Martina Künnecke

Tradition and Change in Administrative Law

AN ANGLO-GERMAN COMPARISON

Springer

Martina Künnecke

Tradition and Change in Administrative Law

An Anglo-German Comparison

Springer

Dr. Martina Künnecke
The University of Hull
Law School
Cottingham Road
Hull HU6 7RX
United Kingdom
m.kunnecke@hull.ac.uk

Library of Congress Control Number: 2006938023

ISBN 978-3-540-48688-6 Springer Berlin Heidelberg New York

Production: LE-TEX Jelonek, Schmidt & Vöckler GbR, Leipzig
Cover-design: Erich Kirchner, Heidelberg

SPIN 11919414 64/3100YL - 5 4 3 2 1 0 Printed on acid-free paper

Tradition and Change in Administrative Law

To my parents, Ingeborg and Manfred Künnecke

Preface

In writing this book, I benefited from the support of collegues, friends and family.

I would like to thank Professor Patrick Birkinshaw, Professor John Bell, Professor Karl-Peter Sommermann, Andrea Krause, *Richterin am Verwaltungsgericht Koblenz*, and Dr. John Hopkins for valuable comments on earlier drafts. I would also like to thank Zamim Dehghan, Agnes Peter and Laurenzo Arturo for their assistance with research in Germany and the UK. Finally, I am grateful to my family for their encouragement and patience.

The University of Hull, October 2006 Martina Künnecke

Contents

Chapter One Introduction

Administrative legal systems are based on national constitutional legal traditions and cultural values. English judges have for centuries applied the common law. In Germany, judges have developed administrative legal principles for the protection of the individual against state action. However, over the last few decades, administrative legal systems have become less isolated. This is the result of fundamental developments in the European legal landscape and of the increasing complexity of administrative legal problems. In the UK, the constitutional basis for judicial review, principles of judicial control and governmental liability as well as the organisation of the courts are changing. Both the English and the German administrative legal systems are increasingly faced with the question of how to balance the dynamics of change with the preserving forces of tradition. Here, the open attitude of judges and lawmakers in considering solutions offered elsewhere is a remarkable development in a field of law which has long been perceived as too nationally specific. There is a growing need for comparative analysis of these dynamics in administrative law – this book provides a valuable contribution to this field of law.

The most significant factors which have "provoked and lead the emergence of a common law for Europe"[1] are the jurisprudence of the European Court of Justice and the European Court of Human Rights. The European Court of Justice has developed the requirements of equivalence and effectiveness of domestic remedies which seek to "force national courts to view the national remedies under the prism of Community law".[2] In England, for example, the "growing extent and impact of principles of law derived from the ECJ" have recently been described as "the biggest influence in the national legal system".[3] Famously, it has been stated that Community law is a "medium and a catalyst which is starting to contribute to a convergence and approximation of administrative law in Europe and not only in a Community law context".[4] The influence is therefore twofold.[5] As a matter of fact

---

1 Van Gerven, W., *Ius Commune Casebook Series, Cases, Materials and Text on National, Supranational and International Tort Law*, 1999.

2 Tridimas, T. in Kilpatrick, C., Novitz, T., Skidmore, P. (eds.) *The Future of Remedies in Europe*, 2000, 35 [49].

3 Birkinshaw, P., "European Integration and United Kingdom Constitutional Law" (1997) *European Public Law* 57 [88].

4 Schwarze, J., *European Administrative Law*, revised 1st edition, 2006, 1435; see also van Gerven, W., "Bridging the Gap Between Community and National Law: towards a principle of homogeneity in the field of legal remedies", 32 *CMLR* 679.

5 Birkinshaw, P., *European Public Law*, 2003, 3.

a Europeanisation of some parts of the national legal heritage has already taken place and European law will continue to permeate national law.

It is arguable whether such further Europeanisation of national law is desirable. On the one hand it has been argued that the idea of a single "internal market" requires for its complete realisation a single system for the judicial resolution of disputes.[6] This "market" approach has been criticised for being "a thin argument to set against the deep values of heritage, legal culture and constitutional legitimacy".[7] A harmonisation on a large scale is currently not planned and would be difficult to achieve. It is important to cherish national diversity in legal tradition. However, a deeper understanding of other European legal systems might lead naturally to a dialogue and an exchange of ideas, either between national legal systems or at European level.

