Overview on the legal instruments of the Council of Europe in the field of administrative law

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Abstract

The interest in administrative justice has been growing in many countries recently. At the core of an accountable and transparent administration is the right to effectively challenge acts and decisions that affect civil rights and obligations, and so also the daily life of individuals. Effective means of redress against administrative decisions require a functioning system of administrative justice that provides fair trial guarantees. Administrative justice is not limited to the guarantee of citizens' rights. Its justification also lies in the necessity to defend the public interest and to guarantee a balance between individual rights and the public interest. An administrative-court proceeding should be public, held within a reasonable time, undertaken by an independent and impartial tribunal established by law, and result in an enforceable judgment that shall be pronounced publicly. In addition to interpreting the rights, the Strasbourg Court has pointed out that it must be borne in mind that the European Convention on Human Rights (ECHR) is intended to guarantee rights that are practical and effective. This paper will analyze the certain provisions of the European Convention on Human Rights regarding mainly with the right to a fair trial and the right to an effective remedy and will try to give a concise retrospective to some of the most interesting cases of administrative nature decided by the European Court of Human Rights. Further, it will emphasize the framework of the Council of Europe of existing and applicable recommendations in the area of administrative law starting with alternative ways of resolution of administrative disputes and giving closure with execution of administrative and judicial decisions.

Keywords: *recommendations; administrative dispute; judicial control; fair trial; effective remedy; public authorities.*

JEL Classification: K23, K33

1. Introduction

The idea of judicial control of the public administration developed as part of the democratic ideology of civic society. From the initial aspiration to introduce judicial review of administrative acts, this idea developed into the modern formulation of the right to administrative justice, even at global level. Guaranteed rights to judicial review of administrative acts are part of the "package" of democratization measures in transition countries[2] and at once the right to judicial review is part of the right to effective judicial protection. The national law within the society (*ubi societas ibi ius – where there is society, there is law*) should be

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[2] Ivan Koprić, *Administrative Justice on the Territory of Former Yugoslavia*, Budva 2005, p. 2.

able to act as a dispute settlement legal instrument/mechanism and to guarantee justice as a supreme legal value in specific public legal relations between public administration and a private person. The relationship between public administration and law is ensured by judicial control and assessment of legality over the administrative acts. Administrative act according to legal theory, means an individual, concrete legal act (administrative decision) issued by public administration in administrative proceedings determined by law, decides, in administrative matters, on rights, obligations or legal interests of individuals, legal persons or other parties directly applying laws that govern the respective administrative field.[3] In other words, the administrative act is an individual legal act of public administration with the capacity of authoritativeness and enforceability, which on the basis of law decides in an administrative matter.[4] Hence, judicial review of public administration is, in a sense, the heart of administrative law. It is certainly the most appropriate method of inquiring into the legal competence of a public authority. Judicial review is not only conducted in order to protect citizens' rights, but also to protect public interest and legal order. Judicial review ensures the realization of the principle of legality of administrative functioning as well as the principle of the rule of law.[5]

Judicial control over administration derives mainly, from the right to a fair trial and the right to an effective remedy, according to the provisions of the European Convention on Human Rights.[6] Although the use of European Convention on Human Rights initially applied only to civil and criminal proceedings, the case law of the Strasbourg Court accepts that it can be used also in administrative matters in the same time establishing the possibility of judicial control over the executive branch of the Contracting States. Moreover, the Council of Europe recommendations in the area of administrative matters emphasize the

[3] Stevan Lilić, *Upravno Pravo*, Beograd, 2010, p. 263.

[4] Zoran Tomić, *Опште Управно Право (General Administrative Law)*, Beograd, 2017, p. 209.

[5] See: Ivo Borković, *Upravno sudovanje i Upravni Spor u Hrvatskoj u vremenu od 1990 do danas* in: *Zbornik odluka Upravnog Suda Hrvatske 1977-2002*, Zagreb 2002.

[6] The European Convention on Human Rights (ECHR) entered into force in 1953 with binding legal effect on all Member States of the Council of Europe. As a common European endeavor, it marks a capital and impressive achievement for the Council of Europe, because it has created a common European legal space for over 820 million citizens throughout the continent, establishing universal standards in the area of international protection of human rights and freedoms. For the first time in the history of international law, ECHR established the right to individual applications as a supranational legal remedy may suspend or strike down national judgments" making states directly accountable to the European Court of Human Rights for violating the provisions of the Convention. The individual who is given the right to individual applications gains a consolidated and powerful position, indeed he is closer to the status of legal subject of international law. The right of individual petition and the Court's ability to offer individuals judicial protection are cornerstones of the Convention system. – Alastair Mowbray, Cases, *Materials, and Commentary on the European Convention on Human Rights*, United Kingdom, 2012, 1-10; Christoph Grabenwarter, *The European Convention for the Protection of Human Rights and Fundamental Freedoms – Commentary*, United Kingdom, 2013, p. 1-7.

same importance of applying respective recommendations in the field of administrative law.[7]

The respect of human rights[8] in administrative law leads to increased accountability of the public sector, with a view to ensuring the fundamental concept of the rule of law, while the scope of individual rights in the administrative process represents an indicator of the intensity of protection of individuals with regard to the authorities and hence the degree of democratic order.[9] This points to the fact that administrative procedure requires common European regulation by all means, as this is that special field of law by which the administrative body directly meets the citizens. Because of that reason, we need to have good administration[10] that will respect the rights of persons and it will be obliged to act upon the signed conventions and the recommendations of the Council of Europe.

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[7] See: Jasna Omejec, *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava*, Zagreb 2013.

