The Significance of the General Principles in European Union Administrative Law

Gina Livioara GOGA[1]

Abstract: The jurisprudence of the Court of justice of the European Union generates principles with general character. These principles have value of law in within the space of the European Union and are applied only to the extent in which the general administrative law does not regulate these norms. In reality the administrative law of the Union represents the fruit of most of the principles of law of the member states, principles that determine themselves a significant impact within the other member states. The purpose of this study is to identify the role and significance of the general principles of European Union law this being the form through which the europeanization of the administrative law is being accomplished. To what extent the administration of the member states will be able to face this rapid evolution, it will depend on how powerful is the capacity of the national administrations to confirm the existence of an administrative space within the european sector.

Keywords: general principles of law; administrative law; European Union; Court of Justice of the European Union.

1. Introduction

In general, within the basic treaties an in the secondary legislation of the Union there have been only certain elements in the direction of creating *an administrative European law*. These elements refer to *the right to judicial verification of the administrative decisions,* to *the obligation of motivating the administrative decisions.*

According to article 6 in the TEU, the Union recognizes the principles provisioned in the Chart of fundamental rights of the European Union from December 7, 2000,

[1] Senior Lecturer, PhD, "Danubius" University of Galati, 3 Galati Boulevard, 800654 Galati, Romania. Tel.: +40.372.361.102, fax: +40.372.361.290, Corresponding author: ginagoga@univ-danubius.ro.

granting it the same judicial value as the treaties. Also, together with the adhesion of the Union to the *European Convention for Protecting the Fundamental Human Rights and Liberties*, all the fundamental rights guaranteed by it as well as the fundamental rights deriving from the constitutional traditions common to the member states represent principles of the EU right. Through this regulation, the judicial references regarding the principles that are defined in the Chart will be made by reference to the primary law.

In what concerns the judicial acts adopted by the Union's institutions, they have to be in complete agreement with the primary law of the EU, including the general principles of law. Accordingly, the legal concepts of the EU introduced in the national systems through regulations, that are directly applicable, will have a special impact over the administrative systems of the member states, determining important changes in what concerns the legal principles applicable in the public administration, in a specific sector.

1. Problem Statement

The role of consecrating the general principles belong to the Court of Justice of the EU, inspired from the principles existent at national level.

These principles have value of law within the European Union and are applied only to the extent in which the general administrative law does not regulate such norms.

On the other side, is there the possibility that a principle of general law, defined by the Court of justice, having constitutional value, will be provisioned also by the legislation of the Union as a principle of European administrative law? Between those two principles there is a difference in what concerns the ***area of application,*** respectively the content and different materialization degrees (Schwarze, 2009). For example the principle of good governance represents a general principle of law but at the same time a principle of administrative European law.

2. Concept and Terms

The Court of Justice borrowed the general principles defined today within the law of the Union from the *common principles of the traditions of the member states*, so

that their place in the archive of the European administrative sources of law would be that of ***constitutional source*** (De la Sierra, 2007).

The starting point was represented by the Algera cause[1] the decisions of the Court of Justice stipulating that where there are no dispositions at the level of the treaties, the Court "is obliged to make decisions by inspiring from the rules recognizes by the legislations, doctrine and jurisprudence of the member states". In case there would not have been this remedy through which the Court, based on the compared law, could accomplish this synthesis of the principles existent at the level of the member states, the Court would have been in the position of producing *a denial of justice.* Or, the role of the Court in consecrating the principles of the administrative law of the Union was and still is fundamental.

In the wording of article 6, paragraph 3 in the Treaty on the EU, the phrasing *the constitutional common traditions of the member states* represent the way in which the Court of Justice of the EU has the grounds in order to deduce the fundamental principles of the EU law.

As declared, *the EU represents a new and autonomous judicial order.* In order to be able to have the legitimacy to impose the respect of some unanimous and mandatory norms, the Union needed a mechanism for the protection of the rights and objectives consecrated as such by the primary law or which result from the application of theses norms belonging to the primary law. In what concerns the secondary law, the practice of the institutions, some rights are recognized in theoretical manner and in the practice of institutions of international laws, such as ECHR, the Union could not have gone far from grating maximum protection of the rights and judicial situations deriving from it. If regarding the regulation of other sectors provisioned as such in the primary law, in what concerns the public administration, we cannot say the same. Moreover, without principles or regulations with general character in the content of the treaties, the role of the principles has been maximized to much more in order to cover the gaps existent in this mater. And these gaps were not insignificant.

3. Solution Approach

It is obvious now why the Court needed to get inspired from the values of the member states. Of course that we can have certain reserves in this matter also.

[1] ECCJ Decision (August 12, 1957). *Algera,* aff. 7/56, 3-7/57, Rec. 1957.