The further development of a common law for Europe in the field of judicial review of administrative action and governmental liability which is heavily reliant on the European Court of Justice's case law will benefit most if it draws inspiration from the concepts and principles that are *common* to the legal systems of the member states.

Another factor in the process of change is the awareness that domestic legal systems face such as striking the balance between the protection of human rights and security in the age of terrorism. Common lawyers are increasingly interested in continental jurisdictions: "... in the light of significant recent constitutional changes in this country, I can foresee our lawyers developing a great interest in the public law jurisdiction of courts elsewhere in the continent of Europe".[8] There is an increasing number of judgments by the House of Lords taking note of comparative research in the field of public law including aspects of German law.[9] Some of these developments have been supported by academic publications in the English

---

6 Jolowicz, T., Introduction in Storme, M. (ed.) *Approximation of Judiciary Law in the European Union* (the Storme Report), 1994; De Smith, *Judicial Review of Administrative Action* (1995) 897: "if Community law is to be uniformly applied, if undertakings are to benefit from comparable levels of judicial protection in different member states and if member states themselves are to be subject to comparable burdens, then there should be a more uniform approach to remedies and procedural rules governing the enforcement of Community rights".

7 Harlow, C., *Convergence and Divergence in European Public Law*, 2002, 224.

8 Lord Goff of Chieveley, "Coming Together – the Future", Clifford Chance Millennium Lectures, in Markesinis, B. (ed.) *The Coming Together of the Common Law and the Civil Law,* 2000, 249.

9 *JD (FC) v East Berkshire Community Health NHS Trust and others, Two Other Actions (FC)* 2005 WL 881875, [2005] UKHL 23, on appeal from [2003] EWCA Civ 1151, HL; *Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)* [2002] UKHL 22; *R (Prolife Alliance) v BBC* [2004] 1 AC 185, [2002] EWCA Civ 297, [2003] UKHL 23, [2003] 2 WLR 1403, HL; *R v Ministry for Agriculture, Fisheries and Food, ex p Hamble* [1995] 2 All ER 714 at 729; for a further discussion of this case, see Chapter Three, "The principle of legitimate expectation in English administrative law".

language.[10] This trend to consider laws and institutional organisations outside one's own jurisdiction is also reflected in the legislative[11] and political processes.[12]

In Germany, where law is perceived as a scientific discipline (*Rechtswissenschaften*), English public law is of great academic interest and, as is well-known, groundbreaking comparative research cutting across the civil/common law divide in administrative law has been carried out by Professor Jürgen Schwarze.[13] English public law is seen as "extremely interesting"[14] and "providing an elucidating contrast" to German law.[15]

Comparative research into the administrative legal systems of two of the largest member states may also be of interest to the new or applicant member states. It may be of assistance in the process of institution building, providing baselines set by good European practice.

The aim of this book is to analyse by way of highlights some main strands in the English and German approaches to judicial control in administrative law. It is concerned with an understanding of the variations in the approaches taken and the complexity of the historical and constitutional backgrounds in which both systems are embedded. It seeks to identify to which extent national legal traditions produce what has been termed "path dependencies",[16] i.e. certain forms of conduct which are preset by national characteristics. Others have referred to the significance of history as "established ways of working"[17] "which might well constitute barriers

---

10 Markesinis, B., Auby, J.B., Coester-Waltjen, D. and Deakin, S.F., *Tortious Liability of Statutory Bodies, A Comparative and Economic Analysis of Five English Cases* 1999; Duncan Fairgrieve and Sarah Green, *Child Abuse Tort Claims Against Public Bodies, A Comparative Law View*, 2004.

11 A Department for Constitutional Affairs Consultation Paper "Constitutional Reform: A Supreme Court for the United Kingdom", July 2003, CP 11/03 2003. An example is the consultation process leading up to the Constitutional Reform Act 2005 establishing a Supreme Court for the United Kingdom. Here, the function of the German Federal Constitutional Court was discussed; see also Sir Andrew Leggat's report "Tribunals for Users – One System, Once Service", August 2001, in which he recommended the commissioning of research into the operation of administrative justice both in the UK and abroad.

