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Protecting Legality: Public administration and judiciary in EU countries

How to conciliate executive accountability and judicial review?

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INTRODUCTION

1. Judicial review of administrative action has for long been restricted in most of European countries. This restriction was founded on the idea that, due to the principle of separation of power, judges should not interfere in executive tasks. Moreover, there was a widespread opinion that judges are not well-equipped to intervene efficiently in administrative questions.

2. Therefore, until the twentieth century, in most of the European countries, ordinary courts were not allowed to look into administrative decisions and special administrative bodies were established for that duty. This issue was, besides, characterized by national traditions, whereas civil law and civil courts activity were much more harmonized through Europe.

3. This picture has greatly changed in the last 50 years. The idea that administrative action has to be submitted to a judicial control has made huge progress. This evolution has been for a good part brought about by the development of European law, namely the European Convention on Human Rights and Community Law, which both are grounded on the idea that state as well as society have to be founded on law and that the respect of law needs to be guaranteed by courts.

4. Everywhere in Europe, especially in its central and eastern part, the judicial control of public administration has been strengthened. Executive and administrative authorities now generally accept this.

5. Nevertheless there are still sensitive questions about extend and modalities of judicial review. Courts decision, and sometimes already judicial procedures can hamper administrative action. Tensions may appear between officials and judges, sometimes between government and courts. How it is possible to provide effective judicial protection by respecting needs of administrative action?

6. By which way it is possible to optimise the two principle of rule of law and administrative efficiency? How to mitigate the effects of judicial control in view to safeguard administrative effectiveness?

7. This report will enter in some issues linked with this question. It will first present the growing impact of judicial remedies within the institutional framework of EC states, and in a second time develop some thoughts on the way to combine “judicial intrusion” and “official freedom”.

A. Growing influence of judicial control on public authorities:

- Convergent models of judicial review;
- European jurisprudence strengthening judicial review;
- Separation of powers and extend of judicial review;
- Guaranties for judge’s independence and impartiality;

B. Developing complementary roles of judiciary and executive:

- Judicial review and governmental accountability
  - Means to conciliate administrative action and judicial review;
  - Administrative procedure and judicial procedure as complementary tasks
- Prospects for the future of judicial review in Europe.

A. GROWING INFLUENCE OF JUDICIAL CONTROL ON PUBLIC AUTHORITIES

8. The growing role of courts control on public bodies appears through several factors: the dispute about the appropriate court system is settled; a large scope of judicial control is required by European law; a new conception of separation of powers emerges; the independence of judges towards the political **level** is better guaranteed.

1. Several models of judicial review but convergent evolution

There are several traditions of judicial review of administration action in Europe.

9. In some countries, the historical tradition was to give judicial review to the ordinary courts. In other, special administrative courts have been created. Today, these «organic» differences are decreasing in importance because even in countries with a tradition of unity of court system, there is a need of specialisation within civil courts to cope with increase complexity of law. On the other side, in countries where administrative courts exist, the requirement of independence and impartiality are the same for administrative judges as for civil judges.

10. It is possible today to conclude that between specialized administrative chambers within civil courts and autonomous administrative courts there is no more great difference. Sometimes the procedural rules applied in these two modes of organisation are still different because civil courts tend to apply an adversarial procedure and administrative court a more "inquisitorial" procedure. But in both cases, procedure has to adapt to the particularities of administrative matters and to respect the principle of fair trial.

11. In many cases, as it is show in Spain or Netherlands, the difference between special administrative court and civil courts specialised in administrative litigation has lost signification and some mixed solution has been adopted.

Nevertheless Europe remains divided in three great families concerning judicial review:

- The common law countries: in these countries, notwithstanding the creation of specialised organs for judicial review, the procedural traditions are still very different from those existing on the continent;
- The countries having followed the French model where the place of objective legality extends the scope of control with a large locus standi;

- The countries influenced by German tradition where the control is articulated on the concept of subjective rights.