[8] The growing consciousness for the human rights after the Second World War contributed to the adoption of a considerable number of international treaties related to the protection of human rights and freedoms. In this respect, with the aim of protection the human rights and freedoms on international plane the new applicative scientific legal discipline of "*International Human Rights Law*" was created. This includes a body of legal principles and rules that are part of international treaties (conventions, pacts), which impose obligations on states, to respect, protect and guarantee rights and freedoms of man and citizen in their territories in conformity with universal legal values. These international normative documents set the fundamentals of the functioning of global politics, as well as the standards of conduct of state authorities and their political legitimacy. – See: O. D. Schutter, *International Human Rights Law*, Cambridge 2010, p. 49-51.

[9] Špela Zagorc, *Decision-Making within a Reasonable Time in Administrative Procedures*, Croatian and Comparative Public Administration, Zagreb 2015, p. 769-790.

[10] The European Administrative Space and Good Administration – include and rest upon recognised standards, principles and values that should be fulfilled and respected by national and European administrations within the EU. Although these concepts are perceived as 'soft' and ambiguous, the sanctions behind them show that they constitute a powerful tool for disciplining bad administrators. The European Commission's progress reports on candidate countries heavily rely on the assessments of administrative reforms according to EAS principles. Hence, the sanction is slowing down in accession process. Similarly, the introduction of good administration in the catalogue of the Treaty provisions shows its obligatory nature and possibility of judicial sanctioning of maladministration. In addition, good administration represents a standard and an anchor in relation to which the administrative behaviour, actions and decisions might be assessed. It covers the whole range of administrative principles determined in the administrative and judicial practice in the EU and its member states. Fortsakis analyses the idea of good administration in the context of user protection that emerged in Europe in the late 20th century, together with the flourishing of privatized public services. Drawing on other authors, he enumerates the following good administration principles defined in the EU law: equality, good administration as useful administration (in the meaning of proportionality and legitimate user expectations), proper functioning of public administration, establishing procedures for hearing users beforehand and providing them with information, the principle of appointing an ombudsman, justification of administrative decisions, the principle of access to administrative documents, the principle of establishing independent administrative authorities, and the principle of establishing judicial protection. See: Ivan Koprić, Anamarija Musa, *Good Administration as a Ticket to the European Administrative Space*, Zbornik Pravnog Fakulteta u Zagrebu, Zagreb 2011, p. 1515-1560; Theodore Fortsakis, *Principles Governing Good Administration*, European Public Law, vol.11, no.2/2005, p. 207-217.

Hence, promoting these legal instruments, which derive from the Council of Europe recommendations and interpretation and application of the provisions of the European Convention on Human Rights, is not possible without a functioning system of administrative justice, which allows private persons to effectively challenge administrative acts (decisions) and holds public authorities accountable for breaches of law and infringements of human rights. Insofar, the implementation of the rights contained in the conventions and recommendations is not on its satisfactory level, due to the increased number of application submitted to the European Court of Human Rights (ECtHR)[11] mainly for probable violation of the right to a fair trial in administrative proceedings, but also not underestimating criteria, which should be satisfied within the right to an effective remedy.[12]

2. Principles of administrative law in the European legal system

The interest for maintaining the rule of law has always been an important segment of the European legal system and especially for the principle of good governance and judicial control of administration. The rule of law ideas form the central background theory against which the principles of administrative law operate, while at the same time acting as a governing principle. It gives rise to a further set of principles, which form the body of administrative law. Thus, it would be quite true if we emphasize that the administrative law expands the rule of law as a set of due process principles, including the right to be heard by or make representations to an adjudicator, the right to be heard by an impartial adjudicator etc.[13] This process allows the ambit of the principle to be extended and later reformulated as an administrative procedure by extending a measure of due process to all decision-makers.

Every European system acknowledges the primary function of administrative law as being the control of public power or, as Shapiro calls it, "bounded government".[14] To put this slightly differently, administrative law subjects officialdom to the rule of law, prescribing behavior within administrative organizations.

Due to the reasons mentioned before in this paper, the European Convention on Human Rights (ECHR) as the most important regional convention

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[11] The European Court of Human Rights (ECtHR) is established by the European Convention on Human Rights in 1959 that is charged with supervising the enforcement of the European Convention on Human Rights, which was drawn up and adopted by the Council of Europe in 1950. In the broader picture of the build-up of international legal institutions over the twentieth and twenty-first centuries, the ECtHR in many ways is an unparalleled success, perhaps only equalled by the European Court of Justice of the European Union. - Jonas Christoffersen, Mikael Rask Madsen, *The European Court of Human Rights between Law and Politics*, Oxford 2011, p. 3.

[12] See: Jonas Christoffersen and Mikael Rask Madsen, *The European Court of Human Rights between Law and Politics*, Oxford 2011, 119-143.

[13] Carol Harlow, *Global Administrative Law*: *The Quest for Principles and Values*, European Journal of International Law, Vol.17/2006, p. 187-214.

[14] Martin Shapiro, *Administrative Law Unbounded*, Indiana Global Legal Studies, Vol.8/2001, p. 369.

for the protection of fundamental rights and freedoms will be analyzed in the context of judicial control of administration cumulatively with the Strasbourg jurisprudence in this field. Specifically, subject of scrutiny will be the right to a fair trial and the right to an effective remedy as the capital provisions which cover this particular subject matter and which serve as control mechanisms in administrative proceeding and administrative-court proceeding (judicial review proceeding).

