European and National Administrative Laws: Best Enemies?

Speech by Estelle Chambas

Good afternoon,

My name is Estelle Chambas, I am currently a PhD candidate and a teaching assistant in the Université Paris II Panthéon-Assas in France. I would like to thank Nataliia Galkina for the invitation today, I am very pleased to be invited to talk to you, especially about my favourite topic: transnational administrative law.

(**PPT**) So, as I said, I am going to talk to you today about transnational administrative law and, more precisely about transnational administrative decisions. What are they? I chose to define them as legal unilateral acts, qualified by their national law as "administrative decisions", which product a binding legal effect in a foreign State, without needing a reception measure adopted by this State. (**PPT**) This should sound quite odd to you because administrative action is usually limited to the State's territory. Hence, it is often said that administrative law, and more broadly public law, is submitted to a principal of territoriality, meaning it can not be applied outside of national borders.

Where does this principle come from? (**PPT**) It is public international law which set the legal framework leading to this so-called principle of territoriality. As you may know, States are considered equal sovereigns. Sovereignty was particularly defined in the *Island of Palmas case* of the Permanent Court of Arbitration on the 4th April 1928. The most famous part of the sentence states: "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State". (**PPT**) To understand more precisely what is the "functions of a State" in regard to legal production, another sentence can be mobilized. It is the *Lotus Case*, judged by the Permanent Court of International Justice on the 7 September 1927. Saying that restrictions upon States' independence cannot be presumed, this sentence added: "Now the first and foremost restriction imposed by international law upon a State is that –

failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention". (**PPT**) However, the decision also asserts that: "Far from laying down a general prohibition of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules".

(**PPT**) At first sight, these two quotes of the sentence seem to be contradictory, and legal scholars do not always agree on the final meaning of the *Lotus case*. The main interpretation, which is quite old since we already found it in Prosper Fedozzi's course at the Hague Academy of International Law in 1929, is that a distinction should be drawn between enforcement jurisdiction and prescriptive jurisdiction. As such, prescriptive jurisdiction is related to law enactment and according to the *Lotus Case*, any law could apply outside of national borders. However, it cannot be enforced in other States. This is how criminal law of France can apply to a national living in Russia, but it can only be enforced on the national territory. In consequence, France will have to request an extradition to enforce its criminal law.
It works in the same manner for administrative law: in theory, national administrative law can cover the whole planet but it can only be enforced on the national territory. Because of the ensuing ineffectiveness, in practice, administrative law is designed to apply only on the national territory.

(**PPT**) However, if we go back to transnational administrative decisions, we can see that there is a problem here since these decisions are directly enforceable in foreign States. It is their essence. Moreover, such decisions tend to increase exponentially with globalization and especially in the EU to which France is a Member State. Driving licences, national linkage to social security, the European blue card, cars' conformity checks, professional qualifications, railway licences or even binding cooperation mechanisms between national regulation authorities are few examples of a steady expansion of transnational administrative decisions in the EU. Here we have another apparent contradiction between a form of the European integration and a classic conception of the principle of territoriality of administrative law based on well-established international sentences. (**PPT**) The point of the presentation of today is to explain how transnational administrative decision can legally exist and why the European Union framework is especially favourable to their multiplication. The interest of this

presentation is not limited to EU law. Indeed, transnational administrative decisions also exists outside of Member States relations, and the reasons why they multiply in the Union are also valid outside it. And the fact that they develop especially well in the EU gives us explanation about the functioning of administrative transnationality.

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I. Conciliation between the concept of sovereignty and transnational administrative decisions

We saw in the introduction that the existence of transnational administrative decisions seemed to be incompatible with the concept of sovereignty and its consequences set by international law. Therefore, we need to explain first how this type of acts can exist and be compatible with the concept of sovereignty. This leads to reconceptualise the conflictual question raised by transnational administrative decisions which is in reality more of a conflict of authorities than of sovereignties.

(**PPT**)

A. Transnational administrative decisions and the conflict of sovereignties

Transnational administrative decisions are a quite new phenomenon but flows of administrative decisions between States are clearly not new. (**PPT**) Traditionally, for an administrative decision to produce a binding legal effect abroad, the State of destination has to adopt incorporation measures to integrate it in its legal order. Hence, it is not the original administrative decision which is going to produce a direct legal effect but the measure of reception instead. This is why this case is excluded from the transnational scope.

Inversely, a transnational administrative decision is the expression of a sovereignty which is going to bind the administration of the State of reception. As such, it organizes a collision of sovereignties. To take an image, it is like a one-way road coming from one country to another which cannot repel drivers coming in. The recognition of transnational administrative decisions is *de plano* or automatic. It means that no specific measure has to intervene in the legal order of reception to enable their effect. This is the root of the sovereignty collisions.

