Chapter 31
Mapping, Explaining and Constructing the Effectiveness of the Pan-European Principles of Good Administration: Overall Assessment

Ulrich Stelkens / Agnė Andrijauskaitė / Yseult Marique

31.01 This book investigates the effectiveness of the pan-European general principles of good administration in two respects: from a domestic perspective and from a transversal perspective (cf. MN. 0.28 et seq.; MN. 2.02 et seq.). In a first step, this book looked at the effectiveness of the pan-European general principles of good administration within the legal orders of the 28 selected CoE Member States, as discussed in the foregoing chapters. Equipped with this national analysis, it is now time to turn to the second perspective, i.e. the question of the overall effectiveness of the pan-European general principles of good administration in harmonizing the national administrative law of the Members States of the CoE with regard to the 'limiting function' of administrative law. This function ensures respect for the rule of law and individual rights by the administration, as well as democratic legitimation of the administration. It aims to create and maintain a 'good administration' as a precondition for effective implementation of democratic policy choices and effective public services with the purpose of serving citizens (cf. MN. 0.25 et seq.).

31.02 We assumed that different general conclusions were theoretically possible when it comes to the question of the overall effectiveness of the pan-European general principles of good administration with regard to this 'limiting function' of administrative law (cf. MN. 2.02). The harmonising effect of the pan-European general principles of good administration in this regard could be negligible, great or anything in between. In the latter case the domestic legal orders of the different CoE Member States would be open to being guided by and to respecting the pan-European general principles of good administration to different degrees. This last scenario, akin to a 'multi-speed Europe', seemed from the start to be the most realistic one. It would reflect the *dynamic character* of the CoE as an organisation aiming (see Article 1 (a) SCoE) to achieve "*a greater unity between its members*" (cf. MN. 0.32) and explain (some of) the differences among these legal orders; it would also reflect the respective national administrative cultures. This assumption has been confirmed.

31.03 What we did *not* expect when designing the project was to what extent assessing the effectiveness of the pan-European general principles of good administration within the different legal orders would shed light on the differences and specificities of national administrative law, and the national conceptions of the purpose of administrative law, of the relationship between

law and administration and of the role of the judge in shaping administrative law. As it turned out, the pan-European general principles of good administration seem to work as a *tertium comparationis* of an operable level of abstraction in the comparison between the different national legal orders. The paths of reception we analysed (cf. MN. 2.40 et seq.) seem to work like a contrast medium highlighting core features of national administrative law and national legal thinking about the purposes and functions of administrative law[1] and, thus, the administrative legal mindsets underlying the administrative law of the states we looked at (cf. MN. 31.32 et seq.). Therefore, looking at the impact of the pan-European general principles of good administration in national law is an interesting compromise between a micro-comparison of (individual) features of administrative law (i.e. the right to be heard, proportionality, local self-government, state liability, etc.)[2] and a macro-comparison between whole legal orders[3] in order to classify them into groups or legal families.[4] To a certain extent it also seems to be a tool for combining comparative administrative law with comparative administration.

31.04 This finding may be due to the fact that this research on the effectiveness of the pan-European general principles of good administration on the national level turned out to be research on the process of 'legal transplantation' and the success of 'legal transplants' in administrative law. These 'legal transplantation processes' begin with the breeding of 'transplantable organs' (the

---

1 A similar experience was the result of the research endeavour of the books edited by J.-P. Schneider (J.-P. Schneider [ed.], *Verwaltungsrecht in Europa – Band 1: England und Wales, Spanien, Niederlande* [2007]; J.-P. Schneider [ed.], *Verwaltungsrecht in Europa – Band 2: Frankreich, Polen und Tschechien* [2009]. Here a similar result was achieved through a uniform structure of country reports conceived as 'introductions' to English, Spanish, Dutch, French, Polish and Czech law (and written by researchers from these countries). This structure followed core questions of administrative law identified from a German perspective (so that in this case German law served as a contrast medium).

2 There are in fact numerous comparative works dealing with individual topics of administrative law. Some of them served systematically as a basis for editing and cross-checking the reports collected in this book, such as J.-B. Auby (ed.), *Codification of Administrative Procedure* (2014); J.-B. Auby/T. Perroud (eds.), *Droit comparé de la procédure administrative* (2016); C. Dragos/P. Kovač/A. T. Marseille (eds.), *The Laws of Transparency in Action – A European Perspective* (2019); D. C. Dragos/B. Neamtu (eds.), *Alternative Dispute Resolution in European Administrative Law* (2014); K. Oliphant (ed.), *The Liability of Public Authorities in Comparative Perspective* (2016); S. Ranchordás/B. de Waard (eds.), *The Judge and the Proportionate Use of Discretion* (2017).

3 Macro-comparisons of the administrative legal orders of different European states can be found in A. von Bogdandy/P. M. Huber/S. Cassese (eds.), *The Max Planck Handbooks in European Public Law – Vol. 1: The Administrative State* (2017) and in three volumes of the German version of this project: A. von Bogdandy/S. Cassese/P. M. Huber (eds.), *Handbuch Ius Publicum Europaeum – Band III: Verwaltungsrecht in Europa: Grundlagen* (2010); A. von Bogdandy/S. Cassese/P. M. Huber (eds.), *Handbuch Ius Publicum Europaeum – Band IV: Verwaltungsrecht in Europa: Wissenschaft* (2011); A. von Bogdandy/S. Cassese/P. M. Huber (eds.), *Handbuch Ius Publicum Europaeum – Band V: Verwaltungsrecht in Europa: Grundzüge* (2014). See, furthermore, M. Fromont, *Droit administratif des États européens* (2006); K. Abderemane/A. Claeys/E. Langelier/Y. Marique/T. Perroud, *Manuel de droit comparé des administrations européennes* (2019).

4 See on this difference U. Kischel, *Comparative Law* (2019), Chapter 1 MN. 17 et seq.

pan-European general principles of good administration) on the CoE level, mostly by using material found in the national legal orders of several CoE Member States (cf. MN. 31.21 et seq.). They continue with the decisions of relevant actors on the national level (politicians, judges, senior civil servants, etc.) as to whether transplantation is needed, and which pan-European general principles of good administration have to be transplanted. This choice may be autonomous or guided by advice from institutions or experts coming from partner states and/or the CoE and/or the EU and/or the OSCE and/or NGOs, etc. The transplantation processes go on with the act of transplantation itself by the national government, the national legislator, the national courts, the national ombudspersons and similar institutions. Finally, the most important step is reception and adaption, which means that the transplanted principles have to become embedded in the daily practice and routine of the administration, government and legal practice.[5] The metaphorical comparison of the research on the effectiveness of the pan-European general principles of good administration to a transplantation process may help to understand[6] why our research provided information not only about the characteristics of the transplanted 'organs' (the pan-European general principles of good administration) but also about the 'bodies' (the national legal orders) which have received them, more or less successfully.

31.05 This chapter is divided into four sections in order to articulate an overall transversal assessment of the effectiveness of the pan-European principles of good administration. The first section (cf. MN. 31.08 et seq.) analyses the interaction between national administrative law and the pan-European general principles of good administration. It shows that this interaction is a joint development process which is easily explained by the fact that the pan-European general principles of good administration have been gradually developed over decades and that the evolution of national administrative law has not come to a standstill, as national administrative law has had to constantly reinvent itself. In this context we will also be able to map the differences and particularities of the national administrative law which came forth in our research.

---

5 See on these different stages of the 'legal transplantation process' C. Saunders, "Transplants in Public Law" in M. Elliott/J. Varuhas/S. Wilson Stark (eds.), *The Unity of Public Law* (2018), pp. 257 – 277 (pp. 263 et seq.). See furthermore fn. 181 and fn. 182.

6 The use of metaphors in (comparative) legal reasoning is, of course, problematic, as has been prominently discussed with regard to the 'legal transplant' metaphor by O. Kahn-Freund, "On Uses and Misuses of Comparative Law", (1974) 37 *The Modern Law Review*, pp. 1 – 27 (pp. 5 et seq.). In fact, it is a misuse of metaphors if they are used as a tool to *create* legal rules by way of a metaphorical analogy. Conversely, carefully selected metaphors may be helpful to *explain* existing rules and their interactions, above all if these interactions become quite complex. Then, the use of metaphors may be either a tool of legal didactics (which, of course, may not appeal to everyone) or a tool for constructing an analytical framework for research (for the latter L. Foljanty, "Rechtstransfer als kulturelle Übersetzung", [2015] *KritV*, pp. 89 – 107 [pp. 92 et seq.]).

31.06 This mapping goes beyond a presentation of interesting by-products of our research. It provides an explanatory framework for understanding why the pan-European general principles of good administration have different effects in different legal orders, work in different ways – and thus have different modes of operation within the national legal orders. The second section explains these different modes of operation (cf. MN. 31.76 et seq.). Analysing them makes it clear that harmonizing the national administrative law of the CoE Member States with regard to the 'limiting function' of administrative law through the pan-European general principles of good administration is a *process* which is at different stages of development in the different Member States. Therefore, this section will claim that the pan-European principles cannot be perceived in a binary manner: as either effective or not effective within a national legal order. They can be effective in the different national legal orders to varying degrees.

31.07 The analysis of the different modes of operation of the pan-European general principles of good administration allows us to construct their normative functions *within the framework of the CoE,* as the third section will explain (cf. MN. 31.98 et seq.). The pan-European general principles of good administration are to be understood as a concretization of the 'administrative law components' of the 'founding values' of Article 3 SCoE. Therefore, the pan-European general principles understood and viewed as a 'coherent whole' (cf. MN. 1.88 et seq.) have a function similar to the endeavours of the CoE organs and institutions of concretizing the notions of the 'rule of law' and 'democracy' within the meaning of Article 3 SCoE (cf. MN. 1.13 et seq.). The pan-European general principles of good administration are therefore part of regional international law and describe the administrative law obligations a Member State enters into when joining the CoE. In consequence, they can be used as evaluation standards, namely to assess if a certain 'configuration' of national administrative law is no longer a mere '*mise en œuvre*' of these principles but a violation of the limits of the wide margin of appreciation that Member States enjoy within the remit of the CoE. We will explain these graduated legal effects of the pan-European general principles of good administration with a concept which we call the 'building blocks theory'. Thus, we come to the result that these principles are overall effective to a degree which makes the lack of attention given to them by legal scholarship (cf. MN. 0.28) regrettable. This leads us to conclude by naming further desiderata for research on the pan-European general principles of good administration (cf. MN. 31.132 et seq.).

I. The Pan-European General Principles of Good Administration within the National Legal Orders: Mapping the Differences and Peculiarities in National Administrative Law

31.08 In the Introduction we stressed that 'CoE law' – including the pan-European general principles of good administration – may only have a harmonising effect on the law of the CoE Member States to the extent to which each of them is willing to adapt its national legal order to 'CoE requirements' by ratifying CoE conventions, by following CM recommendations, by accepting monitoring by CoE commissions and institutions and following their opinions, and – last but not least – by accepting that the national legislator and the national government, as well as the national courts, may be guided by the case law of the ECtHR. Thus, it is up to each and every CoE Member State to make 'CoE law' effective by being open to adapting its national law to it (cf. MN. 0.34). This leads to the 'bottom up' approach of our research (cf. MN 2.01 et seq.). These different types of 'openness' of the national legal orders to 'receiving' and 'upholding' the pan-European general principles of good administration in an effective way lead to us being able to (roughly) classify the states we looked at into two groups – a classification system which should not be equated with classification into groups like 'legal families' (cf. MN. 31.18). First, we will explain the reasons for these classifications and the reasons for grouping certain states together. Then we will analyse the reception processes in these two groups (pausing a bit longer on the special cases of *Portugal*, *Spain* and *Turkey*) before we turn to the 'backsliding' issue only briefly mentioned so far (MN. 2.23 et seq.) and the question of whether and how the pan-European general principles of good administration, once implemented, can prove to offer a certain 'brake efficiency' against backsliding.

1. Two Types of 'Openness' of National Legal Orders to 'Receiving' and 'Upholding' the Pan-European General Principles of Good Administration

31.09 The two groups of states we looked at correspond to two types of 'openness' of national legal orders to 'receiving' and 'upholding' the pan-European general principles of good administration. They can roughly be described as follows (keeping in mind that we did not look at the smallest CoE Member States, cf. MN. 31.15). The first group consists (mainly) of the founding states of the CoE, a great part of those states which acceded to the CoE before 1970, and *Finland*. The second group consists of *Portugal*, *Spain*, *Turkey* and all the former socialist states which acceded to the CoE from the 1990s onwards.

31.10 To be more concrete, the first group consists of the founding states of the CoE and the 'first

generation of accession states' (cf. MN. 2.06) with the exception of the particular cases of *Turkey* (cf. MN. 31.12) and (probably) *Greece* (cf. MN. 31.13) but including *Finland* (cf. MN. 31.12). In the end, this group consists of those CoE Member States which already had a fully-fledged written or unwritten 'administrative law regime' considered to correspond to the standards of Article 3 SCoE in the 1970s and 1980s. These years were decisive because the CoE became actively engaged in administrative matters at that time (cf. MN. 1.63 et seq.; MN. 31.19 et seq.), the ECtHR "started to become a real player in European integration"[7], and its case law also became increasingly relevant to the day-to-day practice of national administration and national administrative courts. With regard to the latter aspect it is worth recalling that the ECtHR laid the foundations of its case law extending the guarantees of Article 6 (1) ECHR to some 'classical' administrative matters through an autonomous and tendentially broad interpretation of the term 'civil rights and obligations' in the judgement of 16 July 1971 in the *Ringeisen v Austria* case[8] and of the term 'criminal charge' in the judgement of 8 June 1976 in the *Engels and Others v Netherlands* case[9] (cf. MN. 1.45 et seq.).

31.11 The second group of states consists of those Member States of the CoE which were challenged by a transition process from authoritarian or socialist regimes into democracies governed by the rule of law after and/or in the context of their admission to the CoE, either from the 1970s (*Portugal*, *Spain* and probably [cf. MN. 31.13] *Greece*) or from the 1990s onwards (*Turkey* and the Baltic, Central European, East European, and South-Eastern European Member States). The states in this group have met these challenges with variable levels of success. They have either transformed themselves successfully from authoritarian or socialist regimes into democracies governed by the rule of law, they have begun doing so but still have some way to go, have never really got on the way, tried to use forbidden shortcuts, or were on the way but have lost track or are in danger of losing it. In these cases the reception of the pan-European general principles of good administration within their legal orders can clearly be described as a process of legal transplantation with different degrees of success, promising approaches, failures or backlashes. What makes these processes comparable is that in all cases a similar set of legal institutions serving the same function (the 'limiting function' of administrative law) was (or was sought to be) transplanted. This allows for some conclusions on the preconditions for

---

7 E. Lambert Abdelgawad, "European Court of Human Rights" in S. Schmahl/M. Breuer (eds.), *The Council of Europe – Its Laws and Policies* (2017), pp. 227 – 268 (MN. 9.02).

8 *Ringeisen v Austria* (2614/65) 16 July 1971 ECtHR.

9 *Engels and Others v Netherlands* (5100/71; 5101/71; 5102/71; 5354/72; 5370/72) 8 June 1976 ECtHR [Plenary].

successful 'institution-building' in administrative law. Nevertheless, for the sake of clarity, we will subdivide the second group into three sub-groups: *Portugal* and *Spain* (MN. 31.43 et seq.), *Turkey* (MN. 31.47 et seq.) and, finally, the 'younger' Baltic, Central European, East European, and South-Eastern European CoE Member States (MN. 31.53 et seq.). The latter will be called 'post-socialist Member States' in the following lines for the sake of simplification. We are aware that the 'starting conditions' and the further developments of the transition processes in these post-socialist states are not all the same (cf. MN. 31.58 et seq.). However, there are common features between the post-socialist Member States linked to the fact that they have strived to transplant the pan-European general principles of good administration into a 'law in the books' and a 'law in action' marked by 'socialist legality' (cf. MN. 31.54). This justifies the discussion and comparison of the transplantation processes in these states in a common section.

31.12 *Turkey* and *Finland* are cases in which their classification into the aforementioned groups does not correspond to their accession dates. There are reasons for this. The inclusion of *Turkey* in the second group is justified by the fact that the different military coups in 1960, 1971 and 1980 and the constitutional changes in their aftermath seemed to have allowed a demilitarization and democratisation process to occur in *Turkey* only in the 1990s (cf. MN. 10.02 et seq.) which, of course, has delayed the beginning of the implementation of 'Western administrative law standards' in *Turkey* (cf. MN. 31.47 et seq.). The inclusion of *Finland* in the first group is justified by the fact that (1) its late accession to the CoE was mainly due to its precarious neighbourhood with the Soviet Union precluding any 'expression' of its orientation towards Western Europe (cf. MN. 16.01 et seq.), and (2) that it could nevertheless cooperate within the Nordic Council, *inter alia*, with *Denmark*, *Iceland*, *Norway* and *Sweden*. Thus, it could uphold its 'Nordic administrative law tradition'[10] and was never considered to be a 'transition country'.[11] In fact, *Finland* was actively involved with observer status in in standard-setting activities in administrative matters of the CDCJ in the 1970s (cf. MN. 31.19). All this may explain why the assessment of our Finnish colleague on the impact of the pan-European general principles of good administration in *Finland* (cf. MN. 16.53 et seq.) is quite similar to those of our Norwegian and Swedish colleagues (cf. MN. 8.49 et seq.; MN. 9.50 et seq.).

31.13 Moreover, we have to recall that we were not able to get reports from *Denmark*, *Ireland* and *Greece* (cf. MN. 2.06). Whereas it seems beyond doubt that *Denmark* and *Ireland* would have

---

[10] Kischel (fn. 4), Chapter 7 MN. 100 et seq.

[11] See F. Benoît-Rohmer/H. Klebes, *Council of Europe Law. Towards a pan-European legal area* (2005), p. 116.

been classified in the first group, the situation is less clear with regard to *Greece*. *Greece* joined the CoE by ratification of the SCoE on 9 August 1949 but – after the military coup of the colonels on 21 April 1967 – it renounced its Membership of the CoE on 13 December 1969. After the end of the military regime *Greece* had to re-join the CoE and was re-admitted on 28 November 1974[12] after free elections were held on 17 November 1974.[13] Thus, the development of administrative law in *Greece* shares similarities with that in *Portugal* and *Spain* (cf. MN. 31.43 et seq.). This corresponds with the fact that the Greek constitution of 1975 provided for a comprehensive administrative litigation system for the first time.[14]

31.14 Concerning *Russia*, the *Ukraine* and *Azerbaijan*, we have explained the reasons for not including these countries in our research (cf. MN. 2.15 et seq.; MN. 2.31). They would be part of the second group as well. Thus, the lessons learned from the reports on the states of the second group (cf. MN. 31.53 et seq.) may also be of relevance for these countries. However, *Russia* has to be seen in a specific context and should not be put in the same basket with all other post-socialist states.[15] Particular care must be taken when transferring the results of our research to this specific context.

31.15 Finally, we did not include in our research the smallest CoE Member States (cf. MN. 2.09 et seq.), namely, by order of their accession, *Luxembourg* (founding state), *Iceland* (accession on 7 March 1950), *Malta* (accession on 29 April 1965), *Cyprus* (accession on 24 May 1961), *Liechtenstein* (accession on 23 November 1978), *San Marino* (accession on 16 November 1988), *Andorra* (accession on 10 November 1994), *Monaco* (accession on 5 October 2004), and *Montenegro* (accession on 11 May 2007). Hence, we are not able to say if the particularities of very small jurisdictions (cf. MN. 2.11 et seq.) would justify classifying (all or some of) them in a group of their own or whether all these states can be assigned partly to the first group and partly to the second group.

---

12 CM Resolution 74 (34) Invitation to Greece to rejoin the Council of Europe of 28 November 1974.

13 I. Ö. Kaboğlu/S.-I. G. Koutnatzis, "The Reception Process in Greece and Turkey" in H. Keller/A. Stone Sweet (eds.), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (2008), pp. 451 – 529 (pp. 452 et seq.); E. Klein, "Membership and Observer Status" in Schmahl/Breuer (fn. 7), pp. 40 – 92 (MN. 3.59).

14 M. Ioannidis/S.-I. G. Koutnatzis, "Evolution and *Gestalt* of the Greek State" in A. von Bogdandy/P. M. Huber/S. Cassese (eds.), *The Max Planck Handbooks in European Public Law – Vol. 1: The Administrative State* (2017), pp. 237 – 289 (pp. 260 et seq.).

15 Kischel (fn. 4), Chapter 7 MN. 62 et seq.

2. Founding States, Germany, Austria, Switzerland and Finland: Mutual Learning from One Another despite Different Administrative Legal Mindsets

31.16 Our research revealed fundamental differences between the national conceptions of the purpose of administrative law, of the relationship between law and administration and of the role of the judge in shaping administrative law in the CoE founding states, *Germany*, *Austria* and *Switzerland* as well as in *Finland* – which we will call the 'old Member States' in the following for the sake of simplification. A preliminary indication of these differences is that nearly every rapporteur from these states found it (rightly) necessary to give a more or less extensive 'introduction' to the specific features and basic concepts of 'their' administrative law and their developments, often going back to the 19th century and extending this to the 1970s-1990s.[16] Thus, the rapporteurs often stressed that the 'core features' of 'their' administrative law could not have been shaped by the pan-European general principles of good administration simply because of a mismatch in time. State organization (centralisation or decentralisation, including local self-government), civil service law, administrative procedure rules, administrative justice, state liability, freedom of information or transparency legislation (or the decision to uphold a principle of administrative secrecy), etc. have been conceived long before the CoE and the ECtHR became active in administrative matters in the 1970s.

31.17 In fact, the reports on the reception of the pan-European general principles of good administration in these states made it clear that the foundations of the administrative law systems and what is to be considered as the specific '*Gestalt*'[17] of the respective administrations of these states were laid down before 1945, mostly at a point between 1880 and the 1920s, a period sometimes called the '*Belle époque of administrative law*'.[18] Of course, after 1945 these systems developed further, above all by creating new administrative tasks and missions and new administrative tools, and – with regard to the 'limiting function' of administrative law – by adding and strengthening democratic and human right elements, administrative procedure rules, new elements of administrative justice, freedom of information or transparency legislation, etc.

---

16 *Austria:* MN. 12.12 et seq.; *Belgium:* MN. 4.05 et seq.; *Finland:* MN. 16.02 et seq.; *France:* MN. 5.08 et seq.; *Germany:* MN. 11.22 et seq.; *Netherlands:* MN. 7.09; *Norway:* MN. 8.06 et seq.; *Sweden:* MN. 9.01 et seq.; *Switzerland:* MN. 13.01 et seq.; *United Kingdom:* MN. 3.15 et seq.

17 The German word '*Gestalt*' (meaning altogether 'shape', 'stature', 'figure', 'appearance' and 'character') is consequently used in this context in von Bogdandy/Huber/Cassese (fn. 14).

18 O. Jouanjan, "Die Belle époque des Verwaltungsrechts – Zur Entstehung der modernen Verwaltungsrechtswissenschaft in Europe (1880 – 1920)" in A. von Bogdandy/S. Cassese/P. M. Huber (eds.), *Handbuch Ius Publicum Europaeum – Band IV: Verwaltungsrecht in Europa: Wissenschaft* (2011), pp. 425 – 459 (§ 69 MN. 6 et seq.).

However, these post-war developments and reforms are better understood as a further (even far-reaching) process of 'redesigning' or perhaps 'refounding'[19] the old system than as a clear break with what we may call the specific national administrative law traditions.

31.18 A further aspect has to be highlighted. It is true that there had already been 'transplants' of administrative law concepts and institutions between 1880 and the 1920s within Europe which may justify the classification of the administrative legal orders of these states into 'legal families'[20] (cf. MN. 31.34 et seq.). Nevertheless, the further development of all the administrative legal orders of the states we are looking at here can clearly be described as more or less autonomous *national* development, at least until the (end of the) 1980s. Comparative reasoning played perhaps a (limited) role in drafting new statutes (see, e.g., for *Norway* MN. 8.15) but not in legal education and the day-to-day practice of the administration and the courts. Thus, in those old Member States where general principles of administrative law (to be 'discovered' or developed by the judge) have been recognized as a source of law they could only be 'discovered' in the national legal order or developed 'autonomously', without reference to 'foreign' sources or concepts but by reference to 'meta concepts' (good faith, rule of law, legality, legal security, reasonability, proportionality, equality, democracy, sovereignty, etc.) which were considered to be *national* (and certainly not European or even 'global') 'meta concepts' at the time.[21] All this shows that the administrative legal order of these states and their main features were considered to be more or less self-contained. Until the 1990s *Europeanization* of *national* administrative law was not really discussed – even with regard to the national administrative law of Member States of the (then) European Economic Community.[22]

---

19 The term is used with regard to Germany by J.-P. Schneider, "German Traditions in Administrative Law" in M. Ruffert (ed.), *Administrative Law in Europe: Between Common Principles and National Traditions* (2013), pp. 49 – 65 (p. 54).

20 M. Fromont, "A Typology of Administrative Law in Europe" in von Bogdandy/Huber/Cassese (fn. 14), pp. 579 – 600 (pp. 580 et seq.).

21 *Belgium:* MN. 4.51 et seq.; *Finland:* MN. 16.02 et seq.; *France:* MN. 5.80 et seq.; *Germany:* MN. 11.47 et seq.; *Italy:* MN. 6.58 et seq.; *Netherlands:* MN. 7.15 et seq.

22 It has to be recalled that the first edition of the ground-breaking work of J. Schwarze on European administrative law was first published in its original German version (in two volumes) in 1988 (J. Schwarze, *Europäisches Verwaltungsrecht*, 1st edition 1988). Its English translation was published in 1992 (J. Schwarze, *European Administrative Law*, 1st edition 1992). Its objective was ('only') to define – in accordance with the general principles common to the laws of the Member States general principles of EEC law to be respected by the EEC's institutions). Thus, it followed the model of Article 215 (2) of the Treaty establishing the European Economic Community (= Article 340 (2) TFEU) and of *Algera and Others v Common Assembly of the European Coal and Steel Community* (joined cases 7/56, 3/57 to 7/57) 12 July 1957 CJEU at [54] et seq. The work of Schwarze was (initially) not about detecting general principles of European administrative law which could harmonise the national administrative law of the Member States of the EEC or, later, the EU.

