THE CONVERGENCE OF NATIONAL ADMINISTRATIVE PROCEDURES: COMMENTS ON THE EUROPEAN PERSPECTIVE

Jacques Ziller*

The so called 'Napoleonic system of administration' which has been referred to by so many today has changed very quickly. The French administrative system of the XIXth Century is not that of Napoleon, but has much to do with Benjamin Constant, Alexis de Tocqueville, and Alexandre François Auguste Vivien de Goubert, who is hardly known outside of France. Reading Vivien, who wrote his "*Études administratives*" in the middle of the XIXth Century, one discovers that French public administration, and hence also the French law of administration, was very much about contract.

Referring now to the *legge* 241's amendment in 2005, it may indeed be considered as a 'bad translation' of a recent norm of the German code of administrative procedure; it was also a 'bad translation' of the jurisprudence of the *Conseil d'Etat*. It is true that the *Conseil d'Etat* considers that not applying some formal guarantees of administrative procedure does not necessary lead to the invalidity of the subsequent decision if the result would have been the same, had the formal guarantee been applied. But this is only true for formal requirements embedded in regulatory norms (*actes réglementaires*); the non application of formal guarantees set by statute on the contrary necessary leads to declaring the resulting decision void: this is not a heritage of Napoleon, but of Constant and Tocqueville, i.e. French liberalism.

Turning now to EU law, I would like to underline that there is nothing common between EU law and so called "global law". Thinking that there is something in common between EU administrative law and "global administrative law" can only be wishful thinking.

I would like to concentrate my comment on a case which has been mentioned in the paper by by Carol Harlow and Richard

* Professor of European Law at the Università degli Studi di Pavia

Rawlings, the *Bavarian Lager* case (C-28/08 P Commission/Bavarian Lager). This is a case which is with the EC in appeal. At present, what is available are the judgment of the Court of First Instance of 8 November 2007, *Bavarian Lager* (T-194/04, ECR. 2007, p.II-4523) and the opinion of Advocate general Sharpston of 15 October 2009 (not yet published in the ECR). The case is extremely interesting because it is based upon an apparent contradiction between Regulation n° 1049/2001 on access to documents and the Regulation n° 45/2001, which may be considered as a "transposition" into the law applicable to EU institutions and bodies of Directive n° 95/46 on data protection.

What this has in common with the Italian situation regarding law 241, is first, that Regulation n° 1049/2001 is under a so-called "recast procedure", an amendment procedure to adapt it to new circumstances. At present the procedure is in a stalemate, and many specialists are rather happy with this situation – as is my case – because looking at the proposal by the European Commission one gets the impression that the institution who is starting the process (the Commission in its participation in the legislative function) is using the opportunity to try and go back on previously acquired principles; it is also showing how a bad use of comparative law can be made. One of the proposals by the Commission is to change the definition of what is considered as "a document". The Commission proposes the introduction into EU law of a definition similar to the traditional definition of a document in the Swedish law on freedom of the press of 1776, the ancestor of modern laws on access to document. In Swedish law, only "completed" or "final documents" may be accessed. As the Swedish law has an excellent reputation of openness, the comparative law argument might seems to be in favour of openness. But the Commission is forgetting one very important element: in the Swedish system, any document which comes from outside and which is in the possession of an administrative agency is considered as a "final document". Today Swedish State administration is made out of about 240 independent agencies, the "ministries" being very small administrations who support the members of government and are comparable in shape and functions to the "*Presidenza del Consiglio*" in Italy – or to the Secretariat general of the European Commission. A document coming from another agency is by definition a "final document" in

Sweden. In the Swedish context, the definition of "final documents" has thus a rather limited impact on the availability to the public of documents in the process of policy-making; whereas in the EU Institutions context it would definitely contribute to considerably shrinking the number of documents available to the public.

Where the Bavarian Lager case is really interesting for us is that it is shedding light on two issues which according to me would also need to be considered in the Italian context.

First, issues of codification. There is a contradiction between two pieces of EU legislation which are of the same year: Regulations n° 45/2001 and n° 1049/2001. In her opinion, Advocate general Sharpston says (at point 93, enhancing added) "*it is inconceivable that the Community* legislator, in adopting the Access to Documents Regulation, was *unaware of the detailed provisions that he had laid down barely six months previously* in the Personal Data Regulation", a statement which I would tend to consider as a typical example of British humour. Reading the two Regulations, one gets the impression – and this was at stake already in the procedure with the Court of First Instance – that there are real contradictions between those two pieces of legislation. The situation in EU law is quite complex: one Regulation (n° 1049/2001) is in a way standing on its own, as there is no legal basis for an EU wide directive on access to documents; the other one (n° 45/2001) needs to be put into the framework of Directive n° 95/46 on data protection, which, by the way, is also in the process of being amended. In both cases we have to deal with fundamental rights protected by the EU Charter, articles 42 on access to documents, and 8 on data protection.

