Articles

Of General Principles and Trojan Horses – Procedural Due Process in Immigration Proceedings under EU Law

*By Jürgen Bast**

Abstract

The present paper concerns procedural guarantees in immigration proceedings, thus addressing the broader question of the role of the general principles of EU law in respect of administrative decision-making. The main assertion is that certain requirements of procedural due process are recognized in EU law as fundamental rights. They must therefore be observed by Member State authorities when decisions significantly affecting the legal position of a person are taken, provided that the decision is at least partly determined by EU law. The relevant immigration proceedings involve measures related to the termination of residence as well as decisions related to denial or loss of a particular legal status. In effect, the actual scope of application of the EU's administrative fundamental rights is determined by the actual scope of activity of the European legislator. The author concludes that even a relatively 'shallow' harmonization of laws can lead to a 'deep' reshaping of the domestic legal order, by becoming a Trojan Horse for fundamental rights heretofore alien to some national immigration regimes.

A. The Issue: Procedural Guarantees and Administrative Decision-Making in European Migration Law

The present paper concerns procedural guarantees in immigration proceedings, thus addressing the broader question of the role of the 'general principles of law' in respect of the evolving European migration law.[1] I consider the procedural guarantees in administrative procedures as a good indicator for the overall significance that EU law attaches to the rights and interests of individuals who are subject to immigration

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[1] On the various sources of this multi-level body of law, see EUROPEAN MIGRATION LAW 35 (P. Boeles *et al*, eds., 2009).

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proceedings.[2] My main assertion is that certain requirements of procedural due process are recognized in EU law as fundamental rights. They must therefore be observed by Member State authorities when decisions significantly affecting the legal position of a migrant are taken, provided that the decision is at least partly determined by EU law. I conclude that even a relatively 'shallow' harmonization of laws can lead to a 'deep' reshaping of the domestic legal order, by becoming a Trojan Horse for administrative fundamental rights heretofore alien to some national immigration regimes.

The study will look into some of the more indirect – and sometimes unintended – effects of migration law's inclusion into the constitutional framework of the Union, in particular after the entry into force of the Amsterdam Treaty with its 'supranationalized' provisions regarding third-country nationals. Such transfer of competences naturally entails the application of doctrines that have emerged in other contexts. Cross-sectional 'legal transplants' and 'spill-overs' from one sector to another are by no means uncommon in EU law. On the contrary, this is precisely how it came into being and grew into a legal order properly so-called, starting with just one particular sector (the coal and steel markets) from where it incrementally expanded into ever wider fields of law. The European Court of Justice (ECJ) never backed off from 'cross-over' references to its judgments relating to other sectors, using the 'general principles of law' as a conceptual tool for fostering the substantive unity of the legal order.[3] General principles in a sense are mandatory rules of the European game which any incoming sector – much like an acceding new Member State – has to accept before further developments can take place.

Will this 'cross-pollination' also work with regard to migration law? There is every indication that it will, and rightly so. Wouldn't it be great if the armed-to-the-teeth armada of attorneys under the command of, say, the Vitamin Cartel or the Microsoft Corporation in defending their views on anti-competitive practices had eked out procedural guarantees which could stand to the benefit of migrants today, *e.g.* in proceedings relating to the determination of refugee status or the imposition of a re-entry ban on irregular immigrants? All too often in history has migration law played a special role in the doctrines of public law, decoupled from mainstream developments towards liberal constitutionalism.[4] If the Europeanization of migration law tends to break this insulation, it will not be to the detriment of migrants or the community at large.

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[2] Regarding the various functions of administrative procedures, see E. Schmidt-Aßmann, *Europäisches Verwaltungsverfahrensrecht*, *in* PERSPEKTIVEN DER RECHTS IN DER EUROPÄISCHEN UNION, 131, 132–134 (P.C. Müller-Graff, ed., 1998).

[3] See A. von Bogdandy, *Founding Principles*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, 11, 26–28 (A. von Bogdandy & J. Bast, eds., 2nd ed., 2010).

[4] See, *inter alia*, T. A. Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AMERICAN JOURNAL OF INTERNATIONAL LAW (AJIL) 862–871 (1989); G. RENNER, AUSLÄNDERRECHT IN DEUTSCHLAND 1–46 (1998). For a pleading in favour of 'equal treatment' of immigration proceedings, see P. BOELES, FAIR IMMIGRATION PROCEEDINGS IN EUROPE 455–463 (1997).

While this hope still lies at the heart of the present contribution, it has turned out that the general doctrines of EU law are afflicted with insecurities greater than expected, not least owing to the dynamic development of the ECJ's jurisprudence. Consequently, substantial parts of this paper must elaborate the general concepts, in particular as to whether national authorities are bound by the procedural guarantees established in EU law (section B). Only then are these concepts applied to migration law, with a particular view to the right to a fair hearing in immigration proceedings (section C.).

B. Procedural Guarantees as General Principles of Law

I. General principles and national authorities – two distinct models for their relationship

The general principles of Community law (or more broadly, of EU law)[5] constitute, next to the treaties on which the Union is founded, the second source of EU constitutional law.[6] Given their character as unwritten norms, this implies an empowerment of the Court of Justice to identify the relevant principles and to develop their contents. The ECJ has to find, with a reference to the 'constitutional traditions common to the Member States', widely acceptable solutions where explicit treaty provisions are lacking. This task has proven at times difficult to fulfill, in particular regarding the role of State authorities. Two distinct models for reconciling the tension between procedural autonomy and uniform implementation have emerged from the case-law.

