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**The Sources of Administrative Law and their Role in Consecrating the
 Administrative Space of European Union**

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Abstract: At the level of the European Union, we cannot find a proper law in the sector of public administration, there are no precise regulations of administrative law within the legislation of the European Union therefore we cannot talk about a system of administrative law characterized by written laws. The experience of half a century in European integration has proved, given the diversity of the systems of European law that the most important activity of the European judge was to create the law, to cover some gaps, to define or redefine the principles of administrative law. Since the jurisprudence of the Court of Justice of the European Union has known a more and more development and recognition in the past decades and especially at the level of the member states, *the European administrative law has been identified with these principles that seem to be defining it in the future in the lack of a general codification of what we call an European administrative space.* The purpose of this research is to understand the sources of the European administrative law analyzing at the same time the legislation of the European Union as well as the jurisprudence of the Court of justice and the other instances of the European Union.

Keywords: sources of administrative law; principles of administrative law; European administrative space; European Union.

1. The Role of the Primary Law as Source of Law

The sources of the administrative law of the European Union are the written law, the custom law, the general principles of law as well the praetorian law.

The primary legislation includes the *founding treaties* that instituted the European Communities, respectively the *treaties of amending them*. The first treaties, that instituted the ECCS, EEC and Euratom are named *institutive treaties or basic* as they comprise regulations the judicial literature named as *constitutional community law* (Cairns, 2008). This confirmation comes after which in the *Les Verts decision*² the Court asserted that within the new internal judicial order, of cross national dimensions, *the treaty has the character of fundamental constitutional chart.*

The institutive treaties establish the fundamental objectives for which they have been concluded, the community institutions and organs are created and their competencies are established, the judicial principles and action mechanisms are created in order to reach the wanted purpose. Even if their objectives were different, the three treaties comprised principles of common law. Therefore, in spite of the provisions comprised by the treaties in which the member states, respectively the institutions of the Communities had to respect the independent character³ of the latter, it has been admitted that the

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² ECCJ Decision (April 23, 1986). *Les Verts/ European Parliament*

³ In the content of the Treaty establishing the European Community it was stated that its dispositions do not have to modify the provisions of the CECO Treaty "especially in what concerns the rights and obligations of the member states, the attributions of the institutions of this Community and the norms established by the treaty regarding the functioning of the common market for coal and steel" (article 305, EC Treaty). To the same extent, article 42 in the Maastricht Treaty established that "under the reserve of the dispositions to modify the Treaty of establishing the EEC in order to establish the EEC Community, the Treaty of establishing the ECSC, the treaty of establishing CEEA (...) no disposition in the present 968

treaties can be interpreted through the others, often used being the EEC treaty, in the virtue of the common objective of the three treaties, namely the performance of the process of European integration.

The institutive treaties are structured, in general, according to certain criteria. Therefore, within each treaty, dispositions are found regarding the criteria of the institutional clauses (organization of the administrative structures) material (modalities for administrative action in order to fulfill the objectives of the treaties) aspects regarding their entering into force, review of the treaties etc. In order to apply these objectives, the Union has the help of the institutions that have executive character, respectively by *European administration* as is for example the Commission. The main obligation is to apply the provisions of the Union and supervise the way in which they are fulfilled. Also, the *Council fulfills certain activities regarding the put into force of the law of the Union*. Therefore, *there are regulations of the Council that are within this execution frame of the Union*. For example, regarding the provisions of article 65, within the Statute of the Public Servants of the European Union which stipulates the obligation of the Council to proceed to an adaptation of the remunerations of the higher servants and the servants of the Union, within the economic and social policy of the Union, the court of Justice stated that this measure is rather administrative that normative.¹

Regarding the criteria of the material clauses, article 173 in the EEC Treaty (current article 263 in the Treaty of the functioning of the European Union, former article 230 TEC) the Court of Justice *had the right to judicial verification of the administrative decisions* having the ability to control “the legality of the acts of the Council and Commission, other than the recommendations or notifications”.

We also have to mention that once the process of unification² of the institutions that belong to the three Communities was performed action, it has been ensured a higher degree of cohesion in what concerns the activity of the political and administrative institutions of the Communities so that the principles regarding the public administration gained an uniform practice concerning the three treaties.