What are exactly the values, principles, laws or opinions of the doctrine that should be lifted to the degree of pattern of public administration in the European Union?

The primary law came with the following justification to this extent: *any fundamental law, recognized in the content of the European Convention of Human Rights*, as resulted from the constitutional traditions common to all member states, represent the general principles of the Union's law (article 6, paragraph 3 in the TEU). ***But there is a reserve here also. Some principles are not recognized within the member states and if they are still recognized by the member states, they either have different valences in practice***.

At the beginning of its judicial activity, the Court comprised principles in its decisions that belonged to the six member states of the EEC. A particular influence to this end has been determined by the concepts deriving from the content of the administrative legislation in France, without that influence being exclusive. One of these concepts is the principle of ***administration by law*** inspired from the *principe de legalité* in France and the *Rechtsstaatlichkeit* in Germany „both being more or less close" to the concept of *rule of law* in Great Britain. This principle, in spite of its distinct regulation as notion by these three systems of law, produces the same effects in all the mentioned member states. Also, the principle regarding ***the right to fair trial*** was borrowed from within the law systems in Germany and Great Britain (Schwarze, 1992). Also, ***the principle of retroactive application of a less severe administrative*** as being part of the constitutional traditions common to the member states, represent a general principle of the law of the European Union, which determines its respect not only by the Court, but also by the national courts of the member states.[1]

Still, there are principles that are found only in some of the member states and which the judge of the Court has to have in mind only when asserting on a specific cause. For example, there are certain national judicial systems that do not admit the ***right to damage in case of losing the opportunity of recruitment.*** It is the case of the Danish, German, Austrian, Portuguese, Swedish systems of law. This principle is found regulated especially in the contentious of labor law and/or public office in

[1] ECCJ Decision (July 1, 2004). Cause C-295/02, *Gerken*, Rec., p. I-6369, pct. 47-52; Decision on March 11 2008, Cause 420/06, *Jager* in ECCJ, *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*.

Belgium, Greece, Spain, France, Ireland, Italy, Luxemburg, Holland and the United Kingdom.[1]

On the other side, ***the significant evolution of some principles of law of the national systems*** borrowed also by the European administrative law but not yet in a stage of development similar to the one of that state, has determined serious problems to the Commission in what concerns the execution of the obligations provisioned in some European directives. It is about the conflict determined by the application of the *principle of legitimate confidence* (Schwarze, 2009). ***This determined the need for harmonization between the two judicial systems.*** It is obvious that we have to ask the question regarding the system of law that will be obliged to proceed with the harmonization and the answer could not content those attached to the national judicial values. The treaties oblige the member states to implement the European directives through their transposition in internal frame, without exceptions.

In general, many provisions within the legislation of the Union indicate that the functioning of the treaties is made with the strict compliance with *the principles applicable in the member states.* For example, the Court is forced to decide in a matter formulated by a member state, the European Parliament, Commission or Council for matters of incompetence, in case of breaching a fundamental procedure norm, the provisions of the treaty or for the breach of any other norm of the law regarding the application of the treaty or an abuse of law.[2] For these situations, within the treaty we can find regulated *the contractual responsibility* as a way of differentiating it from the *contractual one* in which case the law of that contract is applied.

The method of interpretation used by the Court of justice of the EU is a dynamic one (Negrut, V., 2008). As there is no set of norms that would define the principles applicable to the public administration, the Court is in a constant process of redefining these principles in the context of solving the conflicts. This need of redefinition was explained very simply by A. Gordillo: "We always have to handle specific and different cases, either because we receive new information, or because we analyze the cases in different periods of time or in different places, with

[1] According to these systems of law, the loss of the chance of being recruited is understood as being the "unaccomplished hope of getting an advantages and/ or avoiding the accomplishment of a risk". See the conclusions of General Attroney Mengozzi, Cause 348/06 P, *Comisia/Girardot, Repertoire of the jurisprudence of the Court of Justice and Court of first instance, Part I, Luxemburg: CURIA, 2008*

[2] Article 173 in the EEC Treaty.

different persons or in different political and social frames". For this reason, a case that would seem to be equivalent cannot offer a solution for a future case (Gordillo, 2003). This way the so-called *blind concepts* appeared such as ***good faith, equitability, loyalty***[1]as well as those aiming at the general interest. The blind concepts[2] have been defined as being frequent concepts and redefined by the judicial courts or other public authorities, whose content is elusive and unclear in permanent manner, but have a great importance in the process of drafting and applying the laws, due to their "pliancy in desperate situations". For example, *the concept of good faith* is applied both in what concerns the relations between the individuals as well as in the relations between the public authorities and the private persons, respectively in the relations between the public authorities such as the relations between the authorities of the Union and the national authorities.[3] The Court of justice stated that the public authorities of the Union have to always respect *the principle of god faith* both in administrative sector as well as in the contractual one.[4] This principle is completed with another rule, defined by the Court, according to which those parts of a trial cannot abusively prevail from the norms of the Union.[5]