1. Procedural autonomy, limited by the principles of equivalence and effectiveness

General principles of law first gained importance when the ECJ derived from them rules to be observed in proceedings conducted by a Union institution ('direct implementation', as opposed to 'indirect implementation' where EU law is applied by a national authority). One can cite the criteria for the retroactive withdrawal of administrative decisions as an early

[5] After the *Pupino* judgment of the ECJ (Case C-105/03, *Pupino*, 2005 E.C.R. I-5285) one could speak of 'general principles of Union law' in its entirety, given the Court's straightforward extension of its jurisprudence on the general principles of Community law into the realm of the EU Treaty's third pillar. In view of the merger of the pillars under the Lisbon Treaty, I will henceforth use the new terminology ('EU law', 'Union institutions', etc.) even where the historical context would actually demand the term 'Community'.

[6] Regarding their "constitutional status", see Case C-101/08, *Audiolux*, 2009 E.C.R. I-0000, para. 63. For comprehensive accounts, see *e.g.* GENERAL PRINCIPLES OF EUROPEAN COMMUNITY LAW (U. Bernitz & J. Nergelius, eds., 2000); X. GROUSSOT, GENERAL PRINCIPLES OF COMMUNITY LAW (2006); T. TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW (2006); for a recent study, see S. Prechal, *Competence Creep and General Principles of Law* 3 REVIEW OF EUROPEAN ADMINISTRATIVE LAW 5 (2010).

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example.[7] Since a Union institution almost always operates under EU law, general principles have to fill the gaps whenever a rule of secondary law, governing the administrative proceeding in question, is lacking. Even when such rules exist in a particular sector, the general principles of law can serve as a guideline for interpretation and for correction of insufficient provisions, if necessary.

But are these rules for sound administration developed by the Court of Justice vis-à-vis the Union institutions applicable in cases of indirect implementation, *i.e.*, are national authorities bound by the relevant set of principles? The general answer, based on settled case-law since the 1970s is: 'No, they are not.' As far as EU law does not provide common rules to this effect, the national authorities when implementing EU law act in accordance with the procedural and substantive rules of their own national laws.[8] However, this 'procedural autonomy' of the Member States is subject to two limits imposed by EU law.[9] First, that the applicable rules of national law are not less favorable than those governing similar domestic situations (principle of equivalence); and, second, that they do not render the objectives of the regulation virtually impossible or excessively difficult to achieve (principle of effectiveness). With respect to the sphere of indirect implementation, EU law provides only for a framework control of the applicable administrative law; some deductions from the ideal of a uniform implementation must be accepted.

3. Obligation to respect fundamental rights, within the scope of EU law

Since the late 1960s, the general principles of law have served to develop a second set of rules to which a remarkably different legal regime applies: the fundamental rights of Community law. Recognition of fundamental rights as an integral part of the Union legal order implies that the Member States have to respect these rights whenever they act within the scope of EU law (or, "when they are implementing Union law", as the Charter of Fundamental Rights puts it).[10] A clear case is the indirect implementation of provisions laid down in EC regulations or other legal instruments having direct effect.[11] More recently, it has been established in the case-law that the same holds true for the application of

[7] Cases 7/56 and 3–7/57, *Algera et al. v. Common Assembly*, 1957 E.C.R. (English special edn.) 39, 54 *et seq.*.

[8] Cases 205/82 to 215/82, *Deutsche Milchkontor*, 1983 E.C.R. 2633, para. 17 *et seq*.

[9] Case C-542/08, *Barth*, 2010 I-0000, para. 17 *et seq*.

[10] Case C-555/07, *Kücükdeveci*, 2010 E.C.R. I-0000, para. 23. As to the limits, see Case C-299/95, *Kremzow*, 1997 E.C.R. I-2629, para. 19.

[11] See, *e.g.*, S. Kadelbach, *European Administrative Law and the Law of a Europeanized Administration*, *in* GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET, 167, 191 (C. Joerges & R. Dehousse, eds., 2002).

national laws transposing EC directives.[12] An exhaustive regulation or a full harmonization of the matter is not required; it suffices that the decision to be adopted by the Member State authority is at least partly determined by EU law.[13]

When it comes to fundamental rights, the Court of Justice has never accepted the notion of Member States' autonomy, as it has with respect to 'ordinary' principles of administrative law. If and when the Member States are subject to the fundamental rights of the Union, they are bound in the same way as the institutions of the Union.[14] The reason for this parallelism is explicitly stated in one of the early fundamental rights judgments, the *Hauer* case: It is about protecting the substantive unity of EU law and, ultimately, its claim for primacy over national law however framed.[15] Introducing fundamental rights of EU law aims at replacing fundamental rights of national constitutional law as possible criteria for assessing the legality of secondary EU law and, thus, of any implementing action it requires. As a logical consequence, Member States' authorities, when acting within the scope of EU law, are bound to observe the uniform European standard of fundamental rights protection.

Summarizing, there are two distinct regimes for Member States compliance with the general principles of EU law, with a considerably diverging intensity of control. With regard to the principles of administrative law, Member States are, within certain limits, free to develop solutions different from those applicable to the Union institutions, whereas a uniform standard applies with respect to fundamental rights. Hence, the question arises: What will happen when these two lines of case-law intersect? When a qualified part of administrative law will be construed as procedural guarantees of the individual and will be accorded the status of fundamental rights?

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[12] On the duty of the Member States to ensure that fundamental rights are observed when transposing directives and applying national law based on them, see Case C-107/97, *Rombi and Arkopharma*, 2000 E.C.R. I-3367, para. 65; Case C-276/01, *Steffensen*, 2003 E.C.R. I-3735, para. 69 *et seq.*; Cases C-20/00 and C-64/00, *Booker Aquacultur and Hydro Seafood*, 2003 E.C.R. I-7411, para. 88; on the interpretation of the results prescribed by a directive consistently with fundamental rights, see Case C-540/03, *Parliament v. Council*, 2006 E.C.R. I-5769, paras. 61 and 104–5; Case C-305/05, *Ordre des barreaux francophones et germanophones*, 2007 E.C.R. I-5305, para. 28.