The most recent dispositions regarding the amendment of the institutive treaties are the ones provisioned in the Lisbon Treaty. Therefore, article 20 in the Treaty of the European Union³ regulate a different chapter regarding the forms of cooperation, through which the member states can establish, within the nonexclusive competencies of the Union, a form of consolidated cooperation. This form of cooperation takes place through the institutions of the Union and targets the accomplishment of the Union’s objectives, the protection of these objectives and the consolidation of the process of integration. The acts that have been adopted as a result of the cooperation between the states are mandatory only for the member states participant to and do not represent an *acquis* that has to be imposed to the candidate states in the process of adhesion to the EU.

2. The Derived or Secondary Law

The derived law is made of all the normative acts adopted by the institutions of the Union according to the purpose and objectives established in the constitutive treaties and based on the competencies established through them. The secondary legislation⁴ comprises *regulations, directives, decisions,*

treaty does not breach the treaties of establishing the European Communities nor the treaties or subsequent acts which they modified or amended”.

¹ ECCJ Decision (June 5, 1973). *Commission c. Conseil, Aff. 814/72, Rec., 1073, p.575.*

² The process of unification began on March 25, 1957 by the adoption of the Relative Convention for some institutions common to the three communities and ended in 1965 with the conclusion of the Treaty of merge on the establishment of a Council and Commission common to those there Communities.

³ Article 20 modifies a series of articles, respectively articles 27 A-27 E, 40-40 B, 43-45 TUE and articles 11 and 11 A in TEC.

⁴ In article 189 in the Treaty instituted EEC was stipulated that in order to fulfill their mission and in the conditions provisioned by the treaty, the Council and Commission can adopt regulations and directives, can make decisions and formulate recommendations or notifications. According to article 249 in the Treaty establishing the European Community (former article 189 in the EEC Treaty) the institutions adopting regulations and directives, made decisions and formulate recommendations and notifications are the European Parliament together with the Council and Commission. Currently,

recommendations and notifications. The inclusion of the normative acts in this listing does not send to the idea of a hierarchy from the point of view of the superiority of one of them instead of another act of the Union. Still, in practice, it is a custom that through the adoption of a regulation, the basic dispositions from a certain domain get regulated and based on that the directives and decisions are adopted or, on the contrary, within a directive the main frame is found, and the regulations and decisions complete them (Craig & De Burca, 2009).

Regarding the first three types of acts adopted by the institutions of the Union, they together represent the *category of the formal acts* while the recommendations and notifications form the *category of informal law*, together with the other *measures or methods of developing the policies of the Union* and are called *soft law*. These informal norms are found in practice under the shape of general orientations or inter-institutional agreements.¹

The regulations have a general applicability that do not require the transposition within the national law therefore they have direct effects (Alexandru, 2000).² By direct applicability of a regulation, the Court of justice, in the *Cause Variola SpA v Italian finance administration*³ defines “the entering into force and application in favor or in the detriment of the subjects of law” which “accomplish independently from any measure of take-over by the national law”. The member states have the obligation, according to the treaties, not to obstruct the inherent effect of the regulations and other community judicial norms, as a necessary condition for the simultaneous and uniform application of the regulations on the territory of the Union. Regarding the possibility of access for the private or legal subject to the Court of Justice in order to cancel a normative act that carries the name of *regulation*, this is inadmissible. This aspect results from the conditions of admissibility expressly provisioned in the content of article 263 TFEU. Still, the Lisbon Treaty brings something new. The normative acts will be able to be attacked (such as regulations or directives) but only if they regard the private or judicial person directly and if execution measures are not imposed. To this end, the conditions will be accomplished to determine the validity of a regulation, validity owed to the norms with general character that it regulates and that have to be applied at the level of all the member states, and on the other hand, due to the effect of *direct applicability* in the member states.

The *general applicability* derives from the fact that it is applied to some situations determined in objective manner and the judicial effects target categories of people that are not identified and have an abstract character. Still, there are situations when such an act can have both the characteristics of a general and abstract act as well the features of a decisional act. In practice, there are cases in which a certain measure that carries the name of a regulation is actually a decision, so that in the assertion of a legality control in front of the Court, the conditions of form of the act will not have priority, namely the *character of the mandatory force of the judicial act* or the fact that *the act can produce judicial effects*. In order to make a distinction between the regulation and the decision, in the Court's jurisprudence⁴ it has been stated the necessity to distinguish is one of these acts has a general applicability or nor, being asserted the nature of the act attacked, exactly the judicial effects that this act produces or will produce. To this end, it will be verified if the act individually aims at a person.