2.1. Right to a fair trial in the area of administrative justice

Right to a fair trial is not new; it has long been recognized by the international community as a basic human right and at the same time is fundamental to the rule of law and democracy as a contemporary political regime. In fact, the right to a fair trial is a European value, mandatory for all member-states of the Council of Europe. It includes the standard of legal (as in judicial sphere as well as in administrative field) decision-making within a reasonable period of time.[15]

Administration of justice is a broad term that includes the norms, institutions, and frameworks by which states seek to achieve fairness and efficiency in dispensing justice: criminal, administrative, and civil.[16] By judicial review of administrative action means the power of the courts to examine the legality of the officials act and thereby to safeguard the fundamental and other essential rights of the citizens. The underlying object of judicial review is to ensure that the authority does not abuse its power and the individual receives just and fair treatment and not to ensure that the authority reaches a conclusion, which is correct in the eye of law. The role of judiciary in protecting the citizens against the excess of officials has become all the more important with the increase in the powers and discretion of the public officials in the modern welfare states.[17] As already indicated, in the beginning of this paper, we will focus on the fairness and efficiency of justice in administrative matters and subsequently to the regional impact of Council of Europe recommendations. The rules applicable to the administration of justice are extensive and refer to, *inter alia*, fair trial, independence and impartiality of the tribunal, and the right to an effective remedy. These rules set the central postulates for legal protection of the basic and guaranteed human rights and freedoms.

In this connotation Article 6(1) of the European Convention on Human Rights (ECHR) prescribes the following: *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."*. From this wording it is obvious that it applies to

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[15] Zoran Tomić, *Време и (у) Устав(у) – Овдашње Право с Почетном Филозофском Белешком (Time and Constitution – The Local Law with the Initial Philosophical Note)*, Анали Правног факултета у Београду, Београд (*Anals of the Law Faculty in Belgrade)* no. 1/2019, p. 13-14.

[16] David Weissbrodt, *The Administration of Justice and Human Rights*, Minnesota 2009, p. 23-47.

[17] Awal Hossain Mollah, *Judicial Control over Administration and Protect the Citizen's Rights: An Analytical Overview*, 2006, p. 9.

civil rights and obligations and in criminal charges,[18] so these are two autonomous terms determined through the European Court of Human Rights (ECtHR) practice. However, the applicability of Article 6(1) over administrative disputes arises from the case law of the European Court of Human Rights (ECtHR). This means that the standards, which effect on development of administrative law, can be analyzed through the Strasbourg Court's jurisprudence and mainly in the area of interpretation of Article 6 ECHR. Thus, it is evident that the majority of human rights violations fall within the scope of Article 6 and great part are connected with the decision-making within a reasonable period of time in administrative procedures.[19] The reasonable length of the proceedings is assessed in the light of the specific circumstances of each case, and based on the following standards established by the Court's practice: The reasonable length of the proceedings are assessed in the light of the specific circumstances of each case separately such as: *the complexity of the case; the behavior of each party applicant's individual application; the actions of the proper authorities; the importance of the decision and the nature of the case itself*. Particularly, in the case of *Dumanovski v. the Republic of North Macedonia*,[20] the Court reiterated that the reasonableness of the length of proceedings must be assessed in the light of the aforementioned standards. Namely, the State Employment Bureau granted the applicant, who had been laid off, a monthly unemployment compensation, the amount of which equaled the minimum salary reduced by 20%. The applicant appealed the decision before the Ministry of Labour and Social Policy, alleging that his compensation had been miscalculated. He claimed that the amount of compensation should be based on the average of his last three monthly salaries reduced by 50%. Due to these reasons, the applicant submitted an application before the Strasbourg Court and the Court found violation of Article 6 in respect of the length of proceedings. In the judgment, the Court emphasizes that it is not persuaded by the Government's argument that the proceedings complained of should be considered as three distinct sets of proceedings. The mere fact that the case was referred several times to the Supreme Court for adjudication after the administrative bodies remained inactive, or having decided on its merit, did not split the proceedings into separate sets. This happened even though the content of the dispute was the same throughout the proceedings before the administrative bodies and the Supreme Court. Moreover, the proceedings before the Supreme Court were initiated under the applicant's right to judicial review of the individual administrative decisions and results thereof. After the Supreme Court's decision in 1999 the case was referred back to the administrative bodies for decision-making until the court finally dismissed the applicant's claim. Moreover, the Court pointed out that the workload in the

[18] Applicability of Article 6(1) to pre-trial, appeal and other review stages is based on non-autonomous criteria and depends largely on the existence of accessible remedies in domestic law.
[19] Stevan Lilić, *Evropsko Upravno Pravo*, Beograd 2011, p. 103.
[20] Dumanovski v. the Republic of North Macedonia, ECtHR, Application No.13898/04.

national courts cannot be considered as a factor that can excuse the protracted length of the proceedings.[21]

The Strasbourg Court interpreted the European Convention on Human Rights and thus developed the largest single body of international human rights jurisprudence on fair trial. This is very important, because the the European Convention on Human Rights (ECHR) "stresses the importance of administering justice without delays[22] which might jeopardise its effectiveness and credibility", thus highlighting the importance of the maxim "*justice delayed is justice denied*" - *delayed justice is not relay justice since it might cause distrust in the existence of justice itself and of legal protection in general*.[23] Hence, the historical link to private law rights is no longer definitive of the reach of Article 6(1), as the European Court of Human Rights (ECtHR) has accepted that some administrative decisions can be embraced by Article's procedural guarantees.[24]

The various wordings used in this legal provision - Article 6(1) have generated uncertainties as to exact scope of application of the right of access to courts and the right to a fair trial. Hence, these diverse wordings inevitably raise questions on the precise scope of applications of the right to a fair trial. What is exactly meant by "civil rights, obligations", and do these provisions apply to administrative law?[25] Without a doubt, the term "civil rights and obligations" is interpreted broader than under most national laws and comprises many fields of law that in many national legal systems are classified as public law. For example, the European Court of Human Rights has classified the following proceedings as "civil": - *proceedings concerning a permission, license or the like which is required for the practicing of a profession, the running of a business or the carrying out of any other economic activity*; - *proceedings which have direct consequences for the right of ownership with respect to property or the use or the enjoyment of property (e.g. expropriation, planning, issuing of building permits)*; or - *proceedings concerning social security benefits* (*e.g. health insurance, work accident insurance, welfare allowances, state pensions*).[26] In addition, the answers to the respective aforementioned questions can be found, for instance in the jurisprudence of the European Court of Human Rights, where in the case of

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[21] Ibid, para.44.

