



## The Impact of the European Convention on Human Rights in the Field of Administrative Justice

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**Abstract:** In democratic and modern model of the administrative justice the implementation of the international standards plays a crucial role. This article seeks to examine how the judicial control is exercised in order to protect human rights in the spirit of the European Convention on Human Rights, in order to guarantee impartial and fair administrative proceedings. Among the main mechanisms by which the Council of Europe has provided a high standard of human rights protection is the European Convention on Human Rights and its oversight organs, in particular the European Court for Human Rights (ECtHR). Administrative acts issued by public administration authorities very often constitutes violations of fundamental rights and freedoms of persons, therefore the exercise of judicial control is of the utmost importance. In this regard, this article seeks to analyze current state of play and additional progress toward protection of human rights and freedoms in the field of administrative justice in line with prerequisites of the European Convention on Human Rights and its Protocols.

**Keywords:** Human Rights; European Convention of Human Rights; Administrative Justice; Judicial Review

### 1. Introduction

Public law is generally focused in internal control over the administrative acts based in the hierarchical and instancional principle. Acts of public bodies can be challenged in the respective courts by way of “judicial review”, a procedure by which judges should ensure the legality of such decisions. Therefore, the intention of administrative justice is to guarantee that administrative bodies do not exceed the powers given to them by respective laws. In this regard, the court’s task is to

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verify if the public authority has acted unlawfully in the cases of the misuse of their powers.

In most of the lawful systems today, it is not easy to separate administrative law from the whole legal and constitutional framework. Therefore our research will be focused on the impact of the European Convention on Human Rights in the field of administrative justice.

The European Convention on Human Rights (hereinafter ECHR) was adopted on 4 November 1950 and entered into force on 3 September 1953, as the European legal instrument declaring to guarantee the protection of human rights. The Convention contains several sections where are examined substantive human rights and freedoms. The first section of the Convention, the preamble cites the Universal Declaration of Human Rights emphasizing that: “*Convention is intended to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration*”.

Access to justice is an essential right according to Article 47 of the Charter of Fundamental Rights of the EU and a human right and under article 6 and 13 of the European Convention on Human Rights.

Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial, is one of its most contentious provisions that imposed a massive amount of judgments and decisions of the European Court of Human Rights in Strasbourg. The ECHR is based on the principles and rights to protection against decisions of the public authorities. Such principles constitute the minimum standards of protection that must be guaranteed to the respective party in administrative justice.

The current paper will discuss the impact of ECHR in general and impact of this article in particular in the field of administrative justice.

Through submission of application to Strasbourg, the individual may be able to seek the defeat of obstructions sited by national law. Based on the provisions of the Convention, the accountability of the state is implemented broadly to the decisions issued by public authorities of all branches. Administrative justice and the judicial review of administrative acts are elements of reliable, efficient, effective and transparent administration. As consequence, efficient remedies of restore against administrative decisions should involve a functioning system of judicial review in order to enable fair trial before a competent court. Judicial review of administrative

acts should guarantee public administrative process, held within a reasonable time, conducted by an independent and impartial tribunal.

Among the main mechanisms by which the Council of Europe has provided a high standard of human rights protection is the European Convention on Human Rights and its oversight organs, in particular the European Court for Human Rights. The importance of these rights is highlighted in some provisions of the Council of Europe Statute, and Article 8 provides that: *“serious violations of human rights and fundamental freedoms constitute grounds for the suspension or exclusion of a member state from the Council of Europe”*.

The European Convention on Human Rights was the first instrument that has aimed a broad protection of civil and political rights by establishing a monitoring system in terms of its implementation. During the judicial review respective courts should observe human rights maltreatment in order to enable the advancement of public rights and confidence.

Protection of human rights and freedoms in judicial review procedure intends to guarantee that government and public officers are liable, efficient, objective and transparent in order to promote a good governance, democratic state and public development.

## **2. The Role of European Convention on Human Rights in the Process of Judicial Review of Administrative Acts**

Judicial review is a specialized remedy in public law by which the High Court exercises a supervisory jurisdiction over inferior courts, tribunals or other public bodies (Gordon, 1996, p. 1). Every public authority is obliged to act in accordance with law in order to respect the human rights on every occasion issuing an administrative decision.

Every pillar of the state is obliged to respect the law and protect the human rights in order to control the arbitrary or unlawful decisions. The review of illegal governmental decisions by the court contributes to the protection of substantive human rights and freedoms. In this regard, the judicial review enables to sustain the legality of the decision making process that effects the strengthening of standards of good administration such as liability, efficiency, effectiveness, transparency, public participation etc.