The Bavarian Lager case shows the difficulties of getting a comprehensive codification of citizen's rights against public administration. Access to documents is not only linked to administration, but also the legislation, in the EU context. Regulation n° 1049/2001 goes much further than the usual national legislation on access to documents, because it includes access to the Legislator's documents, i.e. documents of the European Parliament and of the Council, with a single body – the European Ombudsman – which is in charge of ensuring access to legislative as well as administrative documents. At any rate, in national law as well as in EU law, access to documents is about

public institutions; it does not apply to private bodies, on the contrary, the latter are usually protected by professional secrecy. On the other hand, the data protection law is typically applying not only to the public sector, but also to the private sector (this is the reason why the French law of 1978 has been called "*loi informatique et libert*és" – informatics and freedom – which is also the name of the body in charge of ensuring data protection the *Commission Nationale de l'Informatique et des Libertés*). In the field of data protection, private firm have sometimes far more powers – and dangerous powers, due to their total absence of accountability – than public administration. Therefore – as a difference to access to administrative documents – it is not possible to regulate data protection in a general administrative procedure act, which by definition cannot deal with private bodies.

There are a lot of tensions between the need of codification for a better understanding of their rights by "the public" and the technical constraints of codification which are linked to the scope of application of the law which has to be codified.

Second, the "collision" between two sets of rights (to use a concept of German legal theory). The hart of the matter in the Bavarian Lager case is a collision between the right to access documents and the right to data protection. It happens that in the EU law framework those two sets of rights are protected according to different pieces of legislation, although Regulation n° 1049/2001 is taking into account personal data protection as one of the exceptions to access to documents. Looking at both regulations it becomes clear that the issue is not only about protecting the citizens against administration, it is also protecting rights of the individual as against protecting rights of "the public". "The public" sometimes means a collection of individuals; sometimes it means diffuse interests; sometimes it means powerful NGO's or associations of interests. It is a duty of public administration to try and protect both types of rights. It also happens that the clash is between the rights of two individuals: one who wants access to a document, and another one who does want to keep confidential his participation in a procedure in which he has been involved.

There are basically two ways to try and deal with these types of collisions, which need to be kept in mind also for a possible application at national level. One way is illustrated in an extremely interesting way in Advocate general Sharpston's

opinion on the Bavarian Lager case. She tries and make what we lawyers ought to do, that is building categories of situations in order to be able, as much as possible, to avoid clashes between the two applicable sets of provisions, by determining which provisions apply to what categories of facts. Reading her opinion, the reasoning appears extremely convincing in theory; however, it seems that many practitioners find the reasoning brilliant, but not workable in most practical situations. If so, there is the second way to deal with such a collision, a solution which Advocate general Sharpston also envisages as a second best: balancing interests. Balancing interests of access to documents with interests to protect privacy is what the Court of First Instance had done in the Bavarian Lager Case.

What is furthermore interesting in the Bavarian Lager Case is that it shows extremely well that it is not only a question of balancing interests, but also a question of who is balancing interests: the Commission, the European Ombudsman and/or the European Data Protector, the Court? The provisions of Regulation 1049/2001 clearly indicates that it is the European Institution to which the request for access to a document is being addressed which has to do the balancing of interest. According to the Regulation, the principle is access; there are a few exceptions to the principle of access, amongst which the protection of privacy; and there is an exception to the latter, i.e. an "overriding public interest" which would request the document to be communicated. In practice, the latter exception to the exception seems never to have been invoked by the European Commission or other EU Institutions in order to disclose a document. The Commission on the contrary has tended to use the exception of privacy in order not to communicate a document. This is easy to explain in terms of public administration, because communicating documents takes time and resources, which administration prefers to use otherwise. It is thus far more comfortable for the Commission to indicate that a document contains names of individuals in order not to have to communicate it, as the Commission did for a long time in the Bavarian Lager saga. The Bavarian Lager case shows that there are remedies if the administrative agencies do not undertake the right balancing: not only judicial remedies, with courts, but also extra-judicial remedies, with the European Ombudsman for access to EU Institution's documents. Interestingly, the European Data

Protector intervened in the Case both before the Court of First Instance and with the ECJ, defending the same position as the plaintiffs, the European Ombudsman. The case says thus a lot in favour of having, beyond courts, and before or as an alternative to judicial review, independent authorities specialised in promoting and defending certain rights. Maybe this is a question which should be also looked at in the framework of possible complements to Law 241 in Italy.