12 David Cameron's speech on the establishment of a written bill of rights for the UK in which he refers to the German constitutional model, 26 June 2006, http://www.conservatives.com/tile.do?def=news.story.page&obj_id=130572&speeches=1. The Attorney-General Lord Goldsmith suggested a written constitution, *The Guardian*, 9. October 2006.

13 Schwarze, J., *Die gerichtliche Kontrolle der Verwaltung in England, Die Öffentliche Verwaltung*, 1998, 771; *European Administrative Law*, 2006.

14 Middeke, A., on Jochen Frowein, *Die Kontrolldichte bei der gerichtlichen Überprüfung von Handlungen der Verwaltung,* 1993, (1996) DVBl 527.

15 Brinktrine, R., *Verwaltungsermessen in Deutschland und England*, 1998, 3.

16 Großfeld, B. ,"Comparatist and language" in Legrand, A., Munday, R., *Comparative Legal Studies: Tradition and Transitions* 2006, 177.

17 David, R., *International Encyclopaedia of Comparative Law*, vol. 2, Chapter 5, 1970 cited in Bell, J., Public Law in Europe: Caught between the National, the Sub-National and the European, *Epistemology and Methodology of Comparative Law,* 2004, 265.

to convergence of legal systems".[18] A comparison of these two great legal systems is therefore significant because of the contrast in approaches taken. At the beginning of the last century it was remarked that the continental traditions of public law are "so complete an antithesis to the development of the law and constitution of England [that] the true meaning and effect ... of the latter are best shown through this antithesis".[19] It is therefore designed as an analysis of national solutions in England and Germany which may offer alternative arguments from outside one's own jurisdiction.

The comparative method in the field of public law

The comparability of administrative law has been questioned because of its extremely national character. Nevertheless first roots of comparative administrative law can be found at the end of the last century, including the work of Albert V. Dicey and his basic introduction to English constitutional law, Otto Mayer with his development of German administrative law and Edouard Lafferière, one of the founders of French administrative law. However, comparative administrative law then was mainly used to develop one's own doctrine of administrative law by investigating more developed administrative law systems.[20]

The method of comparative law has been used by legislators for their own law making by and for the international unification of law.[21] Legislative comparative law was successfully used in drafting the German Civil Code, which unified the private law of Germany from 1 January 1900. The preparation of the Code involved the careful consideration of the solutions accepted in all the systems then in force in various parts of Germany. These included the *Gemeines Recht*, Prussian law and the French Civil Code, which was in force in the Rhineland.[22] The need for national unification of the law inspired a medieval French jurist, Coquille (1523–1603), to write a commentary on the French customary law, the *Coutumes* of the County of Nevers, and an *Institution au droit français*, by using the comparative method in order to harmonise the various customs of medieval French law: "the very task which comparative law still has to perform today, with the difference that it is no longer the customs of localities but the legal systems of nations which have to be assimilated and harmonised".[23]

---

18 Bell, J., ibid.

19 Redlich, J. and Hirst, F.W., *Local Government in England*, 1903, 376–377 cited in Thomas, R., *Legitimate Expectations and Proportionality in Administrative Law,* 2000, 16.

20 Schwarze, J., *European Administrative Law*, 2006, 91.

21 van Gerven, W., "Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie" (1996) 45 *International and Comparative Law Quarterly* 507.