31.19 Against this backdrop setting 'European' standards in administrative matters via CM Recommendations in the 1970s was a revolutionary idea. The 'analytical survey of the rights of the individual in the administrative procedure and its remedies against administrative acts' of the Committee of Experts on Administrative Law carried out from 1971[23] and published in 1975[24] (cf. MN. 1.63) was really pioneering. It included all CoE Member States of that time and, furthermore, *Spain*[25] and *Finland*. Moreover, as this 'analytical survey' was carried out within the institutional framework of the CoE it could be based on the replies of the governments of the said states to a questionnaire on individuals' rights in administrative procedure and the remedies in administrative matters sent to these governments on behalf of the CoE. All this gave the analytical survey an official status which could give real impetus to the further work of the CoE. Thus, it was able to shape not only CM Resolution (77) 31 on the protection of the individual in relation to acts of administrative authorities but also the further standard-setting activities of the CoE in administrative matters (cf. MN. 1.64 et seq.).

31.20 Then again, these CoE activities of the 1970s fell on fertile ground because they were conceived in a period when several CoE Member States (seemingly independently from one another) had just gone through lengthy internal and controversial discussions on the necessity and advisability of a codification of administrative procedure rules in a General Administrative Procedure Act, to a certain extent following the model of *Austria* and its General Administrative Procedure Act of 1925 (cf. MN. 12.12 et seq.). These national discussions led to the adoption of such acts in *Norway* in 1967 (cf. MN. 8.14 et seq.), in *Switzerland* in 1968,[26] in *Sweden* in 1971 (cf. MN. 9.10) and in *Germany* in 1976 (cf. MN. 11.26 et seq.). In *Belgium* a less ambitious project was discussed at the end of the 1950s but finally failed (cf. MN. 4.34). In the

---

23 For further information on this survey and its preparation see P. Leuprecht, "The contribution of the Council of Europe to reinforcing the position of the individual in administrative proceedings" in Secretariat General of the Council of Europe in co-operation with the Spanish "Defensor del pueblo" (eds.), *Round Table with European Ombudsmen* (H/Omb (85) 5), 1985, pp. 1 – 9 (pp. 3 et seq.); M. Morisot, "La Résolution N° 77 (31) du Conseil de l'Europe sur la protection de l'individu au regard des actes de l'administration" in Conseil d'État (ed.), *Études et documents N° 30 (1978 – 1979)* (1979), pp. 43 – 54 (pp. 43 et seq.).

24 CoE, *The protection of the individual in relation to acts of administrative authorities – An analytical survey of the rights of the individual in the administrative procedure and its remedies against administrative acts* (1975). See also CDCJ, *Protection of the individual in relation to acts of administrative authorities – Final activity report submitted to the Committee of Ministers* (Addendum II to CM (77) 173) of 3 August 1977, p. 2.

25 Spain was seemingly included because of the Spanish Administrative Procedure Act of 1958 (cf. MN. 15.38), which was also taken into account in the analytical survey of the Committee of Experts on Administrative Law.

26 T. Tanquerel, "Switzerland" in Auby (fn. 2), pp. 365 – 386 (pp. 374 et seq.).

United Kingdom the issue was discussed in the 1950s and 1960s in different official reports and commissions in the specific context of the non-judicial bodies then called administrative tribunals (cf. MN. 3.15 et seq.). Overall, the topic was simply *en vogue* on the national political level in most states of Western and Northern Europe. The framework of the CoE seemed, thus, to be an ideal platform for the representatives of its Member States to share their respective national experiences and to promote the reasons put forward in the national discussions for such codifications in an international forum. Hence, the dynamic of these national discussions resonated at the level of the CoE and gained its own momentum at this level.

31.21 This may explain why Resolution 77 (31) met with unique success in those old Member States which did not already have legislation on administrative procedures at that time. It influenced internal political discussions on the necessity of making individual rights in administrative procedures 'visible' through legislation. In some of these states this led to a more or less timely adoption of legislation on individual rights in administrative procedures. Sometimes this legislation was part of a more or less comprehensive General Administrative Procedure Act, namely in *Finland* in 1983 (cf. MN. 16.29), in *Denmark* in 1985,[27] and – quite late but nevertheless – in *Italy* in 1990.[28] Other states merely (but still) adopted statutes copying (partly) the principles included in this resolution, namely *France* in 1978/1979 (cf. MN. 5.41), *Luxembourg* in 1979 (cf. MN. 2.10), and, quite late, *Belgium* in 1991 (cf. MN. 4.39). Furthermore, Resolution 77 (31) seemed to have put the question of individual rights in administrative procedure at least on the political agenda in the *United Kingdom* even if reform proposals failed at an early stage (cf. MN. 3.18 et seq.; MN. 3.75 et seq.). In contrast, Resolution 77 (31) had only little impact (if any at all) on *Austria* (cf. MN. 12.22) and on those other old Member States whose recent legislation on administrative procedure rights had inspired the drafters of the resolution following the 'analytical survey' of 1975. The national discussion on this topic was exhausted; priority was given to the implementation of this recent legislation. Their national legislation having been more or less the inspiration for Resolution 77 (31) the attitude in these states prevailed that they had nothing to 'learn' from the CoE.[29]

---

[27] See on the Danish Administrative Procedure Act M. Gøtze, "Implementation of the Service Directive in Denmark" in U. Stelkens/W. Weiß/M. Mirschberger (eds.), *The Implementation of the EU Services Directive* (2010), pp. 159 – 180 (pp. 161 et seq.).

[28] In *Italy* there was a political discussion on rights in administrative procedure in the 1980s stimulated by Resolution 77 (31); our rapporteurs were unable to ascertain whether the Italian Administrative Procedure Act of 1990 has been enacted independently or as a – late – consequence of this discussion (cf. MN. 6.16).

[29] See, e.g., for *Germany* MN. 11.28. There have also been no amendments to the Administrative Procedure Act in *Norway* (cf. MN. 8.25). For the situation in *Sweden* see MN. 9.39.

31.22 Still, the relative success of Resolution 77 (31) may be explained by the fact that it confined itself to recommending that national legislators simply insert several rights benefitting the individual in administrative procedures to the already existing national corpus of administrative law. This could be done without in-depth changes of national administrative law traditions. This may be exemplified by the fact that neither Resolution 77 (31) nor its explanatory memorandum said anything about the consequences in cases of violation of the rights it recognizes. Thus, following Resolution 77 (31), granting rights to the individual within administrative procedures could be done just through adopting new legislation on these rights – leaving open how the administration would implement these rights and how administrative justice would enforce them.

31.23 The development and impact of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981 (cf. MN. 1.60) are in many respects comparable to the success story of Resolution 77 (31). Convention No. 108 was prepared under the authority of the CDCJ and – as pointed out in the Explanatory Report[30] – preceded by the adoption of general data protection laws in seven Member States, while in other Member States such laws were in an advanced state of preparation. The Explanatory Report also stresses that

> "6. […] While the procedural rules differ from one country to another, in keeping with its general system, there is a large measure of agreement on the objectives to be satisfied by these rules. All national laws recognise: i. the principle of publicity, i.e. that the existence of automated data files should be publicly known; and ii. the principle of control, i.e. that public supervisory authorities as well as the individuals directly concerned by the information can require that the rights and interests of those individuals are respected by the data users.
> 7. In most countries the data protection law has, or will have, a wide scope and apply to data processing in the public sector as well as the private sector".

31.24 Convention No. 108 could therefore build on common approaches to data protection regulation in (recent) legislation by most of the CoE Member States. Furthermore, it could add value to these national legislations by harmonizing their approach to transnational data flows, which was considered, among other things, necessary to reconcile the requirements of effective data protection with the principle of the free flow of information, regardless of frontiers.[31] Finally, it addressed new challenges to the protection of the individual not 'framed' by national administrative law traditions. Again, data protection in both the public and private sectors was simply

---

30 Explanatory Report to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data at [5]. This reports also details (at [12] et seq.) the drafting process of Convention No. 108.

31 See Explanatory Report (fn. 30) at [10] and [62] et seq.

en vogue at the national and international political level in the 1970s/1980s, perhaps fostered by the approaching date of '1984' associated clearly with Orwell's "Big Brother is watching you". Thus, our reports show that all the old Member States which had not already adopted data protection laws did so in the 1980s and 1990s, namely the *United Kingdom* in 1984 (cf. MN. 3.42), the *Netherlands* in 1988 (cf. MN. 7.69), *Belgium* (cf. MN. 4.31) and *Switzerland* (cf. MN. 13.46) both in 1992, and *Italy* in 1996 (cf. MN. 6.10; MN. 6.22). In contrast, Convention No. 108 is mostly considered not to have brought forward significant development to national legislation in those old Member States which already had such legislation before Convention No. 108 was opened for signature in 1981.[32]

31.25 The success of Resolution 77 (31) and of Convention No. 108, as well as the developing case law of the ECtHR on access to justice and fair trial in administrative matters, seemed to have motivated the CDCJ, its Committee of Experts on Administrative Law and the CM to extend their work *beyond* rights in administrative procedure in the following years. Recommendation No. R (80) 2 concerning the exercise of discretionary powers by administrative authorities, Recommendation No. R (81) 19 on access to information held by public authorities, Recommendation No. R (84) 15 relating to public liability, Recommendation No. R (85) 13 on the institution of the ombudsman, and Recommendation No. R (89) 8 on provisional court protection in administrative matters (cf. MN. 1.65) show that the standard-setting activities of the CoE entered into domains which were not marked by *recent* national political debates and recent national legislation in a great number of the CoE Member States of that time. In contrast, these recommendations seem to recommend diverse and quite heterogeneous legislation and structural decisions in administrative matters of different CoE Member States as 'best practice on administrative law legislation' to be followed by other CoE Member States. Thus, the reports on those states whose legislation served as a model for these recommendations highlight that their national legislation preceded the respective recommendations.[33]

31.26 Conversely, in those Member States which did not have legislation on the issues of these recommendations these matters were partly (if at all) subject to judge-made law clearly shaped by respective national administrative legal mindsets. Thus, in these states the transposition of

---

[32] See for *France:* MN. 5.27; *Germany:* MN. 11.21; *Norway:* MN. 8.37; However, adaptions of pre-existing data protection legislation to Convention No. 108 seemed to have happened in *Sweden* (cf. MN. 9.21).

[33] See, e. g., for the institution of an ombudsman: *Austria:* MN. 12.29; *Norway:* MN. 8.21; *United Kingdom:* MN. 3.61; for legislation on freedom of information: *France:* MN. 5.30; *Netherlands:* MN. 7.60; *Norway:* MN 8.22; *Sweden:* MN. 9.09; MN. 9.22 (and to some extent *Austria:* MN. 12.26 et seq.); for legislation on state liability: *Austria:* MN. 12.28; *Germany:* MN. 11.29; *Sweden:* MN. 9.41; concerning legislation on administrative court protection: *Austria:* MN. 12.35; *Germany:* MN. 11.25.

these recommendations into national law was partly understood as a kind of intrusion of the legislator into the domain of the administrative courts, which were considered to be better placed than the legislator to 'create' flexible rules adapted to the particularities and needs of administrative action.[34] The existing reluctance to transpose these recommendations in those states by way of new legislation may furthermore be explained by the fact that they could not be simply transposed by 'adding' new legislation but were considered to demand a more or less intense 'systemic change' with budgetary implications. This may also explain why Recommendation No. R (85) 13 on the institution of the ombudsman (cf. MN. 1.65) could not convince (all) those states which did not already have such an institution to introduce it. If the existing rules on administrative decision making and the intensity of control over administrative action by administrative courts were considered to be sufficient, as well as access to court for the individual easy enough, an ombudsman institution appeared to be a mere (and perhaps costly) duplication of administrative legal protection.[35]

31.27 Similar concerns but different reactions were provoked in nearly all old Member States by the ever-growing case law of the ECtHR on access to justice and fair trial in administrative matters. On the one hand, this was considered as intruding deeply into national administrative law traditions and not always as real progress towards adequate legal protection of individual rights. On the other hand, it was considered binding and often triggered major changes with regard to legal protection in administrative matters in particular and the protection of human rights *vis-à-vis* the administration in general.[36] The only exception seems to be *Germany,* where the basic concerns of the case law of the ECtHR corresponded clearly with the mission of the administrative courts as defined in the German constitution (cf. MN. 11.22). Both the case law of the ECtHR and the German Constitution as interpreted by the German Federal Constitutional Court focus on the right of the individual to access an independent court having full powers of review of matters of fact and law over any kind of administrative decision.

31.28

---

[34] This becomes quite clear in the reports on *Belgium:* MN. 4.34 et seq.; *France:* MN. 5.44 et seq.; *Germany:* MN. 11.30 et seq.; the *United Kingdom:* MN. 3.72 et seq.

[35] See for *Belgium:* MN. 4.40; *Italy:* MN. 6.74; *Germany:* MN. 11.66 et seq.

[36] *Austria:* MN. 12.12 et seq.; *Belgium:* MN. 4.41 et seq.; *France:* MN. 5.04 et seq.; *Italy:* MN. 6.33 et seq.; *Netherlands*; MN. 7.36 et seq.; *Norway:* MN. 8.46; *Sweden:* MN. 8.25 et seq.; *Switzerland:* MN. 13.28 et seq.; *United Kingdom:* MN. 3.114 et seq.

Furthermore, the European Charter of Local Self-Government of 1985 (cf. MN. 1.85) not only took a long time to be ratified by all the old Member States[37] but had and has the potential to deeply affect their internal organization. This applies not only to those states which are marked by administrative centralisation but also to those federations or 'regionalized' states leaving the organisation of local self-government to their sub-national entities. Thus, a common reaction to the challenges of the Charter to national state organisation seemed to be (1) to delay the ratification of the Charter and (2) to deny any direct effect of the Charter in national law after ratification and to consider the Charter more as a 'guideline' for national legislation, thus reducing the Charter to a document with a more soft than hard law character.[38] Conversely, the Charter (and its interpretation by the CLRAE) seems to have played a role in the political and constitutional discussions in those former centralized states which went through a clear decentralisation process following their respective ratifications of the Charter.[39] Furthermore, in states with a clear 'local-self-government-tradition' the Charter sometimes hindered centralization tendencies.[40]

31.29 The reactions to the CM Recommendation No. R (91) 1 on administrative sanctions (MN. 1.65) are, again, different. The undeniable impact of this recommendation in some of the old Member States can be explained by the fact that it could be understood as fleshing out the ECtHR case law in the matter. If it was felt necessary to adapt national law on administrative sanctions to this case law[41] it was, thus, easier to use the already law-like formulated Recommendation No. R (91) 1 as a sort of 'template' for national legislation than to try to 'restate' this case law by oneself.[42]

31.30 Finally, it can be highlighted that the judges of all old Member States only rarely, if at all, refer to the soft law sources of the pan-European general principles of good administration in

---

37 The Charter was ratified by the *United Kingdom* only in 1998 (cf. MN. 3.49 et seq.), by *Ireland* in 2002, by *Belgium* in 2004 (cf. MN. 4.25 et seq.), by *Switzerland* in 2005 (cf. MN. 13.42 et seq.), and by *France* in 2007 (cf. MN. 5.20 et seq.).

38 This seems to be the situation in *Austria:* MN. 12.06 (fn. 39); *France:* MN. 5.22 et seq. (see, however, MN. 5.49 et seq.); *Italy:* MN. 6.08; *Finland:* MN. 16.17; the *Netherlands*: MN. 7.57 et seq.; *Norway:* MN 8.38 et seq.; *Switzerland:* MN. 13.43; the *United Kingdom:* MN. 3.54. In *Germany*, the situation is specific because the Charter is considered to be a simple '*doublette*' of the constitutional provision on local self-government as understood by the Federal Constitutional Court (cf. MN. 11.19).

39 See for *Belgium:* MN. 4.47 et seq.; *France:* MN. 5.49 et seq.; the *United Kingdom:* MN. 3.50 et seq.

40 See for *Finland:* MN. 16.19 et seq.; the *Netherlands:* MN. 7.54 et seq.

41 Such need was not always felt: for instance, *Austria* considers its legislation as always having been in compliance with the principles enshrined in CM Recommendation No. R (91) 1 on administrative sanctions: MN. 12.34.

42 See for *Belgium:* MN. 4.43; MN. 4.62; the *Netherlands:* MN. 7.50; *Sweden:* MN. 9.36.

their case law to fill gaps in national administrative law by way of the '*faute de mieux*' approach (cf. MN. 2.58 et seq.).[43] The reports hint at the fact that there is one trivial reason and two deeper reasons for this. The trivial reason is that the subject matter covered by the pan-European general principles of good administration is extensively covered by national legislation or established national case law, which makes recourse to the pan-European general principles superfluous. The first deeper reason seems to be that the courts of the old Member States established techniques to develop, 'detect' and justify unwritten general principles of administrative law long before 'Europeanization' of administrative law became a topic for discussion, and, thus, developed the habit of only referring to either the national constitution, national 'meta' principles of law or national customs (cf. MN. 31.18). The second deeper reason is related to the soft law character of the CM recommendations. This seems to be an obstacle to their reception through the '*faute de mieux*' approach, sometimes merely because of dubious equalisation of the effects of national soft law (such as administrative guidelines, concepts and programmes) with the specific effects of CoE soft law in administrative matters which may be different (cf. MN. 31.98 et seq.). However, it seems that in most of the old Member States there would be no general (constitutional) methodological obstacles to using standards expressed in the CoE recommendations or the opinions of its commissions to elucidate the content of national general principles. Thus, the '*faute de mieux*' approach' perhaps seems unlikely for the time being but not completely impossible in most of the old Member States.[44]

31.31 The same reasons may explain why the pan-European general principles of good administration have only rarely found their way into administrative self-commitments or 'codes of good administrative behaviour' (cf. MN. 2.45 et seq.) in the old Member States.[45] Either, there is simply no tradition of these kinds of commitments and codes (not only because of extensive legislation but also because of their uncertain legal status)[46] or these codes and commitments

---

43 See for *Belgium:* MN. 4.60 et seq.; *France:* MN. 5.76 et seq.; *Italy:* MN. 6.62 et seq.; *Finland:* MN. 16.46 et seq.; *Germany:* MN. 11.56 et seq.; the *Netherlands:* MN. 7.83 et seq.; *Sweden:* MN. 9.40 et seq.; *Switzerland:* MN. 13.52 et seq.

44 The situation seems to be different in *Austria,* where filling gaps in national legislation by reference to general principles of administrative law seems to be unconstitutional: MN. 12.43 et seq.

45 See, however, for *Belgium:* MN. 4.63.

46 Thus, the *Austrian*, *French* and *Swiss* reports did not refer to this possible path of reception of the pan-European general principles. For *Germany:* MN. 11.61 et seq.

were developed independently from CoE sources because they served a specific function in national administrative politics.[47]

31.32 Taken together these different reactions of the old Member States to the pan-European general principles of good administration developed up to the 1990s reflect their different understandings of the task of administrative law in general, the role of the legislator, the government and the judge in administrative matters, the conception of individual rights *vis-à-vis* the administration, and their respective concepts or '*Gestalt*' of the national administrative state. They shed light on the fact that in different legal orders the law may have steering effects of different intensity *vis-à-vis* the administration and that this may hinge on different degrees of 'constitutionalisation' of administrative law on the one hand and different (constitutional) roles of direct democracy, the parliament, the government and the courts in shaping and applying administrative law and defining administrative tasks on the other hand.[48] In fact, it may be commonplace but is nevertheless worth highlighting that over generations each legal community of a given country (composed of judges, lawyers, officials and scholars working with the national law on a daily basis) develops different routines for how statutes, courts decisions and scholarly work on law should be written, read and understood. These routines are applied by law drafters, civil servants, judges, lawyers, etc. on the basis of often only implicit knowledge in their daily work and are reflected by country-specific legal publication formats.[49] The differences in these routines are also the result of different objectives of the national systems of legal education,[50] the different national training, recruitment and career systems for the civil service and the differing relevance of 'law' in the national curricula of the training of both civil servants in management positions and their subordinates 'at the counter'. In sum, these routines lead to different legal

---

47 This is above all true for the citizen charters and codes of good administrative behaviour developed in the *United Kingdom:* MN. 3.64 et seq.; MN. 3.78 et seq. See, furthermore, for *Italy:* MN. 6.70 et seq.; the *Netherlands:* MN. 7.90.

48 Cf. S. Kuhlmann/H. Wollmann, *Introduction to Comparative Administration* (2nd edition 2019), pp. 11 et seq.

49 See with a focus on court routines in criminal law the description of J. Bell, *Judiciaries within Europe – A Comparative Review* (2006), pp. 1 et seq.

50 On legal education in European countries see C. Baldus/T. Finkenauer/T. Rüfner, *Bologna and law studies* (2011); M. Kilian, *Models of Legal Education in Europe* (2010), pp. 33 et seq.; D. Piana/P.M. Langbroek/T. Berkmanas/O. Hammerslev/O. Pacurari, *Legal Education and Judicial Training in Europe* (2013), pp. 29 et seq.

mindsets in different legal systems.[51] These different legal mindsets make it clear that in different legal systems identical texts are not necessarily applied in the same way to the same factual situations and that they may not have the same degree of binding force for citizens, administrations and courts.[52]

31.33 Thus, from the perspective of these different legal mindsets different answers may spontaneously be given to the following questions, which in our view reveal the main characteristics of an administrative legal system.[53]

- Is *administration* more about *law enforcement* (the realisation of the will of parliament) or more about *management* (managing the implementation of political government decisions)? Or is administration more about implementing its *own* political agendas based on (technical) expertise within the margin of appreciation delegated to it by the constitution, statute or governmental decision? An indication of the possible answers to these questions may depend on whether there are different branches of 'special administrative law' (like planning law, police law, social law, tax law, etc.) as established sub-disciplines of administrative *law* (with corresponding textbooks and courses in legal education) or if 'urban planning, 'policing', 'social welfare', etc. are mainly considered as just different fields of activity of administration and not as specific subjects for legal research or legal education.
- Which functions (cf. MN. 0.25) is *administrative law* mainly understood to perform? Is it the 'enabling function', namely its function to enable the administration to fulfil its tasks by releasing it from the bonds of private law (in the sense of common law or '*droit commun*') and providing it with a legal toolkit better suited for pursuing public interests than private law? Or is it the 'limiting function' of administrative law, namely the protection of the citizen *vis-à-vis* the administration, that lies at the heart of legal reasoning?

---

51 See on these different national 'legal mindsets' and methods of 'legal thinking' Kischel (fn. 4), Chapter 5 MN. 41 et seq. ('common law mindset'), Chapter 6 MN. 104 et seq. ('civil law mindset'), Chapter 7 MN. 106 et seq. ('Nordic legal mindset'). It has to be highlighted that Kischel refrains from harsh generalisations but clearly explains the differences and varieties of legal mindsets within common law, civil law and Nordic countries. See also the description of 'country profiles' of Kuhlmann/Wollmann (fn. 48), pp. 71 et seq.

52 Kischel (fn. 4), Chapter 2 MN. 38.

53 See for similar considerations (with a focus on administrative discretion and judicial review): N. Garupa/J. Mathews, *Strategic Delegation*, "Discretion, and Defense: Explaining the Comparative Law of Administrative Review", (2014) 62 *AJCL*, pp. 1 – 34 (pp. 4 et seq.). However, the conclusions drawn in relation to individual countries in this article seem to be less convincing.

- Is *parliamentary legislation* on administrative matters mainly understood as an intrusion into the domain of government and therefore something that should be limited to formulating policy objectives and budgetary matters? Is parliamentary legislation mainly considered as a precondition for administrative action, at least if the administration interferes with the rights of individuals, and should therefore be detailed? Or is it mainly considered as an intrusion into well-established judge-made law or common law and should therefore be considered as an exception to general rules which should be interpreted restrictively? An indication of the possible answers to these questions may depend on the fact that legal rules are considered either to be the basis of the day-to-day work of the administration or rather as serving 'only' as a standard of review for the judge.
- The latter questions are related to the question of whether *guaranteeing, protecting and realising individual rights* are considered the main tasks of the administration itself or if individual rights are mostly considered as a limit to democratically legitimatized administrative action, thus making such action less effective.
- The answer to the foregoing questions will predetermine the answer to the question of the mission of the administrative courts. Is their main mission protecting citizens against violations of their rights or interests by the administration or is it guaranteeing the proper functioning of administration?
- The answer to the latter question will, again, predetermine the answer to the question of the intensity of judicial review. Should administrative courts review administrative decisions 'intensively' regarding matters of facts and law? Or should administrative courts demonstrate deference to the (technical, scientific, economic, political, etc.) expertise or experiential knowledge of an administrative authority (which could justify limiting the intensity of judicial control regarding whether the administrative decisions are acceptable, plausible, reasonable or *intra vires*)? An indication of the possible answers to these questions would be whether a strictly bound administration is the rule and discretion the exception or *vice versa*.

31.34 Even if we are unable to give answers to these questions for each of the old CoE Member States, we can make an educated guess based on the indirect hints transpiring from the country reports that the individual classification of a legal order to a specific administrative legal mindset will not overall correspond to its traditional classification into a specific 'legal family' (cf. MN. 31.18). This may be exemplified by the following very rough characterisations of the different administrative legal mindsets which we are able to deduce from the reports.

31.35 – *Germany*, *Austria* and *Switzerland* are often described as being part of the 'German type of administrative law'.[54] However, the administrative legal mindsets of *Germany*, *Austria* and *Switzerland* seem to be quite different with regard to the role of the administrative judge within the administrative legal system. Whereas, in *Germany* the main mandate of the administrative judge clearly lies in the protection of individual rights against illegal administrative measures (cf. MN. 11.22 et seq.; MN. 31.40), in *Austria* an intense standard of review by administrative courts seems to be considered rather as an intrusion into the 'domain' of the administration marked by technical expertise, practical knowledge and clearly organised decision-making processes (cf. MN. 12.14 et seq.). Furthermore, *Austria* has a tendency towards positivism,[55] thus limiting the power of the judge to fill gaps in legislation by recourse to general principles of administrative law (cf. MN. 12.43 et seq.), whereas such an approach is completely accepted in *Germany* (cf. MN. 11.47 et seq.). In contrast, in the *Swiss* federal administrative legal order the balance between the canton's autonomy and direct democracy on the one side and the protection of individual rights on the other side seems to be the primary focus, whereas the effective implementation of policy choices seems to be ancillary (cf. MN. 13.01 et seq.).