The directives are mandatory for the member states, but their transposition⁵ remains the task of the member states. In other words, according to the conception in the civil law, it is an *obligation of result*

article 288 in the Treaty of the functioning of the European Union it is mentioned that for the exertion of the competencies of the Union, all the institutions adopt regulations, directives, recommendations and notifications.

¹ Ibidem. See regarding the measures of developing the policies of the Union the dispositions of Protocol no.2 on the application of the principles of subsidiarity and proportionality, attached to the Treaty of the European Union and the Treaty on the functioning of the European Union, that follows the establishment of the conditions for the application of the principle of subsidiarity and proportionality, respectively the institution of a control system for the application of the two principles.

² In practice, it has been admitted that there are split in two categories, respectively the category of basic regulations or regulations of derived law of level I and the category of administrative regulations or of derived law of level II regarding the activities of execution and can be assimilated to the administrative acts with normative character.

³ ECCJ (1973) Case 34/73. Variola SpA. v Italian Administration of Finance.

⁴ ECCJ Decision (February 24, 1987). *Deutz und Gelderman/Consiliul*, 26/86, Rec., p. 941.

⁵ The regulations are automatically valid in the member states and do not have mandatory direct effect if they have a subsequent legislation. See to this end the case 39/72 *Commission v Italy* (1973- regarding the killing of the cows) and case 970

and not an obligation of diligence as the member states are not only encouraged to respect the treaties but they are obliged to apply them. At the level of the Union, the institutions have some certain flexibility in choosing the act that enacts, concerning the enactment through regulation or through directive. The adoption of regulations is preferred because they ensure an immediate impact, specifically precise and clear in order to enact, which is greater than in case of enactment through the directives (Craig & De Burca, 2009). On the other hand, the enactment through the regulations confers the highest degree of convergence through the applicability of its content in a uniform manner, to all the member states. Still, this independence regarding the right of the Union's institutions to assert the type of act that has to be adopted at the level of the Union is censored through the treaties that state the cases in which the institutions are obliged to adopt only directives.¹

The decision is completely mandatory for the subjects aimed. The decisions of the EU represent acts with mandatory character, directly applicable, issued individually, both to the member states as well as to private or legal subjects, in which clarifications are made regarding the way certain administrative measures can be put into practice.

The recommendations and notifications are the only acts that do not have mandatory character for the member states, as the latter are the ones deciding if they will consider the former or not in fulfilling an objective provisioned by the EU. To this end, the Court of Justice² stated that in fact, the precise judicial effect that such an act can produce does not have the nature to determine the right to invoke the provisions of this act by a individual in front of the Court in order to control the legality of the behavior of the Union's institutions without presenting importance to the nature of the appeal, respectively an annulment appeal or a action for damages.

3. The Role of the Custom Law as Source of Law

In the area of the European administrative law, the *custom law* has not gained the character of source of law. In order to produce such effect, the custom norm has to have a long and continuous practice, in this case being obvious that such norms cannot have been consolidated through a long practice if we relate to the moment of the creation of the European Communities. Even if there were some principles that were applied in a reduced proportion and obviously un-uniform within some administrative procedures at the level of the European Communities, these principles cannot have the character of non custom norm.

In the jurisprudence of the Court, in *cause Watson and Belman*³ the general attorney stated that fact that these principles have been catalogued as having the value of some unwritten principles of law that contributed to the accomplishment of a spontaneous judicial order at the level of the Union. Given that

128/78 *Commission v Great Britain* (1979). In an effort to improve the transposition by the member states of the directives and avoidance of the application actions, the Commission organizes meetings in the member states named *directive meetings* to analyze the way in which the member state approaches the implementation of the directive and solves the eventual problems. The member states seem to improve the implementation of the directives, in the annual report no.18 (COM 2001) the Commission reported an improvement in the rate of transposing and the highest rate was reached in 1992. The Commission was encouraged by the fact that the transposing rate was growing in every state. This improvement continued until 2001 and the situation improved even after the extension. The 10 member states that adhered in May 2004 have reached high rates of transposition and until December the average was 97.5% for the old 15 member states and 97.3% for the new 10 states, reaching an average of 97.69%. an integrated system of electronic notification of the national measures of transposition of the directives became operational in May 2004 and the new member states are using it. Up to the end of 2004, only France, Holland and Sweden did not enter in the system (The 22nd COM Annual report (2005) (570).