[13] *Cf.* Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof v. Österreichischer Rundfunk*, 2003 E.C.R. I-4989, para. 45.

[14] Cases 201/85 and 202/85, *Klensch*, 1986 E.C.R. 3477, para. 8; Case 5/88, *Wachauf*, 1989 E.C.R. 2609, para. 19; Case C-2/92, *Bostock*, 1994 E.C.R. I-955, para. 16; Case C-351/92, *Graff*, 1994 E.C.R. I-3361, para. 17; Case C-292/97, *Karlsson*, 2000, E.C.R. I-2737, para. 37.

[15] Case 44/79, *Hauer*, 1979 E.C.R. 3727, para. 14.

II. The constitutionalization of the rights of the defence

1. Article 41 of the EU Charter of Fundamental Rights

That certain principles of administrative law have developed into individual guarantees recognized as fundamental rights is best demonstrated by the EU Charter of Fundamental Rights.[16] The Charter postulates, in its Article 41, a "right to good administration", which includes "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken". Revealingly, however, in express deviation from the general rule of Article 51(1) of the Charter, these administrative fundamental rights shall be applicable only in proceedings handled "by the institutions and bodies of the Union". The framers of the Charter obviously did not think the time was ripe for extending these innovative fundamental rights to proceedings before national authorities. Notwithstanding this hesitant approach, the actual stage of development reached by the general principles of law could reach further than reflected in the text of the Charter. In my opinion, this is the case indeed, as I am going to show with regard to the so-called rights of the defence (after the French *droits de la défence*, sometimes also referred to as the 'principle of the right to a fair hearing').

According to the usual formula employed by the ECJ,

> respect for the rights of defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views.[17]

The principle belongs to a triumvirate of guarantees concerned with legal protection vis-à-vis the exercise of administrative powers. Its close collaborators are the right to have an adequately reasoned decision and the right to an effective remedy.[18] For its part, the rights of the defence serve to provide *ex ante* protection of the individual in the course of the administrative proceeding, that is, before a reasoned decision is issued which can later be

[16] For an overall appraisal, see K. Kańska, *Towards Administrative Human Rights in the EU: Impact of the Charter of Fundamental Rights*, 19 EUROPEAN LAW JOURNAL (ELJ) 296–326 (2004); D.U. Galetta, *Inhalt und Bedeutung des europäischen Rechts auf eine gute Verwaltung*, EUROPARECHT 57–81 (2007); J. WAKEFIELD, THE RIGHT TO GOOD ADMINISTRATION 57–92 (2007).

[17] Case C-462/98 P, *Mediocurso v. Commission*, 2000 E.C.R. I-7183, para. 36 (with omissions).

[18] See Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council*, 2006 E.C.R. II-4665, para. 89.

challenged before an independent and impartial tribunal. The principle of respect for the rights of the defence is in fact a bundle of rights, which places upon the acting authority several obligations to effectively ensure that the person concerned can make known his or her views. It includes, *inter alia*, the right to be informed about the commencement and material object of the proceeding, the right to be advised and assisted by counsel, and the right of access to a file.[19] As a rule, any violation of such rights by a Union institution constitutes an infringement of an essential procedural requirement in the meaning of Article 263(2) TFEU (ex Article 230(2) EC) and can thus lead to the annulment of the contested decision.[20] From a comparative point of view, the relevant case-law of the ECJ and the Court of First Instance (CFI, now called General Court) has formed procedural guarantees which are stronger than their counterparts in most national legal orders.[21] This holds true not only with regard to the contents of the procedural safeguards but also for the doctrine of procedural defects, *i.e.* the legal consequences of a failure to fulfill its obligations on the part of the acting authority.[22]

3. A history of horizontal and vertical expansion

What are the reasons for this powerful structure of procedural rights in administrative proceedings? An answer may be found by briefly reconstructing the origins and development of these guarantees.

Their first appearance took place in a staff case decided by the ECJ as early as 1963, where it held that the right to be heard before any disciplinary decision is taken constitutes a "generally accepted principle of administrative law in force in the Member States".[23] However, this ruling did not have a deeper impact on other sectors of the evolving EU law, probably due to the many particularities of the staff regulations area. The real origin was in

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[19] The case-law is summarized by Kańska, *supra*, note 16, 315–18; J. SCHWARZE, EUROPEAN ADMINISTRATIVE LAW CXLVIII–CLIV (2006).

[20] The applicant does not have to prove that the violation has caused a wrongful decision in terms of substance. However, not every formal defect constitutes a violation of the rights of the defence. The details are subject to a complex jurisprudence, see *e.g.* Case T-147/97, *Champion Stationary et al. v. Council*, 1998 E.C.R. II-4137, para. 87. *Cf.* J. Schwarze, *Judicial Review of European Administrative Procedure*, 68 LAW AND CONTEMPORARY PROBLEMS 85,98 (2004).

[21] For a comprehensive study, see Swedish Agency for Public Management (Statskontoret), *Principles of Good Administration in the Member States of the European Union* (2005), available at: http://www.statskontoret.se/upload/Publikationer/2005/200504.pdf.

[22] On the structural conflicts with more lenient approaches to sanction violations of procedural rights, see W. Kahl, *Grundrechtsschutz durch Verfahren in Deutschland und in der EU*, 95 VERWALTUNGS-ARCHIV 1, 19–28 (2004).

