[74] where several Member States intervened to take the subsidiarity point directly in a case concerning Community competence to regulate tobacco advertising. Significantly, the Court of Justice chose to consider whether the objective of the proposed action *could be better achieved at Community level*, reversing the weight of the key subsidiarity question, which asks whether the objectives could effectively be served by action taken *at or below the member state level.* By stating the legislative objective to be elimination of trade barriers caused by differences in national law, the Court was able abruptly to conclude that action at EU level was appropriate. And the Court entirely failed to ask itself Bermann's question whether the incremental gains in free movement were substantial enough to justify member state loss of freedom to govern subjects that lay squarely within their sphere of competence. The Court's underlying assumption is, in short, almost always that a 'common approach' is necessary to contribute to the smooth functioning of the internal market and allow commercial operators 'to act within a single coherent regulatory framework'.[75] On this view, the very notion of subsidiarity is (as Advocate General Toth once put it) 'totally alien to and contradict[s] the logic, structure and wording of the founding Treaties and the jurisprudence of the European Court of Justice'.[76]

**1. Luxembourg: side-lining subsidiarity**

Nearly twelve years after Bermann wrote, Judge Vassilios Skouris, speaking extra-judicially, noted that the subsidiarity principle, although it 'should perhaps play a pivotal role with regards to the proceedings of the Court', had not left any remarkable traces in its rulings and arguments based on

[74] Case C-491/01 *R v Health Secretary ex p Imperial Tobacco* [2002] ECR I-11453 at [177-85]. See also Case C-376/98 *Germany v Parliament and Council* (Tobacco Advertising) [2000] ECR I-8419, where the Court found (exceptionally) that the EU legislators had overstepped their competence but without considering subsidiarity. And see Joined Cases C-154/04, C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451 at [101-8].

[75] Case C-58/08 *Vodafone and Others* [2010] ECR I-4999at [51-71].

[76] A Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 CML Rev. 1079, 1105 (1992).

subsidiarity had not had a major impact on the outcome of cases.[77] Judge Skouris was quick to defend prevailing court practice. There were stringent criteria for harmonisation and differences between national rules did not suffice to justify legal harmonisation; the differences must be 'likely to curtail fundamental freedoms, meaning that they have a direct impact on the functioning of the single market'. He swiftly moved the discussion on to the safer ground of proportionality, arguing that measures of legal harmonisation must comply with the principle of proportionality in being suitable to achieve the envisaged goals and not disproportionate; if these criteria were met, 'the leeway in performing autonomous and independent subsidiarity reviews is rather limited'; indeed, 'to the extent that, aspects of the principle of subsidiarity are also found in the principle of proportionality, these aspects become part of the general validity of the proportionality principle'.[78]

This line of reasoning has been called by Thomas Horsley '*de facto* subsidiarity review' or acting 'in line with the logic of the subsidiarity principle'[79] but it is in truth very different. Proportionality-testing starts from a premise of competence on which are based the three proportionality questions: Whether the measure exceeds the limits of what is appropriate and necessary in order to attain the objectives pursued? Whether the measure is the least onerous available? And whether the measure causes disadvantages that outweigh the objectives?[80]

This leaves unanswered the key subsidiarity question, which is whether the action is necessary *at all*; could it have been performed as well or better at a more local level? Or to put this somewhat differently, whether there is sufficient 'value added' at Union level to justify the loss of member state autonomy? This

[77] Judge Vassillios Skouris, *The role of the principle of subsidiarity in the case law of the European Court of Justice*, Keynote Speech at European Conference on Subsidiarity (04.5.06).
[78] Ibid.
[79] T Horsley, *Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?* 50 JCMS 267, 270 (2012).
[80] Joined Cases C-27, C-122/00 *Omega Air and others* [2000] ECR I-2560 at [62]; Case C-331/88 *Fedesa and others* [1990] ECR I-4023 at [12-13].

question, which relates to competence, is correctly the prior question.[81]