31.36 – The differences in administrative legal mindsets in the so-called French group of administrative law[56] are even greater: Administration in *France* could be qualified as a 'technocratic administration' steered through primary and secondary legislation. At least historically the main function of the administrative judge seems to be to guarantee the administration's obedience to the law without 'suffocating' administrative activity with overly inflexible rules (cf. MN. 5.10).[57] In contrast, *Belgium* seems to be remaining in a sort of discovery process concerning the answers to the aforementioned core questions of administrative law, which may even differ between the French-speaking and the Flemish communities (cf. MN. 4.05 et seq.; MN. 4.69 et seq.). *Italy* – always quite open to receiving legal transplants in

---

54 Fromont (fn. 20), pp. 593 et seq.; see, furthermore Kischel (fn. 4), Chapter 7 MN. 2 et seq.

55 Kischel (fn. 4), Chapter 7 MN. 9.

56 As well as *France*, Fromont ([fn. 20], pp. 588 et seq.) assigns, *inter alia*, *Belgium*, *Italy* and the *Netherlands* to this type because they have all established a 'Council of State' following the French model. We doubt whether the assignment of the *Netherlands* to the 'French type of administrative law' is plausible on this basis.

57 This characterisation seems to be in line with the characterisation of Kuhlmann/Wollmann (fn. 48), pp. 71: "France can be classified as the exemplar of the Napoleonic continental European state and legalistic system in which the state is typically perceived as a 'value in itself'. Its task is to define the public interest (*intérêt public*) and, following this logic and mandate, to provide comprehensive regulation of social and economic behaviour […]."

administrative law[58] – seems to be increasingly focusing on the 'limiting function' of administrative law (cf. MN. 6.01; MN. 6.26 et seq.), thus leaving behind its 'French heritage' in favour of orientation with the German administrative legal mindset.[59]

31.37 – The *Netherlands* and the *United Kingdom* share a clear understanding of administration as 'management'. Nevertheless, the Dutch approach has incrementally recognized the 'limiting function' of administrative law as necessary for fostering not only effective but also good administration (cf. MN. 7.09 et seq.). In contrast, in the *United Kingdom*, at least on the *governmental level*,[60] the 'limiting function' of administrative law seems to be considered as a (not always) necessary evil hindering effective administration and, thus, something to be handled with care (cf. MN. 3.72 et seq.).

31.38 – Finally, *Finland*, *Norway* and *Sweden* may all be marked by the specific pragmatic 'Nordic legal culture'.[61] Furthermore, their administrative legal systems share the fact that, in the last few decades, they have shifted towards strengthening individual rights *vis-à-vis* the administration and access to courts as a consequence of being a party to the ECHR. However, they seem to have different perceptions of the relationships between law, government, the administration and administrative justice (cf. MN. 8.02 et seq.; MN. 9.04 et seq.; MN. 16.50). Moreover, whereas *Norway* and *Sweden* seem to be content to simply follow 'CoE standards' and the ECtHR case law by adapting their administrative legal systems to it, *Finland* has been setting its own standard by developing its own concept (and 'label') of 'good administration' (cf. MN. 16.25 et seq.) and exporting it to the EU and the CoE (cf. MN. 16.51).

31.39 Overall, four lessons can be learned from looking at the impact of the pan-European general principles of good administration on the old Member States and *Finland.* Firstly, it can be said that they put the 'limiting function' of administrative law on the agenda even for those states in which administrative legal mindsets were clearly focussed on its 'enabling function' and where effective policy implementation by experts was (or still is) considered to be the paramount task of administration, at least until the 1980s/1990s. This applies, *inter alia* and to different degrees,

---

58 R. Caranta, "Cultural Traditions and Policy Preferences in Italian Administrative Law" in Ruffert (fn. 19), pp. 69 – 82.

59 Cf. C. Fraenkel-Haeberle, "Germania und Italia: Eine verwaltungsrechtliche Wahlverwandtschaft", (2015) 48 *Die Verwaltung*, pp. 309 – 336.

60 Of course, in scholarship the attitude may be different. Our British report is the best example of this.

61 See Kischel (fn. 4), Chapter 7 MN. 106 et seq.

to *Austria*, *Finland*, *France*, the *Netherlands*, *Norway*, *Sweden* and the *United Kingdom*.

31.40 Secondly, and unsurprisingly, we can see that the case law of the ECtHR is the main factor having had an impact on the national administrative law of those aforementioned states in which administrative legal mindsets were traditionally clearly focussed on the 'enabling function' of administrative law. Conversely, the impact of this case law is much less noticeable in states like *Germany*, where the administrative legal mindset was already aligned with the case law of the ECtHR (cf. MN. 31.35). Furthermore, it can be highlighted that, above all, those activities of the CoE – even those with merely a soft law character – which dealt with topical administrative law issues that were *en vogue* at the national level at the time of their adoption in the majority of the Member States had a significant impact on the national administrative law of the old Member States. Resolution (77) 31 (cf. MN. 31.21 et seq.) and Convention No. 108 (cf. MN. 31.23 et seq.) are cases in point for this.

31.41 Thirdly, the standard-setting activities of the CoE were less likely to be followed (in a timely manner) if these activities assumed 'administrative law features' as 'best practices' that were only known in a few CoE Member States of the time without building on recent national political discussions in the majority of the other states. This was true above all if these standards were considered to be expressions of the administrative legal mindsets of the states they were taken from (such as issues linked to transparency or the institution of ombudspersons), if they could not be implemented in the national administrative legal system in an easy and cost-neutral way, if there was no clear link to the case law of the ECtHR,[62] if they were not considered to add value to the administrative legal system in the view of the legal community of these states, and, above all, if there was no concrete political reason to do it at that concrete time under those concrete circumstances (cf. MN. 31.26). However, even in these situations one cannot say that these standard-setting activities of the CoE proved to be only paperwork. Quite the contrary, in the long run constant dripping wears down the stone. This seems to have been exactly the case with the European Charter of Local Self-Government, which has been finally ratified by all CoE Member States – after a very long process (MN. 31.28). Furthermore, these standards may be put forward in national (parliamentary) debates as 'CoE standards', which may push governments to deal with these standards and make them 'binding', at least in a 'comply or explain'

---

62 As is the case with CM Recommendation No. R (91) 1 on administrative sanctions, cf. MN. 31.29.

manner.[63] The only alternative to this seems to be the tactic that 'the best defence is offence', as our British colleague put it (cf. MN. 3.02).

31.42 Finally, the overall result of our research with regard to the old Member States and *Finland* is that the pan-European general principles of good administration are effective in these states and have led to a certain harmonization of their administrative law in putting its 'limiting function' on at least an equal footing with its 'enabling function'. This applies in particular where the pan-European general principles of good administration refer to individual rights *vis-à-vis* the administration. However, 'harmonisation' in this context does not mean a 'streamlining' of the national administrative legal institutions and national administrative legal mindsets in general. Nevertheless, as time passes these principles take on their own momentum in creating a more and more intense need to explain and justify (in law drafting processes, political debates, court decisions and in the context of CoE monitoring activities) why particular principles are not being followed in a given state. The resulting constraints are felt on the national level – insofar as they may even be adding fuel to the fire with regard to the ongoing discussion in the *United Kingdom* over whether a Brexit from the EU should be followed by a Brexit from the ECHR and the CoE (cf. MN. 3.83 et seq.).

3. Portugal and Spain: Transition from Authoritarian States to 'Good Administration States'

31.43 The transitions in Portugal and Spain from authoritarian regimes to democratic states governed by the rule of law between the end of the 1970s and 1986 (the year marked by their respective accessions to the EEC) set a precedent that early integration of 'transition countries' into the mainly intergovernmental framework of the CoE together with accepting the jurisdiction of the ECtHR might give real support in this difficult process (and possibly open the door for later membership of the EU). This is also true with regard to the necessary changes in administrative culture and administrative legal mindsets (cf. MN. 31.32 et seq.), which seem to be a paramount element of the success of such a transition. In fact, the respective accessions to the CoE were "celebrated internally as a natural consequence of the democratization" (cf. MN. 14.03) and considered to contribute "decisive momentum to the formation and consolidation of the new democratic system" (cf. MN. 15.02) in both Portugal and Spain.

31.44 Furthermore, the development of administrative law in Portugal and Spain after the ends of

---

63 See for such situations in *Belgium:* MN. 4.37 et seq.; the *United Kingdom:* MN. 3.75 et seq.

their respective dictatorial regimes shows that the introduction (or strengthening) of the 'limiting function' of administrative law, namely the protection of individuals against illegal and arbitrary administrative action, is the focus of administrative law reforms in these transition processes. A history of dictatorship clearly leads to a general distrust towards the administration in society. Reforms in administrative law seek to limit administrative powers in form of checks, balances and the protection of the individual. This corresponds to the fact that, at least in post-war-Europe, transitions from dictatorships to democratic states governed by the rule of law are in general heralded by the introduction of enforceable fundamental rights in the (new) constitution – as was also the case in Portugal[64] and Spain.[65] In these specific situations enabling the administration to implement policy choices effectively recedes into the background of administrative politics even if – of course – the maintaining of law and order and the effective implementation of necessary (and now democratically legitimized) reforms are also a crucial element for the success of such transitions. The development of administrative law in Portugal and Spain between the end of the 1970s and 1986 may, thus, be qualified as a dress rehearsal for the administrative-law-transition-processes in Central and Eastern Europe after the fall of the Berlin Wall (cf., however, MN. 31.58).

31.45 Another lesson may be learned from the Portuguese and Spanish examples. The need and wish for quick changes in Portugal and Spain did not allow for waiting until new citizen-orientated administrative legal mindsets developed in the respective national legal communities by themselves (over generations, cf. MN. 31.32). They had to be pushed in new directions, *inter alia*, by constitutional and legislative reforms. Here it seems that the post-war development of (then West) German administrative law served as an inspiration for managing these changes in Portugal and Spain.[66] This was above all because German administrative law and the German administrative legal mindset was (and still is) to be understood as a reaction to the atrocities of the Nazi Regime (and to the developments in the German Democratic Republic) and, thus, built on the conviction that the most prominent task of administrative law and administrative justice is protecting citizens from arbitrary (ab)use of governmental and administrative power (cf. MN.

---

64 See F. P. Coutinho/N. Piçarra, "Portugal: The Impact of European Integration and the Economic Crisis on the Identity of the Constitution" in A. Albi/S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (2019), pp. 591 – 639 (pp. 592 et seq., pp. 606 et seq.).

65 See J. Solanes Mullor/A. Torres Pérez, "The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance" in A. Albi/S. Bardutzky (fn. 64), pp. 543 – 590 (pp. 551 et seq.).

66 See Fromont (fn. 3), pp. 52 et seq. and pp. 55 et seq.; Kischel (fn. 4), Chapter 7 MN. 21 et seq.

11.22). Post-1949 (West) German administrative law seems, thus, to a large extent the 'basic model' for the administrative law of a European state with a recent past dictatorship.[67] This extends to the constitutional foundations for (West) German administrative law in the form of directly applicable and enforceable fundamental rights additionally protected by a strong constitutional court, which became an 'export hit' to European states wanting to overcome their respective dictatorial pasts (cf. MN. 31.58 et seq.).

31.46 The sustainability of taking over the German administrative legal mindset in Portugal and Spain may be shown by the fact, that, since 1986, the Portuguese and Spanish stories of the reception of the pan-European general principles of good administration do not differ from the German story in any fundamental way in terms of 'attitude' – a combination of openness with regard to the basic concerns of the pan-European general principles of good administration and reliance on domestic legislation covering similar subjects.[68] Furthermore, today, the Portuguese and Spanish stories of the reception of the pan-European general principles of good administration share similarities with the Italian story regarding the conciliation of institutions modelled after French examples (which remained in Portugal and Spain from before their respective dictatorships)[69] with the demands of the case law of the ECtHR on administrative justice[70] or the European Charter of Local Self-Government.[71]

4. Turkey: Wait and See

31.47 Different lessons on the challenges of the transition from authoritarian regimes to 'Good Administration States' can be learned from the developments in Turkey since the 1990s, namely with regard to the role of the commitment of the national government and parliament in these transition processes. In fact, the report on Turkey shows that, especially between 1990 and 2010, various constitutional amendments to the Turkish Constitution of 1982 (generally qualified as giving priority to authority in the balance between authority and freedoms) have been made in view of democratisation, demilitarisation and strengthening individual freedoms (cf.

---

67 Similarly, Kischel (fn. 4), Chapter 7 MN. 23 et seq.; J. Ziller, "The Continental System of Administrative Legality" in G. Peters/J. Pierre (eds.), *The SAGE Handbook of Public Administration* (2nd edition 2012), pp. 323 – 321 (p. 324).

68 This can be proved with regard to the '*faute de mieux*' approach (cf. MN. 2.58 et seq.). Compare MN. 11.56 et seq. (*Germany*) with MN. 14.64 et seq. (*Portugal*), and MN. 15.65 et seq. (*Spain*).

69 For the 'French heritage' in Portuguese and Spanish administrative law see Fromont (fn. 3), pp. 49 et seq.

70 Compare MN.6.33 et seq. (*Italy*) with MN. 14.49 et seq. (*Portugal*), and MN. 15.40 et seq. (*Spain*).

71 Compare MN. 6.07 et seq. and 6.28 et seq. (*Italy*) with MN. 14.28 et seq. (*Portugal*), and MN. 15.20 et seq. and MN. 15.55 et seq. (*Spain*).

MN. 10.03 et seq.). However, our Turkish report describes them as simple “cosmetic surgeries” to the constitution intended to fulfil a precondition for being accepted as a full EU member (cf. MN. 10.04). In fact, the enumerations in this report make it evident that these constitutional changes have had a very fragmented character covering different specific and often highly technical institutional aspects which have not in any way contributed to reducing the extremely high level of violations in Turkey found by the ECtHR (cf. MN. 10.15 et seq.).

31.48 The same applies to the legislative changes in Turkish administrative law in this period. They give the impression of quite minimalist (and often quite late) concessions to the commitments Turkey entered into by ratifying the ECHR and by (only in 1987, cf. MN. 10.15) accepting the jurisdiction of the ECtHR. Again, these changes mostly have a very technical character and seem to try to address the challenges of the ECHR by dealing with the symptoms (reducing the caseload of national courts) instead of trying to cure the disease by making respect for human rights a paramount task for the administration (cf. MN. 10.29 et seq.). This is also reflected by the fact that the Turkish administrative courts do not seem to refer explicitly to the ECHR and the case law of the ECtHR often, leaving the reception of this case law mainly to the Constitutional Court (cf. MN. 10.54 et seq.).

31.49 Similar impressions are given by the national legislation regarding freedom of information of 2003 which did not change the fact that freedom of information is more of an exception than the rule (cf. MN. 10.26 et seq.). The ratification of the European Charter of Local Self-Government in 1992 also seems not to have led to a profound and sustainable strengthening of local and regional democracy, despite reforms in 2004 (cf. MN. 10.23 et seq.). The ratification of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data happened only in spring 2016; before then no national data protection legislation existed (cf. MN. 10.19 et seq.). An ombudsman institution was established in 2012 but access to this institution seems to be formalistic and to not work effectively in practice (cf. MN. 10.40 et seq.).

31.50 Overall, all these changes cannot be considered as an expression of a wholehearted commitment by the respective Turkish governments and parliaments to lay the foundations for changing the Turkish administration into one suited to a ‘European style’ democratic state governed by the rule of law that at least should respect and at best promote fundamental rights. The main indicator of this is the seemingly blunt indifference to condemnations from the ECtHR or even

an open refusal to comply with them.[72] Sometimes the impression remains that the Turkish authorities do not consider the human rights violations underlying these condemnations to be the problem but instead the very fact of these condemnations are considered "unfair criticism at the international level".[73] In the period from 1990 until 2016 only minimal steps seem to have been taken to prevent and delegitimise systematic human rights violations, *inter alia*, by consequently sanctioning the persons responsible for them.[74] There is a certain *déjà-vu* effect here: Turkey (like Greece) was invited to join the CoE in 1949[75] merely for geopolitical reasons (without any previous 'screening' of its compliance with the values of Article 3 SCoE).[76] Correspondingly, Turkey probably became a member of the CoE and party to the ECHR in 1950 and 1954 only to foster the policy of integrating Turkey with the West and not because of it sharing the values enshrined in these treaties.[77] Looking back, similarly the legislation on human rights and good administration in the last decades could be understood as simple 'lip service' in view of an EU membership being sought at the time.

31.51 The events in the aftermath of the attempted coup of 2016, namely the dismissals of almost 130,000 persons from public service (cf. MN. 10.65 et seq.), the constitutional changes of 2017 (cf. MN. 10.09 et seq.), and government-ordered violations of the human rights of presumed sympathisers with the Gülen movement (accused of being responsible for the attempted coup), members of the opposition and the press, seem to confirm that no real implementation of the pan-European general principles of good administration has happened before 2016. Thus, no resilience has been built up in the administration and the courts against such governmental measures either. Even the results achieved before 2016 are paralysed for the time being (cf. MN. 10.72) and cannot prevent further backsliding.[78] This leads to the question of the self-

---

72 Kaboğlu/Koutnatzis (fn. 13), pp. 493 et seq.

73 See Y. Özdek/E. Karacaoğlu, "Turkey" in R. Blackburn/J. Polakiewicz (eds.), *Fundamental Rights in Europe* (2001), pp. 879 – 914 (p. 881).

74 See the examples given by Kaboğlu/Koutnatzis (fn. 13), pp. 480 et seq.

75 CM Resolution (49) 1 of 8 August 1949 on the Admission of Greece, Iceland and Turkey.

76 M. Wittinger, *Der Europarat: Die Entwicklung seines Rechts und der "europäischen Verfassungswerte"* (2005), p. 217.

77 See for the situation as of 2000: Özdek/Karacaoğlu (fn. 73), p. 879; for the situation as of 2006: Kaboğlu/Koutnatzis (fn. 13), pp. 460; for the situation before the attempted coup in 2016: EU Commission, *Commission Staff Working Document – Turkey 2015 Report* (SWD(2015) 216 final) of 10 November 2015 at [2.3] and [2.4].

78 See the references given in MN. 2.22. for the developments in the aftermath of the attempted coup until 2019 in view of democracy, rule of law, human rights and public administration reform. See fn. 116 for the question of whether the term 'further backsliding' is correct with regard to Turkey.

perception of the role of administrators and judges in today's Turkey and, thus, their administrative legal mindset. It could be mainly the maintenance of state integrity against internal and external threats but we have to admit that we simply do not know enough to be able to properly answer this question.

31.52 A general lesson can be learned from this. A precondition for implementing good governance and good administration effectively – and thus also the pan-European general principles of good administration – is that the (central) government and parliament are seriously committed to strengthening individual rights *vis-à-vis* the administration as well as administrative justice. Such a real commitment only exists if the government and parliament are ready to let go effectively of (centralized) power and to establish effective checks and balance systems (and abstain from window dressing). Yearning for integration into the EU only for economic advantages (and considering the implementation of CoE standards only as a burdensome means to that end) does not lead to sustainable good administration. Thus, as the Turkish report puts it, "the upcoming era will be a 'wait and see' period" (MN. 10.72) for those in Turkey who have "a desire for democratization, structuring the public sector in compliance with the requirements of the rule of law and adjusting the practicalities of daily life to universal requirements" (MN. 10.71).

5. The 'Younger' CoE Member States: Challenges of Transition from Socialist Regimes to 'Good Administration States'

31.53 The collapse of the Soviet Union and the end of Soviet hegemony in Central and Eastern Europe as a consequence of the total failure of the (what one could euphemistically call) 'socialist experiment' and parallel developments in Yugoslavia and Albania led to a historically and politically unique situation.[79] Namely, in the same decade fundamental and extensive political, economic and social transformation processes started in more than 25 states, a great many of them having been re-established or newly founded by breaking away from the Soviet Union and Yugoslavia. The enormous challenges consisted of simultaneously managing the transformation from a planned economy to a market economy, the related need to rehabilitate or reconstruct most of their infrastructures (neglected over decades and/or destroyed by civil wars), and transformation into 'European-style' democratic states governed by the rule of law and respecting fundamental rights. In many cases this was accompanied by the further immense

---

[79] T. G. Verheijen, "Comprehensive Reform and Public Administration in Post-Communist States" in Peters/Pierre (fn. 67), pp. 590 – 601 (pp. 591 et seq.).

challenge of (re-)building an independent state with new institutions, often combined with the need to stand up to manifold internal and external security threats.

31.54 Particular challenges with regard to the conceptualization and implementation of reforms of administration, administrative culture, administrative law and administrative justice (often underestimated at the beginning) derived from the fact, that during socialism, all of these states had to different degrees wiped out or replaced pre-socialist 'bourgeois' administrative legal traditions or reform concepts which existed in their territory under the concept of 'socialist legality' developed in and fostered by the Soviet Union in its sphere of influence.[80] This concept fundamentally rejected the checks and balances as well as individual rights of the Western legal systems and replaced them with the concept of 'democratic centralism'. This was meant to ensure 'universal legal discipline' by the administration under the control of the procuracy and the courts, the latter serving as 'transmission belts' of party policy and, thus, as instruments of political oversight. 'Laws' in this system were mostly 'instructions' to be followed uniformly by the administration and all other organs of the state. They were not framed by a clear doctrine of legal sources and hierarchy of norms (a law enacted by constitutional procedure could thus be replaced or overruled by governmental or party decisions, etc.). Concerning the relationship between the administration and the individual, this meant that the existing rules were mainly limited to imposing duties on the individual. The task of the administration *vis-à-vis* the individual was mainly reduced to enforcing these duties through administrative and criminal sanctions. Under these conditions, rules that set out in a predictable and enforceable manner the conditions for granting authorizations or social benefits were at best the exception. Benefits were more likely to be granted *in natura* or by tolerating their actual use and not by granting a licence giving the right to do something. It is clear that most post-socialist countries did not have a legal framework that could be tweaked or reformed into a system respecting individual rights and subjected to administrative justice. The transformations were more fundamental in nature. A totally different legal framework had to be built up, often from scratch, and then be implemented correctly in day-to-day administrative and court practice (cf. MN. 31.60 et seq.).

31.55 Furthermore, the concept of 'socialist legality' fostered an administrative and judicial culture of evading responsibility by civil servants and judges and thus avoiding taking decisions which

---

[80] See on the following the description and the references given by W. Partlett/E. C. Ip, "Is Socialist Law Really Dead?", 2016 (48) *New York University Journal of International Law and Politics*, pp. 463 – 511 (pp. 470 et seq.). See furthermore: D. Kosař/J. Baroš/P. Dufek, "The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism", (2019) 15 *EuConst*, pp. 427 – 461 (pp. 439 et seq.).

could not be based on clear 'instructions' for fear of reprisals. Taking decisions without strict orders or without being clearly backed by superior authorities was at the least risky and was to be avoided, as well as taking responsibility for decisions which could be considered as having undesired effects one day.[81] This clearly shaped a culture of 'legal formalism' or 'hyper positivism', as vividly described and analysed by our Bulgarian colleague (MN.19.82 et seq.), and a 'lazy administrative spirit', as our Croatian colleague put it (MN. 27.52). This legacy of socialism is – following our reports[82] –still present today in many post-socialist states, at least in the daily administrative practice and practice of the lower courts. This is due to the (often inevitable) continued employment of civil servants and judges trained and socialized under the former regime.[83] This state of affairs stands in the way of effective implementation of the pan-European general principles of good administration (or any other rule of law standards in everyday practice).

31.56 Finally, the often-brutal transition to a market economy together with often uncontrolled privatisation procedures (cf. MN. 31.66) and the aggregate loss of real income for civil servants was an 'ideal' breeding ground for corrupt practices at all levels of public administration as well as for organised crime.[84] This made effective fighting against corruption a paramount challenge to be addressed to achieve good administration in everyday life. This has been most clearly highlighted by our Armenian colleagues (cf. MN. 29.07 et seq.) but also in other reports.[85] It is also reflected by the fact that Recommendation No. R (2000) 6 on the status of public officials in Europe and Recommendation No. R (2000) 10 on codes of conduct for public officials (cf. MN. 1.65) have become relevant guidelines for civil service reforms in post-socialist states.[86]

31.57 The enormity of all these challenges becomes clear when looking at the reunification process between the former German Democratic Republic (hereafter 'GDR') and the Federal Republic

---

81 Kischel (fn. 4), Chapter 7 MN. 47 et seq. (with further references).

82 Problems related to 'legal formalism' are highlighted in the reports on *Bulgaria:* MN. 19.81 et seq.; *Croatia:* MN. 27.29 et seq.; *Czechia:* MN. 23.10; *Hungary:* MN. 17.58; MN. 17.75; *Serbia:* MN. 30.50.

83 Kischel (fn. 4), Chapter 7 MN. 54 et seq.; S. Liebert/S. E. Condrey/D. Goncharov, "Conclusion: Public Administration in Former Soviet States – Two Decades of Different Ways" in S. Liebert/S. E. Condrey/D. Goncharov (eds.), *Public Administration in Post-Communist Countries* (2013), pp. 339 – 354 (pp. 340 et seq.).

84 Liebert/Condrey/Goncharov (fn. 83), pp. 342 et seq.

85 See for *Albania:* MN. 26.26; MN. 26.32 et seq.; *Bulgaria:* MN. 2.23; MN. 19.10 et seq.; *Croatia:* MN. 27.10; *Romania:* MN. 2.23; MN. 24.56.

86 See for *Estonia:* MN. 20.42; *Hungary:* MN. 17.66 et seq.; *Lithuania:* MN. 21.54; *Romania:* MN. 24.53 et seq.; *Slovenia:* MN. 22.31; MN. 22.49; Serbia: MN. 30.41.

of Germany. In the end this happened by 'simply' extending the scope of application of the West German constitution of 1949 to the territory of the former GDR, by replacing nearly all GDR laws with West German laws on the basis of the Unification Treaty (cf. MN. 11.02 et seq.) and wiping out the 'GDR legal thinking' by replacing, with marginal exceptions, all senior civil servants as well as judges and law professors with persons 'imported' from West Germany.[87] Thus, the narrative of modern German administrative law is the narrative of West German administrative law having become all-German administrative law following German reunification on 3 October 1990 (MN. 11.04).