[23] Case 32/62, *Alvin v. Council*, 1963 E.C.R. (English special edn.) 49, summary no. 1.

the mid-1970s in the sphere of competition law, in the context of proceedings handled by the Commission under Regulation No. 17. The peculiarities of antitrust proceedings added characteristic traits to the party's right to make his or her point of view known. Such a right was first recognized by the Court as a "general rule" in the *Transocean Marine Paint* case in 1974.[24] According constitutional status to the right to a hearing was arguably motivated by the similarity to criminal proceedings, in particular the Commission's extensive powers of investigation and inquiry and, most importantly, its power to impose financial sanctions. Indeed, these powers place the undertaking concerned in a position similar to that of a person who has been charged with a criminal offence.[25] The Court decided to follow the example of English administrative law by accentuating the notion of procedural fairness for all forms of adjudication, including quasi-judicial decision-making by administrative bodies. According to the underlying rationale, strict observance of procedural rules is to counter-balance the discretion on the part of the acting authority and legitimizes more lenient judicial review in terms of substance.[26]

From this point, a *horizontal expansion* into the other policy areas started in the mid-1980s. At first, these policies were also characterized by direct implementation by Union institutions such as State aids control,[27] control of public undertakings[28] and anti-dumping proceedings.[29] Yet, this process was soon accompanied by a *vertical expansion* into 'mixed' (or 'composite') administrative proceedings.[30] These types of procedures are characterized by administrative implementation involving both EU and Member States' authorities, such as the determination of certain customs duties[31] or the reduction of financial assistance.[32]

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[24] Case 17/74, *Transocean Marine Paint v. Commission*, 1974 E.C.R. 1063, para. 15.

[25] See Case 85/76, *Hoffmann-La Roche v. Commission*, 1979 E.C.R. 461, para. 9.

[26] On the 'first generation' of procedural rules, see F. Bignami, *Three Generations of Participation Rights before the European Commission*, 68 LAW AND CONTEMPORARY PROBLEMS 61, 63–67 (2004).

[27] Case 234/84 and Case 40/85, *Belgium v. Commission*, 1986 E.C.R. 2263, para. 27, and 2321, para. 28; Case 259/85, *France v. Commission*, 1987 E.C.R. 4393, para. 12; Case C-301/87, *France v. Commission*, 1990 E.C.R. I-307, para. 29.

[28] Cases C-48/90 and C-66/90, *Netherlands et al. v. Commission*, 1992 E.C.R. I-565, para. 44.

[29] Case C-49/88, *Al-Jubail Fertilizer et al. v. Council*, 1991 E.C.R. I-3187, para. 15.

[30] See G. della Cananea, *The European Union's Mixed Administrative Proceedings*, 68 LAW AND CONTEMPORARY PROBLEMS 197–217 (2004). On the concept of composite administration (*Verwaltungsverbund*), see E. SCHMIDT-AßMANN, DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE 377 *et seq* (2006).

[31] Case C-269/90, *Technische Universität München*, 1991 E.C.R. I-5469, paras. 14 and 25.

[32] Case C-32/95 P, *Commission v. Lisrestal et al.*, 1996 E.C.R. I-5373, para. 21, confirming Case T-450/93, *Lisrestal et al. v. Commission*, 1994 E.C.R. II-1177, para. 42 *et seq*.

Without going into the details of this dual process of expansion,[33] two accompanying modifications of the scope of the principle deserve attention.

The first concerns the types of decisions in which the protection of the rights of the defence is required. Even with the introduction of the right to a fair hearing in State aids proceedings in the 1980s, the measures that call for special procedural protection ceased to constitute 'sanctions' in the narrow sense. The same holds true for the imposition or withdrawal of anti-dumping duties. Later case-law confirmed that other measures adversely affecting a private party may also qualify, though not any loss of an individual benefit will suffice.[34] The persistent use of the concept of 'sanctions' in competition law cases,[35] however, indicates that it still serves as a point of reference for determining how intensely affected a person must be in order to claim the rights of the defence.[36] Apparently, the 'significant adverse effect' test is stricter than the 'individual and direct concern' test applied under Article 230(4) EC (now Article 263(4) TFEU).[37] Thus, only a segment of the class of acts contestable by individuals under that provision has to be adopted in strict accordance with the rights of the defence.

Second, with the expansion into proceedings which concern applications for exemptions from custom duties, the Court recognized that the rights of the defence may also be relevant in proceedings initiated *by* a person, not only in proceedings initiated *against* a person.[38] Hence, there is nothing in the case-law indicating an *a priori* exclusion of proceedings on status determinations, as they are typical for migration law.

3. Are State authorities obliged to respect the rights of the defence?

Thus far I have referred to a well researched topic. What follows are early observations of a yet mostly unknown field. It concerns two interrelated questions: First, do the procedural

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[33] For details, see H.P. NEHL, PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN EC LAW 41–99 (1999); O. MADER, VERTEIDIGUNGSRECHTE IM EUROPÄISCHEN GEMEINSCHAFTSVERWALTUNGSVERFAHREN 131–285 (2006).

[34] See Case C-48/96 P, *Windpark Groothusen v. Commission*, 1998 E.C.R. I-2873, para. 48.

[35] See *e.g.* Case C-194/99 P, *Thyssen Stahl v. Commisison*, 2003 E.C.R. I-10821, para. 30: "In all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of Community law ...".

[36] See S. Bitter, *Procedural Rights and the Enforcement of EC Law through Sanctions*, *in* THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION, 15, 25–27 (A. Bodnar *et al.*, eds., 2003).

[37] See H.P. NEHL, EUROPÄISCHES VERWALTUNGSVERFAHREN UND GEMEINSCHAFTSVERFASSUNG 288 (2002). The approach of Article 41 of the Charter is arguably more lenient, see Kańska, *supra*, note 16, 316–17.

[38] See K. Lenaerts and J. Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process*, 34 CMLREV 531, 535–537 (1997).

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guarantees constitute fundamental rights, as suggested by the Charter of Fundamental Rights, and, second, are they also applicable in proceedings before national authorities, as denied by Article 41 of the Charter?