It is perhaps not surprising that in only one case can it be said to have taken subsidiarity seriously in a case squarely involving administrative procedural autonomy. In the *Estonia* case,[82] Member States were charged with responsibility for calculating quotas for the purpose of emissions trading. A dispute broke out as to the proper method of calculation between Estonia and the Commission, which had attempted to substitute its own methodology for that of the national authorities. The General Court outlawed the attempt, invoking the principle of subsidiarity to rule that, in an area of shared competence like environmental policy, the burden fell on the Commission to prove that the powers of the Member State were delimited by EU legislation. But although the decision was confirmed on appeal, the ruling on subsidiarity was overturned on the ground that, once the legislature had decided it was necessary to legislate at Union level, the principle was not applicable in areas of shared competence. This is a prime illustration of the false reasoning criticised earlier.

Set in its legislative context, the reasoning of the General Court is amply justified. The legislation in issue was a modification of the core IPPC Directive, which established the system of integrated pollution prevention and control across the EU.[83] This was one of a set of environmental directives seen by specialists in environmental policy-making as an attempt to balance action at Union level with a new policy of decentralisation and deregulation governed by the principles of subsidiarity and proportionality.[84] This is clearly evident in the initial Commission proposal, which takes subsidiarity rather seriously. The Commission defended action at Community level on the ground that a new scientific methodology for pollution control had been

[81] This may be why Craig classifies subsidiarity as a question of competence rather than as a general principle of administrative law: P. Craig, *EU Administrative Law*, 2nd ed, (2012) ch 14.

[82] Cases T-263/07 *Estonia v Commission* and T-183/07, *Poland v Commission* [2009] ECR II-3463 at [52] confirmed on appeal as Case C-505/09 *Commission v Estonia* [2012] ECR I-179.

[83] Directive 96/61/EC, OJ L 2003/275, p. 32 as amended by Directive 2003/87/EC and 2004/101/EC.

[84] See eg, R. Macrory, *Regulation, Enforcement and Governance in Environment Law* (2010) 675.

introduced and centralisation would allow those Member States that had already adopted the new methodology 'to obtain the full environmental benefit of their initiative'. But the Commission recognised that an integrated approach could not 'just be imposed' and it was not intended:

> to attempt to impose one institutional structure for the whole Community- arrangements which are successful in one country may not be appropriate in another owing to differences, inter alia, in national legal and administrative structures. It sets out only a minimum of provisions which must be followed, while allowing the Member States the flexibility to fit those provisions to national and local conditions. [85]

Moreover, the proposal was based on a survey of member state methods and on impact assessment and its lengthy progression towards legislative implementation contained a number of further processes, including opinions from EU committees and consultations.

These procedures reflect a general tightening-up of Commission administrative procedures under the influence of a managerialist ethos and the 'Better Regulation Agenda.[86] Impact assessment and consultations have become a standard procedure in Commission policy- and rule-making.[87] These developments harmonise with Bermann's earlier suggestion that the subsidiarity principle should be recast as 'an essentially procedural principle', which would require certain steps to be taken before any decision was taken to opt for action at Community level.[88] Like reason-giving, such practices are readily capable of being policed by a court and evaluated along similar lines to criteria used to evaluate the quality of scientific evidence in the risk assessment case law of

[85] Commission, '*Proposal for a Council Directive on integrated pollution prevention and control*' COM 93/423 final at [2.4] and [2.7]

[86] European Commission, 'Better Regulation Agenda' and 'Better Regulation Guidelines', both available on the Commission website.

[87] See generally, C. Harlow and R. Rawlings, *Process and Procedure in EU Administration* (2014), chs 1 and 2.