Paul Sieghart distinguishes human rights from other rights in two ways: One, other rights are acquired and are created by some act or event, for example, by a contract or inheritance or a tort. So, those rights can be transferred, disposed of or extinguished by other acts or events. Human rights, on the other hand, are not acquired and so cannot be extinguished or transferred by any act or event (Sieghart, 1985, p. 17). Acting contrary will result in an illegal decision which can be challenged before respective court, in order to seek judicial review.

The Council of Europe's "Recommendation on judicial review of administrative acts" implies that "the decisions of courts or tribunals that review an administrative act should, at least in important cases, be subject to appeal to a higher court or tribunal, unless the case is directly referred to a higher court or tribunal in accordance with national legislation" (Recommendation on judicial review of administrative acts, (2004)20, note 5, para B.4.i.). The EU member states are bound to respect EU fundamental rights, not only with regard to their implementation of EU law (as provided for in Article 51(1) of the Charter), but even beyond in all matters within the scope of EU law, including derogations from fundamental freedoms – as is demanded by ECJ case-law (ERT [1991] ECR I-2925, 1991, par, 42-43.).

Professor Paul Craig has argued that "if the challenged decision was so unreasonable that no reasonable body could have made it, then the court was justified in quashing it. The very fact that something extreme would have to be proven legitimized the judicial oversight and served to defend the courts from the charge that they were overstepping their remit and intervening too greatly on the merits" (Craig, 2003, p. 611). Illegality is where the decision maker must correctly understand the law that regulates its decision making power and must give effect to it. However, this can cover a number of challenges in a case such as 'ultra vires' where a public authority has gone beyond the area of power or jurisdiction given to it by statute, and 'abuse of power' where a public authority has failed to use a power for its proper purpose. Procedural impropriety can cover any procedural error, whether it is a breach of common law rules of fairness or procedures laid down by statute (Allen & Thompson, p. 547).

The judicial review seeks to guarantee effective access to administrative justice in order to support strengthening of the rule of law and human rights and freedoms in Europe. In this regard several main principles are to be implemented such as: access to the court, the right to a fair trial, the independence and impartiality of the courts, and the value of judicial review.

It also signifies the right of private persons to seek legal redress whenever their rights, liberties or interests are negatively affected when the public administration exercises its duties in an unlawful or inappropriate manner (Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration, 20 June 2007).

Article 6 of the Convention provides basic principles involving the fair administration of judicial review as general factors by which the proceedings can be conducted fairly. Article 6.1 of the ECHR guarantees the right to fair public hearing reading as follows:

*“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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.*

The Commission and the Court provides a huge interpretation on the guaranteed rights as an essential element of a democratic state and the rule of law. The right to a fair trial, guaranteed by Article 6 of the European Convention on Human Rights (ECHR), is a paradoxical right. On the one hand, it does not impose a single model for a judicial system on the contracting states; on the other hand, it cannot be left to the sole discretion of domestic law to determine the essential content of such guarantees, in spite of the existence of national legal traditions (Okitsu & Yukio, 2013, p.14.).

Guaranteeing judicial review of administrative acts by a competent and independent court or tribunal that adheres to international and regional fair trial standards is fundamental to the protection of human rights and the rule of law (Handbook for monitoring administrative justice, 2013, p. 12). However, there seems to be less public awareness and understanding of fair trial standards in administrative proceedings than in criminal or civil law proceedings (Trend Report, 2012).

### **3. The Right of Access to the Court in the Process of Judicial Review of Administrative Acts**

The right of access to the court to appeal an administrative act derives from the article 6 (1) of ECHR which enables the individual right of judicial protection in case he/she believes that any of his/her fundamental rights have been violated by the act of public administration. In this regard of ECHR provision, we also have the ECtHR practice as follows: “Where a decision affecting “civil” rights or a “criminal” charge is made by an administrative, disciplinary or executive body, there must be a structural right of appeal to a judicial body in the domestic law – the ability to apply for at least one stage of court review is an autonomous requirement of Article 6 (Dovydas Vitkauskas & Grigoriy Dikov, 2012). In case of review the Article 6 (1) of the ECHR as well as best practice of ECtHR regarding the administrative judiciary, we come to understanding that access to court and justice requires a public and fair trial, by an independent and impartial court established by law.

