Diana-Urania Galetta

Procedural Autonomy of EU Member States: Paradise Lost?

A Study on the "Functionalized Procedural Competence" of EU Member States

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Á Jacques Philippe Emmanuel,
mon mari,
avec tout mon amour

… … …
Amants, heureux amants, voulez-vous voyager ?
Que ce soit aux rives prochaines;
Soyez-vous l'un à l'autre un monde toujours beau,
Toujours divers, toujours nouveau;
Tenez-vous lieu de tout, comptez pour rien le reste.
J'ai quelquefois aimé; je n'aurais pas alors
Contre le Louvre et ses trésors,
Contre le firmament et sa voûte céleste,
Changé le bois, changé les lieux
… … …
(« Les deux pigeons », Jean de la Fontaine, Fables, Livre IX)

Foreword

This volume deals with a fundamental dichotomy which governs the existing system of European Union Law. On the one hand, it is a precondition of a functioning Union that its substantive law should be guaranteed in a uniform manner throughout the Union and it should prevail over the law of the Member States. On the other hand, European Union law is not only executed and interpreted by EU institutions. On the contrary, it is in principle left to national authorities and jurisdictions to handle it in accordance with the procedural rules of the respective Member States.

The latter phenomenon is referred to as the principle of procedural autonomy of the Member States of the European Union. Naturally, this principle may come into conflict with the demands of uniformity of European Union law not only in theory. The numerous case law of the European Court of Justice demonstrates that it has been up to the European Courts to reconcile the two conflicting principles in practice. This has been done by the judges more or less in a pragmatic way without any deep and thorough theoretic reflection.

Therefore, the topic of procedural autonomy of the Member States still presents a blank spot on the map of legal theory and dogmatic argumentation.

This excellent book devoted to the title of John Miltons' famous book "Paradise Lost" is shedding clear light upon this unclear matter. Diana-Urania Galetta, distinguished law professor of the University of Milan, well-known in particular for her fundamental books and articles in the field of administrative law and comparative public law (among others Diana-Urania Galetta, Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo, Giuffrè, Milano, 1998, pp. XVII–273; idem, Violazione di norme sul procedimento amministrativo e annullabilità del provvedimento, Giuffrè, Milano, 2003, pp. XVIII–301) now offers a thorough and convincing legal study of a major issue of European Union law in its relation with the national legal orders of the Member States. Prof. Galetta comes to an European Union minded solution regarding the national judges also as a sort of "agents" in a functional sense of the European Union's interest. I find her

argumentation which cannot be summarized here in detail well-founded and convincing. The book is full of inspiring ideas.

In the end, national procedural autonomy might be nowadays an "unsafe haven" as the author remarks in her last chapter. These two words cannot be used, however, to adequately characterise her study as a whole. On the contrary, the book provides us with a deep analysis of the term "procedural autonomy" and the legal problems connected with it. Thus, to rephrase the comparison, which the author draws, it is a safe harbour of dogmatic reasoning and a brilliant masterpiece of European Union Law.

University of Freiburg Professor Dr. Jürge Schwarze

Preface to the English Edition

This volume is the translation of the book I published with Giappichelli Editore, in Italy, in 2009. In terms of content it differs from the original version only in as far as it was necessary to make reference to important ECJ judgements issued in the mean time (as for the Olimpiclub case I refer to in para. 3.4.) and I had to take into account the entry into force on 1st December 2009 of the Lisbon Treaty. In order to do this, each time I have added the reference to the articles of the consolidated version of the Treaty on European Union (TEU) and of the Treaty on the Functioning of the European Union (TFEU) and to the new wording when changes in the text have occurred.

In as far as terminology is concerned, I have used the terminology adopted in the Lisbon Treaty, even when it differed from the one used by the English speaking doctrine so far (it is the case, for example, for the word "supremacy", to which I have preferred the word "primacy" used in "Declaration n°17 concerning primacy" annexed to the Lisbon Treaty. Or for the expression "sincere cooperation" which is now used in Art. 4, third paragraph, TEU instead of that of "loyal cooperation").

The idea of having my book translated into English was, first of all, a natural consequence of the considerable positive feedback I had received from Italian and foreign colleagues (and on this occasion I would like to thank them all!), most of them stressing the need to let the book circulate in a much wider circle than that of the scholars who are able to read Italian.