31.58 This should it make clear that the challenges of the post-socialist countries went far beyond the challenges of West Germany after the end of the Nazi regime and the challenges of Portugal and Spain after the end of their respective dictatorships (cf. MN. 31.43 et seq.). In fact, those challenges 'only' concerned the robust implementation of human rights, democracy and the rule of law in existing administrative legal systems. A parallel total change of the economic system, as well as the general and sector-specific legislative framework defining administrative missions and enabling the different branches of administration to fulfil their tasks and being, thus, the basis of administrative routines in day-to-day practice, was not intended. This allowed for building on the transition of old governmental, administrative and judicial structures (often established decades before the state turned into a dictatorship) as well as for taking over a great part of the legislation (and the existing administrative and judicial staff used to apply it). Hence, the 'limiting function' of administrative law could be strengthened while maintaining its enabling instruments that were known to be sufficiently effective to deliver public services. This is why we can say that in West Germany adding and strengthening democratic, rule of law and human right elements to administrative law could be understood as a (far-reaching) process of 'refounding' the pre-1933 German system of public administration and its law. It was not the start of a completely new administrative law (cf. MN. 31.17).

31.59 However, looking more closely at the effectiveness of the pan-European general principles of good administration in the post-socialist Member States makes us realise that the above description of their specific challenges is too generalised. These challenges were of varying intensities in the different countries.[88] This is also clearly reflected in our reports. Different vari-

---

87 Kischel (fn. 4), Chapter 7 MN. 56.

88 Kischel (fn. 4), Chapter 7 MN. 61.

ables transpire from them. Nevertheless, regarding the constitutional frameworks of administrative law, there are striking similarities with regard to the configuration of human rights as legally enforceable rights (i.e. as rights directly binding upon the administration and courts and thus being a genuine source of administrative law) and of the constitutional jurisdiction as a jurisdiction with comprehensive powers to enforce respect for human rights against the legislative, the executive and the ordinary courts.[89] In fact, to a great extent, these constitutional features seem to be the result of the respective procedures for the admission of the post-socialist states to the CoE. The PACE opinions and recommendations (as well as the preparatory reports thereto) adopted in these procedures reflect that legally enforceable fundamental rights and a strong constitutional court were considered to be of eminent importance in demonstrating the willingness of a candidate state to fulfil the provisions of Article 3 SCoE[90] (cf. MN. 1.14). Thus, most of our reports make it clear that the respective Constitutional Courts played and continue to play a crucial role with regard to the implementation of the pan-European general principles of good administration.[91] Moreover, all of our reports highlight the importance of accession to the CoE and ratification of the ECHR as a crucial step towards democratization and the implementation of the rule of law and human rights.[92] It was considered not only an international commitment but also an acknowledgement by 'Western Europe' of the desire of the post-socialist states for political changes leading to a 'Western-style' European democracy governed by the rule of law.[93]

31.60 One variable in receptivity to the pan-European general principles of good administration seems to be the extent to which the previous socialist legal order implemented 'socialist legality' and broke away from preceding administrative law traditions and administrative legal thinking. In the end one could say that the more an entire administrative legal system had to be built up from scratch, the more the 'limiting function' of administrative law became only one

---

89 The German influence in this regard is explicitly mentioned in the reports on *Estonia* (MN. 20.02) and *Slovenia* (MN. 22.02). It also played a role in many other post-socialist states, cf. Saunders (fn. 5), pp. 264 et seq.; Ziller (fn. 67), p. 324.

90 See for a comprehensive evaluation in this regard of the recommendations, opinions and reports produced by the PACE and other CoE organs in these procedures: Wittinger (fn. 76), pp. 285 et seq., pp. 328 et seq.

91 See for *Albania:* MN. 26.49 et seq.; *Armenia:* MN. 29.28 et seq.; *Croatia:* MN. 27.45 et seq.; MN. 27.57 et seq.; *Estonia:* MN. 20.43 et seq.; *Hungary:* MN. 17.52 et seq.; *Latvia:* MN. 25.10 et seq.; *Lithuania:* MN. 21.04; *Romania:* MN. 24.03.

92 Benoît-Rohmer/Klebes (fn. 11), pp. 116 et seq.

93 *Albania:* MN. 26.11; *Armenia:* MN. 29.02; MN. 29.45; *Bulgaria:* MN. 19.01; *Czechia:* MN. 23.01; *Croatia:* MN. 27.03; *Georgia:* MN. 28.03 et seq.; *Estonia:* MN. 20.70.; *Hungary:* MN. 17.02 et seq.; *Latvia:* MN. 25.01; *Lithuania:* MN. 21.55; *Poland*: MN. 18.02; *Romania:* MN. 24.01; *Serbia:* MN. 30.51; *Slovenia:* MN. 22.01.

(and not the most visible) aspect of the construction of a legal framework enabling the administration to fulfil its missions and to provide public services in an effective way. This is true above all as far as measures to build up administrative capacity were considered to be a necessary prerequisite for accession to the EU.[94] Conversely, the more a pre-socialist 'bourgeois' administrative and legal culture persisted during socialism, the more post-socialist reforms could build on (not-so) socialist laws, institutions and legal routines. The reforms could then better focus on strengthening the 'limiting function' of administrative law by reinforcing individual rights, democracy, transparency, local self-government, etc. Hence, the impact of the pan-European general principles of good administration becomes more visible. The latter seems to mainly[95] be the case in *Hungary*[96] and *Poland*.[97] Finally, there is the specific situation of *Estonia*, *Latvia* and *Lithuania*. Here, the departure from socialism is inextricably linked with the wish to (definitively) break free from the Soviet Union and Russian hegemony by stressing the re-establishment of the independent Baltic states founded in 1918, by wiping out any 'soviet heritage', and by their unflinching desire to lose the 'status' of a 'post-socialist state' as soon as possible, as well as to become a full member of the EU in every respect. Hence, with regard to administrative law the reports stress that their respective administrative law is to be understood as being shaped by German and/or Nordic legal thinking and that the implementation of the pan-European general principles of good administration (and their 'limiting function') has to be seen in this context.[98] It is also worth highlighting that *Estonia* (MN. 20.49) and *Latvia* (MN. 25.35 et seq.) have directly imported the Finnish concept of 'good administration' as a constitutional right (cf. MN. 31.38) into their respective constitutional orders.

31.61 Another variable in receptivity to the pan-European general principles of good administration

---

94 This is reflected to different extents in the reports on *Albania* (MN. 26.22 et seq.), *Bulgaria* (MN. 19.05 et seq.), *Croatia* (MN. 27.11 et seq.), *Georgia* (MN. 28.24 et seq.), *Romania* (MN. 24.06) and *Serbia* (MN. 30.17).

95 The situations in *Croatia* (MN. 27.30), *Slovenia* (MN. 22.32) and *Serbia* (MN. 30.16) seem to be comparable to some extent because Yugoslavian administrative procedure law was more or less shaped by the Austrian Administrative Procedure Act of 1925 (cf. MN. 22.32 [with fn. 40]).

96 Cf. MN. 17.04 et seq. That the development of Hungarian administrative law is marked by continuity despite all the changes in regimes and state ideologies is also clearly explained in H. Küpper, "Evolution and Gestalt of the Hungarian State" in von Bogdandy/Huber/Cassese (fn. 14), pp. 290 – 328 (pp. 313 et seq.).

97 Cf. MN. 18.18 et seq. See on a level of certain continuity at least in Polish scholarship on administrative law: A. Wasliwsky "Wissenschaft vom Verwaltungsrecht: Polen" in von Bogdandy/Huber/Cassese (fn. 18), pp. 229 – 262 (§ 63 MN. 26 et seq.).

98 See for *Estonia:* MN. 20.01 et seq., MN. 20.05, MN. 20.39 et seq.); *Latvia:* MN. 25.01 et seq. This is confirmed by S. Pivoras, "Post-Communist Public Administration in Lithuania" in Liebert/Condrey/Goncharov (fn. 83), pp. 135 – 160 (pp. 136 et seq.); G. Sootla/S. Lääne, "Public Administration and Developments and Practices in Estonia" in Liebert/Condrey/Goncharov (fn. 83), pp. 161 – 188 (pp. 168 et seq.).

concerns the question of how deep the pan-European general principles of good administration permeate not only into the 'law in the books' but also into the 'law in action'. Here different factors play a role. One factor may be diminishing government commitment over time, giving the impression that references to the pan-European general principles of good administration in government programmes and legislative procedure have become more 'lip service' than 'genuine consideration', as our Czech colleague put it (MN. 23.62).[99] Government action may then have a negative role model effect and demotivate civil servants and judges (cf. MN. 31.93). Another factor may be the importance of the influence of 'old elites' in courts and administration, and in the legal education, training and recruitment of civil servants and judges, which may favour 'legal formalism' (MN. 31.55). Moreover, more 'mundane' obstacles such as language barriers or the lack of case law databases and of scholarship shaping an awareness of the case law of the ECtHR and the standard-setting activities of the CoE may also preclude effective reception of the pan-European principles of good administration and should not be underestimated.[100] However, the question arises of whether it is exaggerated to expect that, to gain a minimum level of effectiveness, the pan-European general principles of good administration should not only shape the 'law in the books', capable of serving as a fertile ground for the development of good administration, but also guarantee the realisation of good administration in practice. Law cannot guarantee compliance in itself but has to be implemented (cf. MN. 31.88 et seq.). The aforementioned obstacles to real implementation of the pan-European general principles in the 'law in action' can only be overcome by creating awareness of them through the education and training of civil servants and judges (by national and international programmes) and through their consequent enforcement by apex courts (cf. MN. 31.91 et seq.). Here, it is important to note that in all relevant reports 'legal formalism' is not considered as an administrative legal mindset of post-socialist states reflecting specific 'core features' of their administrative law but as an attitude sabotaging the strived-for transition into a 'good administration state'.

31.62 With these preliminary remarks in mind we can now proceed to the question of the effectiveness of the pan-European general principles of good administration in the post-socialist Member States *in concreto*. To begin with, conspicuous reception of the pan-European general prin-

---

99 See for *Albania:* MN. 76.75 et seq.; *Bulgaria:* MN. 19.10 et seq.

100 Such obstacles are highlighted in the reports on *Albania:* MN. 26.46 et seq.; *Bulgaria:* MN. 19.15 et seq.; *Croatia:* MN. 27.14.; *Czechia:* MN. 23.12 et seq.; *Hungary:* MN. 17.63; MN. 17.75; *Serbia:* MN. 30.47.

ciples of good administration took place in the context of the ratification of the European Charter on Local Self-Government (cf. MN. 1.58) and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (cf. MN. 1.60). These conventions incontestably shaped at least the first pertinent legislation of most of the post-socialist Member States we looked at[101] and sometimes also the pertinent national case law.[102] A similar clear impact on national legislation can be found with regard to the pan-European general principles on freedom of information.[103]

31.63 A direct impact of the pan-European general principles of good administration on national legislation concerning administrative procedure rules and administrative justice (including state liability) is less obvious. However, as in the old Member States (cf. MN. 31.27), the case law of the ECtHR on the matter, considered as binding, has often triggered more or less important changes in national legislation and case law meant to strengthen individual rights *vis-à-vis* the administration in the post-socialist Member States as well.[104] In contrast, the pertinent CM recommendations (MN. 1.64 et seq.) have sometimes been invoked in the drafting process but have rarely served as sort of 'blueprint' for national legislation on the matter.[105] In some cases

---

101 See for the impact of the European Charter of Local Self-Government on national legislation: *Albania:* MN. 26.11; *Armenia:* MN. 29.20; *Bulgaria:* MN. 19.01; *Czechia:* MN. 23.27; *Croatia:* MN. 27.03; *Georgia:* MN. 28.17 et seq.; *Estonia:* MN. 20.70; *Hungary:* MN. 17.20 et seq.; *Lithuania:* MN. 21.16 et seq.; *Poland*: MN. 18.22 et seq.; *Romania:* MN. 24.12 et seq.; *Serbia:* MN. 30.10; *Slovenia:* MN. 22.16 et seq.; exceptions seem to be *Croatia* (MN. 27.21) and *Latvia* (MN. 25.19) where no clear relevance of the Charter for national legislation is discerned. For the impact of Convention No. 108 on national legislation: *Albania:* MN. 26.60; *Armenia:* MN. 29.21 et seq.; MN. 29.45; *Bulgaria:* MN. 19.26; *Georgia:* MN. 28.20 et seq.; *Hungary:* MN. 17.28; *Latvia:* MN. 25.20 et seq.; *Lithuania:* MN. 21.20 et seq.; *Poland*: MN. 18.26; *Serbia:* MN. 30.11; *Slovenia:* MN. 22.21. Sometimes, however, the reports stress a predominant influence of (only) EU law in the field of data protection: *Czechia:* MN. 23.46; *Estonia:* MN. 20.25; *Romania:* MN. 24.16.

102 See for the impact of the European Charter of Local Self-Government on national case law: *Armenia:* MN. 29.02; MN. 29.45; *Bulgaria:* MN. 19.24; *Croatia:* MN. 27.26 et seq.; *Georgia:* MN. 28.03 et seq.; *Estonia:* MN. 20.20 et seq.; *Hungary:* MN. 17.25 et seq.; *Latvia:* MN. 25.01; *Lithuania:* MN. 21.18 et seq.; *Poland*: MN. 18.25; *Serbia:* MN. 30.51. For the impact of Convention No. 108 on national case law: *Lithuania:* MN. 21.24; *Serbia:* MN. 30.51.

103 *Albania:* MN. 26.61 et seq.; *Armenia:* MN. 29.24 et seq.; *Czechia:* MN. 23.45; *Croatia:* MN. 27.31; *Estonia:* MN. 20.26 et seq.; *Hungary:* MN. 17.29 et seq.; *Poland*: MN. 18.27, MN. 18.74 et seq.; *Serbia:* MN. 30.23; *Slovenia:* MN. 22.19. Sometimes the reports stress a predominant influence of (only) EU law or a less specified 'political will' to contribute to a European trend to legislate on the issue; *Bulgaria:* MN. 19.27; *Latvia:* MN. 25.23 et seq.; *Lithuania:* MN. 21.28 et seq.; *Romania:* MN. 24.20.

104 *Armenia:* MN. 29.37 et seq.; *Bulgaria:* MN. 19.58 et seq.; *Czechia:* MN. 23.39 et seq.; MN. 23.49 et seq.; *Croatia:* MN. 27.33 et seq.; *Georgia:* MN. 28.39 et seq.; *Hungary:* MN. 17.39 et seq.; *Latvia:* MN. 25.01; *Lithuania:* MN. 21.47; *Poland*: MN. 18.34 et seq.; *Romania:* MN. 24.01; *Serbia:* MN. 30.24 et seq.; *Slovenia:* MN. 22.01.

105 *Bulgaria:* MN. 19.36 et seq.; *Czechia:* MN. 23.35; *Croatia:* MN. 27.30; *Estonia:* MN. 20.34 et seq.; *Hungary:* MN. 17.39 et seq.; *Latvia:* MN. 25.27 et seq.; *Lithuania:* MN. 21.30 (with fn. 70); *Poland*: MN. 18.30 et seq.; *Romania:* MN. 24.01; *Serbia:* MN. 30.51; *Slovenia:* MN. 22.01. However, Section I

this can be simply explained with temporal reasons. Those states which had already enacted comprehensive legislation on individual rights in administrative procedure and administrative justice before Recommendation Rec(2004) 20 on judicial review of administrative acts (cf. MN. 1.65) or Recommendation CM/Rec(2007)7 on good administration (cf. MN. 1.59 et seq.) were adopted saw no clear reason to revisit their new legislation, above all if it was considered to comply with the older CM recommendations on the matter.[106] Here, again, the situation is not different from the situation in the old Member States (cf. MN. 31.21).

31.64 Nevertheless, the deeper reason why the CM recommendations on administrative procedure and administrative justice have rarely served as a sort of 'blueprint' for national legislation may be that all pertinent CM recommendations are focussed merely on common standards for the protection of the individual *vis-à-vis* the administration, whereas comprehensive legislation on administrative procedures and administrative justice must also take into account the perspective of the administration and the judge (cf. MN. 31.83; MN. 31.90). It has to include rules on the powers and obligations of administrative authorities and courts, namely rules on who decides under which conditions, how to decide on which grounds, how to enforce decisions against the individual, etc. Thus, the CM recommendations on administrative procedure and administrative justice could only provide for check-lists to be worked through in the drafting process so as not to forget regulations on important individual rights.[107] In contrast, inspiration for comprehensive legislation on administrative procedure and administrative justice could only be found in the pertinent legislation of the old Member States.[108] Thus, not referring *in extenso* (or at all) to the pertinent CM Recommendations in the drafting process on national legislation on administrative procedure, administrative justice and state liability does not readily allow us to conclude that these recommendations did not serve as an (rather indirect and subtle) guideline for national

---

on 'General Principles of Good Administration' of Recommendation CM/Rec(2007)7 on good administration seems to have inspired some drafters of General Administrative Procedure Acts to foresee similar sections referring to general principles, see, e.g., for *Albania:* MN. 26.68; *Hungary:* MN. 17.34. Furthermore, Recommendation No. R (89) 8 on provisional court protection in administrative matters (cf. MN. 1.65) clearly shaped a reform on the matter in *Lithuania* (MN. 21.33 et seq.). Recommendation No. R (85) 13 on the institution of the ombudsman gave impetus to the introduction of such an institution in *Bulgaria*, *Czechia* and *Serbia*: MN. 19.40; MN. 23.52; MN. 30.29 et seq.

106 See, e.g., for the legislation on administrative procedure in *Estonia* and *Slovenia:* MN. 20.35; MN. 22.33 et seq.

107 See e.g. for the legislation on state liability in *Estonia* and *Lithuania* MN. 20.37; MN. 21.32.

108 See e.g. for the legislation on administrative procedure in *Estonia, Georgia*, and *Slovenia:* MN. 20.30 et seq.; MN. 22.35; MN. 28.25.

legislation.[109] They may – following our Latvian colleague (MN. 25.34) – still be used as a 'source of interpretation' of these statutes.

31.65 In this regard it has to be highlighted that in contrast to what happened in most of the old Member States (MN. 31.30) there are clear-cut cases in the post-socialist Member States where courts are referring to the soft law sources of the pan-European general principles of good administration in their case law to fill gaps in national administrative law by way of the '*faute de mieux*' approach (cf. MN. 2.58 et seq.).[110] Simultaneously, at least the apex courts of most post-socialist Member States refer to the ECHR as interpreted by the ECtHR as a directly applicable source of administrative law and as creating enforceable individual rights *vis-à-vis* the administration quite often.[111] Perhaps, this may have a quite trivial reason behind it. At least in the first decade of transition, for the reasons explained above (MN. 31.54), the subject covered by the pan-European general principles of good administration was *not* extensively covered by national legislation or established national case law. Both were still 'in the making' so that referring to CoE law could be a good compromise between 'free creation' of general principles with doubtful legitimacy and a fixation on 'black letter law'. This also makes it clear that this approach presupposes, of course, that the courts do not follow 'hyper positivist attitudes' but are willing and able to build their case law by invoking unwritten general principles.

31.66 Before coming to a conclusion on the overall effectiveness of the pan-European general principles in the post-socialist Member States one last aspect needs to be highlighted. In view of the experiences of the often brutal transition of these states into a market economy, which was often accompanied by disorderly privatisation processes with a high risk of corruption (MN. 31.56), it is at first sight astonishing that neither Recommendation No. R (93) 7 on privatisation of public undertakings and activities, nor Recommendation No. R (97) 7 on local public services and the rights of their users or Recommendation CM/Rec(2007)4 on local and regional public services (cf. MN. 1.65), have been transposed into the national law in any of the post-socialist Member States we looked at. Only our Czech colleague mentions them but stresses at

---

109 Here our Bulgarian and Czech colleagues seem to have a different view, cf. MN. 19.41; MN. 23.62. See, in contrast, for the legislation on administrative procedure in *Serbia*: MN. 30.14 et seq.

110 See the case law referred to in the reports on *Croatia* (MN. 27.56 et seq.), *Estonia* (MN. 20.43 et seq.), *Latvia* (MN. 25.46 et seq.), *and Lithuania* (MN. 21.33 et seq.; MN. 21. 48 et seq.). To a lesser degree a similar approach seem to be followed in *Poland* (MN. 18.71 et seq.), *Romania* (MN. 24.46 et seq.) and *Slovenia* (MN. 22.48).

111 See the case law referred to in to in the reports on *Armenia* (MN. 29.36 et seq.), *Croatia* (MN. 27.45 et seq.), *Estonia* (MN. 20.54 et seq.), *Georgia* (MN. 28.33 et seq.), *Latvia* (MN. 25.13), *Lithuania* (MN. 21.36 et seq.); *Poland* (MN. 18.59 et seq.), *Romania* (MN. 24.30; MN. 24.37; MN. 24.38). A mixed picture is described in the report on *Albania* (MN. 26.46 et seq.), and *Hungary* (MN. 17.52 et seq.).

the same time that they did not have any impact (MN. 23.41 et seq.). The reasons for this may be twofold. First, these recommendations providing for transparent privatisation procedures and guarantees for the continuance of public services at reasonable prices even after privatisation simply came too late for most of the post-socialist states. The damage was already done.[112] The second reason may lie even deeper. As far as we can see Recommendation No. R (93) 7 could not be backed by any previous coherent legislation of the old Member States or comprehensive EU legislation comparable to the legislation, e.g., on public procurement.[113] Furthermore, understanding privatisation processes as administrative procedures where the individual rights of the users and the potential purchaser should be taken into consideration – which was clearly the view of the CJ-DA laid down in the Explanatory Memorandum to Recommendation No. R (93) 7[114] – was quite progressive at the time. At least it contradicted the then privatisation policies of the old Member States and many international donors. They mostly understood privatisation as a transfer of assets governed mainly by budgetary law, private law, the logics of a market economy and competition law.[115] This could have led to the impression that the old Member States expected compliance with higher standards from the post-socialist Member States than they themselves were prepared to meet. That Recommendation No. R (93) 7 was not even really backed by the organs of the CoE may be proved by the fact that, although Recommendation No. R (93) 7 and its Explanatory Memorandum can be found in Appendix 3 of the first edition

---

112 See the description of the shortcomings of the privatisation procedures in *Czechoslovakia* and *Poland* given at the XXIst Colloquy on European Law' in Budapest (15 – 17 October 1991) organized by the CoE to prepare Recommendation No. R (93) 7: G. E. Domański, "The Legal Concept of Privatising State-Owned Enterprises in Poland" in CoE (ed.), *Legal aspects of privatisation* (1993), pp. 88 – 92; P. Kotáb, "Legal Form and Techniques of Privatisation in Czechoslovakia" in CoE (ed.), *ibid.*, pp. 93 – 96.

113 See OECD, *Privatisation in the 21st century in OECD Countries – Report on Good Practices* (2009), p. 17: "It is not clear that general 'good practices" should be formulated concerning national legislative frameworks, which are firmly embedded in national political and constitutional realities. At the same time, it should be recognised that embedding privatisation in the legislative process can have important beneficial impacts on the transparency and predictability of the process. Even governments that are formally entitled to privatise state assets without specific legal authorisation, or which need only to seek the "approval" of parliament, have sometimes chosen to pass a sales act setting out the agreed modalities of privatisation. Where different parts of the political spectrum differ on privatisation – and not least in the current environment of large, sequenced privatisations – this may be useful in signalling a political commitment to investors and reassuring them concerning the likely future path of sell-offs".

114 See at [1] of the Explanatory Memorandum to Recommendation No. R (93) 7. This memorandum cannot be found at the CoE's website but is published in CoE (ed.), *The administration and you* (1st edition 1996), pp. 497 et seq.

115 See the description of privatisation procedures in the different CoE Member States given at the XXIst Colloquy on European Law' in Budapest (15 – 17 October 1991) organized by the CoE to prepare Recommendation No. R (93) 7: T. C. Daintith, "Legal Forms and Techniques of Privatisation" in CoE (fn. 112), pp. 50 – 87 (pp. 58 et seq.); J. F. Robert, "Law and Privatisation – A General Presentation of Issues" in CoE (fn. 112), pp. 17 – 39 (pp. 29 et seq.).

of 1996 of the CoE handbook 'The administration and you' (cf. MN. 1.91 et seq.), the principles enshrined in this recommendation are not specified in the main part of the book.

31.67 The overall result of our research with regard to the post-socialist Member States, therefore, is that, in sum, the pan-European general principles of good administration are (to different degrees) effective in these states. They gave and continue to give guidance as to how to develop an administrative legal framework which duly takes account of the 'limiting function' of administrative law, namely the protection of individuals against illegal and arbitrary administrative action (cf. MN. 0.25 et seq.). All post-socialist states that we looked at have striven to create such a legal framework – even if government commitments in this regard may have decreased over time. This has resulted in quite homogenous administrative legal mindsets in these Member States. Again (cf. MN. 31.45), it seems that it was above all post-1949 (West) German administrative law (including its constitutional foundations) and the corresponding administrative legal mindset which appealed to these states because of being a sort of 'basic model' for the administrative law of a European state with a recent past dictatorship which was, thus, seeking to limit the administration's power in the form of checks, balances and protection of the individual. By focussing on the 'limiting functions' of administrative law these states clearly corresponded with the regulatory objectives of the pan-European general principles of good administration, which facilitated their reception.

31.68 Even if the pan-European general principles of good administration have shaped the 'law in the books' in the post-socialist Member States, we have seen that they are implemented and enforced in practice to very different degrees in these states. In many of them the transition into 'good administration states' is far from being over. The main problems are 'legal formalism' and corruption. However, this does not bring into question the effectiveness of the pan-European general principles of good administration as a whole (cf. MN. 31.61) but shows that their reception must be flanked not only by a consistent fight against corruption but also by the implementation of recruitment and career systems based on meritocracy for administrators and judges, including further professional training to create awareness of these problems.