22 Zweigert, K., Kötz, H., *An Introduction to Comparative Law,* 1987, 51.

23 Ibid 80.

Comparative law has developed from a purely academic discipline to a practical tool in the further development of a common law for Europe. As a result of the goals set in the Treaty establishing the European Community, the comparative law research method has gained momentum. As Legrand puts it, "there is now ... a prominent role for the comparatist to play – a role which is actually so meaningful that her work can help determine whether or not there will, one day, arise a common law of Europe with the obvious implications that can be imagined for every European citizen".[24] There is more awareness that comparative methods may lead the lawyer somewhere and that comparative materials may be a source of inspiration for legal decisions, "whether by legislative bodies or by the courts".[25]

In the field of administrative law, the European Treaties do not provide for legislative competences for harmonisation. The role of comparative law research in the field of administrative law is therefore less obvious than in the case of harmonisation of private law. Traditionally, comparative law is concerned with the comparison of private law.[26] The necessity of comparing national private law systems stems from the need to harmonise existing systems in order to facilitate the legal implications of the exchange of goods and services in the common market. The majority of recent articles on comparative legal issues are therefore concerned with the harmonisation of European private law.[27]

Today the role which comparative law in the field of remedies against public bodies plays in the European Community finds a clear expression in the oftenquoted Art. 288, para 2 of the EEC Treaty:

"In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the member states, make good any damage caused by its institutions or by its servants in the performance of their duties".

---

24 Legrand, P., "How to Compare" (1996) *Legal Studies* 232 [233].

25 See the cases mentioned above; Koopman, T., "Comparative Law and the Courts" (1996) 45 *International and Comparative Law Quarterly* 545.

26 Zweigert, K., Kötz, H., *An Introduction to Comparative Law*, 1987; Markesinis, B., *The German Law of Tort*; de Cruz, P., *Comparative Law in a Changing World,* 1995.

27 Armbrüster, C., "Braucht Europa ein umfassende Privatrechtskdifikation? Vortragsbericht Juristische Gesellschaft zu Berlin" (1998) *JR* 98; Basedow, J., "Un droit commun des contrats pour le Marché commun" (1998) *RIDC* 7; Coester-Waltjen, D., ZR: "Europäisierung des Privatrechts" (1998) *Jura* 320; Jayne, E., "Entwurf eines EU-Übereinkommens über das auf außervertragliche Schuldverhältnisse anzuwendende Recht – Tagung der Europäischen Gruppe für Internationales Privatrecht in Den Haag (998) *IPRax* 140; "Angleichung der Rechtsvorschriften der Mitgliedstaaten über die Kraftfahrzeug-haftpflichtversicherung" 13.10.1997, EWS 1998, 19; Editorial Comment, "On the Way to a European Consumer Sales Law?" (1997) 334 *CMLR* 207; Editorial, "European Private Law Between Utopia and Early Reality" (1997) *MJ* 1; Lando, O., "European Contract Law After the Year 2000" (1998) *CMLR* 821; Gamerith, H., "Das nationale Privatrecht in der Europäischen Union – Harmonisierung durch Schaffung von Gemeinschaftsprivatrecht" (1997) *ÖJZ* 165; Legrand, P., "Against a European Civil Code" (1997) *MLR* 44; Micklitz, H.W., "Ein einheitliches Kaufrecht für die Verbraucher in der EG?" (1997) *EuZW* 229; Van den Bergh, R., "Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law" (1998) *MJ* 129.

This provision not only recognises that there *are* general principles common to the laws of the member states, but also that these principles are a source of Community law. The well-known principles of proportionality, equal protection, legal certainty, protection of legitimate expectation, etc. have been the product of the European Court of Justice's active role in further developing these two considerations in other branches of law. Here the European Court of Justice relied on Art. 220 (ex Art. 164) that it shall ensure that in the interpretation and application of the Treaty "the law is observed". In *Van Gend en Loos* the court held that Art. 220 (ex Art. 164) must mean that Community rules and the decisions, directives and regulations of Community institutions must respect general principles of law such as are common to the legal traditions of the member states.[28] Jürgen Schwarze's work on European administrative law has been groundbreaking and inspiring.[29] The focus of this book, however, remains on a detailed historical and comparative analysis of two national administrative legal traditions placing particular emphasis on judicial control of the administration and governmental liability.

Apart from disagreement amongst writers using the same language about the existence and extent of a convergence of the administrative legal systems in Europe, there remains a lack of "communication" between those writing in different languages. For example, "the continental writers find themselves ignored by those writing in the imperial language".[30] With regard to the *Francovich* decision,[31] it has been said that "each national group of scholars has examined the implications of the judgment for their own national legal order while ignoring its reception elsewhere".[32] In order to ensure an effective implementation of the Community concept it is necessary to investigate other member states' legal systems.