The second reason is related to the growing centrality of the topic of "procedural autonomy" and to the existing literature on this topic. As a matter of fact I wished to open a debate with English language scholars and especially with the UK doctrine which seems somewhat auto-referential, as only contributions in the English language are quoted by authors of papers dealing with the subject of procedural autonomy – as happens with so many topics of EU law.

Even if the translation work has cost a considerable amount of time and energy, we are still dealing here with a translation from Italian. So if, on the one hand, I have tried to always use the English language EU terminology, but I'm not sure whether I have always found the right one, on the other hand, the style is not always

the one English native speaker academics would use. The sentences are sometimes a bit long and the style itself is somewhat different. Anyway I took the decision (and I'm therefore the only one responsible for that) that the "poor style" had to be corrected only if it hindered comprehension of my reasoning.

That's why I would like to thank, first of all, Anke Seyfried, Associate Editor at Springer, who shared this point of view and decided to publish the book without asking for too much (superfluous) editing work. I thank her also for the enthusiastic reaction to my publishing proposal and for the continuous support.

Many thanks also to Ana Aliverti (for the help in the first draft translation) and to my colleague at the "Università degli Studi di Milano" Mary Rubick, who helped me in revising and refining the text.

Università degli Studi di Milano Professor Diana-Urania Galetta

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I also want to thank Prof. Guido Greco and Prof. Vittorio Italia.

Finally, I want to express my gratitude to Prof. Jürgen Schwarze to whom I am indebted in many ways, not least for his foreword to this volume.

A honourable mention goes, though, once again, to my daughter Daphne Yael who, after asking me the title of my new book, at her seven and a half years old had exclaimed: Oh, that sounds interesting!

Contents

Chapter 1
Introductory Notes, Terminological Issues and Demarcation of the Scope of the Study

1.1 The Distinction Between Procedural and Substantive Law in EU Law

A large body of literature has focused on the question of the procedural autonomy of the Member States, especially from the first half of the 1990s onwards. That was in fact a season of important decisions by the European Court of Justice which – as a consequence of their impact, in practice very incisive – brought to the forefront the question of the possible limitations that this jurisprudence may have, or could have, on national procedural legal orders.[1]

Moreover, in the analysis of the EU jurisprudence on this matter it is necessary to take into account that, in order to distinguish between 'procedural law' – which concerns the object of our analysis – from 'substantive law,' it is not possible to use the categories of national law, that could in any case differ from one country to another. Instead, it is necessary to appeal to the relevant EU concepts.[2]

To this end, it is worth specifying at this point that the definition of procedural law indirectly adopted by *Mertens de Wilmars*[3] seems better suited to delineate the European Union distinction between procedural and substantive law.[4]

In fact, in a famous essay in 1981, he makes a distinction between EU norms of substantive law (the so-called material EU law) and national systems of norms aimed to 'sanction' the respect of the EU substantive law. In this context, the term

[1] I refer here in particular to the well-known judgements of the ECJ of 19 June 1990, Case 213/89, *Factortame* and 14 December 1995, Case 312/93, *Peterbroeck*.

[2] As has been recently noted by an influential author, the '*national approach towards the community law, even in the terminological realm*' should be abandoned and replaced by a more accurate '*community approach to law*.' See G. Tesauro, *Diritto comunitario*, p. XIV. Author's translation.

[3] Influential President of the first Chamber of the ECJ at the time of the decision on the *Rewe* case.

[4] In this vein, see also the reflections by W. van Gerven, *Of Rights, Remedies and Procedures*, p. 524, note n. 114, on the use by the ECJ of the expression '*procedural rules*' understood in a very broad and indeterminate sense.

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'sanction' should be obviously understood in a broad sense: since – as he himself specifies – it '*... designates the array of instruments of legal coercion that, in every Member State, guarantees the respect for the law in the case of conflicts arising in the course of its application.*'[5]

Understood in this perspective, it is clear that the EU notion of procedural law is much broader than the one we are used to considering as such. This is because it includes provisions that, in our mental scheme 'of national law,' we would identify as substantive law: but instead, from a EU perspective, they form part of the broad concept of 'procedural law' to the extent that they refer to *suitable legal instruments to sanction the observance of the EU law*.