[88] 'Taking Subsidiarity Seriously' p. 336.

the General Court.[89] Other procedural steps, such as surveys commissioned from an outside, independent body could be phased in, or consideration of 'yellow card' opinions from national parliaments (below) could be made mandatory. In this way, written procedural requirements that typify administrative law systems would lead to a greater intensity of review of subsidiarity requirements than is presently the case. This would allow subsidiarity to take its proper place as a general principle of administrative law, applicable in support of procedural autonomy.[90]

But is this really likely? Can the Court of Justice really be cajoled into greater liking for the subsidiarity principle? Recent case law suggests otherwise. In *Lesoochranárske zoskupenie*,[91] an environmental group claimed standing rights in the Slovakian courts in terms of the Aarhus Convention provisions on access to justice in environmental matters to which both the EU and its Member States are signed up. In its response to a preliminary reference, the Court of Justice repeated its now largely standard formula that, although the Aarhus Convention did not have direct effect in EU law, rights could be created in EU law when the EU had legislated on the subject matter, as it had done in the instant case with the Habitats Directive;[92] it was then for the national court in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention. Similarly, the Court has ruled that Member States cannot use their discretion to deprive environmental protection organisations of rights created *both* by the Habitats Directive and by the Aarhus Convention.[93] Note the priority attached in these rulings to EU law. But the Aarhus Convention is ratified individually by

[89] See C. Anderson, *Contrasting Models of EU Administration in Judicial Review of Risk Regulation*, 51 CML Rev 1 (2014).
[90] C. Harlow and R. Rawlings, *Process and Procedure in EU Administration,* cit. at 87, 327.
[91] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-01255 at [50].
[92] Council Directive 92/43/EEC of 21 May 1992, [1992] OJ L206/7, as amended by Council Directive 2006/105/EC, [2006] OJ L363.
[93] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* [2011] ECR I-03673, [44].

Member States and not by the EU in a representative capacity; it is therefore with Member States that the responsibility for implementation should lie. Instead, the integrative jurisprudence of the Court of Justice opened the door to a new Commission centralising initiative[94] in a field where the Member States had explicitly rebuffed an earlier proposal for standardisation.[95] The Commission highlighted concern for 'the legal uncertainty of stakeholders' but between the lines of the proposal one espies a rather different motive: a Commission keen to expand the boundaries of its competence into the area of national judicial systems.

The Lisbon Treaty hands the Court an additional integrationist weapon by according treaty status to the Charter. Like the Maastricht Treaty, the Charter indicates the intention to protect member-state rights. ECFR Article 51(1) specifies that it is addressed to the institutions, bodies, offices and agencies of the *Union* 'with due regard for the principle of subsidiarity' and applies to Member States only when they are implementing Union law. Article 51(2) specifies that it is not intended to 'extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'. In *Dano*,[96] where the question arose whether Charter rights were applicable when a Member State was legislating in respect of special non-contributory cash benefits payable to a non-national EU citizen seeking work, the Court of Justice (to use Horsley's terminology) acted 'in line with the logic of the subsidiarity principle' and applied '*de facto* subsidiarity review'. Basing itself on Article 51, the Court reasoned that the applicable Regulation 883/2004 was not intended to lay down the conditions creating the right to benefits; consequently, it was for Member States to legislate on the

[94] Commission initiative on access to justice in environmental matters at Member State level in the field of EU environment policy (11/2013) available on the Commission website.

[95] COM(2003) 624 final – 2003/246/COD COM(2003) 624 final – 2003/246/COD. And see *Improving the delivery of the benefits from EU environment measures: building confidence through better knowledge and responsiveness* (COM/2012/95).

[96] Case C-333/13 *Dano v Jobcenter Leipzig* (2014) ECR I-2358 (Grand Chamber).

matter and when they did so, they were not implementing EU law.

Article 41, however, creates a right to good administration, the effect of which on Member States is an open question.[97] One case in particular, concerning the impact of Article 41 on Dutch asylum law, is suggestive.[98] The CJEU was asked whether an admitted breach of the right to a hearing in respect of a deportation order made by Dutch administrative authorities could amount to a breach of ECFR Article 41(2)(a)? Advocate General Wathelet took the innovative line that the right to a hearing comprised two stages. Stage one applied in the pre-litigation administrative context and was governed by Article 41. An infringement of the Charter by (national) administrative authorities at this stage could not be rectified merely by the fact that judicial review was available at the second stage of judicial hearing. This was covered by ECFR Article 47 (right to an effective judicial remedy), which guarantees the rights of the defence to anyone who has been charged. The two were 'very different rights', which must not be conflated or merged.[99] Article 41 was clearly:

> of general application and applies in all proceedings which are liable to culminate in a measure adversely affecting a person. Moreover, that provision applies even where the applicable legislation does not expressly provide for such a procedural requirement.