(**PPT**) Interestingly enough, even if there is this sovereignty question, some transnational administrative decisions have long existed. It is for instance the case of awards of citizenship in virtue of which a State decides to give his nationality to an individual. No foreign administration is entitled to contest such award and, in consequence, whenever a new citizen goes abroad, the administration of reception has to treat him as a national of his new State. This administration is thus bound by the decision of citizenship. Where does this come from? Most likely from international custom which would require States to automatically recognize decision of foreign States related to their nationality. This historical case of transnationality is a key to find out how to deal with the apparent conflict of sovereignties.

Indeed, here the custom helped to override the conflict of sovereignties which indicates that international law may be able to set a framework giving rise to transnational administrative decisions. (**PPT**) Looking back at the *Lotus* sentence, this was also a possibility since enforcement jurisdiction could be exercised abroad "by virtue of a permissive rule derived from international custom or from a convention". (**PPT**) So, it is by the adoption of a new international law rule (*id est* a convention or custom) that sovereignty can be combined with administrative transnationality.

(**PPT**) But a question remains because within the EU, the transnationality mostly results from European Regulations and Directives. You can see some examples on the PPT. How is it possible? It is because the EU was built on international conventions (you may know about the Lisbon Treaty) and this gives an indirect root into an international law rule. Thus, there is another layer (secondary Union law) but the link with a "permissive" international rule still exists. This is how transnational administrative decisions can be input by EU law and not give rise to a conflict of sovereignties.

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B. Transnational administrative decisions and the conflict of authorities

(**PPT**) Now that the question of the sovereignty is solved, let see how transnational administrative decisions work. In fact, by definition they consist in a new repartition of the administrative function between national administrations. Whenever there is a transnational administrative decision, it means that the administration of the State A took in charge a part of

the administrative task of the State B. Facing this division of the administrative function, two subsequent questions arise: which national authority is competent? and which law should apply to transnational administrative decisions?

(**PPT**) A key to address these queries can be found in the "conflict of authorities" which was theorized in France by Jean-Paul Niboyet in the 40's. Nowadays, the conflict of authorities is long forgotten but it seems this technique could fit the case of transnational administrative decisions. (**PPT**) Niboyet used it to explain how "public acts" functioned because neither the conflict of laws or the conflict of jurisdiction could be applied to it. Be careful, what Niboyet called public acts were not public law decisions. They were submitted to private law but they could only be issued by ministerial officers. According to Niboyet, these ministerial officers could never apply another law than there national one since they were instituted by the French public power. "Auctor Regit Actum" principle This means that the conflict of laws never applied to their decisions. So, the question was not "which law apply to this act" but which authority is competent".

This reasoning can easily be transposed to transnational administrative decisions. Indeed, an administrative authority cannot issue decisions according to a foreign administrative law. It also fits the definition of transnational administrative decisions which are identified as "administrative" by their national law. In consequence, to know which law applies to a transnational administrative decision, we only have to determine which national administration is competent. Hence, the conflict of authorities appears very relevant to explain how administrative transnationality works in this case.

One little comment, for this to work, the connection criteria determining the competent national authority has to be clear and unique. It is not yet always the case. Improvement is still possible!

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II. The European Union: a fertile ground for transnational administrative decisions

Now that we've seen how administrative transnationality works, we can wonder why this type of administrative decisions is so widely spread within the EU. The study of this topic helps to better understand the preconditions of their existence.

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A. European institutional features favouring transnational administrative decisions

(**PPT**) The process of European integration is quite unique in the world and offers a framework favouring transnational administrative decisions. Let's remember that the EU has set common goals to all 27 Member States. The result is that States do not only pursue their national interest but also a common interest implemented by European policies. This is a first step toward the division of the administrative function. Since all the States enforce the same policy, it is politically more acceptable to envisioned such division.

Beyond this political element, the EU was born among States which already shared a common legal culture. Moreover, through harmonization and unification, the EU instituted thousands of common legal rules. This common legal core is essential for the circulation of administrative decisions since it is always easier to recognize a type of legal act which already exists in the legal order of reception. It favours the States' acceptance of foreign administrative decisions. Even if theoretically, States can't control transnational administrative decisions coming to their territories, we have seen political resistance in some cases. (**PPT**) For instance, regarding the authorization to sell GMO products, a case law imposed to States to accept the cultivation any product authorized in another State. However, when the directive 2001/18/CE was implemented, France decided to use its safeguard clause without completing the requirements to do so. The French Administrative Supreme Court, the Council of State annulled again and again decrees referring to this safeguard clause. Eventually, the Parliament adopted a statute forbidding the use of these GMOs in 2014. The thing is that in the French legal system, there is no control of statutes in regard of international and EU law by the Constitutional Council. As a result, the GMO directive was consciously violated by France. The consequence was not a sanction of France, but a modification of the GMO directive to allow more broadly the States to block the cultivation of GMOs on their territory. I think that this case really highlights the importance of common value and legal norms for the political acceptance of transnational administrative decisions.