6. The Pan-European General Principles of Good Administration and 'Democratic Backsliding'

31.69 The impact of 'backsliding' from rule of law standards on the effectiveness of pan-European general principles of good administration in the administrative legal orders of the CoE Member States is a specific issue. In the European context 'backsliding' is mainly associated with polit-

ical developments in *Hungary* since 2010 and in *Poland* since 2015 (MN. 2.23 et seq.).[116] Nevertheless, it is addressed only as a side note in our report on *Hungary* (cf. MN. 17.77) and not at all in the report on *Poland*. This may not be what the readers expect. However, this can be explained by looking more closely at the connections between the question of how to address 'backsliding' with legal means and the question of the effectiveness of the pan-European general principles of good administration in the Hungarian and Polish administrative legal orders. Both questions are only partly congruent.

31.70 To explain this apparent paradox it is important to clearly differentiate between the phenomenon of 'backsliding' states and those states who do not make any or only little progress in implementing the pan-European general principles of good administration in their day-to-day practice because of widespread corruption, 'legal formalism' (cf. MN. 31.55) and/or because their governments are not willing to let go of effectively (centralized) power through establishing effective checks and balance systems (cf. MN. 31.47 et seq.). States which have never really been on the way to the top of the standards of a democratic state governed by the rule of law and respecting fundamental rights cannot 'backslide'. They just stay down in the 'valley' of bad governance.

31.71 It is also important to note that the metaphor of 'backsliding' may be misleading insofar as the phenomena which are hereby designated do not happen unintendedly.

> "A key feature of this process of weakening checks and balances is that it reflects a *deliberate* strategy of a ruling party, the (unadvertised) goal being to establish electoral autocracies (with elections possibly "free" but no longer "fair") and the progressive solidification of factually one-party states, where the peaceful rotation of power is made de facto virtually impossible through numerous manipulations which autocratic governments disguise as well-intentioned "reforms" which allegedly aim to improve efficiency, etc., in line with alleged practices from abroad".[117]

---

116 Sometimes the developments in *Turkey* since the 2002 national elections are considered 'democratic backsliding' (cf. N. Bermeo, "On Democratic Backsliding", [2016] 27 *Journal of Democracy*, pp. 5 – 19 [pp. 11 et seq.]; K. L. Schepple, "Autocratic Legalism", [2018] 85 *The University of Chicago Law Review*, pp. 545 – 583 [pp. 551 et seq.]). This is only correct if one assumes that *Turkey* – due to the reforms carried out between 1990 and 2002 – had already reached the standard of a democratic state governed by the rule of law and respecting fundamental rights from which it could 'backslide' (cf. MN. 31.70). Due to the 'cosmetic character' of the post-1990 reforms (cf. MN. 31.47 et seq.) this is a difficult question to resolve.

117 L. Pech/D. Kochenov, *Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid – Policy Brief* (2019), p. 1 (highlighted in the original).

It is *liberal* democracy which is the target of the shift.[118] Therefore, even though it has become established to address this phenomenon mainly as a 'rule of law issue'[119] (cf. MN. 2.23 et seq.), it is better to call it 'democratic backsliding'. Following a widely accepted definition this means

> "the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party".[120]

In sum, 'democratic backsliding' is the means of a 'legal coup'.[121] However, the political regimes pushing through this process 'only' seek competitive advantage – in the end for a monopoly – in political competition to an extent which makes any electoral success for the opposition extremely unlikely. These regimes do *not* strive to completely abolishing free elections as such. Winning 'democratic' elections is needed to legitimise the regime so that it can claim to be effectively supported by the majority of voters (which also excludes obvious electoral fraud).[122] This has to be ensured by creating at least the illusion of an overall economic, social progress and stability.[123] This illusion must not burst.

31.72 With regard to the administration this means that the regime must avoid any impression of deliberately implementing maladministration by bluntly abolishing laws intended to create a legal framework for good administration. Moreover, in the everyday life of the people the administration still has to act legally and effectively in a non-arbitrary manner. The regime still needs competent and well-trained civil servants to maintain order and to provide public services in a way which can reasonably be expected. In general, the regime needs good administration and administrative justice – with the perverse consequence that good administration supports bad governance. Thus, it is realistic to think that part of a 'backsliding' strategy may be to adapt the legal framework on administrative procedures and administrative court procedures to the standards of the pan-European general principles of good administration. In fact, this happened

---

118 D. Adamski, "The Social Contract of Democratic Backsliding in the 'New EU' Countries", (2019) 56 *CML Rev*., pp. 623 – 666 (pp. 626 et seq.).

119 With regard to the rule of law it is above all the 'separation of powers' which is targeted Kosař/Baroš/Dufek (fn. 80), pp. 450 et seq.

120 L. Pech/K. L. Schepple, "Illiberalism Within: Rule of Law Backsliding in the EU", (2017) 19 *Cambridge Yearbook of European Legal Studies*, pp. 3 – 47 (p. 10); similarly Bermeo (fn. 116), pp. 6 et seq.

121 K. L. Schepple, "On Being Subject of the Rule of Law", (2019) 11 *Hague Journal of the Rule of Law*, pp. 465 – 472 (p. 468).

122 Bermeo (fn. 116), p. 13.

123 Adamski (fn. 118), pp. 627 et seq.

in *Hungary* in 2016, where the drafters of the new Codes of Administrative Procedure and of Administrative Court Procedure explicitly referred to Recommendation CM/Rec(2007)7 on good administration, Recommendation Rec(2004) 20 on judicial review of administrative acts and other pan-European general principles of good administration (MN. 17.34 et seq.).

31.73 Thus, in the realm of administrative law 'democratic backsliding' typically happens through sector-specific reforms (in media law, higher education law, legislation governing NGOs, refugee legislation, etc.), reforms of freedom of information legislation, reforms of the institutional arrangements of courts and reforms of other institutions intended to control executive power, and restrictions on local and regional self-government (in the face of the possibility of them still remaining liberal enclaves). The reforms of local self-government and freedom of information legislation mentioned by our Hungarian colleague (cf. MN. 17.23 et seq.; MN 17.31) may serve as examples. The 'trick' here is to justify these reforms with a claimed ineffectiveness and malfunctioning of the sector or institution targeted and to refer to similar sector-specific and institutional arrangements in those other (West) European states which are in general not suspected of pursuing objectives contrary to liberal democracy and the rule of law[124] (cf. MN. 31.123).

31.74 Under these conditions the European law dimension of 'democratic backsliding' relates in a substantive sense to the question of whether the respective national legislative reforms are compatible with European constitutional law, including European human rights law (cf. MN. 0.17 et seq.). In a procedural sense it is about the existence and effectiveness of 'constitutional oversight' of national legislation by the CJEU, the ECtHR and other monitoring institutions of both the EU and the CoE (cf. MN. 2.25 et seq.). Here, the main question is whether a reform of the national legislative framework which, under 'normal' conditions, could be compatible with European human rights and European constitutional standards may justly be found to be incompatible with these standards because they are part of a targeted strategy to silence opposition and to maintain the existing regime's grip on power. Another question is whether an intended reform affecting European human rights and/or European constitutional standards which could in principle be appropriate for addressing real problems of ineffectiveness and malfunctioning in existing institutions may be considered to be violating these standards because the invoked problems do not really exist. Relying on those grounds would thus seem to be abusive because other objectives are actually being pursued (cf. MN. 31.128). To what extent is 'thou shalt not

---

124 Schepple (fn. 116), pp. 565 et seq.

bear false witness' binding for law drafters so that not only is the legal text adopted by the legislator the object of constitutional oversight but also the actual political motives behind it?[125]

31.75 Against this backdrop, from the 'top down' perspective of European constitutional law, referring to the pan-European general principles of good administration against 'democratic backsliding' is possible only as far as they can be considered to have a 'constitutional value' within the CoE's legal order (cf. MN. 0.05). We will come back to this (cf. MN. 31.98 et seq.). Notwithstanding this, the pan-European general principles of good administration can offer a certain 'brake efficiency' against democratic backsliding on the national level in so far as they have been effectively implemented in the day-to-day practice of administrative and judicial decision making. This is possible if these principles have shaped not only the administrative legal mindset of the 'law in the books' but have also been implemented into the 'law in action' before the state becomes the prey of the regime. We have said that in general a regime needs good administration and administrative justice to support the illusion of an overall economic and social progress and stability. We have said, too, that the (unadvertised) sole reason for democratic backsliding is the progressive solidification of de facto one-party states while maintaining an illusion of a democratic state governed by the rule of law. At least for senior civil servants and judges this demands a constant schizophrenic attitude in everyday practice in the long run if they want to meet both diametrically opposed 'standards' at the same time. How long can this be sustained day-to-day, assuming that in the long run not *every* civil servant and every judge has become completely cynical and corrupt but will be guided to some extent by intrinsic motives?[126] Pretending is exhausting. Thus, perhaps there is a hope that even an institution completely subjugated by a regime (such as apex courts, the media) will subsequently turn against it and thus break up the 'backsliding cartel'[127]. This may be supported and encouraged by the EU's current multi-path efforts to enforce the rule of law *vis-à-vis* 'backsliding'

---

125 In *Commission v Poland* (C-619/18) 24 June 2019 CJEU [GC] at [127] the Grand Chamber seems to focus on the 'real reasons' if the context of the new regulation gives rise to suspicion that the reasons put forward in legislative procedures do not correspond to the real motive.

126 We must admit that the aforementioned schizophrenic attitude can only be supposed as long as 'democratic backsliding' is assumed to be a purely opportunistic process of seizing and maintaining power, and not based on any ideational political convictions which may be implemented for intrinsic motives. See for such an argument P. Blokker, "Populist Counter-Constitutionalism, Conservatism and Legal Fundamentalism", (2019) 15 *EuConst*, pp. 519 – 543.

127 We deliberately borrow the term 'cartel' from competition law. In competition law 'cartel' means a group of independent companies which join together to fix prices, to limit production or to share markets or customers between them. A 'backsliding cartel' would therefore be a group of political actors implementing a 'backsliding strategy' to obtain competitive advantage – in the end a monopoly – in political competition. It would be interesting to analyse if the 'rule of law enforcement' strategy of the EU (cf. MN.

EU Member States, which aim to significantly increase the EU's pressure on their current regimes (cf. MN. 2.25 et seq.).

II. Explaining the Modes of Operation of the Pan-European General Principles of Good Administration

31.76 The foregoing analysis, as well as the country reports, discuss in a general manner the 'impact' of the pan-European general principles of good administration on national legal orders and their 'effectiveness' within these legal orders. Looking at the different paths of reception through which the pan-European general principles of good administration can become effective within national legal orders (cf. MN. 2.40 et seq.) has already allowed us to pierce the veil of the state (as an unitary body)[128] to look at the various national actors which make these principles effective: the legislator, the government, the administration itself, the judiciary, ombudspersons and other independent accountability institutions. These actors appropriate the pan-European general principles of good administration in different ways and to different effects.

31.77 This reveals that these principles can become effective in different 'modes of operation'. These modes can be described in a simplified manner as follows. First, the national *legislator* may use the pan-European general principles of good administration as inspiration or even as 'model rules' for national legislation and *transpose* the pan-European general principles of good administration into national 'hard law'. Secondly, a legal and factual environment supporting the application of these principles in the day-to-day working of the administration has to be created to *implement* the pan-European general principles of good administration in the national legal order. This is a permanent multi-dimensional task of all state organs. However, the fulfilment of this task by different state actors is most effective when it is actively promoted and coordinated by the *government*. Thirdly, the pan-European general principles of good administration can serve as standards of national *judicial review* and of national external monitoring of administration and therefore be a tool to *enforce* good administration.

31.78

2.25 et seq.) could learn from the EU Commission's leniency programme and its 'anonymous whistleblower tool', which have proved to be quite successful in antirust proceedings (cf. https://ec.europa.eu/competition/cartels/overview/index_en.html).

[128] Cf. M. Breuer, "The Council of Europe and International Institutional Law" in Schmahl/Breuer (fn. 7), pp. 946 – 968 (MN. 38.32).

Analysing these 'modes of operation' of the pan-European general principles of good administration is of interest because it reveals that their 'complete' effectiveness depends on the interaction between different national actors. This already shows that there are no clear boundaries between 'transposition', 'implementation' and 'enforcement' of these pan-European principles. The different elements of this triad correspond to different phases of the *mise en œuvre* of these principles within the national legal order, which merge into one another with the ultimate aim of fully injecting these principles into domestic law and administrative practice. This leads us to the following conclusion which could seem to be a paradox at first sight. The more comprehensively the pan-European general principles of good administration are transposed, implemented and enforced in the national legal system the less they appear as foreign bodies in this system and the less visible they become. Furthermore, this explains why one cannot say that the pan-European principles are either effective or not effective within a national legal order. From comparing the national reports, we can see that they can be effective at different times to different degrees, at different levels and sometimes in different forms depending on the content and source of the principles. Thus, it becomes clear that harmonizing the national administrative law of the Member States of the CoE with regard to the 'limiting function' of administrative law is a *process,* with the ultimate aim being "to achieve a greater unity" between the CoE Members (cf. MN. 0.32), something which is at different stages of development in the different Member States.

31.79 The combined use of the terms 'transposition', 'implementation' and 'enforcement' to describe the different modes of operation of the pan-European general principles of good administration is deliberate, even if these terms originate from EU law. This triad is widely accepted (however, rarely elaborated on in detail) to describe the duties of the EU Member States deriving from Article 4 (3) TEU to 'ensure the fulfilment' of EU law, especially in the case of the obligation to 'transpose', 'implement' and 'enforce' the regulatory programme of EU directives.[129] However, there are no apparent reasons not to use these terms in the present context. They correspond with the role of the national government, the legislator, the administration and the national judiciary when a state wants (or has to) take up 'foreign' political ideas and legal concepts, to transform them into a national political agenda and to put this national political

---

[129] See, e. g., European Parliament Think Tank, *At a Glance: Transposition, implementation and enforcement of Union law* (EPRS_ATA(2018)627141) of 15 November 2018; L. Etherington, "Digging Beneath the Surface: Transposition, Implementation and Evaluation of European Environmental Law", (2006) 8 *Journal of Environmental Policy and Planning*, pp. 107 – 133 (pp. 113 et seq.).

agenda into practice. Similar terms and concepts are, thus, also used in the context of the research on legal transplants[130] (cf. MN. 31.04). The resulting associations with EU law allow us to (carefully) draw on the results of EU implementation research whilst being, however, well aware of the fundamental differences between the EU and the CoE and the effects of their respective law (cf. MN. 2.01).

1. Transposition of the Pan-European General Principles of Good Administration into National Law

31.80 When we speak of 'transposition' of the pan-European general principles of good administration we refer to the integration of these principles into the national 'law in the books' so that they became legally binding and visible in the domestic legal order. This does not exclude them remaining at the level of purely textual commitments. Nevertheless, transposition of the pan-European general principles of good administration may be a necessary prerequisite for them also becoming effective in the 'law in action'.

31.81 In fact, all pan-European general principles of good administration – independently of their sources – can give impetus to introducing new or adapting existing legislation at the national level. A lot of examples have been given for this in the country reports and the foregoing section of this chapter. In all these cases the legislator takes inspiration from CoE hard or soft law, which is transposed into directly applicable general provisions capable of creating rights and obligations for the individual, and which are to be invoked in court – and thus into national (hard) law. This national 'hard law' transposing a pan-European general principle can be of a merely declaratory nature if the transposed principle is already a directly applicable part of the national legal order. This would be the case if it derives from a self-executive provision of a duly ratified CoE convention incorporated into the national legal order. An example of this would be national legislation codifying specific case law of the ECtHR which makes this case law 'visible' in national law without replacing or superseding it. Furthermore, the transposition of pan-European general principles of good administration into national hard law may also have a constitutive or 'genuine' character, mainly if these principles derive from CoE soft law or those provisions of CoE conventions which are not self-executing. If the new legislation will eliminate national law contradictions with the ECHR the constitutive or declaratory character

---

130 Cf. Saunders (fn. 5), pp. 267 et seq. (who distinguishes between 'reception' and 'adoption' of legal transplants (which would correspond with 'transposition' and 'implementation' in our understanding).

of the new legislation depends on the place of the ECHR in the national hierarchy of norms (cf. MN. 31.89).

31.82 If the pan-European principle to be transposed is expressed on the level of the CoE, in a text formulated like the provisions of a statute – in particular in a CM recommendation or a CoE convention – the national legislator might be tempted to copy this (if necessary, translated) text more or less *verbatim* into the provisions of the national act. At first sight using the recommendations and conventions as text templates for national legislation seems to be the optimum solution for complying with these acts.[131] Recommendation CM/Rec(2007)7 on good administration even seems to invite the Member States to carry out this kind of transposition by describing itself as a 'model code'[132] (cf. MN. 1.71 et seq.). However, this consideration would imply that at least one of the main aims of these CoE acts is in fact the unification and/or harmonisation of the *wordings* of pertinent national legislation.[133] Such a general assumption would be in contrast with the CM recommendations typically only recommending that the governments of the Member States

> "be guided in their law and administrative practice by the principles annexed to this recommendation".

The pertinent CoE conventions do not use a similar standard formula, although they make it clear that they shall be binding for its parties, as to the result to be achieved but leave the choice

---

131 With similar arguments a transposition of EU directives using a simple 'copy out method' is sometimes preferred because "it rules out the risk of incorrect transposition" (R. Král, "On the Choice of Methods of Transposition of EU Directives", (2016) 41 *E. L. Rev.*, pp. 220 –242 [p. 232]) or is considered to guarantee that the directive will lead to a real approximation of the national provisions in the best way (cf. J. Schwarze, "Richtlinienumsetzung 'eins-zu-eins'" in R. Pitschas/A. Uhle/A. Aulehner (eds.), *Wege gelebter Verfassung in Recht und Politik – Festschrift für Rupert Scholz* (2007), pp. 167 – 178 [p. 172]).

132 See also Recommendation No. R (2000) 10 on codes of conduct for public officials which recommends: "[…] that the governments of member states promote, subject to national law and the principles of public administration, the adoption of national codes of conduct for public officials based on the *model code* of conduct for public officials annexed to this Recommendation" (emphasis added).

133 Cf. Benoît-Rohmer/Klebes (fn. 11), p. 107. The wording of the fourth recital of the preamble of Resolution (77) 31 on the protection of the individual in relation to acts of administrative authorities could also point in this direction: "Considering that, in view of the increasing co-operation and mutual assistance between member states in administrative matters and the increasing international movement of persons, it is desirable to promote a common standard of protection in all member states". However, this recital is not included in the preamble of the other pertinent CM recommendations.

of form and methods to the national authorities.[134] In sum, both the CoE conventions and recommendations in the realm of administrative law acknowledge that the "fundamental differences" in the legal systems of the CoE Member States,

> "[…] particularly in their underlying concepts render the enactment of identical provisions – i.e. true unification – impossible. What can be and has been achieved is the adoption of common solutions to given legal problems which are then implemented by the legislatures of the member States within the confines of their individual legal systems"[135].

31.83 Thus, a more or less *verbatim* transposition of provisions of the pertinent CoE conventions or recommendations would be a 'minimalist' transposition, meaning that the national legislator would not be 'guided' by the principles enshrined in them but would merely copy them without adapting them to their individual legal systems. This may be an indication that this is done only for 'window dressing' and that the respective laws are not really meant to be implemented. However, if the provisions of the CoE act copied *verbatim* are about individual rights to be recognized by the Member States, e.g. in administrative procedures or administrative court procedures, the aim of such an approach may also be to create something like a 'Bill of Rights' *vis-à-vis* the administration or a legally binding 'citizen's charter'.[136] This 'charter' would then simply frame the administrative and judicial decision-making process. It could hardly be used as a (legal) working basis for the administration and courts. Such a working basis consists of comprehensive legislation on administrative procedures and administrative justice including rules on the powers and obligations of administrative authorities and courts (cf. MN. 31.90). Thus, a simple 'charter' can 'only' guarantee rights against the administration and the judge and does not necessarily make the realisation of these rights a specific mission of the administration and the courts.

31.84 This already shows that a more or less *verbatim* transposition of the pertinent CoE conventions and recommendations is not necessarily the most effective way to introduce the pan-European national principles of good administration within the national legal order. It may even

---

134 See, e.g., Article 4 (1) of Convention No. 108: "Each Party shall take the necessary measures in its domestic law to give effect to the basic principles for data protection set out in this chapter". Cf. also the quite soft formulation of the obligations of the parties to the European Charter of Local Self-Government and of the CoE Convention on Access to Official Documents.

135 H. J. Bartsch, "The Acceptance of Recommendations and Conventions within the Council of Europe" in *Le rôle de la volonté dans les actes juridiques – études à la mémoire du professeur Alfred Rieg* (2000), pp. 91 – 99 (p. 93). Bartsch highlights this with regard to the standard-setting activities of the CM and through CoE conventions in general.

136 See for the minimalist transposition of Resolution 77 (31) in *Belgium*, *France* and *Luxembourg*: MN. 31.21.

be counterproductive if the relevant provisions of the CoE are formulated in a vague way. Here a *verbatim* transposition may lead to norms which are not sufficiently precise to create enforceable rights and obligations and, thus, either are incompatible with the requirements of legal certainty[137] or have to be considered merely as a 'symbolic legislation' intended just to demonstrate a 'good administration commitment' without creating legal effects. It is even questionable if a *verbatim* 'transposition' of the provisions of CoE conventions or recommendations prescribing or recommending organisational defaults (e. g. with regard to local self-government or administrative justice) could be considered as a transposition at all because it would not create or change the legal framework for the organisations and institutions concerned but merely form a sort of self-commitment of the legislator to do so in future.

31.85 In sum, whether or not a *verbatim* transposition of provisions can be a workable means of effectively introducing the pan-European general principles of good administration into the national legal order depends largely on the exact content of each specific CoE convention or recommendation.[138] Apart from this, it may also be questionable if such minimalist transpositions are in line with the spirit of these acts. They are formulated in a vague way to give the national legislator large leeway in 'customising' the prescribed or recommended specifications so that they are in line with national administrative traditions and legal mindsets as well as with national political preferences. Their vagueness enables the national legislator to see the transposition of CoE standards not only as a purely 'compulsory exercise' but above all as a possibility to shape its own good administration policy on the basis of the pan-European general principles of good administration.[139] The preamble of Recommendation CM/Rec(2007)7 on good administration makes this clear by highlighting that its intention is above all to give impetus to the

---

137 Similar arguments are put forward against a verbatim transposition of EU directives: S. Krohn, "Die Eins-zu-eins-Umsetzung des europäischen Umweltrechts", (2018) *Zeitschrift für Europäisches Umweltrecht*, pp. 385 – 386 (p. 386); L. E. Ramsey, "The Copy Out Technique: More of a 'Cop Out' than a Solution?", (1996) 17 *Statue Law Review*, pp. 218 – 228 (pp. 224 et seq.); W. Schroeder, "Die Beseitigung von 'Goldplating' durch nationale Deregulierung", (2018) 26 *Journal für Rechtspolitik*, pp. 227 – 235 (p. 231); R. Thomas/G. Lynch-Wood, "Transposing European Union Law in the United Kingdom: Administrative Rule-Making, Scrutiny and Better Regulation", (2008) 14 *EPL*, pp. 177 – 210 (pp. 187).

138 With regard to the transposition of EU directives it is also acknowledged that there is no general possibility of a *verbatim* transposition but the mere existence of this legislative option depends on the precision of the directive: M. Payrhuber/U. Stelkens, "*1:1-Umsetzung von EU-Richtlinien: Rechtspflicht, rationales Politikkonzept oder (wirtschaftspolitischer) Populismus*", (2019) *EuR*, pp. 190 – 221 (p. 214).

139 With regard to the transpositions of EU directives a similar view (understanding the scope for transposition of directives above all as a possibility for political shaping) is taken by the political science research on 'Customization', see, e.g., E. Thomann, "Customizing Europe: transposition as bottom-up implementation", (2015) 222 *Journal of European Public Policy*, pp. 1368 – 1387; E. Thomann/A. Zhelyazkova, "Moving beyond (non-)compliance: the customization of the European Union policies in 27 countries", (2017) 24 *Journal of European Public Policy*, pp. 1269 – 1288.

Member States to '*promote*' good administration. This can only be done in a credible way if this promotion is not perceived as an extraneous but an internal policy.

31.86 Furthermore, it may be highlighted that effective transposition of the pan-European general principle of good administration into national hard law does not necessarily imply action being taken by the legislator. This can also happen through judge-made law, i.e. through established case law irrespective of whether case law is considered as a genuine source of law (as in the common law countries) or 'only' as the expression of unwritten principles having legal force which become incrementally visible as *general* principles because of being routinely applied and refined by the courts. As regards the effectiveness of transposition via national case law, the main issue may be to ascertain whether the judge-made law has become clear enough to satisfy the principle of legal certainty.[140] In conceptual terms it should be highlighted that a 'constitutive' ('genuine') *transposition* of the pan-European general principles of good administration into national law through judge-made law only occurs if the principle itself is not part of an international treaty or another source of international law which is considered directly applicable and self-executing within the national legal order in question. Thus, the reception of the pan-European general principles of good administration through judicial application of the ECHR (MN. 2.53 et seq.) is not a constitutive transposition of these principles into the national legal order by the judge. It is a 'simple' application of an international treaty directly applicable and self-executing through the operation of the pertinent national constitutional provisions (cf. MN. 31.89). In the end, it is of a merely declaratory character. This is even not different if the national courts follow the example of the ECtHR and refer to other – non-binding – CoE sources as tools to give a concrete expression to the ECHR's norms when interpreting them (cf. MN. 1.52 et seq.). In contrast, a constitutive ('genuine') transposition of the pan-European general principles via judge-made law happens if the national judge refers (1) to a CoE convention either not ratified or not considered to be self-executive by the Member State in question or (2) to CoE soft law to directly justify (without a detour via the ECHR) the existence of national general principles of administrative law by way of the *faute de mieux* approach (cf. MN. 2.58 et seq.). However, it has to be admitted that the boundaries between these scenarios are fluid and that the exact distinction between them is unlikely to be relevant in practice. In fact, even in the aforementioned cases of crystal-clear examples of the application of the *faute de mieux*

---

140 Cf. with regard to the requirement of a legal basis for infringements in the rights guaranteed by the ECHR (cf. MN. 1.44): *Sunday Times v UK* (6538/74) 26 April 1979 ECtHR [Plenary] at [47]; N. Lupo/G. Piccirilli, "European Court of Human Rights and the Quality of Legislation: Shifting to a Substantial Concept of 'Law'? (2012) 6 *Legisprudence*, pp. 229 – 242 (pp. 236 et seq.).

approach by national courts (cf. MN. 31.65) the courts use a combination of both methods of argumentation to make their points.