Most of the new democracies in central and Eastern Europe have been inspired more or less by the German model.

From another point of view, across Europe, two tendencies can be seen in the systems of judicial review:

- In some countries, the courts concentrate their control on the "procedural correctness" of administrative action. The best way to know if the decision taken is right is to verify if it was made following a fair and equitable procedure that permits each party to voice his opinion.

- In other countries the judicial control extends to the substance of the decision: the role of the judge is to find out what the law commands in the given situation, what are the rights on stake. Procedural rules are only tools to find out the "right solution" corresponding to a "legal truth".

2. Reinforcement of judicial review under European influence

12. Whatever these different traditions, judicial review becomes in the whole European union a general commitment for member state. The obligation to organize judicial review of administrative action derives from ECHR as from Community law which both require a large scope of judicial control of administrative action. Furthermore it is recognized as a common standard of democratic European society.

13. Art 6 ECHR demands that everyone can address an independent and impartial tribunal for the determination of his/her civil rights. The concept of civil rights has been interpreted extensively by the European court and covers nearly all subjective rights, based on either public laws or private laws (König 28.01.1978; Ortenberg 25.11.1994; Pellegrin 08.12.1999).

14. The jurisprudence of the European court of Justice demands that national laws and national tribunals guarantee the effective implementation of community law. This means that national court have to guarantee the rights given to citizen by community law (Johnston 15.05.1986 - Heylens 15.10.1987) against national authorities. As community law has penetrated more and more legal fields, the rights guaranteed by community law have become more and more important. For instance, community rules about public procurements have open this issue to judicial review whereas it was before out of court control in most countries.

15. By an effect of contamination ("overspill"), the principles of access to court against adminstrative action have found application even in matters not concerned by the European Convention or by community law. A very strong general principle of rule of law has developed, having as component an effective judicial review in nearly all the fields of public action. In public opinion judicial review has become a component of democracy as a mean of control of public bodies in the hands of the citizens.

16. Even in the countries where judicial review exists for long time, it has changed in quality because European standards and comparative law induced a claim for real efficiency of this control. The effectiveness of judicial review not only requires a large scope for the control but also:

- Judgment in reasonable time limit;

- Effective interim relief

- Sufficient intensity in the control of public decisions, including full revision of facts and respect of general principle like proportionality.

Administrative action shall no longer escape from judicial control by traditional exceptions like being grounded on executive prerogative or legislative rule.

3. A new understanding of separation of power

17. In the past, the concept of separation of powers was defined as the fact that the rule of law (Rechtstaat) was understood as the respect by administrative bodies of prescription given by the lawmakers.

18. In this sense, court control was at the service of the supremacy of parliament. The duty of courts was relatively simple: to look after the observance of legislative rules. Each time, the legislator gave a large room of action to the executive, and this happened frequently, the judicial control was necessarily restrained or even excluded.

19. Today, even in the case of complete conformity with acts of parliament, administrative norms can be contested on the grounds of violation of superior rules like European law. In this context, the administrative judge is not only the guarantor of the administration's respect for legislative rules but also the judge of the legislator's respect for constitutional rules and of the compliance of national norms with EU law and international law.

20. It is therefore not uncommon for an administrative judge of a European state to sanction the administration for having faithfully applied a law that is itself contrary to European law. This "paradigmatic change" is no longer really contested, but its scope has not yet been totally integrated into a number of national judicial systems of control of the administration. It changes the position of courts into the institutional framework. Separation of power does no more mean incompetence of courts to challenge decisions taken by the executive or by the legislative power but real independence of courts and capability for them to enforce the rule of law even against the other powers.

21. The new understanding of the principle of separation of powers appears also in the reduction of acts excluded from judicial review because of their supposed political nature. So called "acts of government" or "prerogative powers" emanating from the head of State are increasingly put under courts supervision.