Another special feature of European institutions favouring administrative transnationality is the creation of administrative networks. It is indeed quite common to find networks of national

authorities in specific sectors of regulation such as banking supervision, competition law, energy regulation or even in the environmental field. (**PPT**) These networks are mostly institutionalised in secondary EU law and do not only function on the free will of national authority. As you can see in the directive 2011/16/UE, any request of tax information received from a foreign tax administration implies a legal obligation to respond to it. The request is thus directly enforceable for the administration of reception. Hence, by multiplying administrative networks, the EU provides an institutional framework particularly adapted to transnationality.

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B. European legal mechanism creating the transnational effect

(**PPT**) Besides institutional features, the EU also provides legal mechanisms which helps to concretely implement administrative transnationality. The main tool is the principle of mutual recognition which is at the crossroad between mutual trust and legal equivalence. This principle can be found in written EU law but also in the ECJ case law. The philosophy of this principle is to presuppose an equivalence between the legal system which justifies an automatic recognition of foreign decisions. The mutual trust regarding the equivalence in the implementation of the law is fundamental, without it States might block the transnational effects of foreign administrative decisions. We find here again the question of the political acceptance of transnationality.

The goal of the principal of mutual recognition is to ensure the four freedoms by avoiding successive administrative controls in different countries for one single matter. So, it is a keystone in the building of the European single market.

(**PPT**) There are two ways by which the EU impose the application of this principle. Firstly, the principle of mutual recognition can directly be provided by written law. You can see some examples for driving licences or professional qualifications on the PPT.

(**PPT**) In parallel, the ECJ also intervened in favour of mutual recognition of administrative decisions. The landmark case is the *Cassis de Dijon* affair in 1979 which set the obligation to allow the commercialization of products legally commercialized in other Member States. It is

only with the white book of 1985 that this case-law was officially associated with the principle of mutual recognition. The *Cassis de Dijon* case was limited to the free movement of goods but it was then extended to the free provision of services in the *Säger* decision and to the freedom of establishment in the *Vlassopoulo* decision. By this case law, the transnationalization of some administrative decisions is the key to give real effectiveness to the European freedoms.
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In conclusion, transnational administrative decisions participate to the deterritorialization of administrative law. They find their roots in international law which organizes a division of the administrative function. Therefore, administrative transnationality, in this case, leads to a conflict of authority: determining the competent national authority which will apply its national administrative law. The EU legal framework is particularly adapted to this way of functioning. We find very numerous transnational administrative decisions in this Union. Especially, this can be explained by specific features of the EU favouring administrative transnationality. Indeed, the EU provides both the institutional and legal mechanisms allowing the existence of such decisions.

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About statute n°2021-1109 confortant le respect des principes de la République (comforting the respect of the principles of the Republic). This statute was originally called statute against separatism. It is a statute about laicity. (**PPT**) French laicity was born with a statute of 1905 related to the separation between Churches and the State which put an end to any subvention of cults by the State (mainly for Catholicism at that time). Also, it sets a standard of neutrality in public services. It means it is not only secularism, by which a State does not proclaim a state religion, it is laicity by which civil servants are forbidden to manifest any kind of religious commitment. For instance, I am a catholic but when I teach at university, I cannot wear my cross. It would be an infringement to this principle nowadays written in art. 1 of the Constitution of 1958.

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The statute comforting the respect of the principles of the Republic intervened in France at a moment where we saw more and more youngsters going to the jihad and becoming terrorists. In consequence, even if the statute applies to every religion, politically Islam was the main target of the text. One addition of this statute is to put associations under scrutiny, especially by obliging them to enter a "contract of republican commitment" in order to receive public funding. This contract commands associations to respect the fundamental principles of the French Republic, in particular laicity. Also, the statute requires more transparency for religious associations receiving foreign funding. We can also find some rules prohibiting inequal inheritance between men and women, polygamy, virginity certificates, feminine genital mutilations. Another important point is the end of home-schooling when classes are made by the parents. Regarding private schools if they did not already conclude a contract with the State, they have to subscribe to a charter of republican values.

Debates were quite strong regarding this statute because it was said it violated public liberties. Also, some argued that by taking such measures the State was no more laic because fighting against religion outside of public services (like in private associations). Others instead said that this statute fulfilled a better protection of laicity in France. What we can say is that beyond the law, this statute was politically not secular. It aimed precisely against extreme Islam even in the private sphere of association and cults. This is the paradox of this text which is completely different in the making than the statute of 1905. In conclusion, by this statute, the freedom of conscience in France can be limited by the values of the Republic and the respect of the public order. Not every view can be expressed even in private spheres whenever the Republic considers it is an attempt to its principle. If this might be understandable in the cases of Islamic associations sending young people to the jihad, this remains an open door to a disproportionate limitation of religious freedoms.