31.87 Finally, the question may arise of whether a specific pan-European general principle of good administration can be considered as 'transposed' into the national legal order by the national lawmaker in the specific scenario of national legislation preceding recognition of the pan-European general principles on the CoE level covering the same matter and complying with them. In such a case the national legislator abstains from any legislative changes and/or the national judge from any modifications of established national case law to adapt national (case) law to the new CoE standards. In these situations the specific pan-European general principle has certainly not impacted the national legal order in a factual way. In contrast, it may be that the national principles have served as an inspiration for the 'CoE lawmaker' (cf. for examples MN. 31.20 et seq.) and may even be literally transposed into 'CoE law'. Nevertheless, it would be wrong to consider that in these cases the simple fact that the 'birth' of a specific pan-European principle on the CoE level did not entail any changes in legislation and case law on the national level makes it impossible to consider the pre-existing national (case) law as a transposition of this principle. In the end, it is through the (implicit) declaration that there is no need for change in national (case) law due to its already existing compliance with the new CoE standards that the national lawmaker expresses agreement that the principle is worth being 'upgraded' to a CoE principle and, thus, also worth being complied with in future legislation.

2. Implementation of the Pan-European General Principles of Good Administration in the National Legal Order and Everyday Practice

31.88 The transposition of the pan-European general principles of good administration into national hard law is sufficient only to integrate these principles into the national 'law in the books' so that they became legally binding and visible in the domestic legal order. However, to become effective in the real world they have to be applied and observed in the day-to-day working of the administration and, thus, have to become a natural part of the 'law in action'. Thus, a legal and factual environment conducive to the application of these principles in the day-to-day working of the administration has to be created, supported and maintained. We will refer to this as the 'implementation' of the pan-European general principles of good administration. As already said, this is a permanent multi-dimensional task involving all state organs.

31.89

The first element of this task would be the creation of an *operational constitutional framework* for incorporation of the ECHR[141] and other CoE conventions into the national legal order, making governmental, administrative and judicial non-compliance of self-executing provisions of these treaties a breach of the principle of the legality of administration.[142] Here the reports showed different technical and substantive solutions in detail which sometimes also distinguished between 'human rights treaties'/the ECHR and 'ordinary' international treaties.[143] The main differences between these solutions are related to the place of incorporated international treaties and the ECHR in the national hierarchy of norms. However, the question of the rank of incorporated treaties in the national hierarchy of norms is above all of importance with regard to the question of whether the legislator is bound by treaty provisions when enacting ordinary law or whether a 'treaty override' is constitutional.[144] From an administrative law perspective this raises the question of whether the administration and/or the courts can disregard statutory provisions which are contrary to treaty provisions.[145] Here the solutions described in the respective sections of our reports differ quite considerably, without any trend in a particular direction being discernible. This question may, however, be of relevance only in cases of a clear conflict of norms which cannot be resolved by means of a treaty-consistent (namely ECHR-consistent) interpretation of the statute.[146] Furthermore, regardless of the place of incorporated international treaties in the national hierarchy of norms, their provisions (at least if they are self-executing)

---

141 An overview on the status of the ECHR in the internal legal order of the CoE Member States is given by J. Polakiewicz, "The Status of the Convention in National Law" in Blackburn/Polakiewicz (fn. 73), pp. 31 – 53 (pp. 36 et seq.).

142 This is highlighted in the reports on *Belgium*: MN. 4.24; *Bulgaria:* MN. 19.22; *Croatia:* MN. 27.27; *Estonia:* MN. 20.12; *Germany:* MN. 11.36; *Lithuania:* MN. 21.11; *Portugal:* MN. 14.27; *Romania:* MN. 24.24 et seq.; *Spain:* MN. 15.16.

143 The latter distinction is made by the constitutions of *Armenia:* MN. 29.30 et seq.; *Czechia:* MN. 23.17; *Latvia:* MN. 25.07 et seq.; MN. 25.16; *Norway:* MN. 8.31 et seq.; MN. 8.35; *Romania:* MN. 24.04; MN. 24.09 et seq.; *Serbia:* MN. 30.06 et seq.; *Sweden:* MN. 9.02; *Turkey:* MN. 10.13 et seq. A special status is granted to the ECHR in the constitutions of *Albania:* MN. 26.37 et seq.; *Austria:* MN. 12.05; *Hungary:* MN. 17.49 et seq.; *Slovenia:* MN. 22.41 et seq.

144 A treaty override may only be unconstitutional in so far as an incorporated treaty has a constitutional rank or a rank between the constitution and ordinary law. This would be the case, e.g., in *Albania:* MN. 26.19 et seq.; *Austria:* MN. 12.05 (only with regard to the ECHR); *Belgium:* MN. 4.23; *Bulgaria:* MN. 19.02; *Croatia:* MN. 27.23 et seq.; *Czechia:* MN. 23.17; *France:* MN. 5.18 et seq.; *Georgia:* MN. 28.15 et seq.; *Estonia:* MN. 20.10; *Italy:* MN. 6.04 et seq.; *Lithuania:* MN. 21.10 et seq.; the *Netherlands:* MN. 7.27; *Poland:* MN. 18.12; *Portugal:* MN. 14.27; MN. 14.41; *Serbia:* MN. 30.06 et seq.; *Slovenia:* MN. 22.13 et seq.; *Spain:* MN. 15.18; *Switzerland:* MN. 12.13; *Turkey:* MN. 10.13 et seq.

145 The question is addressed in the reports on *Belgium*: MN. 4.24; *Bulgaria:* MN. 19.03 et seq.; *Italy:* MN. 6.06; *Hungary:* MN. 17.19; *Latvia:* MN. 25.10; *Romania:* MN. 24.24 et seq.; *Sweden:* MN. 9.08.

146 See for such an argument for *Germany:* MN. 11.16; MN. 11.37 et seq.; *Finland:* MN. 16.14; *Hungary:* MN. 17.18; *Italy:* MN. 6.06: the *Netherlands*: MN. 7.28; *Poland:* MN. 18.12; *Spain:* MN. 15.19; *Switzerland:* MN. 12.13; *United Kingdom*: MN. 3.22 et seq.

can always be considered as legal limits to administrative and judicial discretion by operating a treaty-consistent interpretation of those national rules granting discretion. Thus, the exercise of administrative or judicial discretionary power may be considered as unlawful if it leads to a result which is incompatible with treaty provisions. However, we have to admit that this aspect is not mentioned in any of our reports.

31.90 On the level of *ordinary legislation* effective implementation of the pan-European general principles of good administration means 'tidying up' domestic law existing prior to the principles (or the national act transposing them into domestic law) in order to avoid redundancies or contradictions between the existing provisions and those resulting from the pan-European principles or their transposition. The aim of this 'tidying up' is to ensure the consistency of the domestic law.[147] In this regard, implementing the pertinent pan-European general principles of good administration in comprehensive codes (such as General Administrative Procedures Codes or Municipal Codes) may be more effective than using simple 'Charters' or a 'Bill of Rights'. Integrated into a comprehensive code dedicated to the administration, the principles become an integral part of the legal working basis of the administration so that they also gain direct relevance to the work of the administration in day-to-day practice (cf. MN. 31.83). In general, it can be said that the more comprehensively the legislator implements the pan-European general principles of good administration into the national legal framework, the more they are appropriated as 'national' standards bearing 'national' legitimacy, and the less they are perceived as being of 'foreign' origin.[148] Furthermore, a coherent legal framework including the pan-European general principles of good administration can reduce the dangers of civil servants and judges – following an unduly 'formalistic' approach – reaching decisions which do not take sufficient account of the parties' interests or legal common sense (cf. MN. 31.55). It helps to promote good administration as a precondition for effective public services with the purpose of serving citizens and not the other way around (cf. MN. 0.25 et seq.).

31.91 Thus, comprehensive implementation of the pan-European general principles of good administration by the legislator facilitates their application (and the application of the national acts transposing and implementing them) as 'normal' national law by the administration and courts.

---

147 The necessity of 'tidying up' domestic law to ensure effective implementation of EU directives into national law is highlighted by the 'tidying up' of the French *Conseil d'État:* Conseil d'État, *Pour une meilleure insertion des normes communautaires dans le droit national – les études du Conseil d'État* (2007), pp. 48 et seq.

148 Similarly, Saunders (fn. 5), p. 272 (with regard to legal transplants in general).

In fact, at the level of *administrative and judicial application of the law* effective implementation of the pan-European general principles of good administration means that they and the transposing and implementing national acts are used as a 'normal' basis for administrative and judicial decision-making and as norms are not genuinely different from norms of a purely domestic character. This means above all that the pan-European principles and the transposing and implementing national acts have to be applied in a manner which is not different or less favourable than that of applying purely domestic law. Furthermore, the pan-European principles and the transposing and implementing national acts have to be applied in a manner which takes into consideration their purpose and does not render them virtually or nearly ineffective (depriving them of any or most of their '*effet utile*').[149] Furthermore, effective implementation of the pan-European general principles of good administration through administrative and judicial application means that these principles, as well as national acts transposing and implementing them, are interpreted in the light of the CoE sources from which they originate, the pertinent case law of the ECtHR (cf. MN. 1.17) and the practice of those CoE institutions charged with monitoring the compliance of the Member States with these principles (cf. MN. 1.85 et seq.).

31.92 On the *political level* effective implementation of the pan-European general principles of good administration is above all a governmental mission. To succeed a real commitment to achieving sustainable promotion of these principles is necessary.[150] This real commitment means, *inter alia*, ensuring appropriate funding for administrative and local authorities as well as for courts and other control institutions, seriously tackling the causes of corruption and systemic human rights violations and calling those responsible for corruption and human rights violation to account, identifying an administrative and judicial culture of evading responsibility and 'legal formalism' (MN. 31.55) as 'bad administration' and introducing pertinent issues in

---

149 Both requirements are well known as the '*principle of equivalence*' and the '*principle of effectiveness*' in EU law where they are established as requirements to be complied with by national authorities and courts when applying domestic procedural law to implement EU law (cf. e.g., A. Arnull, "Remedies before National Courts" in R. Schütze/T. Trimidas [eds.], *Oxford Principles of European Union Law – Volume I: The European Union Legal Order* (2019), pp. 1011 – 1039 [pp. 1012 et seq.]; P. Craig, *EU Administrative Law* [3rd edition 2018], pp. 758 et seq.; J. H. Jans/R. de Lange/S. Prechal/R. J. G. M. Widdershoven, *Europeanisation of Public Law* [2nd edition 2015], pp. 43 et seq.). Stripping these principles of their specific Union law context, they describe very well the requirements that national authorities and courts must respect to fully integrate norms of a 'foreign' origin into their national legal orders.

150 This is what the Preamble of the Recommendation CM/Rec(2007)7 on good administration means when recommending that "the governments of member states […] promote good administration within the framework of the principles of the rule of law and democracy [and] through the organisation and functioning of public authorities ensuring efficiency, effectiveness and value for money".

(legal) education and training for civil servants and judges,[151] to name only a few aspects of serious governmental engagement with regard to the promotion of good administration. Less demanding, but still useful, would be measures for promoting the translation and dissemination of the pertinent CoE documents and findings of the ECtHR and their integration in the relevant databases, and measures for seeking support and guidance from competent CoE institutions such as the Venice Commission, GRECO and the CLRAE (cf. MN. 1.85 et seq.).

31.93 In contrast, governments (and the apex courts) do not create an environment fostering the implementation of the pan-European general principles of good administration when they tolerate systemic human rights violations, become indifferent to condemnations from the ECtHR or openly deny their obligations to comply with them, and when they try to delegitimise the ECtHR and the CoE institutions with 'principled resistance'.[152] Furthermore, only bad implementation can be achieved when governments use more or less populist rhetoric putting forward *ad nauseam* national sovereignty, constitutional identity or national legal culture to ban CoE or ECtHR 'interference' in internal affairs with the sole aim of distracting the international community and the national electorate from internal problems, bad administration or their unwillingness to share power and accept objective checks and monitoring. The latter practice is characterised by the fact that government officials (or the apex courts) emphasise national legal cultural identity without specifying which concrete element of the national legal culture is actually affected by the measure termed undue interference. Throughout this book we have found examples of this kind of behaviour. Such behaviour is harmful to the effective implementation of the pan-European general principles of good administration, mainly because of its negative role model effect. If national governments and/or the apex courts dismiss the CoE and ECHR standards as being standards of dubious legitimacy, there is no reason why the administration (or the lower courts) should make an effort to implement them effectively. However, the more the pan-European general principles of good administration have been implemented into the national legal order to an extent that their 'foreign' character becomes hardly visible , the less such behaviour may affect their effectiveness.

---

151 The CoE supports such training activities through the HELP programme (Human Rights Education for Legal Professionals (cf. E. Pastrana/R. Bustos, "'Bonne formation pour des bonnes jugements – Le programme HELP (formation aux droits de l'homme pour les professionnels du droit) du Conseil de l'Europe", (2019) 118 *RTDH*, pp. 531 – 545.

152 See on this concept: M. Breuer, "'Principled Resistance' to ECtHR Judgements: Dogmatic Framework and Conceptual Meaning" in M. Breuer (eds.), *Principled Resistance to ECtHR Judgements – A New Paradigm?* (2019), pp. 3 – 34 (pp. 18 et seq.).

3. Enforcement of the Pan-European General Principles of Good Administration by Administrative Oversight and Justice

31.94 Creating, fostering and maintaining a legal and factual environment supportive of the application of the pan-European general principles of good administration in the day-to-day working of the administration is a necessary condition for the pan-European general principles of good administration to become effective in the national 'law in action'. Yet, this may not be sufficient if the principles are not respected. They have to be enforced through, e.g., restoring situations which comply with them (through quashing non-compliant decisions, re-opening proceedings or making a factual restitution in kind), granting compensation for damage suffered because of non-compliance with these principles, and ensuring adequate dissuasive sanctioning of those responsible for non-compliance (e.g. through disciplinary measures or criminal prosecution). This is what we refer to as 'enforcement' of the pan-European general principles of good administration in this section.

31.95 Effective enforcement of the pan-European general principles of good administration requires above all that these principles (and the domestic law transposing them) are applied as standards of judicial review and other oversight mechanisms. This means, e.g., that the courts conclude from non-compliance with the pan-European general principles that an administrative decision is unlawful, that ombudspersons consider non-compliance with these principles as 'maladministration', and that non-compliance with these principles is considered a breach of duty in disciplinary proceedings, internal review or – if relevant – budgetary control. It also means, furthermore, that persons aggravated by those measures have (effective) access to justice and that at least voluntary non-compliance with these principles entails a real risk of criminal and disciplinary proceedings for those responsible. With regard to the pan-European general principles of good administration which deal with issues of administrative justice this means that they do not only lay the foundation for the other pan-European general principles of good administration to be effectively enforced. They also have to be enforced themselves to become effective.

31.96 Nonetheless, effective enforcement of the pan-European general principles of good administration does not necessarily go as far as implying that they need to be made/recognized as directly applicable *international* standards of review by courts and other oversight mechanisms. Again, their comprehensive transposition and implementation by the national legislator may lead to situations in which their enforcement is not really visible as enforcement of international standards but mainly as enforcement of national law (cf. MN. 31.91). This means that having a

small number of cases in which national courts or other oversight institutions refer directly to the pan-European general principles of good administration does not necessarily lead to the conclusion that they have not been transposed and implemented to a high degree of effectiveness or that they are not effectively enforced.[153] It may also be an indication that these principles are in general so effectively implemented into the national legal order that their enforcement does not stand out in daily practice. It contrast, it may be an indication that national law is incompatible with the pan-European general principles of good administration if courts need to refer to them as international standards by asking whether the pan-European general principles take precedence over national law or whether national law can and must be interpreted in accordance with these principles (cf. MN. 31.89 et seq.). Furthermore, if the apex courts, above all the constitutional courts, find themselves obliged to refer almost by default directly to the pan-European general principles as standards of review this may be an indication of serious shortcomings in their implementation and enforcement on the level of the administration and the lower courts.[154] This situation must again be distinguished from the situation in which apex courts refer to pan-European general principles of good administration to fill gaps in national legislation (MN. 31.86).

31.97 Finally, our reports reveal that many ombudsman institutions, data protection officers, freedom of information commissioners and similar independent accountability institutions make it known to the public that they consider the enforcement of the pan-European general principles of good administration, in particular those deriving from the ECHR and other CoE conventions, to be a distinctive part of their mission.[155] Here, direct reference to the CoE sources of these principles (instead of referring to domestic legislation) may serve to draw on positive connotations of 'international human rights standards' and to stress the independence of the institution in question from the national government. Thus, the mere fact of these references existing or there being a high number of them does not allow us to conclude that the pan-European general principles of good administration are enforced by these institutions in a particularly effective way.

---

153 However, such conclusions are plausibly drawn in the reports on *Czechia*: MN. 23.60 et seq.; *Serbia:* MN. 30.32 et seq.

154 We find such conclusions in the reports on *Albania:* MN. 26.44; MN. 26.46 et seq.; *Croatia:* MN. 27.45 et seq.; *Hungary:* MN. 17.75; *Slovenia:* MN. 22.43.

155 See, e.g., the examples given in the reports on *Croatia:* MN. 27.54; *Estonia:* MN. 20.64 et seq.; *Finland:* MN. 16.41 et seq.; *France:* MN. 5.74 et seq.; *Georgia:* MN. 28.50; *Hungary:* MN. 17.68 et seq.; *Latvia:* MN. 25.71; *Lithuania:* MN. 21.53; *Poland:* MN. 18.65; MN. 18.69; *Portugal:* MN. 14.31; *Romania:* MN. 24.62 et seq.; *Spain:* MN. 15.62 et seq.; MN. 15.77; *Sweden:* MN. 9.47.

III. The Pan-European General Principles of Good Administration as Regional International Law

31.98 The foregoing sections showed that the pan-European general principles of good administration are transposed, implemented and enforced within the national legal orders of the CoE Member States to different degrees and to different extents; yet they are never considered as completely irrelevant. This assessment is true regardless of the 'specification' of a concrete principle, i.e. regardless of the subject matter covered (i.e. civil service, local self-government, individual rights, administrative procedure, administrative justice, transparency, etc.) and regardless of the awareness of relevant national actors (members of government, members of parliament, administrators and judges) that pertinent work exists on the CoE level. Sometimes the relevant national actors become aware of this relevant work indirectly, for instance through opposition in parliament, the claimant in an administrative court case or CoE monitoring. In the latter case, however, the pan-European principles lead at best to an adaption of national (case) law or the statement that existing national (case) law is already in line with them (cf. MN. 31.87). They lead at the very minimum to a certain need to explain and justify (in law drafting processes, political debates in parliament, court decisions and in the context of CoE monitoring activities) at the national and the international level why particular principles are not being followed in a given state (cf. MN. 31.41). Thus, the pan-European general principles of good administration are certainly considered to be of *political* weight by the relevant national actors in the CoE Member States. Furthermore, the more the pan-European general principles of good administration are considered to form a 'coherent whole' covering the entire range of general organizational, procedural and substantive legal institutions meant to ensure a democratically legitimized, open and transparent administration respecting the rule of law on the level of the CoE (cf. MN. 1.95), the more they are perceived as a 'CoE package of good administration' (cf. MN. 1.88) on the national level. It is worth exploring if the pan-European general principles of good administration 'as a package' are not only of political but also of normative relevance in the relationship between the CoE and its Member States and between the CoE Member States.

31.99 In doing so we will first demonstrate that it is justified to derive from this CoE Member States' *practice* a *normative relevance* for the pan-European general principles of good administration 'as a package'. In fact, this 'package' is part of the CoE's regional international law, namely as an authentic (but still developing) concretisation of the administrative law components of the founding values of the CoE within the meaning of Article 3 SCoE. Thus, they can

be used by the CoE organs and institutions and by the ECtHR as normative evaluation standards for assessing the compliance of CoE Member States' national administrative law with CoE law regarding its 'limiting function'. Violation of the pan-European general principles of good administration 'as a package' by a CoE Member State may be considered an infringement of regional international law – and is not only a purely internal matter (cf. MN. 31.101 et seq.).

31.100 Considering that the pan-European general principles of good administration are part of the CoE's regional international law as a 'package' does not mean that they form a strict set of rules to be observed in each and every aspect by the CoE Member States.[156] As a 'package' these principles leave a wide margin of appreciation to the CoE Member States as to which principles (included in the 'package') are to be transposed, implemented and enforced into the national legal system, to what extent and under which circumstances. However, even a wide margin of appreciation has its limits (otherwise, there would not be a margin of appreciation but unfettered discretion).[157] Furthermore, the transposition, implementation and enforcement of only individual pan-European general principle of good administration or only of principles with the same 'specification' (i.e. only principles covering either civil service or local self-government, individual rights, administrative procedure, administrative justice, transparency, etc.) cannot guarantee on its own that the national administrative law of a given Member State respects the founding values of the CoE referred to in Article 3 SCoE (cf. MN. 1.11 et seq.). This is only possible by transposing, implementing and enforcing a sufficient (minimum) number of the pan-European principles of different 'specifications' in 'flexible combinations'. Only then can national administrative law provide for checks, limits and balances of the powers of administration from different sides so that the 'administrative law component' of the founding values of Article 3 SCoE is effectively *mis en œuvre* by creating and ensuring a democratically legitimized, open and transparent administration respecting the rule of law. We will describe these graduated legal effects of the pan-European general principles of good administration with a concept which we call the 'building blocks theory' and show that these graduated legal effects are even typical for normative relevant 'CoE standards' (cf. MN. 31.116 et seq.).

---

156 Similarly G. de Vel/T. Markert, "Importance and Weaknesses of the Council of Europe Conventions and of the Recommendations addressed by the Committee of Ministers to Member States" in B. Haller/H.-C. Krüger/H. Petzold (eds.), *Law in Greater Europe* (2000), pp. 345 – 353 (p. 353).

157 Cf. J. Gerards, *General Principles of the European Convention on Human Rights* (2019), p. 7; G. Ravarani, "Quelques réflexions sur la légitimité du juge de Strasbourg", (2018) 118 *RTDH*, pp. 261 – 296 (pp. 287).

1. The Pan-European General Principles of Good Administration as an Authentic Concretisation of Article 3 SCoE

31.101 The pan-European general principles of good administration as a 'package' can be seen as part of the CoE's regional international law only if they are to be understood as an authentic concretisation of the 'administrative law dimension' of the CoE founding values enunciated in Article 3 SCoE. Conversely, when understanding this 'package' as a normative concretisation of Article 3 SCoE we claim that understanding Article 3 SCoE in light of the pan-European general principles of good administration corresponds to an authentic interpretation (i.e. an interpretation shared by the parties of the CoE) of Article 3 SCoE. This claim is not only justified under international rules on the interpretation of international treaties as expressed in articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT). It also reflects the fact that the pan-European general principles of good administration are part of the 'common heritage' of the CoE Member States – a fact that impacts on the way the international rules on the interpretation of international treaties have to be applied here (cf. MN. 31.114 et seq.).

31.102 The SCoE is an international treaty to which the general rules of international law on the interpretation of international treaties apply. These rules are laid down in articles 31 to 33 VCLT, which reflect customary international law.[158] Therefore, articles 31 to 33 VCLT can be used as rules for the interpretation of the SCoE even if the VCLT does not directly apply to international treaties concluded before its entry into force (Article 4 VCLT) and even though it has not been ratified by all CoE Member States.[159] This is generally accepted.[160] Accordingly, the ECtHR agrees to be guided by articles 31 to 33 VCLT when interpreting the ECHR[161] because these articles

> "enunciate in essence generally accepted principles of international law to which the [ECtHR] has already referred on occasion".[162]

---

158 International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries – Part IV of the Report of the International Law Commission* (A/73/10) of 2018, p. 16 at [2], pp. 18 at [4]; M. N. Shaw, *International Law* (8th edition2017), p. 685; J. Wouters/C. Ryngaert/T. Ruys/G. de Baere, *International Law – A European Perspective* (2019), p. 96.

159 *France*, *Iceland*, *Norway*, *Romania* and *Turkey* are not party to the VCLT.

160 C. Walter, "Interpretation and Amendments of the Founding Treaty" in Schmahl/Breuer (fn. 7), pp. 23 – 39 (MN. 2.43 et seq.); Wittinger (fn. 76), p. 38.

161 See Gerards (fn. 157), pp. 47 et seq.; D. Harris/M. O'Boyle/E. Bates/C. Buckley, *Law of the European Convention on Human Rights* (4th edition 2018), p. 6.

162 *Golder v UK* (4451/70) of 21 February 1975 ECtHR [Plenary] at [29].

31.103 Article 31 (3) (b) VCLT is of particular importance for our questions. It stipulates that when interpreting an international treaty

> "[t]here shall be taken into account, together with the context […] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

With regard to Article 31 (3) (b) VCLT it is acknowledged that 'subsequent practice' and 'agreement of the parties regarding the interpretation of the treaty' may not always be distinguished. Such 'agreement' within the meaning of Article 31 (3) (b) VCLT is not a formal international treaty but a sort of understanding among the parties regarding the interpretation of the treaty as the result of a process.[163] Thus, 'subsequent practice' can (already) be considered

> "when the parties to a treaty, through their authorities, engage in common conduct in the application of the treaty, and when such action is conducted wilfully and with awareness (belief, fully aware) of the consequences of their actions".[164]

31.104 As for the question of which national acts or omissions can amount to 'subsequent practice' it is acknowledged that a

> "[s]ubsequent practice […] must be conducted 'in the application of the treaty'. This […] includes not only official acts at the international or at the internal level that serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, inter alia, official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the internal or at the international level".[165]

31.105 Furthermore, insofar as Article 31 (3) (b) VCLT is precisely applied to the SCoE it is acknowledged that (1) the day-to-day practice of the CM and the PACE when applying the SCoE is of relevance as well as (2) the reactions of the 47 CoE Member States to this practice.[166] As a process involving so many actors a common understanding of the SCoE through 'subsequent state practice' may evolve over decades. This is above all true in the present context: on the level of the CoE the development of the pan-European general principles of good administration as a 'package' as well as, on the national level, their transposition, implementation and

---

163 International Law Commission (fn. 158), p. 30 at [11].

164 L. Crema, "Subsequent Agreements and Subsequent Practice within and outside the Vienna Convention" in G. Nolte (ed.), *Treaties and State Practice* (2013), pp. 13 – 28 (p. 17).