[22] Too long administrative proceedings must not lead to *de facto* decisions. Further, the authority has to hear the affected party before taking any legal action and has to provide him/her the opportunity to reason his/her opinion; additionally, the authority has to ensure mechanisms to consider these opinions of the affected party adequately during the administrative proceedings (see the case of *Megadat.com SRL v. Moldawia*, ECtHR Application No.21151/04).

[23] David Weissbrodt, *The Administration of Justice and Human Rights*, City University of Hong Kong Law Review, 1/2009, p. 23-47.

[24] Anthony Gordon, *Article 6 ECHR, Civil Rights and the Enduring Role of the Common Law*, European Public Law, 2013, 75-96.

[25] See: Pierre Schmitt, *Access to Justice and International Organizations: The case of Individual Victims of Human Rights Violations*, United Kingdom, 2017, p. 91-115.

[26] See: Жил Дитертр, *Изводи из најзначајнијих одлука Европског суда за људска права*, (Žil Ditertr, Extracts from the most important decisions of the European Court of Human Rights), Belgrade, 2006, p. 166.

Reingeisen v. Austria, the Court extended the notion of civil rights and obligations, coverings some rights and obligations that could be solved in an administrative procedure. Furthermore, in the case of *König v. Germany*, concerning the possible violation of Article 6(1), the ECtHR expressed its opinion by stating the following: *"If the case concerns a dispute between an individual and a public authority, whether the latter had acted as a private person or in its sovereign capacity, is not conclusive. Only the character of the right at issue is relevant. An activity presenting the character of a private activity cannot automatically be converted into a public-law activity by reason of the fact that it is subject to administrative authorisations and supervision".*[27] In the case of *Feldbrugge v. the Netherlands*, the European Court of Human Rights had to deal for the first time with the issue about social security where a question regarding the applicant's right to a fair hearing by a tribunal was breached in the procedure for determining her right to sickness benefits. There was a genuine and serious dispute concerning this issue and at the end, the Court ruled that there was a violation of Article 6(1).[28] Also, in the case of *Benthem v. the Netherlands*, the European Court of Human Rights held that there was a violation of Article 6(1) concerning the right to a fair trial and particularly this case established what is further known in the international case law as the "*Benthem criteria*".[29] On the other hand, Article 6 ECHR is applicable to an action for cancellation of an administrative decision harming the applicant's rights described in the case of *De Geouffre de la Pradelle v. France*, then in administrative procedures concerning revocation of a firearms license, where the applicants had been listed in a database containing information on individuals deemed to represent a potential danger to society as has been ruled in the case of *Pocius v. Lithuania* and *Užukauskas v. Lithuania*. The applicants had brought legal proceedings challenging their inclusion in police files and had sought to have their names removed from the database. The Court concluded that Article 6 was applicable, because the inclusion of the applicants' names in the database had affected their reputation, private life and job prospects.[30] In respect of access to court pursuant to Article 6(1), in the case of *Potocka and others v. Poland*, the applicants put forward the complaint that they had no access to the court. Moreover, they argued that the Polish Supreme Administrative Court did not have full jurisdiction as to the facts and the law, because it was only able to examine the lawfulness of the decision under appeal and could not consider any other aspects of

[27] *König v. Germany*, ECtHR, Application No.6232/73, (Paragraph 89-91).

[28] *Feldbrugge v. the Netherlands*, ECtHR, Application No.8562/79 from 29 May 1986.

[29] According to what are known as the *Benthem criteria*, Article 6 will only be applicable if (a) there is a dispute ("*contestation*") of a serious and legal nature between two (legal) persons which are in some relation to the right; (b) the disputed right has - at least on arguable grounds - been recognised under national law; (c) the outcome of the national proceedings is directly decisive for these rights and obligations; and (d) these rights are "civil" in the autonomous sense of the Convention.

[30] For more cases on similar or different subject matters which cover the implication of Article 6 ECHR in administrative proceedings see: *Guide on Article 6 of the European Convention on Human Rights by the European Court of Human Rights*, 2018.

the case, such as questions of facts and of expediency. The European Court of Human Rights ruled that although the court has been established to analyze the legality of administrative decisions, it has been provided with the authority to waive in whole or in part the contested act if it finds a breach of the procedural requirements of fairness. As a result of the decision of administrative court, a certain state of transition is created and it is responsibility of the public administration authorities to stabilize it.[31] This undoubtedly shows that there is a weakness of the Polish legal system. In practice, the administrative court has repeatedly repealed successive decisions issued within the same administrative cases, which cause considerable delay in the final settlement of those. Apart from repeatedly repealing the incorrect decision, the courts do not have at its disposal any measures to discipline administrative authorities. Due to this reason, the European Court of Human Rights determined that there was no violation of Article 6(1) in respect to the right to effective access to a court. Concerning the application of Article 6 of the European Convention on Human Rights over administrative disputes, it is important to stress that there was ongoing a long debate concerning the applicability of guarantees provided under Article 6 of the European Convention on Human Rights to administrative sanctions (fines) for antitrust violations. Hence, in the *Menarini case,* the Strasbourg Court held that a heavy administrative fine issued by the Italian antitrust authority and sanctioning a pharmaceutical company for an alleged cartel, falls within the criminal-head of Article 6 of the European Convention on Human Rights. In the above mentioned case, the judges in Strasbourg clarified that Article 6 of the European Convention on Human Rights, in principle, does not preclude a criminal sanction from being imposed by an administrative body, provided that, in such case, "*there is a possibility of appeal before a judicial body with full jurisdiction*".[32] This outcome was not unpredictable: on the contrary, it was a well expectable one, especially considering the principles elaborated by the European Court of Human Rights case law (starting from *Engel* judgment of 1976). In fact, the administrative fine inflicted in the case mainly served for a punitive and deterring purpose (although not entirely disjoint from a concrete pursue of public interest) and it was certainly serious as to the possible financial consequences.[33]

[31] See case of *Potocka and others v. Poland,* (ECtHR), App.No.33766/96, final 27 March 2002

[32] Miriam Alena, (2014). Article 6 ECHR: New horizons for domestic administrative law, Ius Publicum Network Review, www.ius-publicum.com.