As is so often the case, the judgment of the Court of Justice was less explicit. Remarking that the Directive 2008/115 was 'intended to provide a detailed framework for the safeguards granted to the third-country nationals', the Court observed that it

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[97] See H. Hoffman and B. Michelson, *The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case*, 9 EuConst 73, 96-100 (2013).

[98] Case C-383/13 *G and R v Staatssecretaris van Veiligheid en Justitie* [2013] I-533. See similarly Joined Cases129, 130/13 *Kamino International Logistics* [2014] ECR I-2041 but contrast Joined Cases C-141/12 *YS*, C-372/12, *M & S* (17 July 2014), concerning residence permits, where it was said that Art. 41 is addressed 'solely' to Union authorities and cannot be relied y on against national authorities.

[99] *G and R*, Opinion at [46-51].

left significant gaps. It was, however, 'settled case-law' that the rights of the defence formed 'an integral part' of the EU legal order and were 'enshrined in the Charter'. It followed that national administrations acting within the scope of EU law must observe the rights of the defence. In cases like the present, where the governing EU law contained no specific provisions, national law was applicable subject to the well-known principles of equivalence and effectiveness. But – and the reservation is significant - the rules must comply with EU law and Member States must 'take account of' the case law of the Court of Justice on the application of the applicable Directive.[100]

**2. National parliaments – towards a rainbow alliance?**

The onus must therefore rest primarily with political actors. Member state representatives in Council can protect national interests although, as their efforts are usually shrouded in obscurity, we cannot know when they do. Since Lisbon, however, national parliaments are more specially the guardians of subsidiarity, being mandated by Article 69 TFEU to ensure in accordance with the arrangements laid down in Protocol 2 (above) that proposals and legislative initiatives comply with the principle of subsidiarity. Every recent proposal for legislation from the Commission contains evaluations of the proposal in terms of proportionality and subsidiarity and the arrangements for forwarding documents to national parliaments have (at least in principle) been greatly strengthened.[101] This lays the foundation for the so-called 'yellow' and 'orange card' procedures, which (briefly) provide for Reasoned Opinions from national Parliaments or their chambers that can, given the right majority, force the Commission to review its draft.

At the time of introduction, these procedures were generally seen as likely to be ineffective. Since then, however, there are signs that national Parliaments may be taking them seriously. Commission reports on subsidiarity and proportionality

[100] Directive 2008/115/EC on common standards and procedures for returning illegally staying third-country nationals, OJ 2008 L 348 p. 98; *G and R*, Judgment at [35-37].

[101] See for detail, Arts 1 and 2 of Protocol 1 on the Role of National Parliaments in the European Union, OJ C 310/204 (16.12.2004).

record an increase in the issuing of reasoned opinions following early successes when the Commission withdrew the so-called Monti II proposal to curtail European workers' right to strike in response to a yellow card.[102]

National parliaments –or some of them- seem to be becoming more assertive on EU issues and the scheme is seen as strengthening the hand of parliaments at national level and making ministers more accountable.[103] Links between national parliaments through COSAC are now stronger and the Conference of Speakers has published online Guidelines for inter-parliamentary relations. There are four inter-parliamentary websites with links to national Parliaments and IPEX regularly publishes Commission proposals on its website, facilitating yellow cards. In addition, a number of assertive parliamentary chambers recently came together to call for strengthening of the procedures,[104] proposing that the Commission should be bound to withdraw or amend its proposal when a yellow card was triggered and – bolder –that parliaments should also monitor compliance with both the proportionality principle and legal basis. These proposals are currently under discussion.