165 International Law Commission (fn. 158), p. 32 at [18].

166 Cf. Walter (fn. 160), MN. 2.46 et seq. Wittinger (fn. 76), pp. 76 et seq.

enforcement, took and takes place step-by-step through an ongoing (and open-ended) process (cf. MN. 1.89 et seq.). Nonetheless, the requirements for establishing 'state practice' in the present context need not be set too high (cf. also MN. 31.113 et seq.). Interpreting Article 3 SCoE in light of the pan-European general principles of good administration would 'only' flesh out the content of this article. Such an interpretation would neither extend the scope of the article nor create completely new obligations for the CoE Member States or give Article 3 SCoE a completely new twist. It would 'only' make the obligations that the Member States entered into when ratifying the SCoE more visible without either amending or modifying Article 3 SCoE.[167]

31.106 Through application of these criteria there is sufficient evidence to prove that the CM, the PACE and the ECtHR, as well as CoE Member States, are engaged in a state practice in their application of the SCoE. This state practice establishes their agreement that the pan-European general principles of good administration 'as a package' are a normative concretisation of the administrative law components of the values enshrined in Article 3 SCoE which, nevertheless, leave a wide margin of appreciation for the CoE Member States (cf. MN. 31.100). To explain this we will first outline our general analysis of the conduct of the organs of the CoE and the ECtHR as well as of the CoE Member States, then we will discuss some particular questions related to the assessment of this state practice, before explaining that this state practice gives an additional substantive legitimacy to the pan-European general principles of good administration. This acknowledges that the pan-European general principles of good administration are part of the 'common heritage' of the people of the CoE Member States.

31.107 That the CM, the PACE and the ECtHR commonly understand the pan-European general principles of good administration as being a concretisation of Article 3 SCoE can be deduced from the decades spent building up these principles incrementally and consolidating them into a coherent framework by inextricably bundling different sources of CoE hard and soft law (CoE conventions, the pertinent case law of the ECtHR, CM recommendations, the adoption of the activities of the CLRAE, the Venice Commission, GRECO, etc.). These sources refer to and interact with each other so as to cover the entire range of general organizational, procedural and substantive legal institutions meant to ensure a democratically legitimized, open and transparent administration respecting the rule of law (cf. MN. 1.95 et seq.). This reflects an increasing

---

[167] See for the question if amending an international treaty by subsequent state practice is possible and which requirements for the establishment of a state practice are necessary in this case: International Law Commission (fn. 158), p. 59 at [25] et seq.; M. G. Kohen, "Keeping Subsequent Agreements and Practice in Their Right Limits" in Nolte (fn. 164), pp. 34 – 45 (pp. 35 et seq.).

awareness on the level of the CoE that this framework goes beyond the political level by formulating normative expectations with regard to the founding values of Article 3 SCoE.

31.108 On the part of the CoE Member States, the previous sections of this chapter outlined that the pan-European general principles of good administration are in general accepted as a 'package' giving guidance (leaving a wide margin of appreciation) on how to promote, implement and enforce good administration within their national legal orders. Furthermore, all CoE Member States have ratified the ECHR, accepted the jurisdiction of the ECtHR and the 'orientation effect' of its case law on 'good administration issues' (cf. MN. 1.18 et seq.),[168] ratified the European Charter of Local Self-Government and the Convention No. 108 (cf. MN. 1.58; MN. 1.60) and participate in the activities of the CLRAE, the Venice Commission and GRECO (cf. MN. 1.10). Thus, in all CoE Member States the cornerstones of the pan-European general principles of good administration are either incorporated into the national legal order or are accepted as being standards of review used by the ECtHR and in the monitoring activities of the CLRAE, the Venice Commission, and GRECO. Furthermore, the conduct of the representatives of the CoE Member States within the CM and the PACE allow for concluding that the increasingly coherent standard-setting activities of the CoE with regard to good administration are recognized as a coherent common strategy to build up a 'good administration framework' in an incremental way. In fact, the preamble of each pertinent CM recommendation refers to the foregoing recommendations covering similar matters so that each agreement of a given Member State to the adoption of a new CM recommendation related to the same issue may also be considered as renewed approval of the foregoing recommendations, regardless of whether the state in question was already a member of the CoE at the time of their adoption.

31.109 The adoption of the Recommendation CM/Rec(2007)7 on good administration is a case in point to illustrate the foregoing idea. Its preamble lists all the older CM recommendations on administrative procedure, civil service and administrative justice. With the adoption of Recommendation CM/Rec(2007)7 on good administration, all 47 CoE Member States accepted these older recommendation deliberately as a part of the CoE's *acquis* in the field of good administration. In the last 'considering recital' of this preamble it is furthermore clearly expressed that the principles enshrined in it are considered an element of the "right to good administration", the "requirements" of which

---

168 The case law of the ECtHR on 'good administration issues' is not brought into question by the recent discussion of the legitimacy of the ECtHR and its case law (cf. on this discussion MN. 31.113; MN. 31.121).

> "stem from the fundamental principles of the rule of law, such as those of lawfulness, equality, impartiality, proportionality, legal certainty, taking action within a reasonable time limit, participation, respect for privacy and transparency; and that they provide for procedures to protect the rights and interests of private persons, inform them and enable them to participate in the adoption of administrative decisions".

Thus, through their agreement with Recommendation CM/Rec(2007)7 the representatives of all CoE Member States within the CM also agree upon an understanding that the pan-European general principles of good administration spelled out in this recommendation (and of those cited in the preamble) are a concretisation of the 'rule of law' and the other founding values enshrined in Article 3 SCoE. A similar meaning can be given to the agreement of the representatives of the CoE Member States to the adoption of Recommendation CM/Rec(2007)4 on local and regional public services (referring in its preamble *inter alia* to CM Recommendation No. R (97) 7 on local public services and the rights of their users) and of Recommendation CM/Rec(2019)6 on the development of the ombudsman institution 'replacing' Recommendation No. R (85) 13 on the institution of the ombudsman (cf. MN. 1.65).

31.110 These findings are confirmed by the introduction of the second edition of the CoE handbook 'The administration and you' – the current 'official marketing tool' of the CoE to promote the pan-European general principles of good administration (cf. MN. 1.93):

> "This handbook sets out and explains principles that have been adopted by the [CoE] which are relevant to the relations between public authorities and the people they serve. The [CoE] instruments from which these principles are drawn are listed in Appendix I. The reader should note that these instruments are the authoritative texts, as they are the result of political agreement between the member states of the [CoE] and have been adopted (and opened for signature, as the case may be) by its [CM]. While recommendations and resolutions of the [CM] are not legally binding on its member states, they do have political and moral authority by virtue of each member state's agreement to their adoption (unless, and to the extent which they have expressed a reservation to the text at the moment of its adoption) and the extent to which they are widely applied in the law, policy and practice of member states".[169]

When highlighting that the individual CM recommendations are not legally binding but have 'only' political and moral authority, the handbook clearly means that these recommendations are not 'strictly' legally binding. This does *not* imply that the whole 'package' of the pan-European general principles of good administration has no normative relevance.[170] Conversely,

---

169 CoE (ed.), *The administration and you – A handbook* (2nd edition 2018), p. 6.

170 The question arises of whether the 'moral authority' attributed to the CM recommendations in general (cf. MN. 1.08) is not a reason to expand the concept of 'law' beyond the scope of strictly legally binding rules to rules having normative relevance mainly because of their 'political and moral authority', see H. Jung, "Die Empfehlungen des Ministerkomitees des Europarates – zugleich ein Beitrag zur europäischen

another passage of the introduction to the second edition of the handbook makes it clear that the 'package' is to be understood as a concretisation of the administrative law components of the founding values of Article 3 SCoE:

> "Given the privileged place that public authorities have in democratic societies and the public character of their role, it is natural that the rule of law is the primary source of many of the principles in this handbook. The rule of law ensures that everyone – individuals and public authorities – is subject to the law; that there is legal certainty and that everyone knows what his or her rights and duties are under the law; that public authorities cannot act in an arbitrary manner; that proper application of the law is ensured by an independent and impartial judiciary whose judgments are enforced; and that human rights are respected, especially the principles of non-discrimination and equality of treatment".[171]

31.111 We must stress once again that the state practice discussed here refers only to the common understanding that the pan-European general principles of good administration as a 'package' are a normative concretisation of the administrative law components of the values enshrined in Article 3 SCoE leaving a wide margin of appreciation for the CoE Member States (cf. MN. 31.100). Thus, the simple fact that a representative of a given Member State has agreed to the adoption of a specific CM recommendation or to the text of a specific CoE convention does not allow us to conclude that this Member State is legally obliged by this conduct to follow this specific recommendation or to sign and ratify this specific convention.[172] Conversely, the simple fact that a Member State has not explicitly agreed to a specific CM recommendation or to the text of a CoE convention does not prevent us from assuming that the principles enshrined in the CoE act in question are part of the 'package' of the pan-European general principles of good administration concretising Article 3 SCoE as a consequence of an authentic interpretation due to subsequent state practice. Actually, the adoption of the text of a CoE convention and of a CM recommendation has required only a two-thirds majority of the representatives casting a vote since 1994 (cf. MN. 1.05; MN. 1.07). However, not being in favour of adopting a specific text does not allow us to conclude that the Member State in question does not agree with the principles behind the text or that it will not accept (and follow) a contrary majority decision. In fact, the practice of Member States entering explicit reservations to CM recommendations where they do not intend to fully apply a recommendation (cf. MN. 1.08) shows that the only way to declare unequivocal disagreement is to be explicit. Actually, in all our reports the simple

---

Rechtsquellenlehre" in J. Bröhmer/R. Bieber/C. Callies/C. Langenfeld/S. Weber/J. Wolf (eds.), *Internationale Gemeinschaft und Menschenrecht – Festschrift für Georg Ress* (2005), pp. 519 – 526 (pp. 522 et seq.).

171 CoE (fn. 169), p. 7.

172 See Wittinger (fn. 76), pp. 407 et seq.

fact that a Member State did not vote in favour of a CM recommendation or CoE convention was never put forward to justify why the principles enshrined in them could not be incorporated within the national legal order. The fear that factual departure from the principle of unanimity for the adoption of CM recommendations (cf. MN. 1.07) would lessen their political and moral authority[173] has never been confirmed.

31.112 Furthermore, the principles of *venire contra factum proprium* and *estoppel* have to be taken into consideration when assessing if the conduct of a Member State with regard to the pan-European general principles of good administration reflects a common understanding of Article 3 SCoE.[174] Following these principles, secret reservations not to comply with an international commitment a state 'officially' engages with have no legal effect. The other CoE Member States can rely on the 'official behaviour' of 'hypocrite' (representatives of) Member States obviously paying only 'lip service' to the founding values of the CoE. Thus, that current governments in some CoE Member States do not share the founding values of Article 3 SCoE or are indifferent to them (cf. MN. 2.05 et seq.) does not bar us from deducing a common understanding of Article 3 SCoE to be concretised by the pan-European general principles of good administration as a 'package'. Otherwise, any collaboration of the CoE Member States over realising the aims of the CoE (cf. second half-sentence of Article 3 SCoE) would be impossible.

31.113 Overall, one may argue that we do not set the threshold high enough for identifying a 'subsequent state practice' within the meaning of Article 31 (3) (b) VCLT. Our approach may be challenged for assuming a purely fictitious 'authentic interpretation' of Article 3 SCoE. However, the vagueness in Article 3 SCoE makes it clear that its values are not static: their content and meaning are subject to continuous development and are therefore – like the ECHR[175] – of a *dynamic nature* allowing for an *evolutive interpretation*.[176] This reflects the dynamic character of the CoE as an organisation aiming to achieve "a greater unity between its members" (cf. Article 1 (a) SCoE) by "inter-governmental cooperation between independent partners" (cf. MN. 0.32). The critique levelled at 'consensus interpretation' of the ECHR by the ECtHR[177]

---

173 Cf. Wittinger (fn. 76), p. 133.

174 Cf. de Vel/Markert (fn. 156), p. 351; Wittinger (fn. 76), p. 408; see on the estoppel principle in general most recently P. Kaijun, "A Re-Examination of Estoppel in International Jurisprudence", (2017) 16 *Chinese Journal of International Law*, pp. 751 – 786.

175 Gerards (fn. 157), pp. 51 et seq.

176 Wittinger (fn. 76), p. 391.

177 See on the consensus interpretation of the ECHR: J. García Roca, "Déférence internationale, imprécision de la marge nationale d'appréciation et procédure raisonnable de décision", (2020), 121 *RTDH*, pp. 71 –

cannot be held against this. In fact, the way in which the ECtHR establishes an 'European consensus' on some aspects of a right guaranteed by the ECHR is often criticised (cf. MN. 3.31) for clothing a 'trend' in some Member States as a consensus between all of them.[178] However, we would firstly claim that the standards we apply to prove the existence of a 'subsequent state practice' in the interpretation of Article 3 SCoE are stricter than the standards the ECtHR applies. Furthermore, all the arguments put forward in the discussions surrounding Protocol No. 15 to the ECHR in connection with the 'consensus interpretation' of the ECtHR do not apply in the present context. In the end, these discussions pertain to the legitimacy of the ECtHR as an international court.[179] This question does not arise here. We are asking if the conditions of Article 31 (3) (b) VCLT in the particular case of Article 3 SCoE are met. This is not a question about the legitimacy of judicial activism in an international court but one about the conditions under which one can assume the existence of a state's self-commitment under international law.

31.114 Another reason why we think that we set the threshold high enough for identifying a 'subsequent state practice' in the present context lies deeper. We saw that the pan-European general principles of good administration were first developed from the 1970s onwards in a process of mutual learning by the old Member States under the historical shadow of the horrors of Nazi Germany and under the very present shadows of the socialist regimes in the ex-Soviet Union states and its satellite states[180] (cf. MN. 31.20 et seq.). Their deliberative evolution on the intergovernmental platform of the CoE made it easier for those states which joined the CoE from the 1970s onwards, in particular the post-socialist states, to accept the incorporation of these principles into their 'new' national legal orders not as 'foreign law' but as the result of common

---

105 (pp. 82 et seq.); Gerards (fn. 157), pp. 93 et seq. For a recent in-depth analysis of the pertinent case law of the ECtHR: N. Vogiatzis, "The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court", (2019) 25 *EPL*, pp. 445 – 480 (pp. 450 et seq.).

178 See for examples (but not sharing the critique): F. Krenc, "L'acceptabilité des arrêts der la Cour européenne des droits de l'homme par les États partis: un 'défi permanent'", (2020) 121 *RTDH*, pp. 217 – 253 (pp. 233 et seq.).

179 The ECtHR 'consensus interpretation' is criticized for not being strict enough when establishing a consensus between the parties to the ECHR. See, *inter alia*, on this discussion and its link to the discussion on the legitimacy of the ECtHR I. Cram, "Protocol 15 and Articles 10 and 11 ECHR – The Partial Triumph of Political Incumbency Post-Brighton", (2018) 67 *ICLQL*, pp. 477 – 503 (pp. 480 et seq.); Ravarani (fn. 157), pp. 286 et seq.; Vogiatzis (fn. 177), pp. 467 et seq. This has led to the introduction of the 'principle of subsidiarity' into the preamble of the ECHR by Article 1 of Protocol No. 15 amending the ECHR (cf. MN. 31.113).

180 In addition, there were the less present shadows of the authoritarian regimes in *Greece*, *Portugal, Spain* and *Turkey*; cf. A. von Bogdandy/L. Hering, "Im Namen des Europäischen Clubs der rechtsstaatlichen Demokratien", (2020) 75 *Juristenzeitung*, pp. 53 – 63 (pp. 54 et seq.).

European experiences of the need to limit administrative powers, to protect and promote individual rights and to guarantee an open and transparent administration, as well as effective implementation of democratic policy choices and effective public services (cf. MN. 0.25 et seq.) Today, the pan-European general principles of good administration are being developed further under the current shadow of the specific challenges and backlashes in the transitions of the post-socialist CoE Member States into democratic states governed by the rule of law and respecting human rights (cf. MN. 31.53 et seq.), and the equally current shadows of 'democratic backsliding' experienced at least in *Hungary* and *Poland* (cf. MN. 2.23 et seq.; MN. 31.69 et seq.) and the raise of populism in many more CoE Member States (including states in Western Europe). The pan-European general principles of good administration are thus impregnated with common European history and marked by the desire of the CoE Member States to build up a positive counterimage to the common negative experiences which did and do affect all of them even if their *immediate* effects are (of course) more visible in certain states than in others. This is why we claim that the pan-European general principles of good administration are not only the 'administrative law component' of the founding values of Article 3 SCoE but are also the 'administrative law components' of the "spiritual and moral values which are the *common heritage* of [the] peoples" of the CoE Member States and which are "the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy", as the Preamble of the SCoE puts it. Furthermore, they are the 'administrative law components' of the "common heritage of political traditions, ideals, freedom and the rule of law" of "like-minded European countries" within the meaning of the Preamble of the ECHR (cf. MN. 0.27). Thus, considering the pan-European general principles of good administration as the 'administrative law component' of 'common heritage' of the CoE Member States justifies construing the 'subsequent state practice' in the application of Article 3 SCoE by the CoE Member States in a way which would perhaps seem to be too 'idealized' when applying Article 31 (3) (b) VCLT to 'normal' international treaties.

31.115 Furthermore, considering the pan-European general principles of good administration as the 'administrative law component' in the 'common heritage' of the CoE Member States has practical repercussions for the quality of the pan-European general principles of good administration being incorporated into the national legal orders of the CoE Member States – an aspect that bridges to the previous section of this chapter and leads us to the following sub-section. In fact, being such a part of the 'common heritage' of the CoE Member States facilitates the transposition, implementation and enforcement of the pan-European general principles within the national legal orders. As a part of a 'common heritage' of all CoE Member States they are also

part of the legal cultural heritage of every individual CoE Member State. Even if a specific 'good administration principle' is, at first, only known in some CoE Member States and only later taken over by the CoE or the ECtHR, transformed on this level into a pan-European general principle of good administration and recommended as 'best practice' to the other Member States (cf. MN. 31.25), the principle in question is never totally 'decontextualized' from its national origin and its national theoretical and doctrinal elaborations and controversies, implementation problems and deficits.[181] This is first due to the fact of their deliberative intergovernmental elaboration within the CoE or the deliberative comparative elaboration within the Sections or the Grand Chamber of the ECtHR, which allows for dealing with these national contexts within the deliberations. Secondly, and more importantly, the framework of the CoE allows for working on a 'common ground' marked by the mutual entanglement of the legal, constitutional and political histories of the CoE Member States, which have created common negative and positive experiences forming their 'common heritage' (cf. MN. 0.27). Thus, transposing, implementing and enforcing the pan-European general principles of good administration within the domestic order is only partly a re-contextualisation of principles of foreign origin within the domestic legal environment. It is mainly a simple and much easier adaption of national law to face challenges for good administration identified thanks to the common experiences of the CoE Member States.[182]

---

181 The 'decontextualisation' of constitutional 'legal transplants' mediated by international organisations in a legal transplantation process (cf. MN. 31.04) is one of the main arguments in support of the critical view of such constitutional transplants of the (fascinating) 'IKEA theory' of G. Frankenberg, "Constitutions as commodities: notes on a theory of transfer" in G. Frankenberg (ed.), *Order from Transfer – Comparative Constitutional Design and Legal Culture* (2013), pp. 1 – 26 (pp. 8 et seq.); see also the further (again fascinating) elaboration of the 'IKEA theory' by R. Michaels, "'One size can fit all' – some heretical thoughts on the mass production of legal transplants" in Frankenberg (ed.), *ibid.*, pp. 56 – 78 (pp. 59 et seq., pp. 69 et seq.).

182 In contrast, the IKEA theory describes the endeavour of recontextualisation of legal transplants as follows (G. Frankenberg, "Constitutional transfer: The IKEA theory revisited", (2010) 8 *I•CON*, pp. 563 – 579 (pp. 575 et seq.): "This open-ended phase of recontextualization is vastly simplified under the transplant thesis and bears very little resemblance to the transplanting of an organ […]. For the constitutional elites and their experts, when going about the reassembling of the imported items, must operate without knowing the original master plan or its meaning and may, at best, rely on fairly unreliable, abstract instruction manuals provided by global constitutionalism – less reliable even than IKEA's operating instructions" (similarly Frankenberg [fn. 181], p. 20). This does not really apply to items bought in the 'CoE shopping centre'. When the national elites and experts recontextualise these 'high quality products' they know the original master plan and its meaning and – in case of doubt – may claim for individual assistance from the CoE and its institutions (cf. Saunders [fn. 5], pp. 262 and 268). See also Michaels ([fn. 181], p. 70), who distinguishes between 'best solutions' (tailor-made furniture) and 'good enough solutions' (IKEA furniture) offered by reform institutions like the World Bank.

2. The Pan-European General Principles of Good Administration as Regional International Law with a Graduated Binding Effect: The 'Building Blocks Theory'

31.116 Considering that the pan-European general principles of good administration are part of CoE's regional international law as a 'package' does not mean that they form a strict set of legal standards to be observed in each and every aspect (cf. MN. 31.100). This regional international law leaves a wide margin of appreciation to the CoE Member States as to which principles (included in the 'package') are to be transposed, implemented and enforced into the national legal system, to what extent, under which circumstances and in which combinations. However, this margin of appreciation has its limits (it is not unfettered discretion) and the CoE Member States have an obligation to transpose, implement and enforce a sufficient number of the pan-European principles of different 'specifications' (i.e. principles covering civil service, local-self-government, individual rights, administrative procedure, administrative justice, transparency, etc.) to adapt their national administrative law to the demands of Article 3 SCoE. Thus, there is a need to develop a test adapted to the specific feature of the pan-European general principles of good administration, namely the graduation of the legal effects of these principles as a 'package'. This 'good-administration-test' should help with assessing whether a certain national 'configuration' of national administrative law and administrative justice violates Article 3 SCoE (as concretised by the pan-European general principles of good administration as a 'package') or if the choices made by a Member State in relation to its national administrative law and administrative justice remain within the wide margin of appreciation granted by Article 3 SCoE.

31.117 This 'good-administration-test' should be adapted to the graduated legal effects of the pan-European general principles of good administration as a 'package'. This requires that these graduated legal effects are correctly understood. We think that a metaphorical[183] approach could help here, namely the approach we will call the 'building blocks theory'. It compares the 'package' of the pan-European general principles of good administration with a set of (prefabricated but nevertheless high-quality) building blocks which can be used to build up a proverbial tower, i.e. a national administrative legal framework in so far as its 'limiting function' is concerned. The building blocks are accompanied by (elaborated) instructions which explain how to build this tower but they leave much room for creativity. However, these instructions make it clear that some specifications need to be complied with, such as a minimum height, the mandatory

---

183 See on the use of metaphors in comparative law fn. 6.

use of a minimum number of the bricks (allowing for using more or all of them and for integrating 'home-made blocks' serving similar purposes) etc. A completed tower of the necessary height is an administrative legal framework containing a meaningful combination of all the elements considered necessary for ensuring that this administrative legal framework respects the founding values of Article 3 SCoE. The different pan-European general principles of good administration with their different 'specifications' (i.e. civil service, local self-government, individual rights, administrative procedure, administrative justice, transparency, etc.) are the different building blocks (of varying shapes, sizes and functions) which may be used and combined to construct the legal framework. However, they can be used in different combinations to build the tower and – as already said – the set can be complemented by home-made elements.

31.118 By inspecting the tower an expert engineer, whether external (CM, PACE, ECtHR, CLRAE, Venice Commission, GRECO, etc.), internal (national courts, ombudspersons, other national accountability institutions, internal review bodies, parliamentary opposition, etc.) or completely independent (scholarship, NGOs, media etc.) should be able to assess which building blocks have been used and which have been left out. They should also be able to assess if it is an ambitious construction or if only a minimum number of the blocks has been used, if the construction follows the assembly instructions (provided by institutions or experts of partner States and/or the CoE and/or EU and/or the OSCE and/or of NGOs, etc.[184]) or if the building blocks are used in a creative way or following local traditions, if the construction is compact (leaving not much room for manoeuvre for the administration within the tower) or filigree (adapted to a confident and expert administration). If the construction stands for a long time, then the expert engineer can see if all building blocks are serving their purpose, if they need to be replaced, modified or have been taken out – perhaps to an extent that the whole construction risks falling apart. The analysis may also lead to the conclusion that one was never dealing with a real *construction* but only with a simple rubble heap of blocks thrown on top of each other (by an uncommitted national government) so that the blocks cannot serve their purpose. As with a building inspection all these assessments – which are in the end nothing other than the 'good-administration-test' – are made on the basis of the explications of the Member State whose building is being inspected. The Member State is therefore involved in the evaluation procedures to the extent that it can and should explain to the experts what is to be achieved with certain constructions and why changes have been made over time.

31.119

---

184 See fn. 182.

Describing the legal effects of the pan-European general principles of good administration with this 'building block theory' is perhaps unconventional. Therefore, before we discuss the added value of the 'building block theory' for carrying out the 'good-administration-test', it is worth mentioning that graduated legal effects of this kind are not unusual but even typical for standards developed within the framework of the CoE. The best and most obvious examples are the CoE's '*à la carte* conventions', often named 'Charters'.[185] These '*à la carte* conventions' "allow contracting states to module their commitments, meaning that they accept certain parts of the text but not others".[186] Furthermore, they set limits to the discretion resulting from their flexible nature. They stipulate that each party should consider itself bound by a specified number of articles of the convention and, furthermore, that the articles chosen shall be a combination of articles taken out of different parts of the convention. This *à la carte* system is foreseen, *inter alia*, by Article 20 of the European Social Charter and Part III Article A of the revised European Social Charter[187] (cf. MN. 1.56), Article 12 of the European Charter of Local Self-Government[188] (cf. MN. 1.58) and Article 2 of the European Charter for Regional or Minority Languages[189] (cf. MN. 1.56). All these articles are entitled "Undertakings".