4. Analysis of Results

At national level, the application of the principles of law of the EU has a special relevance. In what concerns the states that are candidate to the adhesion, the criteria imposed to them by the European Council in Copenhagen aimed at ensuring some stable institutions that would guarantee democracy, state of law, the respect of the human rights, a functional market economy etc., but at the same time expected that the candidate states would acquire the necessary capacity in order to fulfill the state obligations as a member state, respectively the adhesion to the political economic and monetary objectives of the EU. In order to reach these final

[1] ECCJ Decision (January 13, 2004). Cause 453/00, *Kühne c. Heitz*, and more recently Decision on February 12, 2008, Cause 2-06, *Willz Kempter KG* c. *Hauptzollamt Hamburg-Jonas*

[2] OECD **(**1998). *European Principles for Public Administration*, Paris: SIGMA papers no. 27.

[3] Cour de Cassation (2000). *L'application aux Pays Bas des principes generaux du droit communautaire, notamment les principes de securite juridique, de confiance legitime, de bonne foi et celui de la proportionnalité*,, p.7, http://www.courdecassation.fr.

[4] ECCJ Decision (July 15, 1960). *Von Lachmüller and others/Commission EEC* (43/59, 45/59 şi 48/59, Rec., p.933, p. 956); Decision on December 16, 1960, *Fiddelaar/*Comisia CEE (44/59, Rec., p. 1077, p. 1099).

[5] EECJ, CJCE Decison (December 3, 1974). *Van Binsbergen*, 33/74, Rec., p. 1299, pct. 13.

objectives, *the member states had the obligation to apply the general principles of the Union, even if they were not part of the legal traditions.* If some principles were found to a certain extent in the national public administrations, they did not acquire a mandatory character unless through imposing them as general principles of law, once they were defined as such by the jurisprudence of the EU Court of Justice, becoming part of the community acquis.[1]

At the same time, the national judges have to apply the law of the Union according to the general principles and in the situations in which these principles are not found regulated in their national law. For example, in the matters of restoring a fiscal tax paid in a member state in an illegal and discriminatory way towards the citizens of the other member states, relating to the dispositions of article 110 in the TFUE, the person is entitled to formulate a request for restoration, according to the legal proceeding at internal level. In case there are no such regulations, in order to guarantee the judicial security, the Court of Justice stated that this restoration has to be related to *the principle of enrichment without just cause* existent at the level of most of the other member states, any situation that is discriminatory towards the citizens of the other member states being eliminated in this manner. This principle has been recognized as *a principle of general law of the European Union* but applicable to the situations in which the enrichment is related to a case of enrichment without just cause of the Union, as it concerns the case in which the tax is paid in the account of the budgets of the member states. This situation is different because the restoration will be made according to the principles of national law. Therefore, in the situations in which at national level there is no such legal remedy and the Court would indicate to a harmonization of the legal remedies at the level of all the member states, a state of judicial insecurity would be created, because the encouragement of a procedural way cannot be encouraged (Craig & De Burca, 2009) not compatible with the existent system of national law or which cannot be accepted under any way at national level[2]. In this case as well the national courts will have to require a decision based on the appeal on interpretation, which the Court of justice will solve according to the general principles of law.

In case the national courts have not requested a prejudicial appeal, and the responsibility of the member state was not triggered as final remedy, at the level

[1] OECD **(**1998). *European Principles for Public Administration*, Paris: SIGMA papers no. 27.
[2] See (2000) *L'application aux Pays Bas des principes generaux du droit communautaire, notamment les principes de securite juridique, de confiance legitime, de bonne foi et celui de la proportionnalité*, p.1, http://www.courdecassation.fr.

of the member states should also exist other procedural ways based on which the access to justice will be ensured. To this end, article 21 in the Law of the administrative contentious regulates the review as an extraordinary way of appeal against the definitive and irrevocable solutions issued by the instance of administrative contentious, issued with the breach of the principle of the priority of the Union's law.