Application of the Article 6 (1) of ECHR serves not only as the right to access the court in order to appeal an act of public administration, furthermore, in some places it effectively took over a supreme constitutional role in safeguarding the administrative justice. In such cases, there are authors who believe that “it is time also to reconsider the role of the non-judicial mechanisms for the control of government action such as the ombudsmen; tribunals and inquiries; and internal complaints procedures” (Diane Longley & Rhoda James, 1999). We understand that in this case, a great deal of attention should be addressed to the efficiency of administrative bodies as well as limitation established upon them as a result of judicial review. In addition, we believe that based on the right to access the court, a lighter form of subsequent administrative judicial control is ensured, which does not fade the administrative control, in contrary it helps it in reestablishing the law in such cases where the administrative control failed to guarantee the legality of administrative acts effectively and sufficiently.

The right to access the court aims to ensure a proper administration of justice, particularly it starts with guarantees that an individual has the right to access the court and ensures all his/her aspects of judicial forms when reviewing the matter. The access to the court shall be substantial and not just formal, and every limitation to access a court or a tribunal should be pursued by legitimate aim and means used shall be proportional with that aim. At this point of view, we refer to the practice of ECtHR case of *Tinnelly vs UK* which says the following “the right guaranteed to

an applicant under Article 6 (1) of the Convention to submit the dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the *ipse dixit* of the executive” (Tinnely & Sons Ltd and others vs UK, 1998, par. 72-79, esp par. 78).

The right to address the court pursuant to Article 6 (1) of ECHR does not necessarily mean that the individual has the right to appeal the court decision (appeal the decision of lower court to the higher court). Referring the ECtHR practice, Article 6 does not provide, as such, a right to appeal to a higher court from a decision of a lower court; only where the domestic procedure foresees such a right, Article 6 will apply to the superior stages of court jurisdiction – the ability to apply for two or more stages of court review is therefore a non-autonomous requirement of Article 6 (Dovydas Vitkauskas & Grigoriy Dikov, 2012).

State cannot restrict or eliminate the exercise of those disputes that falls into the domain of Article 6 (1) and which could be, for instance even the legality of administrative body decisions because “breach of a right in the ECHR will now be a ground for judicial review. It will be unlawful for a public authority to act in a way which is incompatible with a Convention right and judicial review proceedings may be brought by the victim or potential victim of the unlawful act” (Diane Longley & Rhoda James, 1999).

Article 6 is applied when there is a protected and disputable interest because applicability of Article 6 under its civil heading entails cumulative presence of all the following elements: there must be a “dispute” over a “right” or “obligation” (Bentham v. the Netherlands, §§32-36); that right or obligation must have a basis in domestic law (Roche, §§116-126); and finally the right or obligation must be of a “civil” nature (Dovydas Vitkauskas & Grigoriy Dikov, 2012). Furthermore, the right to access the court is closely bonded with the right to act in judicial manner to protect the legitimate rights and interests, pursuant to the ECtHR practice that says: “The right of access to a court draws its source from the principle of international law that forbids denial of justice” (Dovydas Vitkauskas & Grigoriy Dikov, 2012). In this matter, the right to address the court or tribunal shall be ensured by state and should be effective guarantee that no individual is denied from his/her rights to seek justice.

Access to court also consists the possibility to resist in a trial (civil, criminal or administrative) either personally or through the attorney and this right shall be provided by each state that applies ECHR as it is substantial for the democracy and

rule of law. Furthermore, “Access to justice is an important element of operational framework of legal empowerment. The concept of access to justice encompasses the whole range of laws, procedures, institutional arrangements through which justice can be delivered to the people in efficient and effective manner” (Abdullah Al Faruque & Nirmal Kumar Saha, 2006). This important element, not only does strengthen the democracy and rule of law but we could also add that “access to justice and legal empowerment are also the means to attaining other goals such as the reduction of poverty, the guaranteeing of individual rights, legal certainty, security against crimes and government abuse, and the reform of laws and legal procedures” (Ineke van de Meene and Benjamin van Rooij, 2008, p. 21).

Access to court is closely linked with justice system of a state as well as with democratic society because “there are three basic features of the justice system in a democracy. First, the orderly resolution of disputes is essential to the functioning of any democratic society. Secondly, the institutions should be governed by defined set of rules; thirdly, the courts as a judicial branch of the government have a particular role in the protection of human rights” (Abdullah Al Faruque & Nirmal Kumar Saha, 2006). Basically by accessing the court, the individual rights are protected by challenging the administrative act in the court which was issued by the administrative body who believes that certain right or lawful interest is being violated by the same act. On the other side, by accessing the court we achieve the objective aim as well, as we are dealing with the assurance of legality in society.

Finally, by accessing the court, the external control is being performed in order to ensure the legal protection towards the functionality of public administration and at the same time is a guarantee of the Article 6 (1) of ECHR for the citizens in protecting their rights through state legislation that incorporated the ECHR into their respective justice system.