31.120 A similar *à la carte* approach underlies the 'Rule of Law Checklist' adopted by the Venice Commission in March 2016 (cf. MN. 1.14):

> "The Rule of Law is realised through successive levels achieved in a progressive manner: the more basic the level of the Rule of Law, the greater the demand for it. Full achievement of the Rule of Law remains an on-going task, even in the well-established democracies. Against this background, it should be clear that the parameters of the checklist do not necessarily all have to be cumulatively fulfilled in order for a final assessment on compliance with the Rule of Law to be positive. The assessment will need to take into account which parameters are not met, to what extent, in what combination etc. The issue must be kept under constant review".[190]

---

185 Benoît-Rohmer/Klebes (fn. 11), pp. 97 et seq.

186 See for this and the following (with more examples) Benoît-Rohmer/Klebes (fn. 11), pp. 106 et seq.

187 Claiming that the *à la carte* approach significantly limits the practical relevance of the ESC and its revised version: O. Dörr, "European Social Charter" in Schmahl/Breuer (fn. 7), pp. 507 – 541 (MN. 23.75).

188 For an overview how the CoE Member States have made use of the *à la carte* system of the Charter cf. G. Boggero, *Constitutional Principles of Local Self-Government in Europe* (2017), pp. 34 et seq.; C. M. G. Himsworth, *The European Charter of Local Self-Government* (2015), pp. 68 et seq.

189 On the reasons and effects of the *à la carte* structure of this Charter cf. S. Oeter "Conventions on the Protection of National Minorities" in Schmahl/Breuer (fn. 7), pp. 542 – 571 (MN. 24.32 et seq.).

190 Venice Commission, *Rule of Law Checklist* (CDL-AD(2016)007) of 18 March 2016 at [29].

This is of particular importance in the present context in the light of the PACE Resolution 2187 (2017) on the Venice Commission's Rule of Law Checklist of 17 October 2017. The PACE

> "welcomes the Rule of Law Checklist, which helps to introduce a new, uniform benchmark for measuring compliance with one of the founding principles of the Council of Europe".

Furthermore, the PACE stresses that

> "The Rule of Law Checklist is based largely on the standards developed by the Council of Europe, making them accessible and functional, enabling respect for the rule of law to be measured in a detailed, objective, transparent and fair manner".

This understanding of the legal effects of the Venice Commission's Rule of Law Checklist corresponds clearly with the legal effects of the pan-European general principles of good administration as explained by our 'building blocks theory'.

31.121 Finally, the legal effects of the pan-European general principles of good administration by means of the 'building block theory' look like the 'principle of subsidiarity' combined with the 'margin of appreciation doctrine'[191] as the ECtHR has developed them with regard to those ECHR rights that may be subject to national interferences "necessary in a democratic society" (right to respect for private life, freedom of religion, of expression, etc.) and are not absolute (e.g. prohibition of torture).[192] Article 1 of Protocol No. 15 amending the ECHR will add the following recital at the end of the preamble of the ECHR:

> "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the [ECtHR]".

We will not discuss here whether the political intentions behind the introduction of this new recital are designed to 'invite' the ECtHR to apply a more relaxed level of scrutiny in cases against those Member States where national democratic decision-making processes and individual judicial review are well-established and appear robust.[193] The least that can be said is

---

191 See for recent detailed case law analysis with regard to both principles: Gerards (fn. 157), pp. 5 et seq., pp. 160 et seq.; for the origins of this case law see García Roca (fn. 177), pp. 72 et seq.

192 García Roca (fn. 177), pp. 84 et seq.; Ravarani (fn. 157), pp. 287; R. Spano, "The future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law", (2018) 18 *Human Rights Law Review*, pp. 473 – 494 (pp. 483 et seq.).

193 The idea behind the 'principle of subsidiarity' combined with the 'margin of appreciation doctrine' and its appraisal in Protocol No. 15 is that an executive decision based on rules adopted by a democratically elected national parliament and confirmed by the national judiciary in processes taking into consideration the ECHR rights (cf. for this concept of process-based review E. Brems, "The 'Logics' of Procedural-

that the parties to the ECHR do not invite the ECtHR to intensify its control.[194] Either way, we are referring to the 'margin of appreciation doctrine' to show that the legal effects of the ECHR may be similar to the graduated legal effects of the pan-European general principles of good administration in so far as that – within clear limits[195] – reasonable[196] different national legal configurations of conflicting interests and policy choices may comply with the same international standards. Like the pan-European general principles of good administration the rights guaranteed by the ECHR do not squeeze national law into uniform straightjackets but leave room for manoeuvre for national policy choices.

31.122 In a nutshell, the 'building blocks theory' thus provides an analytical tool for structuring the 'good-administration-test'. This tool can be used by anybody with enough expertise to handle it (the 'expert engineers', cf. MN. 31.118). Thus, it may not only be applicable to scholarly research on the compliance of national administrative law with the pan-European general principles of good administration. The tool can also be used in monitoring procedures carried out within the intergovernmental framework of the CoE, in proceedings before the ECtHR or as a tool in the EU's 'rule of law toolbox' (cf. MN. 2.27) and by domestic courts or monitoring

---

Type Review by the European Court of Human Rights" in J. Gerards/E. Brems (ed.), *Procedural Review in European Fundamental Right Cases* [2017], pp. 17 – 39 [pp. 22 et seq.]; Spano [fn. 192], pp. 480 et seq.) should benefit from a 'presumption of compliance with the ECHR' because national authorities are in general better placed to strike a balance between individual rights and competing interests (see regarding this presumption Bogdandy/Hering [fn. 180], p. 61; Cram [fn. 179], pp. 487 et seq.; García Roca [fn. 177], pp. 97 et seq.; A. Nußberger, "Das Verhältnismäßigkeitsprinzip als Strukturprinzip richterlichen Entscheidens in Europa", [2013] *NVwZ-Beilage – 60 Jahre BVerwG*, pp. 36 – 44 [pp. 41 et seq.]; Ravarani [fn. 157], pp. 288; Vogiatzis [fn. 177], pp. 473 et seq.; see furthermore MN. 3.31; MN. 3.85 et seq.). Unfortunately, a 'presumption of compliance with the ECHR' creates the risk of immunizing populist measures (infringing the rights of those individuals not sharing the opinion of the majority, belonging to a minority or whose rights and interests are simply sacrificed as collateral damage to majority projects) against effective supervision from the ECtHR (cf. A. Nußberger, "Procedural Review by the ECHR: View from the Court" in Gerards/Brems, *ibid.*, pp. 161 – 176 [pp. 166 et seq.]). Moreover, it is argued that this risk has materialised: the recent case law of the ECtHR is claimed to follow a sort of anticipatory obedience to the intentions behind Protocol No. 15 and to pay disquieting deference to national policy choices neither 'necessary in a democratic society' nor proportionate (Cram [fn. 179], pp. 484 et seq.; García Roca [fn. 177], pp. 101 et seq.; D. Szymczak, "Putsch manqué ou marché de dupes ? – Retour sur la conférence de Copenhague des 12 et 13 avril 2018", [2018] 116 *RTDH*, pp. 812 – 835 [pp. 831 et seq.]; more nuanced Krenc [fn. 178], pp. 221 et seq.). A 'relaxed level of scrutiny' may also lead to a 'two classes society' distinguishing between longstanding democracies (of the old CoE Members States) and 'new' democracies in the post-socialist states (cf. Spano [fn. 192], p. 493 et seq.). Such dual standards of review are neither justified in view of increasing populist governmental rhetoric and action in the old CoE Member States (this phenomenon is neglected by Bogdandy/Hering [fn. 180], p. 62 et seq.; Spano [fn. 192], p. 490 et seq.) nor can they be maintained in the long run in view of the equality of all CoE Member States – which may result in a collective 'race to the bottom' with regard to the intensity of human rights scrutiny.

194 Krenc (fn. 178), p. 221.

195 Gerards (fn. 157), p. 7.

196 Spano (fn. 192), p. 488.

bodies when they evaluate if a specific 'configuration' or adaption of national administrative law meets the standards of Article 3 SCoE (or constitutional principles to be interpreted in the light of Article 3 SCoE).

31.123 It is also worth highlighting that as an analytical tool structuring a multidimensional evaluation the 'building blocks theory' does not simply consist of a 'ticking boxes' exercise on a checklist of pan-European general principles of good administration. Therefore it avoids the disadvantages of such checklists, namely that the person responsible for monitoring compliance may only focus on individual features of national administrative law and 'tick the box' whenever an apparently harmless feature corresponds to similar features in other CoE Member States where they serve a reasonable purpose. Thus, a checklist creates the risk that the evaluation loses sight of the ultimate aim of the pan-European general principles of good administration 'as a package' (cf. MN. 31.73). Clever national governments could therefore easily simulate compliance with individual features of such a checklist by isolating each box of the checklist from its context.[197] Conversely, analysing the compliance of national administrative law with the pan-European general principles of good administration as a 'package' on the basis of the 'building blocks theory' does not decontextualize its different individual features but focuses on their combinations and thus the 'big picture'.[198]

31.124 Nevertheless, the complexity of the 'good-administration-test' on the basis of the 'building blocks theory' should also not be overestimated. Today, after about 50 years (since it started in the 1970s, cf. MN. 31.10) of incremental transposition, implementation and enforcement of the pan-European general principles of good administration in the old CoE Member States (cf. MN. 31.19 et seq.), and 30 years since the post-socialist CoE Member States started to construct an administrative legal order complying with these pan-European principles (cf. MN. 31.53 et seq.), most of the CoE Member States have built their 'good administration towers'. These 'good administration towers' have already been inspected several times by several 'expert engineers' in total and in detail. Thus, the overall quality of these towers, their shortcomings, their particularities and the need to adapt them to updated standards of good administration (as the standards have been adapted since the 1970s) are often known (and are, e.g., addressed clearly in our country reports). Furthermore, no complex 'good-administration-test' is needed to assess

---

197 See with regard to 'rule-of-law-checklists' Schepple ([fn. 121], pp. 469).

198 For the necessity of such an approach (with regard of 'rule-of-law-assessments') A. Nußberger, "Wenn Selbstverständliches nicht mehr selbstverständlich ist: Zum Status quo des Menschenrechtsschutzes in Europa", (2018) 73 *Juristenzeitung*, pp. 845 – 854 (p. 850).

non-compliance with the pan-European general principles of good administration by those CoE Member States whose governments have not yet completed their ‘good administration tower’ for whatever reason (e.g. they never really started or just stopped building, lost the plans, went bankrupt or to war, or started to ‘pretend’ they were building to get international funding). Therefore, today, the main purpose of carrying out the ‘good-administration-test’ is to evaluate subsequent changes to these towers and their effects on the towers’ overall structure and thus on their stability. This means that the test will in general be focussed one of two questions. Firstly, why a Member State did not use specific building blocks for the construction and if the construction is nevertheless stable. Second, whether the stability of the construction is affected by subsequent reforms which have taken out, replaced or rearranged the building blocks or which have rehabilitated or replaced whole parts of the structure. Thus, the ‘good-administration-test’ may above all be applied to the ‘administrative law components’ of reforms that are part of a ‘backsliding strategy’ (cf. MN. 31.73) and to those reforms which have been triggered or justified by austerity pressure or supposedly new challenges (such as globalisation, digitalisation, terrorist threats, migration, climate change, etc.).

31.125 Nevertheless, the ‘building blocks theory’ mainly reduces the complexity of the ‘good-administration-test’ in different ways. First, the test does not address the question of the standards it should be based on and their purposes. This question is a preliminary one that can be deemed to be answered by the mere common understanding between the CoE Member States and their subsequent state practice, concretising the ‘administrative law components’ of the values enshrined in Article 3 SCoE with normative effect thanks to the pan-European general principles of good administration ‘as a package’ with their different ‘specifications’ (cf. MN. 31.101 et seq.). To put this with the metaphors of the ‘building blocks theory’: the (elaborated) instructions provided by the CoE explaining how to build the ‘good-administration-tower’ (cf. MN. 31.101 et seq.) are not up for discussion. This means above all that general discussions on the ‘legitimacy’ of the pan-European general principles of good administration and the general need to demonstrate deference to national identity, national legal culture and the like (cf. MN. 31.93) are not part of the ‘good-administration-test’ but beside the point.

31.126 Secondly, the ‘building blocks theory’ reduces the complexity of the ‘good-administration-test’ by focussing on the ‘combination’ of the building blocks in the ‘good-administration-tower’ under inspection. It is not about comparing different towers and which building blocks are used by other CoE Member States. This ‘outsmarts’ the typical argument put forward by ‘backsliding regimes’ justifying reforms which pull specific ‘building blocks’ out of the tower with the argument that other CoE Member States (whose governments are not suspected of

pursuing objectives contrary to liberal democracy and the rule of law) do not use this specific building block either (cf. MN. 31.73). Thus, the argument that an individual feature of national administrative law has been 'copy pasted' from another CoE Member State where it serves a perfectly reasonable purpose does not affect the results of the 'good-administration-test'. This test is only about (1) the purpose that the feature under consideration serves in the legal order in which it has been transplanted and (2) whether the integration of this feature in the 'good-administration-tower' of the recipient state impairs the stability of the construction in whole or in part.

31.127 Thirdly, the 'building blocks theory' reduces the complexity of the 'good-administration-test' by being based on a (real or simulated) structured dialogue between an 'expert engineer' and the Member State about the extent and the modality of the transposition, implementation and enforcement of the pan-European general principles of good administration within the national legal order. This dialogue is about the reasons why a national government and/or the legislator chose specific building blocks, left others unused or added, exchanged or took out building blocks after completing the tower. This structured dialogue presupposes that there are arguments for specific choices which are rational and verifiable. Thus, again, simply putting forward national legal cultural identity to justify a specific domestic construction without being able to name the concrete element of the national legal culture at stake (cf. MN. 31.93) would be beside the point. The same applies if evidence fails that the issues at stake are really about national legal cultural identity and not only about local 'administrative law folklore' or – even worse – simple privileges with which that the political, administrative or judicial elites have become acquainted.

31.128 Therefore, this structured dialogue needs to be grounded in the assumption that the national government is striving for an administrative legal framework ensuring respect for the rule of law and individual rights by the administration and the democratic legitimation of the administration as a precondition for effective implementation of democratic policy choices and effective public services with the purpose of serving citizens and not the other way around (cf. MN. 0.25 et seq.). This assumption is (1) based on the CoE membership of the state and thus its declaration to adhere to the values of Article 3 SCoE and (2) on the principles of *venire contra factum proprium* and *estoppel* from which follow that secret reservations not to comply with an international commitment a state 'officially' engages in do not have legal effects (cf. MN. 31.112). The 'trick' is that national government is taken at its word so that the 'good-administration-test' is limited to the question of whether a certain 'configuration' of national admin-

istrative law can be (reasonably) justified with the arguments actually put forward on the national level (in law drafting processes, discussions in parliament, impact assessments, court decisions etc.).[199] Thus, there is no need to ask whether a certain 'configuration' of national administrative law could be justified with other reasons (cf. MN. 31.74). Above all, this means that if the reasons put forward for a specific reform turn out (based on evidence[200]

) to be a simple pretext (not reflecting but deliberately obscuring the real reasons for the incriminated measure) there would be an assumption of non-conformity of this reform with the pan-European general principles of good administration as a 'package' even if the same reform could be justified with other reasons. This idea is in line with the concept of Article 18 ECHR ("The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed"), which the ECtHR has fully applied[201] since the *Merabishvili* case.[202]

31.129 An example may be helpful to explain the functioning of the 'good-administration-test' on the basis of the 'building blocks theory'. Take reform of freedom of information legislation in a given CoE Member State aiming to reduce the scope of persons entitled to the right of access to state-held information or documents. This right should from now on be reserved to persons acting as a 'public watchdog' (such as the media, NGOs, bloggers, researchers, non-fiction writers). The 'official reasons' for this reform are (1) the need to align national law to the ECHR, (2) the fact that there are CoE Member States – including Germany (cf. MN. 11.30 et seq.) – where a general right of access to state-held information is not recognised, (3) that the General Administrative Procedure Act already allows for access to all information and every document for every person concerned with this information or document, and (4) that there has been a massive abuse of the right to access to information by 'ordinary' people (i.e. applications just to keep the administration busy and, thus, just for amusement at the cost of the tax payer) which requires a simple way of rejecting such applications without special examination. Here

---

199 Correspondingly, when applying the 'margin of appreciation doctrine' (cf. MN. 31.113) the ECtHR does not ask, if the incriminated measure could be justified in general but focusses on the reasons the respondent state puts forward to justify the incriminated measure (García Roca [fn. 177], pp. 87 et seq.; Ravarani [fn. 157], pp. 287.

200 Correspondingly, when applying the 'margin of appreciation doctrine' (cf. MN. 31.113) the ECtHR asks if during the national legislative procedure (convincing) statistical or scientific evidence has been produced (and discussed) to support the reasons which were put forward to justify the incriminated legislation. See for example P. Popelier, "Evidence based Lawmaking: Influences, Obstacles and the Role of the European Court of Human Rights" in Gerards/Brems (fn. 193), pp. 79 – 94 (pp. 88 et seq.).

201 Bogdandy/Hering (fn. 180), pp. 59 et seq.; Harris/O'Boyle/Bates/Buckley (fn. 161), pp. 841 et seq.

202 *Merabishvili v Georgia* (72508/13) 28 November 2017 ECtHR [GC] at [309] et seq.

reason (1) is beside the point and cannot pass the 'good-administration-test' even though such a reform would comply with the case law of the ECtHR, namely the judgement of the Grand Chamber in the *Magyar Helsinki Bizottság v Hungary* case.[203] In this case the Grand Chamber found that only persons acting as a 'public watchdog' are entitled to claim the right of access to state-held information or deriving from Article 10 (1) ECHR (cf. MN. 1.48 et seq.). However, there is no obligation to go beyond the guarantees of the ECHR and neither does the case law of the ECtHR prevail over rights guaranteed by other sources of the pan-European general principles of good administration. Reason (2) cannot pass the 'good-administration-test' either: the situation in other CoE Member States is irrelevant when assessing the administrative legal framework of one's own Member State (cf. MN. 31.126). In contrast, reasons (3) and (4) would need closer examination. The result of the test will depend on the answers given to the question of whether the problems invoked by reason (4) actually exist (meaning that there has been massive abuse in the past and that there have not only been singular cases) and if the individual rights referred to by reason (3) may be considered as a workable substitute in cases where such access is essential for the enforcement of individual rights.

31.130 The main weakness of the 'building blocks theory' may arguably lie in that it does not give a clear answer to the question of which pan-European general principles of good administration have to be transposed, implemented and enforced in which combinations and to which degree so that the domestic administrative legal system can be considered as compliant with Article 3 SCoE. It also does not specify which 'building blocks' of which 'specifications' in which 'combinations' have to be used to ensure that the 'good-administration-tower' is solid and serves its purpose. However, this weakness may also be the strength of the 'building blocks theory'. It makes it clear that the transposition, implementation and enforcement of the different pan-European general principles of good administration is not an end in itself.[204] The whole endeavour of incorporating them into domestic law makes only sense to the extent that the overall result really helps to fight arbitrary exercising of administrative power, to protect and promote individual rights, and, furthermore, to guarantee an open and transparent administration as well as the effective implementation of democratic policy choices and effective public services that exist to serve citizens (cf. MN. 0.25 et seq.). Different societies have different needs to meet to

---

203 *Magyar Helsinki Bizottság v Hungary* (18030/11) 8 November 2016 ECtHR [GC].

204 This is clearly stressed (with regard to the different elements of the rule of law) by M. Krygier, "The Rule of Law: Pasts, Presents, and Two Possible Futures", (2016) 12 *Annual Review of Law and Social Science*, pp. 199 – 229 (pp. 212 et seq.).

reach these aims, which may also depend on the different 'administrative legal mindsets' developed over generations in different states (cf. MN. 31.32 et seq.).

31.131 Thus, prefabricating 'fixed' combinations of the building blocks would exclude customised solutions adapted to the specific needs of CoE Member States. What Martin Krygier wrote about the rule of law applies to the graduated legal effects of the pan-European general principles of good administration as a 'package':

> "[…] one should be wary of too swiftly converting general presumptions into prescriptions, particularly prescriptions that are highly specific, let alone that hold out particular institutions as universal models to be emulated. Even if it makes sense to think of the rule of law as any sort of technology at all, it has to be understood as a distinctive kind of technology: an interaction technology, not a production technology, to borrow a distinction from Stephen Holmes. The success of interaction technology depends crucially on how it engages with the specific sorts of interactions to which it is applied. Because the patterns and character of social interactions vary hugely with time, place, and circumstance, how they might be affected is not something to be understood a priori.
> Pursuit of the rule of law requires reflection on how some generally valuable goods might be achieved in particular contexts. Problems and predicaments will vary, and so too will the best ways to meet them. Wherever you are, the rule of law should be approached with a combination of its point(s) in mind, more specific principles derivable from those grounding values, and acquaintance with various attempts to secure and institutionalize such ends, together with a great deal of reflected-upon local knowledge".[205]

IV. Outlook: Desiderata for Research on the Pan-European General Principles of Good Administration

31.132 This book has shown that the pan-European general principles of good administration are (to different degrees) effective in the CoE Member States and that they are part of the CoE's regional international law, namely an authentic (but still developing) concretisation of the 'administrative law components' of the founding values of the CoE within the meaning of Article 3 SCoE. Thus, the pan-European general principles of good administration are not only of practical but also of normative relevance and have led to a certain harmonisation of the national administrative law of the Member States of the CoE with regard to the 'limiting function' of administrative law. Against this backdrop the pan-European general principles of good administration are a clearly under-researched area (cf. 0.28). This book can only be a first (we hope nevertheless meaningful) step towards filling this research gap.

31.133 This assessment calls for desiderata for research and research transfer. With regard to the latter we would wish that the results of this book – namely the assessments of the effectiveness

---

[205] M. Krygier (fn. 204), p. 213.

of the pan-European general principles of good administration in the different CoE Member States we looked at – would be disseminated through articles in respective national languages published in the national law journals or through papers presented at national conferences. This would help to overcome the language barrier hindering the reception of the pan-European general principles of good administration in day-to-day national practice and, thus, create awareness of the existence of the pan-European general principles of good administration and their relevance for national law – and thus turn our research into a sort of 'activist research'.[206]

31.134 Furthermore, this book has shown that any research on the convergence of national administrative law in Europe should be aware of the fact that the administrative legal orders of the CoE (and EU) Member States, as well as the 'administrative legal mindsets' of their legal communities (composed of judges, lawyers, officials and scholars working with the national law on a daily basis), are above all divergent, namely with regard to their national conceptions of the purpose of administrative law, of the relationship between law and administration and of the role of the judge in shaping administrative law (cf. MN. 31.32 et seq.; MN. 31.67 et seq.). This calls for knowing more: not only to broaden the basis of the research on the effectiveness of the pan-European general principles of good administration but also to simply enhance knowledge of the different administrative legal orders within Europe (and their distinctiveness) for comparative purposes in general. Hence, one could ask for reports from those states we did not include in our research because we believed that we had reached a critical mass of CoE Member States that would allow us to extrapolate overall trends within the CoE Member States (cf. MN. 2.30). Even if we still believe that this is true, we have learnt that the legal communities of neighbouring European states with a deeply interwoven common history may have clearly different 'administrative legal mindsets' that are worth further exploration. However, there are also countries which we included in our research but where our country reports are nearly the only (fairly recent) source of knowledge on their administrative legal systems and the administrative legal mindsets of their legal communities. This applies even to the administrative law of such a populous, economically and geopolitically important state as *Turkey* (cf. MN. 31.51). Finally, it would be highly interesting to gain access to the administrative law and administrative legal mindsets of the local legal communities in the very small CoE Member States (*Andorra*, *Cyprus, Iceland*, *Liechtenstein*, *Luxembourg*, *Malta*, *Monaco*, *Montenegro, San Marino*)

---

[206] See on the concept of 'activist research' in social sciences: C. R. Hale, "What is Activist Research", (2001) 2 *Items & Issues,* pp. 13 – 15.

and how they implement ‘good administration’ in their administrative legal frameworks (cf. MN. 2.09 et seq.; MN. 31.15).

31.135 Finally, we have shown that the pan-European general principles of good administration are not a loose bundle of various rules in administrative matters but form a ‘coherent whole’, a real ‘package of good administration’ (cf. MN. 1.88 et seq.) which reflects the common experiences of the CoE Member States and are thus part of the ‘common heritage’ of the people of these states within the meaning of the preambles of the SCoE and the ECHR (MN. 31.114 et seq.). This calls for in-depth exploration of the background, the function and the meaning of these principles, and the experiences which have led to their adoption. Thus, it would be interesting to organise the different pan-European general principles of good administration with regard to their ‘specification’ in a framework consisting of issues such as

- administrative organisation (administration and government, distribution of competences, privatization, local self-government)
- the status of civil servants and public employees
- administration and law (sources of administrative law, legality of the administration, discretion)
- legal certainty and the protection of legitimate expectations
- administrative decision making, administrative procedures and procedural rights (including spatial planning procedures)
- administrative sanctions
- (local) public services and the rights of their users
- freedom of information, transparency and data protection
- administrative justice and administrative oversight
- state liability.

This framework could be filled in like a textbook, with the different sources of the pan-European general principles of administrative law illustrated with the preparatory works done within the CoE, the case law of the ECtHR on the ‘principles of good governance’, and the work of the CLRAE, the Venice Commission and GRECO, as well as with ‘good’ cases from the courts of the CoE Member States and relevant national scholarship. Such a use of national sources could ‘unlock’ the practical experience of each Member State for all the other Member States without the need to first acquire knowledge about the specificities of their respective legal systems because the pan-European general principles of good administration would serve as a common reference framework. The CoE handbook “The administration and you” (cf. MN.

1.91 et seq.) could serve as a model and inspiration for such an endeavour. In fact, we have already received funding from the German Research Foundation to carry out this further research as a ‘phase 2’ of our project. Thus, this book ends with a cliff-hanger …

… to be continued.