However, the role of the Court of Justice should be the one established through the Treaty, the Court not having the competence to proceed to the elimination of the differences existent at the level of the national law of the member states, as they are responsible for the application of the law of the Union at national level. In the case in which, according to the treaties, the national courts are referred to with such a requirement, the national court considers that the instance of the Union should be appraised in a cause whose object is not the interpretation of a provision of the Treaty, it would have to refer to the Court of Justice. After the Court is pronounced to this matter, the national courts will apply these decisions depending on the legal traditions existent, without the differences between the legal systems would being eliminated. Towards the tendency of the Court of justice of the European Union to assimilate the law of the member states, many voices have expressed their concern as this is a matter of legitimacy (Legrand, 2002). On the other hand, the frequent and combined use of some principles of law at the level of the EU and at the level of the Court has represented *a source of judicial insecurity* both at national level as well as at the level of the European Union. Therefore, in the judicial practice of the EU, some general principles of law are interpreted together with other principles.[1] It can be the case of combined application and interpretation of the principles of *non discrimination* and *proportionality*, rule that has determined the birth of numerous exceptions in the practice of the Court.

5. Conclusions

We assert that the influence of the general principles of law over the member states is definitive, being a principle source of general laws of the Union, while the secondary legislation of the Union has a less general influence, so that the process of contaminating the principles of law of the Union at the level of the

[1]**Schwarze, J. (2009).** ***Droit administratif européen***, Second Edition, Bruselles: Bruylant, 2009.

member states and the accomplishment of *an European administrative space*[1] will be more accentuated and will happen sooner due to the role of the judges of the Court of Justice.

Since the jurisprudence of the Court of Justice of the European Union knew a higher development and recognition in the last decades and especially at the level of the member states, ***the contemporary European administrative law has been identified with these principles.***

The definitive role of the jurisprudence is the one to lead the member states in the way to understand the application of the legislative acts of the European Union but no less than that, many times it helps understand their own jurisprudence. It seems that the member states either accept or understand more difficulty some practices that exceed the national ones. But we should not be worried about the fact that the national authorities or national courts do not understand the law of the European Union because this is the only way to achieve uniform results. What should be worrying is the ***holdback from appealing to the Court of Justice or the lack of constitutional national and legal remedies that would guarantee the residents of the member states the access to the range of rights granted by the legislation of the Union in relation to the administration.***

References

Article 173 in the EEC Treaty, (2008). Cause 348/06 P, *Comisia/Girardot, Repertoire of the jurisprudence of the Court of Justice and Court of first instance, Part I, Luxemburg: CURIA.*

Cour de Cassation . (2000) *L'application aux Pays Bas des principes generaux du droit communautaire, notamment les principes de securite juridique, de confiance legitime, de bonne foi et celui de la proportionnalité,* 2000, p.7, http://www.courdecassation.fr.

Craig, P. & De Burca, G. (2009). *The law of the European Union. Comments, Jurisprudence and doctrine,* 4th edition. Bucharest: Hamangiu.

De la Sierra, S. (2007). *Les sources des principes du droit administratif européen in* J. B. Auby, J. D. de la Rochère, *Droit administratif européen*. Brussels: Bruylant.

ECCJ Decision. (August 12, 1957). *Algera*, aff. 7/56, 3-7/57, Rec. 1957.

ECCJ Decision. (July 1, 2004). Cause C-295/02, *Gerken,* Rec., p. I-6369, pct. 47-52;

ECCJ Decision (March 11, 2008). Cause 420/06, *Jager i*n *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.*

[1] OECD **(**1998). *European Principles for Public Administration*, Paris: SIGMA papers no. 27.

ECCJ Decision. (January 13, 2004). Cause 453/00, *Kühne c. Heitz,* and more recently Decision on February 12, 2008, Cause 2-06, *Willz Kempter KG* c. *Hauptzollamt Hamburg-Jonas*.

ECCJ Decision. (July 15, 1960). *Von Lachmüller and others/Commission EEC* (43/59, 45/59 şi 48/59, Rec., p.933, p. 956); Decision on December 16, 1960, *Fiddelaar/*Comisia CEE (44/59, Rec., p. 1077, p. 1099).

EECJ. Decison. (December 3, 1974). *Van Binsbergen*, 33/74, Rec., p. 1299, pct. 13.

Gordillo, A. A. (2003), *Une introduction au droit*, London: Esperia Publications Ltd.

L'application aux Pays Bas des principes generaux du droit communautaire, notamment les principes de securite juridique, de confiance legitime, de bonne foi et celui de la proportionnalité, 2000. http://www.courdecassation.fr.

Legrand, P. (2002). *Public Law, Europeanisation and Convergence: Can comparatists Contribute?* in P. R. Beaumont, C. Lyons, N. Walker, *Convergence and divergence in european public law*, Ed. Hart Publishing, Oxford.

Negrut, V. (2008). *Le Rôle de la Jurisprudence (CEJ) dans le Développement du Droit Communautaire*, Galati: Acta Universitatis Danubius.

OECD (1998). *European Principles for Public Administration*, Paris: SIGMA papers no. 27.

Schwarze, J. (2009). *Droit administratif européen*, Second Edition, Bruselles: Bruylant, 2009.