¹ For example, article 50, paragraph 1 in the TFEU states that "in order to accomplish the liberty of establishment regarding a determined activity, the European Parliament and Council, decides according to the directives". Also, article 52, paragraph 2 in the TFEU states that "the European Parliament and Council deciding in accordance to the ordinary legislative procedure, adopts directives regarding the coordination of the dispositions mentioned previously".

² ECCJ, connected causes C-120/06 P și C-121/06 P, *Fiamm and otehrs/Council and Commission Consiliul and Commission in ECCJ Repertoriul jurisprudenței Curții de Justiție și a Tribunalului de Primă Instanță/ Repertoire of the jurisprudence of the Court of Justice and Court of first instance*, Part I, Luxemburg: CURIA, 2008-8/9 (A), p. I-6515.

³ ECCJ (1976). Cause 118/75, *Watson and Belman*, Rec.

these principles do not gather the conditions listed above, the Court avoided to decide on the matter, namely that at the level of the European administrative practice there were no practices of this nature. By not having clear regulations within the treaties regarding the principle according to which the European administration has to perform its activity, the Court of Justice defined the so called unwritten principles. These rules of the law of the Union have the features of fundamental norms of law in the jurisprudence of the Court. In fact, the unwritten principles are nothing more than rules or principles of law existent within the constitutional traditions of the member states. For example, regarding the *principle of good administration*, in the *decision on December 10, 1957 on the High Authority*¹, the Court stated that its obligation is to examine the aspects that are particular to the individual cases represent the essence of a good administration, these principles being nothing more than unwritten rules of the ECSC law. Subsequently this principle gained the character of written norm but a few decades later. The role of its consecration within the jurisprudence so soon is owed to the long tradition it has in states such as Holland, Belgium or Great Britain.²

Also, there is the possibility that on a longer basis, the two systems of administrative law, the national and the European one, would not be maintained within the internal judicial order in a certain state, as the European legislation cannot function as an efficient system if is not applied in an uniform way. In other words, the success of the European integration would consist in performing *a codification of the administrative law*, respectively *of the administrative principles*, that would determine a higher transparency at the level of the Union. Currently, at the level of the Union, we cannot talk about a general codification of the law of administrative procedures because there is no express judicial competence from the EU and no significant judicial- political will but we can assert that the first steps have been made to the codification, *the Community Code of Customs* being the best example in this matter (Schwarze, 2007).

If we attempt an analysis of the jurisprudential system existent in Great Britain, we will notice that *under the influence of the europeanization of the Union law, the British system has adopted several rules of law unwritten that they apply here in the case of the administrative procedure* such as *the irrational character or unreasonable character of the decision*, as procedure vice (Fromont, 2006).

4. The Jurisprudence as a Source of Law

Given that the legislation of the EU does not comprise regulations that would define the principles applicable to the European administration, the Court of Justice had the role of defining these principles by inspiring from the general principles of the existent public administration at the level of the member states. Therefore, the absorption of the regulations of the Union takes place without strictly regarding the legislation of the EU in the form of the obligation to implement. It is the transfer of some principles that belong to other member states but through the EU law. The principles of European administrative law are shared by the member states at the moment of the implementation and application of the Union's law on one side as being a natural event and on the other side, these principles guide the national law of the states in the future actions, under the guidance of the jurisprudence of the Court, principles that are gradually included in the content of the Treaties.

But, as we will see, neither the states with experience within the EU and in general all the states that have adhered in the past decade, including Romania, cannot praise with remarkable results in what concerns the takeover and application of modern principles within the public administration under the influence of Europeanization. Except from some founding states, which has systems of administrative law of reference at the level of the EU, the other states have been pushed to apply these principles for

¹ ECCJ Decision (December 10, 1957). *Usines à tubes de la Sarre c. Haute Autorité*, Causes 1/57 and 14/57, Rec., p. 201, 209, 220.