As we will see, the problem of procedural autonomy and its limits emerges in this much broader context and – as has clearly appeared at least from the jurisprudence in *Kühne & Heitz*[6] – it is relevant also in terms of use of the institution which in the Italian administrative law is defined as '*ex officio* annulment.'[7] The *ex officio* annulment assigns the power to the national public administrations to annul administrative acts that are incompatible with norms in force.

This institution and its 'EU implications' will be specifically addressed in the course of Chapter 3. Additionally, other themes will be considered there, for example the authority of *res judicata* or State liability which from our national point of view are both matters of 'substantive law,' but which in the EU jurisprudence turn out to be instead elements pertaining to the procedural autonomy of the Member States and its limits.

1.2 The Concept of 'Procedural Autonomy': Cross-Reference

The scholarly works on the object of the present enquiry are almost all concentrated on the analytical examination of the EU jurisprudence on this matter. They are aimed at identifying the possible restrictive outcomes of this jurisprudence regarding the pre-supposed procedural autonomy of the Member States. This concept, however, is taken for granted without making an effort to examine and understand its nature and origins – even less its rationale.

[5]The '*sanction*' as '*... l'ensemble des moyens de contrainte légale qui, dans chaque Etat membre assure le respect du droit en cas de conflit à propos de son application*'. See J. Mertens de Wilmars, *L'efficacité des différentes techniques nationales de protection juridique contre les violations du droit communautaire par les autorités nationales et les particuliers*, p. 379 ff. (390). Author's translation.

[6]Judgement of the ECJ of 13 January 2004, Case 453/00, *Kühne & Heitz*.

[7]The Italian administrative law doctrine categorizes the "*ex officio* annulment" among the so-called "administrative acts of second degree": that is, among those acts through which the administration intervenes over its preceding acts modifying them. In particular, it is directed to eliminate, from the outset, the effects of an illegitimate administrative act.

The first objective of the present enquiry is therefore to provide (in Chapter 2) a definition of procedural autonomy that is also able to account for its inherent limits. These limits derive from, in the first place, the necessary coexistence of procedural autonomy with requirements and principles that are related, more generally, to the regulation of the relationships between internal law and EU law. This is because – as will be thoroughly examined – analyzing the concept of procedural autonomy outside the general context in which it is located is equal to distorting its role and importance.

To this end, before speaking of 'procedural autonomy' it is necessary to define the concept of 'procedural competence' of the Member States and delineate its scope of action. This is so since – as it will be argued – the procedural autonomy subsists only and to the extent that the procedural competence of the Member States exists and disappears the moment when – as in the case, for example, of the directives on public procurement procedures that we will briefly examine in Chapter 4 – the procedural competence is taken over by the Union. In the latter case, if the instrument used is the directive, the idea of procedural autonomy is substituted by that of the "choice" of the national authorities regarding "form and methods" given that, in terms of Art. 288 third paragraph, TFEU (*ex* Art. 249, 3, TEC) '*A directive shall be binding*, *as to the result to be achieved*, *upon each Member State to which it is addressed*, *but shall leave to the national authorities the choice of form and methods*.' And if, as we will see,[8] there is a substantial similarity between the idea of procedural autonomy and the mechanism underlying the use of the instrument of the directive, these are in actuality two entirely different scenarios.

1.3 The Analysis of the Jurisprudence: Delimitation to Preliminary Rulings and the Fundamental Decisions, in the Light of our "Well-Thought Path"

The third chapter will be devoted to the analysis of the EU jurisprudence considered more relevant to this topic. Moreover, the selection will be made only within the jurisprudence of the European Court of Justice (ECJ) enacted in the context of the preliminary ruling of Art. 267, TFEU (*ex* Art. 234, TEC), since it is in this specific area that the contours of the particular relationship between national judge and EU judge – which in doctrine is defined in terms of 'co-jurisdiction' – [9] are outlined. As we will see especially in Chapter 4, this is an essential aspect in the line of reasoning that I want to develop.

[8] In Chap. 2, para. 2.5.

[9] See E. Picozza, *Diritto amministrativo e diritto comunitario*, p. 308. This phenomenon corresponds to the '*intertwined nature of the EU's judicial function*' referred to by J. Ziller, *Separation of Powers in the European Union's Intertwined System of Government*, p. 31.