A rhetorical upgrading to fundamental rights first took place in 1991 when the Court held that investigative proceedings prior to the adoption of anti-dumping regulations call for respect of procedural rights of the undertakings concerned.[39] For almost a decade, however, this language didn't have a deeper impact on the ensuing case-law. The constitutional discourse in the EU obviously had changed when in 2000 the Court, in the *Krombach* case concerning the Brussels Convention on Jurisdiction and the Enforcement of Judgments, somewhat cryptically accorded the status of fundamental rights to the right to a fair hearing.[40] The Court linked this right to the concept of a "fair legal process", which in turn was said to be "inspired" by the European Convention of Human Rights (ECHR).[41] This reference is to a certain extent misleading since the right to a fair trial under Article 6(1) ECHR does *not* cover (non-judicial) administrative proceedings, though it may cover certain disputes governed by administrative laws.[42] Nonetheless, the foundation of a semantic constitutionalization of the rights of the defence was laid. And indeed, only three years later in the *Aalborg Portland* case, the Court referred to these guarantees as "fundamental rights" without thinking it necessary to give any reasons for such qualification other than a reference to the *Krombach* judgment.[43] It is fair to assume that the meanwhile proclaimed Charter of Fundamental Rights has offered the Court of Justice an invitation to do so – which it was very much willing to accept. In the landmark *Kadi* appeals decision of 2008, the grant of judicial review in the light of fundamental rights, including the rights of the defence, has even been elevated to the status of a "constitutional guarantee" forming part of the core of the EU constitutional order.[44]

This brings us to the crucial point of whether the rights of the defence, being part of the general principles of EU law, are also relevant when the acting authority is of a Member State. The last word has not yet been spoken, but the direction is clearly determined. The

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[39] Case C-49/88, *Al-Jubail Fertilizer et al. v. Council*, 1991 E.C.R. I-3187, para. 15.

[40] Case C-7/98, *Krombach*, 2000 E.C.R. I-1935, para. 42.

[41] *Id.*, paras. 25–26.

[42] For a review of the role of Article 6(1) ECHR in administrative matters, see C. GRABENWARTER, VERFAHRENSGARANTIEN IN DER VERWALTUNGSGERICHTSBARKEIT 35–81, 355–396 (1997). According to the Grand Chamber (GC) of the European Court of Human Rights, decisions regarding the entry, stay and deportation of aliens are not covered by Article 6(1) ECHR, see, *Maaouia v. France*, Appl. No. 39652/98, Judgment of 5 October 2000, Reports of Judgments and Decisions 2000-X, para. 40.

[43] Cases C-204/00 P *et al*, *Aalborg Portland A/S*, 2004 E.C.R. I-123, para. 64.

[44] Cases C-402/05 P and C-415/05 P, *Kadi et al. v. Council and Commission*, 2008 E.C.R. I-6351, paras. 290, 336–337, 349.

answer seems to be in a simple syllogism: [45] 1) Member States are obliged to respect the fundamental rights when acting within the scope of EU law, 2) The rights of the defence enjoy fundamental rights status, *ergo* 3) ...

In fact, there is some evidence in recent case-law which points in that direction. The first line of case-law concerns the freezing of funds of terror suspects. In the *Yusuf* and *Kadi* cases, the Court of First Instance still rejected the claim that the claimant had been entitled to a hearing before the Council makes the final determination to put them on the list of terror suspects, since the listing decision of the Council was, according to the CFI, fully determined by the listing decision of the UN Security Council.[46] However, in its judgment of December 2006 concerning the *Modjahedines du peuple d'Iran* the situation was found to be different. Putting the organization on the autonomous European list of terror organizations was declared unlawful owing to the fact that no hearing had taken place, neither on the national level nor in the Council proceedings.[47] This is a remarkable finding with implications for other policy fields. Different from the previous case-law on mixed administrative proceedings, where the obligation to respect the rights of the defence was exclusively attributed to the Union institution involved, the *Modjahedines du peuple* judgment assumes a joint responsibility of all relevant authorities of the European composite administration.[48]

A decisive step into the sphere of indirect implementation was eventually taken in a rather unspectacular case on veterinary issues: the *Dokter* case of June 2006.[49] It concerned measures of a Netherlands authority to control the foot-and-mouth disease on the claimants' holdings, namely, vaccination and slaughter of the animals concerned. The measures were taken in accordance with a legal framework set by EC directives and State-addressed decisions. The qualification of the rights of the defence as fundamental rights was already considered to be self-evident for the Court of Justice. Presumably for that very reason it felt no need to provide a further explanation as to why the national authority was obliged to respect the procedural guarantees defined in EU law. For the ECJ it suffices to refer to the "important consequences for breeders" flowing from preventive measures of animal health. Having established the rights of the defence as the relevant standard of legality, the Court's appraisal of the fact that no hearing had taken place followed the usual

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[45] This point is also made by Bitter, *supra*, note 36, 24–25.

[46] Case T-306/01, *Yusuf et al. v. Council and Commission*, 2005 E.C.R. II-3533, para. 328; Case T-315/01, *Kadi v. Council and Commission*, 2005 E.C.R. II-3649, para. 258. The Court of Justice later found this premise to be wrong and, consequentially, draw the opposite conclusion, see Cases C-402/05 P *et al.*, *supra*, note 44, para. 348.

[47] Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council*, 2006 E.C.R. II-4665, para. 89.

[48] *Cf.* G. della Cananea, *Return to the Due Process of Law: The European Union and the Fight against Terrorism*, 32 EUROPEAN LAW REVIEW (E.L.Rev.) 896, 900 (2007).

[49] Case C-28/05, *Dokter*, 2006 E.C.R. I-5431, para. 71 *et seq*.

test for justifying a restriction of a fundamental right, *viz* examining the proportionality of the interference in view of the pursued objectives of general interest.[50]

If the *Dokter* case provides the future model for the standards to be met by national authorities when acting within the scope of EU law, we can clearly see the centripetal effects of qualifying certain principles of administrative law as fundamental guarantees of the individual, at the expense of the procedural autonomy enjoyed by the Member States. We are witness to a process of mutual strengthening of semantic constitutionalization and vertical expansion of EU law.