These are hopeful signs but whether the new forces can be harnessed in aid of national administrative procedures is questionable. To attract political attention, an issue must be a matter of high visibility and political salience. Administration and administrative procedure are not usually matters of high political salience, although they may be ancillary to such issues- as both the health services and asylum procedures cases demonstrated. The Commission proposal for a European Public Prosecutor's Office, described by the UK House of Lords as 'a very significant and

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[102] I. Cooper, *A yellow card for the striker: national parliaments and the defeat of EU legislation on the right to strike*, JEPP online, 1 (2015).

[103] H. Brady, *The EU's 'yellow card' comes of age: Subsidiarity unbound?* (2013) available online. And see A. Cygan, *The Parliamentarisation of EU Decision-Making: The Impact of the Treaty of Lisbon on National Parliaments*, 36 EL Rev 480 (2011).

[104] British House of Lords EU Committee, *The role of National Parliaments in the European Union*, HL 151 (2014/15); Dutch Tweede Kamer *Democratic Legitimacy in the EU and the role of national parliaments: work in progress* (November 2013); Danish Folketing, European Affairs Committee, *Twenty-Three Recommendations to strengthen the role of national parliaments in a changing European governance* (January 2014).

disruptive incursion into the sensitive criminal law systems of the Member States' and 'unnecessary, excessive and insufficiently justified', was in this respect exceptional.[105]A yellow card from 11 national parliaments initiated long negotiations with the Council and EP concerning changes, which are not yet concluded.

**III. Careful Convergence please!**

There are many reasons why administrative procedures tend to converge, not all of which are connected with Europe. We live and work in an information society in which information technology shapes our conduct. There are other significant international treaties, notably the European Convention on Human Rights, the WTO and, as already mentioned, the Aarhus Convention. And so on. In this paper, however, I have focused on three main ways in which the European project has led or, in the case of codification, might lead, to convergence of administrative procedures within a single 'European administrative space'. The first method, through application of the general principles of law by the CJEU, is general, indirect and often tangential, though it often provides a helpful stepping stone for the Commission. This process, which bites deeply into the doctrine of procedural autonomy is, I would argue, both of doubtful legitimacy and generally inappropriate. The Court of Justice lacks expertise. It does not have at its disposal the procedural tools routinely demanded of modern lawmakers - the type of information collected by the Commission, for example, in respect of its proposal for the IPPC directive (above). Even less is it in a position to assess the 'spill-over effects' of rulings on national law and legal orders - such as the impact of changes in standing rules on judicial review in Slovakia or Germany (above). It is not in a position to gauge the impact of an individuated decision on a member-state public service; there are costs in administrative processes as the English Court of Appeal warned in the *Watts* case (above). In such situations, careful consideration must be given to Bermann's key question whether the incremental gains for the Union are

[105] EU Committee, *Subsidiarity Assessment: The European Public Prosecutor's Office,* HL 65 (2013-14) at [13-14]; EU Committee, *The impact of the European Public Prosecutor's Office on the United Kingdom*, HL 53 (2014–15).

substantial enough to justify incursions into national space. Is there enough 'value-added'? The Court of Justice pays lip service to the concept of autonomy but fails in practice to observe it. The principle of national procedural autonomy should weigh more heavily in judicial balancing and the Court should be more ready to employ its self-denying ordinance. Judicial legislation is commonly contested on the ground that it is undemocratic; equally, it is likely to be ineffective.

It is easy to assume that Member States share similar traditions of administrative law or administrative procedure with minor variations but in practice this is not the case. As indicated earlier, common principles of good administrative procedure were easily identified but these were differently interpreted and applied.[106] The body of research on the Europeanization of national administrations is too voluminous to be considered here[107] but it is incumbent on us to bear in mind that, as Konstantinos Papadoulis observes in his study of Greek aviation policy:

> It is expected that common rules and regulations within the EU should lead to administrative convergence. However, culture and civil service structure and function of national administrative systems and styles vary. Responsiveness is not merely a matter of formal and institutional reform... divergence in the responses of national governments during the implementation process of EU public policies reflects a combination of administrative culture and style, political objectives and socio-economic interests... [108]

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[106] Statskontoret, *Principles of Good Administration in the Member States of the European Union* (Stockholm: Statskontoret, 2005).