² In the cause *Girardot*, with the object of damage claims, based on article 91, paragraph 1 in the Statute of the EC public servants, the Court of Justice proceeds at solving the appeal by examining the judicial systems of the member states at the moment of referring to the Court of First Instance of the European Communities. CJCE, C-348/06 P, *Commission CE/Marie-Claude Girardot*, p. I-848, I-849.

at least two reasons. Firstly, it is about imposing the criteria of adhesion to the future candidate states that were conditioned by the performance of remarkable progress and in a very short period of time and once they adhered, of a process of gradual integration in the European administrative space. For example, the European Council in Madrid in 1995 underlined the necessity to adapt the administrative and judicial structure of the states candidate. Secondly, it is relevant the development of the Union depending to the modifications that took place in trade, legislation, litigations and lobby in the life of the European community (Haas, 2004) and another period of gradual the European integration according to the evolution¹ that took place between the member states but also at their borders.²

From the perspective of the legislative sector³ an increase in the activity of the Union was registered as the perception of the legitimacy of the rights regulated by the EU raised. The number of regulations, directives, and decisions adopted raised too, and together with it an intensification of the judicial activity at the level of the Court of Justice of the EU. Any public or private actor had the ability to address the Court of Justice if their rights recognized by the legislation of the Union were breached. For example, article 234 in the Treaty of Rome allowed the national judges to require the Court of justice interpretations regarding the causes that involve disputes on the laws of the Union.

*The increase in the activity of the Court reflects the degree of development and intensification of the institutional activity of the Union, as well as certain aspects regarding the integration of the member states in the European space.*⁴

5. Conclusions

If we analyze the *percentage in which the case law of the Court of justice of the EU is applied at the level of the member states we will notice that the proportion is very low*. Although a European administrative law is delimiting, some member states did not adapt to the principles imposed by the jurisprudence because of the administrative traditions existent at their level. In spite of the absorption of the ideas and principles, especially by the states that have adhered recently, the process of the consolidation of the democratic traditions has proved to be the hardest to accomplish. A more intense activity was therefore imposed to the national courts under the aspect of the implementation of the decisions of the Court of the European law in general as well as the necessity of a codification of the rules of coordinating the indirect administration of the law of the European Union (Schwarze, 2000). The conclusion deriving from the present paper is that the consolidation of the system of administrative law of the European Union has been accomplished together with the development of the role of the jurisprudence of the Court of Justice. Actually, the notion of *European administrative law* has gained a certain expansion and certain characteristics at the level of doctrine once the

¹ These results have been explained by the non functionalist theory regarding the regional integration of Ernst Haas, appeared at the end of the 50s theory according to which the integration was approached on certain sectors and that inevitably would generate a development of other sectors in the meaning of the integration due to the links between them. The phenomenon of positive integration and negative integration seem to be responsible for the excess of power on the market.

² A first period is the one between 1958-1969 when the preoccupation was to create institutions and vitalize their activity. The second period is between 1970-1985 period in which the Commission and European Court of Justice have been preoccupied especially in eliminating the borders of trade in order to create a Unique Market within the European Communities and the cross national exchange but also the harmonization of the policies between the member states. The third period is after 1986 together with the adoption of the Unique European Act modifying the system of voting in favor of the qualified majority. This is the reason for which after 1986, there is the most active stage of the European institutions reflected in the program of the Unique Market.

³ The trade between the private actors of the member states has raised, as in Brussels there were more and more groups of lobbyists. They influenced the elaboration of the community legislation reason for which at the creation of the Communities there was the attempt to draw them together with the officials of the Commission and even their involvement in influencing the over national policies.

⁴ For example, at the beginning of the 60s, the number of the causes brought to the Court of Justice by the member states was not so high. Toward the end of the 60s they begin to grow and more and more gaps are starting to form in the national legislation in favor of the Community legislation. From this moment on, at the level of the Union, there was a need for the elaboration of a legislation that would govern the free circulation of the goods, respectively the need for a normative frame and institutional frame, both stable.

jurisprudence managed to answer the most acute problems existent at the level of the direct and indirect administration within the European Union. On the other side, *as long as the jurisprudence of the Court will prevail as importance, there is the risk that we cannot wait for a possible codification of the norms and principles of administrative law very soon.*

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