#### **4. The Right of the Fair Trial and the Independence of the Court in the Process of Judicial Review of Administrative Acts**

The right to a fair trial in administrative justice as a fundamental human right and synonymous of the rule of law in public administration is guaranteed in Article 6 (1) of the ECHR and is developed by the ECtHR. The right to a fair trial concerning the administrative justice relates not only to the development of the judicial process, but also to the right to initiate a judicial process. The right of



access to a court includes not only the right to institute proceedings but also the right to obtain a ‘determination’ of the dispute by a court. It would be illusory if a Contracting State’s domestic legal system allowed an individual to bring a civil action before a court without ensuring that the case would be determined by a final decision in the judicial proceedings (Jacob, 2007, p. 115). This right means that the individual has rights that are guaranteed practically and effectively instead of those that are theoretical and unrealistic, so that no one is deprived of his or her right to seek justice and to acknowledge a court decision on administrative disputes.

In administrative justice, the ECHR is upheld when the state has enacted administrative legislation which is in line with international standards, as “administrative jurisdiction protects legal interest of citizens whose rights are violated by a public administration act, so the state provides administrative justice” (Martinez, Constitutional Law, 2011, p. 292). On the other hand, the administrative justice in harmony with the ECHR provides individuals with equal opportunities to address the court or tribunal for fair trial in administrative disputes.

The rule of law can only be secured with an independent judiciary and independent legal profession. The right to fair trial also increases the participation of individuals so that their demands are heard and reviewed by another independent and impartial power such as the court established by law and as sanctioned in Article 6 (1) of the ECHR. A fair trial in civil and criminal matters is a fundamental element of the rule of law and part of the common heritage, according to the ECHR.

As noted above, the right to a fair trial is guaranteed in Article 6 (1) which provision as stated by Vitkauskas & Dikov, “enshrines the principle of the rule of law, upon which a democratic society is built, and the paramount role of the judiciary in the administration of justice, reflecting the common heritage of the Contracting States. It guarantees procedural rights of parties to civil proceedings” (Dovydas Vitkauskas & Grigoriy Dikov, 2012, p. 7).

The ECtHR's practice of administering justice is extremely stable and has gradually established a unified definition of procedural justice. Standards created by ECtHR "relate to civil rights and obligations as well as criminal charges. The standards deal with the right to be informed promptly of charges, trial within a reasonable time, the right to counsel, adequate facilities for the defense, the right to an interpreter, the independence and impartiality of the decision maker, the right to hear witnesses, the right not to incriminate oneself, the presumption of innocence, the public and fair hearing, and public pronouncement of the judgment

(Weissbrodt, 2009, p. 47). Logically, not all of these standards apply to administrative judiciary, but such rights as: the right to access the court, the right to a fair trial, the independence and impartiality of the courts, public and justified judgment, the execution of judgments and the right to be heard are some of the ECHR's and ECtHR's standards, which also apply to the administrative judiciary.

The right to a fair trial is also related to the right to participate and to be heard by the court, which is another element of the due legal process guaranteed by Article 6 of the ECHR. This right relates mainly to the right to do research and submissions and to get answers to them. The requirements of Article 6 of the ECHR, taken in its entirety, are intended to guarantee to anyone who claims that their rights recognized by the Constitution and by law have been violated.

ECHR has enjoyed a very high degree of compliance with its provisions, both because many countries have incorporated its provisions into domestic law and because the ECtHR and European Commission's judgments have almost always been obeyed and fundamental fair trial guarantees are established in Article 6 of the ECHR. Article 6(1) provides that a person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (Weissbrodt, 2009, p. 37).

According to ECtHR practice, a court will be considered independent only if its decisions cannot be annulled or affected by the executive in this context “the ECtHR has construed Art. 6 to require what is essentially a judicialised form of due process. The tribunal must be independent of the parties and the executive, must hold proceedings in public, pronounce its decision publicly and ensure a fair hearing of both parties” (Diane Longley & Rhoda James, 1999, p. 249).

The right to a fair trial is linked to the independence of judges and courts, which is one of the fundamental principles of the democratic state and therefore, this right in most cases of the ECtHR has been interpreted as one of the fundamental principles of the rule of law and democratic state due to the large number of applications and precedents it has created. The role of a judges and courts in a democratic state is to exercise the function of justice, they must ensure the implementation of the norms expressed in the Constitution, laws and other legal acts guarantee the rule of law and protect the human rights and freedoms. Respect of this principle is a necessary condition for the protection of human rights and fundamental freedoms and for this reason as Weissbrodt stated “ECHR imposes an obligation upon states to organise

their legal systems so as to comply with the requirements of Article 6(1)” (Weissbrodt, 2009, p. 39).