The significance of a comparison of the administrative legal systems of England and Germany is based on the need for reconciling the "common law" with the "civil law". This "gulf" between common law and civil law, as described by Cappeletti, has occupied many comparative lawyers.[33] The convergence of civil law and common law has been a long-term topic of discussion among comparative lawyers and has created its own "miniature Babel of terminology". Terms such as unification, harmonisation, *Angleichung* and approximation can be found in the increasing number of publications in this field.[34]

One difficulty of comparative legal analysis is that of legal concepts and their translation. The danger of translating concepts lies in the fact that the culture of the chosen language associates other or no underlying meanings to a word. Pierre Legrand in his article "The Impossibility of "Legal Transplants"" describes it like

---

28 *Van Gend en Loos*, C-26/62 [1963] ECR 12.

29 *European Administrative Law,* 2006.

30 "The Convergence Debate", Editorial (1996) 3 *Maastricht Journal of European and Comparative Law* 105 [106].

31 *Francovich and Bonifaci v Italy* [1991] C-6 9/90, ECR I-5357.

32 "The Convergence Debate", n. 30 at 106.

33 Cappelletti, M., *New Perspectives for a Common Law of Europe*, 1978.

34 Merryman, J.H., "Convergence of Civil Law and Common Law" in Cappelletti, M., *New Perspectives for a Common Law of Europe*, 1978, 195 [196–197]; Storme, M., *Approximation of Judiciary Law in the European Union*, 1994.

this: "... as the words cross boundaries there intervenes a different rationality and morality to underwrite and effectuate the borrowed words: the host culture continues to articulate its moral inquiry according to traditional standards of justification". Thus, the imported form of words is inevitably ascribed a different, local meaning which makes it *ipso facto* a different rule. As Benjamin wrote, "the word *Brot* means something different to a German than the word *pain* to a Frenchman"[35] or *bread* to an Englishman. In more legalistic terms, "discretion", for instance, is a term which in German law is heavily connotated by legal doctrine. As we will see, a more neutral term "area free of judicial control" has been chosen to tackle this problem. "Care must be taken to ensure that the substantive problem is formulated in terms which are wherever possible free from the specific doctrinal conceptions of the legal order in which it occurs. Only thus is it possible to recognise a rule to be found in a foreign legal order which, as a matter of doctrine, may be differently formulated or situated as a functionally equal solution."[36] The functional method has been criticised, however, for "stripping the law of all that is interesting".[37] Further, "contemporary criticism of the functional method insists on the complexity of the "law" as a phenomenon while, at the same time, stressing the importance of doing justice to such complexity when comparing laws".[38] This is particularly true when comparing administrative law because "administrative law is a combination of what is going on in the political world, combined with the reactions of the judiciary".[39]

It has been noted that administrative law traditions are more "nationally specific" than private law traditions.[40] The explanations for the structure of any one country owe as much to history and chance as they do to any deep-seated rationale.[41] It is crucial that in the field of administrative law the comparison is not restricted to rules and principles but that both the historical perspective and the constitutional context in which a legal system operates is embraced in that comparison. The origins of the administrative law traditions in both jurisdictions and the role of the courts are crucial in understanding its place in modern society. Allison has illustrated the importance of such an historical perspective even though his conclusions appear to deny the potential for change in modern English society.[42]

---

35 Legrand, P., "The Impossibility of "Legal Transplants"" (1997) 4 *Maastricht Journal of European and Comparative Law* 111 [117].

36 Schwarze, J., *European Administrative Law*, 2006, 82.

37 Graziadei, M., "The Functionalist Heritage" in Legrand, P.,Munday, R., *Comparative Legal Studies: Traditions and Transitions*, 125.

38 Ibid 114.

39 Craig, P., *Administrative Law*, 2003, 4.

40 Bell, J. in Beatson, J., Tridimas, T., *New Directions in European Public Law*, 1998, 167.

41 Ibid 166.

42 Allison, J.W.F., *A Continental Distinction in the Common Law, A Historical and Comparative Perspective in English Public Law,* 2000.