[33] In the leading case *Engel and Others v. the Netherlands* (App. no 5100/71, 5101/71, 5102/71) (1976), ECtHR concerning a sanction (inflicted to some members of the armed forces) classified in the Netherlands as disciplinary, the Strasbourg Court identified three criteria in order to establish whether an offence is '*criminal* 'in the sense of Art. 6 ECHR: the classification of the offence in the law of the respondent state (however, this indication has only a formal and relative value and provides no more than a starting point); the nature of the offence; and the degree of severity of the penalty that the applicant risks incurring. The second and the third criteria are alternative and not necessarily cumulative but a cumulative approach can be adopted where neither criteria by itself is conclusive.

2.2. Right to an effective remedy as a fundamental convention's right

A right without remedy cannot be regarded as a real-practical right. Without remedy, a right remains only on the paper. This argument is explained throughout traditional Latin legal maxim *Ubi ius ibi remedium est*: "*Wherever there is a right, there is a remedy*"; or, "*For every right violation, there must be a remedy*".[34] In other words, where one's right is denied, or infringed the law affords the remedy of an action for its enforcement. Where internal law grants rights to a person, it must assure that these rights can be effectively protected in practice. Therefore, citizens may use legal remedies when they consider that a state institution unlawfully jeopardizes a right or legal interest, contributing in the consolidation of the rule of law within the framework of the legal system of a certain state. Otherwise, rights without legal protection, remain unenforceable in the real life. Legal recourses are a universal legal category of the constitutional and international law, because they are stipulated and guaranteed by national constitutions as well as by regional and international conventions on human rights. Thus rights and remedy can be considered as parts of a whole which we cannot have one without the other. Under the principle of *Ubi ius ibi remedium est* the identification of the individual right grants the access to judicial protection primary before national courts and subsidiary before the European Court of Human Rights, which functions under the Council of Europe and protects the rights enshrined under the European Convention on Human Rights (ECHR). In this context, should be noted the right of the citizens of the member-states of the Council of Europe to directly invoke the provisions of the European Convention on Human Rights in the proceedings before state institutions and individually lodge an application before the European Court of Human Rights[35] when they consider that the final and enforceable decisions of state institutions have allegedly violated a right or freedom guaranteed by the Convention or its additional protocols. On the other side, pursuant to Article 35 of the Convention, a citizen of a member-state of the Council of Europe has the right of direct protection of the rights and freedoms prescribed by the Convention and its additional protocols, before the European Court of Human Rights, when two conditions are fulfilled cumulatively: *firstly*, there is an exhaustion of all remedies available in the national legal order, and *secondly*, the individual appeal has to be made within a period of six months from the date on which the final decision was taken. In other words, if a citizen exhausts all domestic remedies before national courts, then he can exercise the right of individual appeal to European Court of Human Rights (Article 34) as a subsidiary

[34] Светомир Шкарић, *Уставно право*, Скопје 1995, p. 134.

[35] During half a century this body has been the foremost regional mechanism in the world for enabling disputed questions of fundamental rights to be decided in a judicial forum. The Court derives it existence from the European Convention on Human Rights. The European Court of Human Rights is unique institution that has played a central role in strengthening democracy and the rule of law in European continent, as well as has long been part of the most advanced human rights regime in the world. – Spyridon Flogaitis, Tom Zwart, Julie Fraser, *The European Court of Human Rights and its Discontents*, United Kingdom, 2013, p. 2-7.

legal recourse, namely as "*ultima ratio*" (as a last resort) legal remedy in the cases when they are not satisfied from the efficacy or equity of national court proceedings. In addition, Article 34 of the Convention not only stipulates the duty of the states to allow their citizens to lodge individual applications to the European Court of Human Rights, but it obligates them not to "*hinder in any way the effective exercise of this right*".[36] In relation to this, it should be noted that from the constitutional perspective, the Constitution of Montenegro (2007), in Article 56 explicitly stipulates that "*Everyone shall have the right of recourse to international institutions for the protection of own rights and freedoms guaranteed by the Constitution*". For justice as a fundamental and supreme legal value, the right of citizen to sue his state before the European Court of Human Rights as one of the most striking supranational judicial institutions ever created confirms the century old experience that the truth comes to light, even though it is always oppressed (*Veritas laborat nimis, extinguitur numquam*).[37]

Article 13 of the European Convention on Human Rights establishes the right to an effective remedy, stating *"everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity"*. This is one of the key provisions underlying the Convention's human rights protection system. The primary aim of the provision is to increase judicial protection offered to individuals who wish to complain about an alleged violation of their human rights. In that sense, the right to an effective remedy is an essential pre-condition for an effective human rights policy. According to the Strasbourg Court's case law, this provision has "close affinity" with Article 35 of the European Convention on Human Rights, whereby the Court may only deal with the matter after all domestic remedies have been exhausted insofar as "that rule is based on the assumption, reflected in Article 13 of European Convention on Human Rights that there is an effective remedy available in the domestic system in respect of the alleged breach".[38] The European Convention on Human Rights requires that a "remedy" be such as to allow the proper domestic authorities both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. A remedy is only effective if it is available and sufficient. It must be sufficiently certain not only in theory but also in practice, due to this reason, the right to an effective remedy is often linked to the principle of subsidiarity giving a chance the case to be solved by national authorities. In this manner, the European Court of Human Rights has reiterated in many occasions that the Strasbourg Court is not a Court of fourth instance and cannot deal with so many cases when the basic preconditions for submitting an application have not been satisfied prior of submitting an application.