The right to a fair trial, public, independent and impartial tribunal in accordance with ECtHR practice “includes three main characteristics required from a judicial body, some of them at times overlapping each other: tribunal “established by law” (H. v. Belgium); “independent” tribunal (Campbell and Fell, §§78-82) and “impartial” tribunal (Piersack v. Belgium). Where a professional, disciplinary or executive body does not conform to the above requirements, Article 6 will still be complied with provided the applicant subsequently has access to full judicial review on questions of fact and law (Dovydas Vitkauskas & Grigoriy Dikov, 2012, p. 35).

In order for a court to consider disputes between the parties (regardless of their nature) and to make enforceable decisions and consequences for them, it must not only be created by law but the law should provide a detailed description of its territorial and real jurisdiction. Examining a dispute between the parties by an independent and impartial tribunal is an element of a due legal process and strengthens the state's immunity as well.

As the right of access to a court is an inherent part of the fair trial guarantee in ECHR, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity (Jacob, 2007, p. 129).

The concept of fair trial also implies the right of the parties to be informed and commented on all the evidence presented or the observations presented in order to influence the court's decision. In order for the court to maintain independence and impartiality, it must be assiduous in upholding the impartiality of its judges. Article 6 of ECHR is a very powerful reinforcement of every litigant's ordinary expectation that in this country he will have a fair trial” (Jacob, 2007, p. 204). While the notion of the “independence” of the tribunal involves a structural examination of statutory and institutional safeguards against interference in the judicial matters by other branches of power, “impartiality” entails inquiry into the court's independence vis-a-vis the parties of a particular case (Dovydas Vitkauskas & Grigoriy Dikov, 2012, p. 39).

## **5. Conclusions**

The implementation of European Convention on Human Rights in the field of administrative justice guarantees strengthening of the rule of law and implementation and promotion of principles of good administration. In this regard, the implementation of European Convention on Human Rights aims to promote and improve democratic governance in order to impose essential human rights and freedoms and administrative justice for any person who access the courts.

Judicial review of administrative act in line with principles of European Convention on Human Rights is considered as main mechanism to control unlawful exercise of authority by the executive. Convention enables harmony between the domestic legal systems with respect to human rights and in this regard, States may play a dynamic role to protect human rights in the civil, political, social, economic and other fields.

Review of administrative decisions by an independent body is an essential obligation of a democratic and rule of law state, that implies promotion and implementation of the principle of legality in administrative justice through challenging administrative acts for violation of law and human rights.

The monitoring process of administrative trials is of utmost importance in order to promote the establishment of specialized courts, democratic state, judicial reform, good administration, and increasing responsiveness among the administrative authorities. The process of judicial reforms concerns the efficiency for issuing a first instance decision, time limits for appeals procedure and use of extraordinary legal remedies. As part of this process, the administrative judge should not only pay attention to the discretionary powers exercised by public officer , but should mainly be focused on the breach of human rights issue and provide mechanisms such violations to be corrected.

The thorough oversight of administrative acts in judicial review process aims equilibrium of discretionary powers given to administrative authority. As consequence, the European Courts should continue to neutralize these powers of the administration with strengthening judicial review scope and standards.

Due to establishment of new specialized courts and tribunals many countries particularly in Central and Eastern Europe are facing different challenges as consequence of adopting of new legislations in the field of administrative justice in line with recognized European standards and Convention requirements. Even

though the differences between administrative justice systems are evident in different countries of Europe, however these systems have been under impact of case law of the ECtHR and the ECJ, although not accomplished in satisfactory level regarding the general principles of judicial review.

In several countries there is a huge break between number of decisions issued in administrative procedure and number of court decisions upon the judicial review. As main reason for this could be lack of awareness to access the court, discrimination as well as costs and prolongation of court proceedings.

It is also necessary to strength the overview related to violation of fundamental rights in national and international levels through presenting new administrative reforms in order to overcome the challenges that are facing different European countries regarding the scope of review of administrative acts, discretionary powers, examination of facts, administrative silence and enforcement of judgments.

Finally, we point out that the crucial aim of any reform in the field of administrative justice should be to promote and improve the protection of individual rights in Europe, due to frequent violations of their rights by administrative bodies. Finally, in many countries the legal structure systems in national level should be revised and accorded in line with international standards, in contrary shall be increased legal insecurity.

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