22. The boundaries of legality have also changed. What falls in the realm of legality and what corresponds to administrative discretion? In the present conception of the distinction between legality and discretion, a complete discretionary decision does no longer exist. In any case, courts control rules of competence of the public organ, procedural rules, correct assessment of the factual situation, respect of the public interest, compliance with general principles, a.s.o.

23. But on the other side, public law remains characterized by the existence for most of the decisions to be taken by public authorities of a certain margin of choice. In all judicial systems, defining the extent of control by the courts over the use of this power of choice constitutes a complex issue. The general tendency is to reinforcing judicial control over the use of this power.

24. Modern legal analysis reveals that discretion does not involve an interpretation of the law but only an assessment of the facts. Even if the law uses "indeterminate legal concepts", such as "public security" or "immorality", it is up to the judge to verify if the interpretation given to these concepts by the administration is correct; the interpretation of legal concepts is a question of legality and not of opportunity.

25. Moreover, the exercise of discretion has to be analyzed as an assessment power; this power is set in the framework of a number of general principles that limit its scope of application: the principles of equality, proportionality, legitimate expectation, etc. The evaluation of facts corresponding to the exercise of discretion must respect certain rules: the administrative authority must be sure to gather all pertinent facts and to disregard any that are irrelevant. The different factual elements of assessment must be weighed, with a view to respecting their relative importance, as fixed by law. Finally, this power of choice is to be used only to reach the goals for which it has been established and no other; otherwise it would constitute a "misuse of power".

26. All these elements can be put under the scrutiny of courts. It is up to them to correct this assessment if it appears to be obviously excessive or unreasonable – in other words, if there is an "obvious error of assessment". The rules concerning the exercise of discretion are shared by most European administrative jurisdictions. They are more or less strictly applied, depending on the circumstances and the country. But they allow for a rigorous control of the administration without depriving it of the authority and scope of action it requires.

4. Warranting independence and impartiality of judges

27. The judges in charge of the control of public administration are in a particular situation characterized by the fact that one of the parties is a public institution, sometimes an elected body and perhaps even an authority having a great influence on the Government.

28. This means that from their nomination onwards, and throughout their career, they have to be especially protected from external pressure. This question is particularly relevant for the nomination of heads of courts, and especially higher courts. Even in countries very committed to the separation of powers, political organs like the Parliament or the chef of state nominate the highest judges. These traditional forms of influence of the executive on the judiciary have to be reconsidered. Only really independent and impartial judicial bodies are recognised as fulfilling the requirements of art 6 ECHR.

29. In many countries, this issue has been resolved by the creation of Councils on judicial careers; these institutions are competent for all important decisions concerning administrative judges: nomination, mobility promotion, sanction, etc. But the real issue is how to guarantee that these bodies are not under political influence. The best solution is to ensure a significant proportion of administrative judges amongst the members of these bodies.

30. These measures, however, are not sufficient. As judges and public authorities' officials commonly have the same education and social background, they may have the same vision of conflicts within the society. For this reason, they can appear to the public as representing the same interest than the public bodies. To avoid an impression of collusion with government, they have to show very clearly their impartiality. On the other side, the government's trust in judges is a pre-requisite. It must be sure of their political neutrality and their compliance to the system of separation of power. No institution can by itself give a definitive answer to this sensitive problem. Only a political culture prohibiting political or economic influence on judges can give them the necessary independence.

31. Some means can help to install this political culture: solid links between the different legal professions (judges, lawyers, scholars, etc.); the awareness and the support of the media are also very important. Judges, especially professional associations of judges have to show self-restraint on political issues. Politicians should show public acceptance and confidence in courts political impartiality.

32. If achieving real independence and impartiality of courts remains a complex issue, improvements in this direction are obvious in most European countries giving the courts increased legitimacy and reinforced efficiency in their control of public authorities.

B. DEVELOPING COMPLEMENTARY ROLES OF JUDICIARY AND EXECUTIVE

33. The increased scrutiny power of courts can appear as a fear for executive authorities. But this antagonism can be avoided. There are ways to conciliate administrative action and judicial review. New forms for complementary role have to be found.