4. A summary of the law on procedural guarantees

The current law on procedural guarantees in administrative proceedings can be summarized in the following four points:

1) The procedural guarantees in administrative proceedings, as first developed in competition law cases, are not bound to a specific policy field. They can doubtlessly be applied in migration law, to the extent the latter has come within the scope of EU law.

2) The procedural guarantees are no longer bound to the direct implementation of EU law, *i.e.* administrative proceedings handled by Union institutions and bodies. The wording of Article 41 of the Charter of Fundamental Rights does not reflect the actual state of the case-law on the scope of the general principles of law. So far as they are recognized as administrative fundamental rights, procedural guarantees are valid also with regard to the indirect implementation of EU law, i.e. administrative enforcement by Member State authorities of rules laid down in EC regulations or EC directives.

3) Observance of the rights of the defence is one of the core procedural guarantees recognized as administrative fundamental rights of EU law. Yet, it is only required in certain types of proceedings, depending on the nature of the administrative act that the authority is minded to adopt. The rights must be guaranteed in all proceedings which are liable to culminate in a measure having a *significant adverse effect* on the person concerned, including but not limited to sanctions.

4) Procedural guarantees such as the rights of the defence are not absolute rights; rather, they are subject to limitations provided for by EU law or national law. However, any restrictions have to meet the standards of a justified interference with a fundamental right. Limitations may be made only if they are necessary and genuinely meet objectives of

[50] *Id.*, para. 75 *et seq.*

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general interest recognised by the Union (see Article 52 of the Charter of Fundamental Rights).[51]

C. The Rights of the Defence in Immigration Proceedings

In the remaining part of this paper I shall apply the above concepts to administrative decision-making regarding the entry, stay and return of third-country nationals in the EU (hereinafter referred to as 'immigration proceedings'). I will first distinguish different legal strategies to introduce procedural guarantees into European migration law, and then identify the types of immigration proceedings that actually require observance of rights of the defence as a general principle of law.

I. Approaches to introduce procedural guarantees into European migration law

One could conceive of at least four routes of how a strong version of procedural guarantees in immigration proceedings could become part of European migration law. Though they are certainly not mutually exclusive, the following overview should help to clarify the particular role of the general principles of law in that process.

The first basis on which procedural guarantees could be developed is international human rights law. Certain minimum requirements of procedural due process are stipulated in Article 13 of the International Covenant on Civil and Political Rights (ICCPR) and Article 1 of Protocol No. 7 to the ECHR concerning expulsion of lawfully resident aliens.[52] According to the European Court of Human Rights (Eur. Court H.R.), an obligation to conduct an individual assessment follows from Article 4 of Protocol No. 4 prohibiting collective expulsion.[53] By implication, other substantive human rights also contain 'hidden' requirements of good administration that may become relevant for immigration proceedings.[54] However, it would blur the line between *lex lata* and *lex ferenda* to contend that, according to international law as it stands, expulsion orders or similar decisions could

[51] As regards the implementation of the guarantees and, in particular, the periods within which the rights of the defence must be exercised, Member States enjoy a certain degree of autonomy, see Case C-349/07, *Sopropé*, 2008 E.C.R. I-10369, para. 38.

[52] See Eur. Court H.R., *Lupsa v. Romania*, Appl. No. 10337/04, Judgment of 8 June 2006, Reports of Judgments and Decisions 2006-VII, paras. 51–61.

[53] See Eur. Court H.R., *Čonka v. Belgium*, Appl. No. 51564/99, Judgment of 5 February 2002, Reports of Judgments and Decisions 2002-I, paras. 59–63.

[54] Boeles *et al.*, *supra*, note 1, 377–380.

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only be issued after the interested party has been duly and adequately heard.[55] In terms of procedural guarantees, the minimum standards of international human rights law are arguably too low and fragmentary for European migration law's purposes.

The second gateway for procedural guarantees could be the ECJ's jurisprudence on persons enjoying free movement rights in the EU. Procedural rules which are thus far reserved for Union citizens and their family members[56] could, by analogy, be extended to other migrants.[57] That is what the Court did, *inter alia*, with respect to Turkish citizens benefitting from residence rights under the Association Agreement with Turkey,[58] and also to other EU/EC agreements entailing a right to be admitted for a third-country national.[59] As promising as this may be, it has yet to be clarified as to what extent the ECJ has based this jurisprudence on an internal market rationale. The extension of this rationale to all third-country nationals is not readily apparent.[60]

A third way by which procedural guarantees could find their way into European migration law is through the legislative process of the Union, *i.e.*, by using the post-Amsterdam competences to harmonize the procedural laws of the Member States applicable to immigration proceedings. Various EU immigration acts do include articles entitled 'procedural safeguards'. Yet, as far as the provisions concern administrative decision-making (rather than legal review), they address the form of the decision taken (draft language, notification in writing, statement of reasons etc.); hardly any deal with the administrative procedure.[61] A right to be heard before any decision is issued is notably

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[55] But see J. E Méndez, H. Olea and A. Feldmann, *International Standards of Due Process for Migrant Workers, Asylum Seekers, and Refugees*, *in* HUMAN RIGHTS AND REFUGEES, INTERNALLY DISPLACED PERSONS AND MIGRANT WORKERS, 459, 465 and 470 (A.F. Bayefsky, ed., 2006), referring to decisions of the Inter-American human rights system.

[56] See Articles 28–31 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. 2004 L 158/77.

[57] *Cf.* K. Groenendijk, *Forty Years of Free Movement of Workers: Has it Been a Success and Why?*, *in* RETHINKING THE FREE MOVEMENT OF WORKERS, 11, 21 (P. Minderhoud & N. Trimikliniotis, eds., 2009).