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[36] For more: Steven Greer, *The European Convention on Human Rights*: *Achievements, Problems and Prospects*, Cambridge 2006, p. 144-148.

[37] Jonas Christoffersen, Mikael Rask Madsen, *The European Court of Human Rights between Law and Politics*, Oxford 2011, p. 119-143.

[38] *Guide to good practice in respect of domestic remedies*, Council of Europe, 2013, p. 11.

In the early case law, Article 13 of the European Convention on Human Rights did not receive a lot of attention. The Court would very often find a violation under a separate provision of the European Convention on Human Rights (in many cases Article 6) and subsequently rule that it was not necessary to also examine the applicant's case under Article 13. Later, the judges from the European Court of Human Rights in the *Airey case* have criticized this approach, stating that the complaint should be first examined under Article 13 of the European Convention on Human Rights.[39] Even in the legal literature there has been a considerable amount of criticism. Barkhuysen has enumerated the various points of criticism. *Firstly*, the Court did not properly examine whether there was indeed in a specific case overlap between the complaint under Article 6 and the complaint under Article 13. The Court more or less automatically reached the conclusion that it was not necessary to examine the applicant's case under both provisions, which was not necessary justified. A complaint under Article 13 might be of a different nature than the one made by an applicant under Article 6. *Secondly*, the *lex specialis* approach of the Court was only justified if the Court would thoroughly examine in its test under Article 6 whether there had been a lack of remedies.[40]

Having in mind the above mentioned the Court reiterated that position in the Grand Chamber judgment in *McFarlane v. Ireland* stating that Article 13 also allows a State to choose between a remedy which can expedite pending proceedings or a remedy *post factum* in damages for delay that has already occurred. While the former is preferred as it is preventative of delay, a compensatory remedy may be regarded as effective when the proceedings have already been excessively long and a preventative remedy did not exist.[41] An example of good practice are also the French cases. In France, the effectiveness of a remedy with full suspensive effect before the administrative courts against decisions on removal and the country of destination was recognized by the Court, deeming this a remedy which should be fully exhausted.

3. The framework of the Council of Europe's recommendations in the area of administrative matters

The Council of Europe started its work in the sphere of administrative law quite early, in 1977 when its first resolution on protection of the individual in relation to the acts of administrative authorities was issued. The ideological basis of the document was the ever-increasing importance of public administrative activities. Public authorities, in addition to their traditional task of safeguarding law and order, have been increasingly engaged in a vast variety of actions aimed at ensuring the well-being of the citizens and promoting the social and physical

[39] Martin Kuijer, *Effective remedy as a fundamental right* (Seminar on human rights and access to justice in the EU 28-29 April) Barcelona 2014, p. 3.

[40] Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak, *Theory and Practice of the European Convention on Human Rights*, United Kingdom, 2018, p. 1035-1062.

[41] Mc Farlane v. Ireland, App.No.31333/06, para.8, judgment of 29 March 2006.

conditions of society. This development resulted in the individual being more frequently affected by administrative procedures. According to the text of the resolution, in spite of the differences between the administrative and legal systems of the member States, there is a broad consensus concerning the fundamental principles that should guide the administrative procedures and particularly the necessity to ensure fairness in the relations between the individual and administrative authorities.

Having in mind the need for drafting of a recommendation on good administration, the Parliamentary Assembly of Council of Europe recommended to the Committee of Ministers to prepare a consolidate model code of good administration, deriving from several recommendations in the area of administrative matters, particularly from the Recommendation No. (80) 2 and the European Code of Good Administrative Behavior.[42] Beside these, two other important recommendations have been used as a guideline for preparation of the recommendation on good administration. Those are the Recommendation on provisional court protection in administrative matters[43] and Recommendation on administrative sanctions.[44] The closure of this process happened in 2007 when a substantive document has been prepared on good administration, referring to all the other recommendations delivered by the Council of Europe in the field of administrative matters.

According to the text of this recommendation, the preamble underlines that good administration in many situations involves striking an appropriate balance between the rights and interests of those directly affected by state action on the one hand and the protection of the interests of the community at large, in particular those of the weak or vulnerable, on the other, and recognizing that procedures intended to protect the interests of individuals in their relations with the state should in certain circumstances protect the interests of others or the wider community.[45] Additionally, it has been emphasized that good administration depends on the organization and management and in the same time it must meet the requirements of effectiveness, efficiency and relevance to the needs of society. Because of this reason, the recommendation contains the principles of good administration, the rules governing administrative decisions and the right to appeal against administrative decisions.[46] Subsequently, following this recommendation

[42] What is important about the Recommendation (80)2 is the fact that it contains the basic principles regarding the behavior of administrative authority in exercising a discretionary power. Additionally, it elaborates that the general administrative guidelines that govern the exercise of a discretionary power are made public or communicated in an appropriated manner.

[43] Recommendation (89) 8 on provisional court protection in administrative matters (adopted by the Committee of Ministers on 13 September 1989 at the 428th meeting of the Ministers' Deputies).

[44] Recommendation (91) 1 on administrative sanctions (adopted by the Committee of Ministers on 13 February 1991 at the 452nd meeting of the Ministers' Deputies).

[45] See Recommendation (2007) 7 on good administration (adopted by the Committee of Ministers on 20 June 2007 at the 999 meeting of the Ministers' Deputies).

[46] See Section I, II and III from the Recommendation (2007) 7.

many others were adopted by the Council of Europe also defining substantial requirements in the field of administrative law.