1. Judicial review and government accountability

34. As result of the described evolution, judicial review has gained considerably in efficiency. This situation gives rise to new questions and challenges in the relation between public authorities and judicial bodies. Shall public administration be afraid of judicial control?

35. There is a tradition to see an antagonism between the interests of administrative authorities and judicial control. Executive authorities fear that the courts interfere in sensitive administrative decision without sufficient legitimacy and replace the position of elected or designated authorities by their own appraisal. Extending their influence over the limit of strict legal points may tempt them.

36. It is anyway unpleasant for a public authority to be contradicted by a court. The possibility to go to court creates also legal uncertainty until the end of the trial on the rightfulness of the contested decision.

37. No Government welcomes sincerely scrutiny of its activity by an independent judiciary. It can be highly embarrassing for ministers or officials to explain their decisions, to disclose documents and to answer questions from a persistent judge.

38. For all these reasons, tendencies have existed in several countries to limit the principle of the rule of law and to hamper judicial review. This control is for instance included for some categories of acts, the locus standi is restricted or the scope of the control is restricted.

39. But this reluctance appears very often to be unjustified: judicial review is not necessarily adversarial to administrative action. But public authorities need to learn to cope positively with judicial review.

40. Administrative justice can be seen as a phase in the decision-making process of the administration and as an instrument for justifying administrative actions: In the tradition of continental doctrine we find phrases like “judging the administration is still part of the process of administrating” or judicial review of administrative action is the continuing of public administration activity by other means”. Public bodies and courts follow a common objective, which is the best administrative decision.

41. In a modern state, which has rule of law and general interest as criteria, administrative action and judicial review are not adversarial but complementary. The judicial trial can bring supplementary elements of appraisal of the coherence of the decision. Public authorities and courts have the same criteria’s and work in the same direction: they look for the best decision from the point of view of law and of common interest. Judicial review has therefore to be seen as a mean of improvement of the rationality and the quality of administrative decision. If the court recognizes the contested decision as legal, it is a legitimation

for the public authority. If it is quashed, the public authority can be happy that a bad decision is eliminated. What is important for public authorities is to show good faith. It can sometimes be a good strategy for a public authority to have a difficult decision being scrutinized by the courts: it can be a mean not the bear the responsibility of the decision.

2. Means to conciliate administrative action and judicial review

42. In many EU countries there is a tendency of over-regulation of administrative activity related to "legislative and regulatory inflation". The multiplication of international conventions, EU regulations and national laws gives rise to an increasing complex nexus of rules of procedure and require more and more complicated steps to be taken before a decision can be made (impact assessment, principle of precaution, preliminary consultation, publicity of documents, etc.).

43. Judicial control may contribute to weighing down this already cumbersome administrative activity. Adding rigid control to severe rules provokes a disequilibrium that multiplies the sources of irregularity: the occurrence of a significant number of abolitions defers one of the essential aims of judicial control – legal security.

44. Critical reaction with regard to judicial control of the administration can happen, in particular at the political level, when courts quash important projects in which an executive authority has extensively invested. Democratic legitimacy and even economic efficiency or financial necessity is then presented as being compromised by judicial control that is too rigid in terms of formal legality. The impact of the quashing or the setting aside of an administrative decision or regulation can be very harmful for administrative action. For instance, if a tribunal quashes an important tender or the permission for a public project, this may have severe consequences from a financial point of view or by delaying the expected measure.

45. How then can the risk of excessive judicialisation be reduced without limiting control? How can the effects of judicial control of the administration be adjusted? In several countries the thinking is heading towards solutions other than the restriction of appeal possibilities or reduction in the power of judges. This reflection – together with a number of developments – is ongoing. These developments lead paradoxically not to reducing the role of the courts but to expanding it even further.