[58] See Case C-136/03, *Dörr and Ünal*, 2005 E.C.R. I-4759, paras. 66–69, concerning Articles 8 and 9 of EEC Directive 64/221 (no longer in force).

[59] Case C-327/02, *Panayotova*, 2004 E.C.R. I-11055, paras. 26–27.

[60] *Cf.* S. Peers, *Human Rights in the EU Legal Order*, *in* EU IMMIGRATION AND ASYLUM LAW, 115, 121 (S. Peers & N. Rogers, eds., 2006), advocating an application "wherever there is a link to a right conferred by Community law".

[61] See, *inter alia*, Article 5(4) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, O.J. 2003 L 251/12; Articles 10(1) and 20(1) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, O.J. 2004 L 16/44; Article 11 of Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, O.J. 2009 L 155/17.

absent in the current legislation, with the exception of the Procedures Directive concerning asylum claims.[62] The 'procedural safeguards' established by the Union legislator seem to fit into the overall picture of a failed attempt to establish a genuine European approach to immigration policy paying due regard to the rights of the individual.[63]

The fourth strategy follows the example set by the Court of Justice in its judgement on the Family Reunification Directive, where it demonstrated the potential of fundamental rights recognized as general principles of law to narrow the scope of Member States' discretion when implementing an EC directive.[64] As I mentioned in the beginning, even a rather 'shallow' harmonization of laws can have a 'deep' impact in the national legal order since the legislative act has the effect of bringing the matter within the scope of EU law. It hence serves, willingly or not, to import legal transplants from other policy fields embodied in general principles of law. In this particular case, Union legislation tacitly imports a strong version of administrative fundamental rights that were first developed in competition law. Accordingly, this approach is less concerned with the failure of the Union legislator to lay down procedural rules that meet the minimum standard set by the general principles of law. While legislative concretization and adaptation to a specific context would be advantageous in terms of legal certainty and be preferable also from the perspective of Member State autonomy,[65] it is not a precondition for the general principles of law to get applied.[66] On the contrary, in the absence of appropriate rules of secondary law, the principle itself fills the lacuna and/or serves as a guideline for consistent interpretation of a weak regulation, as the case may be. With respect to the rights of the defence, it has long since been recognized in the Court's formula that this fundamental principle must be guaranteed "even in the absence of any rules governing the proceedings in question".[67]

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[62] Article 12(1) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, O.J. 2005 L 326/13. But see the exceptions in Article 12(2) and (3). *Cf.* T. Strik, *The Procedures Directive: An Overview*, *in* THE PROCEDURES DIRECTIVE: CENTRAL THEMES, PROBLEM ISSUES, AND IMPLEMENTATION IN SELECTED MEMBER STATES, 7, 13 (K. Zwaan, ed., 2008).

[63] See, *e.g.*, T. BALZACQ & S. CARRERA, MIGRATION, BORDERS AND ASYLUM: TRENDS AND VULNERABILITIES IN EU POLICY (2005); J. Monar, *The Area of Freedom, Security and Justice*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, 551, 575, 579–580 (A. von Bogdandy & J. Bast, eds., 2010).

[64] See, *supra*, note 12.

[65] On the paradox of over-regulation through judge-made law, see Schmidt-Aßmann, *supra*, note 2, 142.

[66] For a similar approach to the related issue of judicial protection, see E. Brouwer, *Effective Remedies in Immigration and Asylum Law Procedures: A Matter of General Principles of EU Law*, *in* WHOSE FREEDOM, SECURITY AND JUSTICE? 57 (A. Baldaccini, E. Guild & H. Toner, eds., 2007).

[67] See *surpa*, note 17.

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II. Immigration proceedings that require respect for the rights of the defence

Can a third-country national claim a right to be heard in an immigration proceeding handled by a Member State authority when such hearing is not mandatory according to national law? Pursuant to the general doctrines discussed above, a two-fold test is required to answer the question: First, the immigration proceeding at hand has to fall within the scope of EU law; and second, the administrative measure in question must have a significant adverse effect on the migrant concerned.

Not much needs to be added to clarify the first test. According to the usual doctrine for determining the Treaties' scope of application, the mere existence of a legal basis empowering the Union legislator will not do.[68] Given also the absence of Treaty provisions that grant third-country nationals a right to free movement, migration law issues concerning these non-citizens do fall within the scope of EU law only to the extent that the issue is addressed in existing legislation. Accordingly, procedural guarantees in immigration proceedings come as a corollary of substantive legislation. In addition, the inclusion into the scope of EU law may follow from legislative acts aimed at harmonizing procedural aspects of migration law, *e.g.*, the procedures for granting international protection under the Procedures Directive.[69]

As far as the second requirement is concerned, there is ample room for interpretation, given the lack of clear guidance from pertinent case-law. What are the types of decisions resulting from immigration proceedings that usually meet the 'significant adverse effect' test the Court would apply? Offering some preliminary answers, I shall distinguish between two groups of decisions: those relating to the termination of residence, and those to denial or loss of legal status.

1. Decisions related to the termination of residence

In my opinion, administrative acts relating to the involuntary termination of residence are a clear example of measures that involve such significant adverse effects for the person concerned that uniform procedural guarantees are demanded. This qualification includes state action such as the issuance of expulsion orders, the conduct of deportation proceedings and related enforcement measures, as well as the imposition of a re-entry ban on an expellee (exclusion order).[70] While expulsion does not constitute criminal

[68] *Cf.* Case C-127/08, *Metock*, 2008 E.C.R. I-6241, paras. 77–78.

[69] See C. Costello, *The Asylum Procedures Directive in Legal Context: Equivocal Standards Meet General Principles*, *in* Baldaccini *et al.*, *supra*, note 66, 151, 175–176.

[70] See Boules *et al.*, *supra* note 1, 391.