As regard to the significance and practical impact of Council of Europe recommendations it is important to observe the following: According to the Statute of the Council of Europe (Articles 15b and 20), a recommendation is one of the legal instruments by which the Committee of Ministers communicates its conclusions in respect of its measures that believes will achieve the basic goals of the Council of Europe. According to Gregor Puppinck, Director of the European Centre for Law and Justice: "A recommendation differs from other methods of communication to governments in that it explicitly indicates an agreement regarding the measures contained therein, irrespective of the legal nature of these measures (convention, agreement, common policy and others). In adopting a recommendation, each State expresses its willingness and the Committee of Ministers expresses its agreements. The legal significance can be assessed in light of (1) existing treaty standards, (2) especially the European Court of Human Rights and its interpretation, (3) domestic law and (40 other international standards being developed".[47] Furthermore, in respect of the legal status of the recommendations, it must be explained that contrary to conventions that states may have ratified and are obliged to respect them, the situation is completely different with the status of recommendations. This means that they do not have binding legal effect, but their importance should not be neglected because of the moral and political effect that they have upon states and their governments. Governments, if necessary, can express reservations to all or part of a recommendation, as it can do under Article 10.2, lit. c) of the Rules of Procedure for the meetings of the Ministers' Deputies. Hence, it can be concluded that conventions have legal supremacy over recommendations especially when they fall within the scope of an existing convention. Moreover, the Member States cannot recommend that governments adopt new measures if they are contrary to an existing convention which they have already signed and obliged to respect it. Contrary, it would mean infringement of international norms and undertaken obligations to respect it. Hence, it must be argued from the Strasbourg case-law that there is interpretation of the European Convention on Human Rights provisions in the light of the recommendations of the Committee of Ministers. This was clearly expressed in the case of *Demir and Baykara v. Turkey* (ECtHR Application No.34503/97). Namely, the European Court of Human Rights asserted the following: "in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values".[48] Additionally, the European Court of Human Rights has developed the

[47] Grégor Puppinck, *Status of the recommendations of the Committee of Ministers in the legal field of the Council of Europe – Synthesis*, European Centre for Law and Justice 2012, p. 1-8.

[48] It is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms

doctrine of the effectiveness of rights and evolutive interpretation according to which "*the Convention is intended not to guarantee rights that are theoretical or illusory but rights that are practical and effective*".[49]

3.1. Issues about judicial and alternative ways of resolution of administrative disputes

Recommendation (2001) 9 of the Committee of Ministers on alternatives to litigation between administrative authorities and private parties[50] promotes the use of alternative means for solving disputes in accordance with the principle of good practice. The purpose of this recommendation is to easy overcome and to undergo a rigid or punctilious solution in relation to dispute settlement before the court, which is, by rule, overloaded and often burdened with the rigidity of the procedure. According to the recommendation, alternative means are: internal views, conciliation, mediation, negotiated settlement and arbitration and what is common for all of them is their non-binding character.[51] Furthermore, internal views, in principal should be possible in relation to any act. They may concern the expediency and /or legality of an administrative act. Conciliation and mediation can be initiated by the parties, a judge or compulsory by law. In rear situations and unless otherwise provided by law, administrative authorities shall not use a negotiated settlement to disregard their obligations. Finally, arbitration is the process where parties should be able to choose the law and procedure for the arbitration within the limits prescribed by law. Moreover, arbitrators should be able to review the legality of an act as a preliminary issue with a view to reaching a decision on the merits even if they are not authorized to rule on the legality of an act with a view to it being quashed.[52]

The issue about resolution of disputes before courts has been solved by recommending the use of these alternative means even during the court proceeding. The member states of the Council of Europe are encouraged to devote themselves to alternative ways of resolving disputes. Affirmation of alternative means is specifically emphasized in the area of criminal and family law. Over the last ten years, a lot of attention is devoted to some alternatives of administrative trials. The development of alternative means for solving disputed conflicts between the

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and principles applied in international law or in the domestic law of the majority of Member States of the Council of Europe.

[49] See case of *Artico v. Italy* (ECtHR Application No. 6694/74, paragraph 33)… Further, see: Grégor Puppinck, the cited paper.

[50] Recommendation (2001) 9 on alternatives to litigation between administrative authorities and private parties (adopted by the Committee of Ministers in 5 September 2001 at the 762nd meeting of the Ministers' Deputies).

[51] Alternative means to litigation should be either generally permitted or permitted in certain types of cases deemed appropriate, in particular those concerning individual administrative acts, contracts, civil liability and generally speaking claims relation to a sum of money. - *Recommendation Rec(2001)9 of the Council of Europe on alternatives to litigation between administrative authorities and private parties*.

[52] See Section 3 –Special features of each alternative means of the Recommendation (2001) 9.

administration and private entities depends largely of two factors. The first one is characteristic for states that do not have sufficiently developed courts for solving administrative disputes. The later one is expression of the necessity of the citizens for more flexible and faster resolution of administrative disputes. The most important which must be stressed out is the fact that alternative means have been used before the courts in order to avoid this practice. Meanwhile, in the Preamble, it is emphasized that the resolution of disputes before the court is still necessary and that the alternative means represent a supplement rather than a substitution for judicial control. Indeed, it can be concluded that in many countries alternative means of administrative dispute resolution have not been used in their full capacity, so certainly there is a necessity for their further affirmation with a final purpose of broader acceptance.

Contrary to on alternatives to litigation between administrative authorities and private parties, Recommendation (2004) 20 of the Council of Europe[53] elaborates the issue about judicial review of administrative acts. Namely, having in mind the main purpose of the Council of Europe which is to 'achieve greater unity among member States', it has been considered that the judicial review of administration acts represents an essential element in the system of protection of basic human rights and freedoms and as such should provide an open approach for this aspect of revision.[54] Additionally, this Recommendation recalls on Article 6 of the European Convention on Human Rights which provides that *"everyone is entitled t a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"* and the relevant case-law on administrative disputes of the European Court of Human Rights considering that effective judicial review of administrative acts to protect the rights and interests of individuals is an essential element of the system of protection of human rights.[55]

For the needs of the Recommendation, the term "administrative acts" has been expanded and additionally covering the legal acts (both individual and normative) and situations of refusal to act or an omission to do so in cases where the administrative authority is under an obligation to implement a procedure following a request. In this connotation, by "judicial review" is meant the examination and determination by a tribunal of the lawfulness of an administrative act and the adoption of appropriate measures, with the exception of review by a constitutional court. Hence, according to the above written definition, the scope of judicial review should be all administrative acts and such review may be direct or by way of exception.[56] In judicial review, the court does not go into the merits of the administrative action; courts function is restricted to ensuring that such authority does not act in excess of its power. The court is not supposed to substitute

[53] Recommendation (2004) 20 on judicial review of administrative matters (adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies).