46. It is possible to introduce correctives or mitigations to the potential conflict between judicial review and administrative action. Several means may limit some unwished consequences of judicial review.

i. Giving the courts more complete powers than annulment

47. In many judicial systems the first step has been the realization that the abolition of an administrative action is often in itself both insufficient and excessive: it is insufficient as it creates a legal void that is then difficult to fill. The judge can help to overcome this void by indicating to the administration the path to follow and the laws to be respected, and then by ordering the actions to be taken.

48. Thus in several countries the powers of declaration and injunction have been developed for the benefit of administrative courts. These powers permit them to go beyond the annulment of illegal decisions and to help re-establishing administrative legality by indicating to the administration how to draw the consequences of abolition.

ii. Consultation procedures

49. In some countries there are procedures by which public authorities (or lower courts) can ask higher courts about the interpretation of a law or a regulation. Such a preliminary ruling procedure can avoid to take illegal decisions or to wait the result of claims in view to arrive more rapidly to legal certainty about the judicial interpretation of legal difficulties. This system exists in France but also within the judicial system of EC. Of course, this kind of procedure may perhaps appear as unfair because the advice given by the court may be seen as a pre-judgment or a privilege in favour of public bodies. This procedure has therefore to be handled with caution by the courts.

iii. Rectification of administrative decisions

50. Administrative and judicial procedures can open a possibility for the public authorities to rectify some defects affecting administrative decisions. For instance, the administration may modify the formal grounds given to take a decision; the missing of a procedural requirement may be taken later on; the insufficiency of a preliminary study may be corrected. The courts can be entitled to check if such correction is legitimate, which may be the case if the administrative decision is correct in substance or if the same decision should be taken again after quashing of the first one. These kind of possibility of "curing" defect decision exist in certain extend in Germany.

iv. Postponing of the effect of a judgment

51. In principle the annulment of an administrative decision by a tribunal should retroact to the day on which the decision has been taken by the public authority. This rule can have very adverse effects on the principal of legal certainty: a situation, which had the appearance of legality, is modified with retroactive effect; this can be very negative for third persons. To avoid such consequences, in several countries (Germany, France, EC courts) the courts have introduced a possibility to postpone the effect of an annulment to the day of the judgment recognizing the illegality of the decision.

v. Delaying of the effects of case law reversal

52. When a case law is reversed, the effects are the same as if a legal norm is retroactively modified. This can be very problematic for the legal security to avoid such a situation several courts have decided that reversal of case law will have effects only for the future except for the claimant whose claim has provoked the renunciation of the precedent.

vi. Absence of consequences for illegalities affecting "bound" administrative decisions.

53. Bound decisions are decisions without any margin of appreciation for the public authority: this decision must necessarily be taken with a given content. Consequently, if they are quashed, the public authority is obliged to take exactly the same decision.

54. In some countries, courts decide that for this reason it doesn't make sense to grant these decisions, even if they are affected by an illegality. In such cases, the recognition of the bound character of the decision and the absence of any discretion is in favour of the keeping of the concerned decision.

55. The risk for an authority for losing a law claim does of course always exist. Bad decisions ought to be set aside. But adverse effects on general interest shall be minimized.

3. Relations between administrative procedure and judicial review

56. In a modern conception, administrative action is a process, which begins with private initiative asking for public intervention, and ends with the follow up of courts decision taken on administrative decision. In so far, judicial control has to be looked at as an element of a complex public decision process.

57. Judicial procedure is the extension of administrative procedure. In the event that the administrative decision is annulled, a new administrative procedure generally follows, with a view to correcting the error pointed out by the court. No complete separation exists therefore between the administrative phase and the judicial phase: the two combined produce "right decisions".

58. Therefore there is a close link between the rules governing administrative procedure and judicial review. The rules of administrative procedure constitute a guarantee of quality and legality in administration decision-making, which gives judicial procedure a subsidiary function, thus reducing the congestion of tribunals. These rules also facilitate the intervention of judicial control, rendering it *a posteriori* more effective. It could therefore be said that there is no advanced or effective judicial control if it is not based on rules of administrative procedure that frame and orient administrative activity in a precise and strict way. Conversely, judicial scrutiny is a guaranty for the respect of procedural rules. The correct implementation of administrative procedure is a central element of judicial review. In so far, administrative procedure and judicial review are deeply complementary.