[107] See, eg, C Knill, *The Europeanisation of National Administrations: Patterns of Institutional Adjustment and Persistence* (2001); H Kassim, *The European Administration: Between Europeanization and Domestication* and E. Page, *Europeanization and the Persistence of Administrative Systems* in J Hayward and A Menon (eds), *Governing Europe* (2003).

[108] K Papadoulis, *EU Integration and Administrative Convergence: The Greek Case,* 43 JCMS 349, 350-1 (2005). See similarly G Noutcheva and S Aydin-Düzgit, 'Lost in Europeanisation: The Western Balkans and Turkey' (2012) 35 West European Politics 59.

How much stronger would this message be if applied to the common asylum procedure.

The path to effective convergence lies in a 'bottom up' approach, which has the advantage of being based on national experience and allows national officials on whom the burden of enforcement falls, to participate in the planning. Administrative practice is rooted in the culture and day-to-day practice of officials. Change requires more than legislation; it requires a change of mindset; unless there is a very genuine will on the part of national politicians and officials to change their practices, change will not happen. Public procurement procedure, for example, involves a central area of Community competence where harmonisation has proceeded slowly over a long period of time. Yet the Commission has conceded that it struggles 'to bring some common disciplines to regulation of this critical government function'[109] while an independent survey of implementation has concluded that 'the harmonisation process of European law on public procurement can also be seen as a significant example of the actual European unification process: slow, irregular, imperfect, complex'.[110] The current refugee crisis has demonstrated the fragility of the solidarity on which a harmonised asylum process depends. Across Europe, society is today becoming less open to external influences and cultures while at the same time being more protective of their own. The path to convergence must start with consultation and participation and proceed via action plans, position papers and framework directives, underpinned by peer review and training.

I am not of course suggesting that there is no room for convergence of administrative law and procedure. I do insist, however, that harmonisation and standardisation are tasks for the EU legislator to be undertaken with caution. Euroscepticism is no longer an 'awkward English phenomenon' but a trans-European phenomenon.[111] Reform of Regulation 1049/2001, the Union's disgracefully limited access to information legislation, is currently

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[109] Commission Staff Working Paper, *Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation*, SEC(2011) 853 final, p. iv.

[110] M. Morón (ed), *Public Procurement in the European Union and its Member States* (2012), 9.

[111] See the essays in R. Harmsen and M. Spiering (eds), *Euroscepticism: Party Politics, National Idnetity and European Integration (*2004).

stalled.[112] The ambitious codification project has been, as indicated earlier, whittled down; its outcome is uncertain. Against this background, Bermann's warnings[113] must be taken seriously.

Richard Rawlings and I concluded in a recent joint paper that the arguments in favour of pluralism and diversity were powerful, 'more especially in the context of an enlarged and enlarging Union'. We saw a serious danger of undercutting or weakening established administrative procedures tailored to national political understandings and cultural values. We thought the deadening effect of too much standardisation should be firmly resisted. It was

> a source of strength that diverse national practices reflected in national codes are there to be drawn on. At one and the same time these reflect particular historical experience and cultural traditions while becoming increasingly open to European and external/comparative influences. [114]

It is, however, more appropriate on the present occasion to leave the last word to Professor Chiti:

> Despite the clear growing importance of the European administration (services, offices, bodies, agencies) and its special law, the overall framework of public administration in EU member state is still diverse. The national legal cultures and the various institutional experienced that have characterised European States should not be considered a limit for the Union, but a richness (in line with general recognition of the richness of its cultural diversity...) which comes from the past, but which is also an opportunity for the future.

Do we really want it to be otherwise?

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[112] See Commission, *Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents*, COM(2008) 229 final 2008/0090; European Parliament resolution of 14 September 2011 on public access to documents (Rule 104(7)) for the years 2009-2010 (2010/2294(INI)).

[113] Above, text at n. 67.

[114] C. Harlow and R. Rawlings, *National Administrative Procedures in a European Perspective: Pathways to a Slow Convergence?*, 2 IJPL 215 (2010).