[54] Stevan Lilić, *Evropsko Upravno Pravo*, Beograd 2011, p. 94-106.

[55] See: Preamble of the Recommendation (2004) 20. Furthermore, in this connotation it must be emphasized the need to achieve balance between the legitimate interests of all parties with a view to providing for the procedure without delay and for efficient and effective public administration.

[56] See: Section B – Principles and scope of judicial review of the Recommendation (2004) 20.

its decisions for that of the administrative authority. In judicial review of administrative action, the courts merely enquire whether the administrative authority has acted according to the law.[57] Subsequently, judicial review should be available at least to natural and legal persons in respect of administrative acts that directly affect their rights or interests. Member States are encouraged to examine whether access to judicial review should not also be opened to associations or other persons and bodies empowered to protect collective or community interests. Beside, the most crucial aspect is the way of regulation of the judicial review. It should be conducted by a tribunal established by law whose independence and impartiality are guaranteed in accordance with the terms of Recommendation (94) 12. Contrary, the whole process could be jeopardized if there is a lack of these judicial standards. Finally, there is the issue about effectiveness of judicial review. If a tribunal finds that an administrative act is unlawful, it should have the powers necessary to redress the situation so that it is in accordance with the law. In particular, it should be competent at least to quash the administrative decision and if necessary to refer, the case back to the administrative authority to take a new decision that complies with the judgment.[58]

3.2. Execution of administrative and judicial decisions in the field of administrative law

Decisions of administrative authorities that entail obligations for private persons and judicial decisions in the field of administrative law and recognize rights for private persons should be executed. This obligation is contained in the Recommendation (2003) 16 of the Council of Europe[59] which purpose is efficient execution of administrative and judicial decisions in the field of administrative law through handling an effective system of voluntary execution and also establishing a system of fairly execution. Subsequently, member states should provide an appropriate legal framework to ensure that private persons comply with administrative decisions that have been brought to their knowledge in accordance with the law, notwithstanding the protection by judicial authorities of their rights and interests. The introduction of an appeal against decision entails automatic suspension; private persons should be able to request an administrative/judicial authority to suspend the implementation of the contested decision in order to ensure the protection of their rights and interests.[60]

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[57] Judicial review is also concerning two important questions: Whether the authority has exceeded its power? And Whether has abused its power? For more details see: Chapter 2 – "Judicial Review of Administrative Action", 24, available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/38174/8/08 chapter%202.pdf, consulted on 1.05.2019.

[58] See: Section 5 – The effectiveness of judicial review of the Recommendation (2004) 20.

[59] Recommendation (2003) 16 on the execution of administrative and judicial decisions in the field of administrative law (Committee of Ministers, 9 September 2003 at the 851st meeting of the Ministers' Deputies).

[60] See: Section 1 – Implementation of the Recommendation (2003) 16.

In deciding on the request for suspension, the public interest and the rights and interests of third persons should be taken into account by the administrative authority and, unless it is excluded by law, by the judicial authority. However, in the procedure of enforcement, the administrative authorities should accept the following guarantees: enforcement must be expressly provided by the law; private persons should be given the possibility to comply with the administrative decision within reasonable time; the use of and the justification for enforcement are to be brought to the attention of the private persons against whom the decision is to be enforced and the enforcement measures used including any accompanying sanctions are to be respect the principle of proportionality.

Member states should ensure that administrative authorities implement judicial decision within a reasonable period of time and in order to give full effect to these decisions, they should take all necessary measures in accordance with the law. However, in cases of non-implementation by an administrative authority of a judicial decision, an appropriate procedure should be provided to seek execution of that decision, in particular through an injunction or a coercive fine. Furthermore, the Recommendation (2003) 16 prescribes that it is an obligation of the member states to ensure that administrative authorities will be held liable where they refuse or neglect to implement judicial decisions.[61]

4. Conclusion

The idea that administrative action has to be submitted to a judicial control has made huge progress. This evolution has been for a good part brought about by the development of European law, namely the European Convention on Human Rights, which both are grounded on the idea that states as well as society have to be founded on law and that the respect of law needs to be guaranteed by courts.

Good judicial control over administration implies a good legal framework that corresponds to the legal tradition, institutions and the capacity of the state in which it is applied. Acceptance of legal solutions of other states that are not adaptable to the internal social and legal conditions and circumstances represents a useless application of sources and work. However, adaptation to the contemporary principles of justice and democracy is an important precondition for the progress of the whole society. European legal documents emerge with the aim of contributing to greater protection of rights and approximation and harmonization of the legal systems that should be an important factor in the process of drafting of laws and other legal acts as well as their implementation in practice.

In this connotation, it must be emphasized that judicial review of administrative acts can act as a safeguard against abuse and should, as a minimum, determine whether these boundaries and standards have been violated, in contravention of national legislation. Courts and tribunals should have the power to

[61] According to the Recommendation (2003) 16, public officials in charge of the implementation of judicial decisions may also be held individually liable in disciplinary, civil or criminal proceedings if they fail to implement them.

examine the legal boundaries of the decision-making authority in light of the standards of administrative law. In this segment, of particular importance is the interpretation of the conventions rights and giving a true meaning of the Council of Europe recommendations.

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