59. An increasing number of European countries have elaborated laws of administrative procedure. These rules constitute the framework of conduct of the public administration and a base for a balanced judicial control. In spite of their diverse sources of inspiration, the following common rules can be mentioned:

- Rule of complete investigation: Before taking a decision, the administration must be sure to gather all of the pertinent elements of fact and assessment. This rule can be interpreted as the obligation to carry out impact assessment in the various fields before certain decisions are taken.

- Rule of fair hearing and transparency: Draft decisions that could infringe on the interests of interested parties must be brought to their attention so that they can make their observations known. The administration must disseminate appropriate information on the decisions it will take or has taken and ensure public access to administrative documents

- Formal reasons for decisions: the administration must explain the reasons for taking a particular decision.

- Principles of consultation and co-operation: To enhance the understanding and acceptance of its actions, the administration must, insofar as possible, announce – and obtain public opinion on – important projects. If any observations or reservations concerning such a project arise, the administration must take these into account in an appropriate way.

- Rule of self-control: The administrative authority must carry out a thorough examination of the complaints it has received and correct any behavior or decision that proves to be irregular.

60. European regulations or directives have developed many of these principles. For instance, the directive on the assessment of the effects of certain public and private projects on the environment, the "Strategic Environmental Assessment" (SEA) directive, two directives on public access to environmental information and public participation. These directives integrate provisions on access to justice. They concentrate in the field of environment but have direct or indirect effects on many aspects of administrative procedures and judicial review.

4. Prospects for the future of judicial review in Europe

61. With the development of modern administrative law, the complexity of the regulation and the procedural requirements increase constantly. Many fields of administrative decisions have gained dramatically in complexity. Decisions dealing with the environmental questions, planning decisions, public procurements, taxation law have become so complex that their application needs special knowledge. On the other hand, the efficiency of judicial control of administration has made tremendous progress: the scope of control, the intensity of the control, the control tools in the hands of the judges in the form of general principles. The improvement in the field of interim relief, the powers recognised to the judges all these elements make the judicial review more and more effective.

62. The result of these developments is that the administrative decision has become always more fragile. It is nearly impossible to go through complex decisions without missing one or the other legal constraint. On the substance, the intensity of judicial control opens many ways for contesting the decision taken by the public authority. The information of the public has increased and the number of claims is continues by growing.

63. In several countries, at least in certain fields, the number of claims has strongly increased so that the courts have difficulties to settle them in a reasonable time limit. Sometimes the claims do not correspond to a real legal discussion but are an expression of political protest. This concerns in particular, the litigations concerning foreigners (asylum, etc.).

64. Another point of crisis is the question of increasing inefficiency of internal administrative redress procedures: it is traditionally considered that a good way to avoid law suits is to have a formalised complaint procedure to an administrative body; But there is a general ascertaining that this mode of resolution of contestation has lost a good part of its efficiency with the reduction of personnel within the public administration. These procedures of complaint within the public authorities are less and less treated with the needed caution. The result is that they lose their deterrent effect on judicial complaints. In some countries the stage of internal appeal has obligatory precondition before court access has been abandoned.

65. All these elements of evolution can awake the impression that the system of administrative control is about to lose its balance: the duty of public authorities has become excessively cumbersome; the stability of legal relations and the certainty of legal situations is put in question; the role of courts has become unclear.

66. These symptoms show the necessity of strengthening the regulatory framework. One of the possible directions for correcting the misbalance of the regulatory system is to improve the complementary role of administration and judiciary. Both activities have to be better integrated in a comprehensive system of public decision finding. By this integration, role and methods of judicial review have to change in view to participate more actively to the public decision making process.