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punishment in the meaning of Article 6(1) ECHR or Article 4 of Protocol No. 7, as the Strasbourg Court has confirmed,[71] it often entails a sanction-like effect for the individual concerned – a striking parallel to the administrative sanctions in competition law proceedings which triggered the development of the rights of the defence in the first place.[72]

If this is the case, all decisions related to returns adopted in accordance with the Returns Directive ('return decisions', 'decisions on removal' and 'entry-ban decisions') are henceforth subject to the rights of the defence, once the time-line for its implementation has expired.[73] One of the core objectives of this Directive is to establish certain minimum standards of treatment of third-country nationals who are subject to expulsion, deportation and exclusion proceedings in the Member States. This does not only serve the interests of the persons concerned[74] but also to foster the mutual recognition and transnational enforcement of the decisions taken.[75] Accordingly, the Returns Directive includes a chapter on "Procedural Safeguards", which was among the controversial topics during the legislative process.[76] As far as the administrative decision-making is concerned, the relevant regulation, in Article 12 of the Directive, is limited to defining the form, the motivation and the means of communication of decisions related to returns. There is no mentioning in the Directive of a right to be heard before the decisions are taken. Yet, as I have argued at length, in such circumstances the right directly follows from the relevant general principle of law. Concerns about the effectiveness of the returns policy constitute a legitimate objective of public interest and may thus serve as a ground of justification for interference. However, any restriction of the right to a fair hearing must balance the rights and interests involved in accordance with the principle of proportionality. To provide for a general dispense of a mandatory hearing in expulsion, deportation or exclusion proceedings would be disproportionate.

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[71] Eur. Court H.R. (GC), *Maaouia v. France*, Appl. No. 39652/98, Judgment of 5 October 2000, Reports of Judgments and Decisions 2000-X, para. 39; Eur. Court H.R. (GC), *Üner v. The Netherlands*, Appl. No. 46410/99, Judgment of 18 October 2006, Reports of Judgments and Decisions 2006-XII , para. 56.

[72] See also Méndez *et al*, *supra* note 55, 463–465, comparing immigration and criminal proceedings in terms of due process.

[73] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, O.J. 2008 L 348/98.

[74] As stated in the 11th recital of the Preamble of the Directive.

[75] See J. Bast, *Der Vorschlag der Europäischen Kommission für eine Abschiebeverfahrens-Richtlinie*, *in* PERSPEKTIVWECHSEL IM AUSLÄNDERRECHT?, 648, 650–653 (K. Barwig, S. Beichel-Benedetti & G. Brinkmann, eds., 2007).

[76] Articles 12–14 of the Directive. For details, see D. Acosta, *The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly?*, 11 EUROPEAN JOURNAL OF MIGRATION AND LAW (EJML) 19 (2009), A. Baldaccini, *The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive*, 11 EJML 1, 11–13 (2009).

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2. Decisions related to denial or loss of legal status

Immigration proceedings that are liable to culminate in denial or loss of a beneficial legal position of the person concerned are the second group of proceedings arguably calling for procedural fundamental rights. This includes decisions rejecting an application for a particular legal status as well as decisions withdrawing such status. In the former case, the proceeding is usually initiated by the migrant filing an application. Even in such circumstances, it can be essential that the applicant is placed in a position in which she may effectively make known her views before the final decision is taken, in particular when the authority intends to base its decision on evidence beyond that provided by the applicant.

Again, there is much room for discussing which legal positions deserve the special procedural protection due to the significant adverse effects resulting from a denial or loss. In my view, the procedures for the determination of refugee status and other forms of international protection surely meet this requirement. Given the important consequences potentially resulting from a failure to grant international protection, such proceedings are very likely to pass the threshold set by the Court, in particular when compared with the less severe consequences that satisfied it in the *Doktor* case.

A different rationale could apply pertaining to other categories of third-country nationals that have come within the scope of EU law due to the activity of the Union legislator. Here it seems particularly relevant whether the legislative act entails the grant of an individual right, *i.e.* the entitlement to a particular legal status.[77] This is the case indeed in the Family Reunification Directive[78] and some other acts such as the Long-Term Residence Directive or the Blue Card Directive.[79] Here, the procedural guarantees, including the rights of the defence, serve the function to make effective the rights created by EU law.[80] The situation is arguably different where the Union legislator has confined itself to the harmonization of concepts but has left it to the Member States' discretion to grant a legal status or not, as is the case *e.g.* in the Students Directive.[81] Though the rejection of an application for a student residence permit or its ensuing withdrawal involve the denial or loss of certain rights attached to that legal status, there is no right for a third-country national to be admitted under the Students Directive which could demand the preventive protection of

[77] *Cf.* Case 222/86, *Heylens*, 1987 E.C.R. 4097, paras. 14–16; C-327/02, *supra*, note 59, paras. 26–27.

[78] *Cf.* Case 540/03, *supra*, note 12, para. 60.

[79] See *supra*, note 61.

[80] See Peers, *supra*, note 60, 121.

[81] Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, O.J. 2004 L 375/12.

uniform procedural guarantees. In such instances, the applicable procedural laws are national, subject to the limits imposed by the principles of equivalence and effectiveness.[82]

D. Conclusion

This paper has identified various types of immigration proceedings before a Member State authority that are likely to entail the strong version of procedural guarantees recognized as fundamental rights in the EU legal order. The relevant proceedings involve measures related to the termination of residence as well as decisions related to denial or loss of a particular legal status, such as withdrawing international protection or refusing a statutory right to be admitted to the Union. Given the important consequences for migrants following from such decisions, the 'significant adverse effect' test applied by the Court will hardly be an insurmountable hurdle. In effect, the actual scope of application of the EU's administrative fundamental rights is determined by the actual scope of activity of the European legislator. To the extent that migration law issues are governed by legislative acts of the Union, any leeway in decision-making by Member States' authorities must be used in accordance with the general principles of EU law, including the requirements of procedural due process.

[82] See *supra*, note 8.

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