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Good Administration and the case-law of the European Court of Human Rights

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The European Convention on the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as "the Convention"), ratified by all Member States of the Council of Europe, created a mechanism by which individuals can have their complaints that public powers of any Contracting State breached their rights examined by the European Court of Human Rights. A right to individual petition, brought before that Court under Article 34 of the Convention by victims of alleged violation of the rights guaranteed by the Convention makes it ultimately possible, by way of a judgment given by that Court, to assess whether the conduct of public powers respected the applicants' human rights. The ratification of the Convention is a necessary political requirement for any State wishing to join the Council of Europe. [1]

International responsibility of the state can arise under the Convention in respect of acts, decisions and omissions of any branch of power, including executive powers. Hence, the Convention is relevant also for the executive branch of the government as it provides a set of well-developed criteria, by which adherence of any national administration to effective respect for human rights can be assessed.

The Convention itself is silent as to what good administration is. Nor did the Court develop, in its case-law, such a right of an individual character. [2] Hence, an interesting debate on whether a right to good administration can be said to be an individual right [3] is not really relevant to the Convention and to the Court's case-law. There are, in the author's view, rather slim chances that such a right would be developed in the future, notwithstanding the fact that the Court has been many times criticized for undue judicial activism. It has been said that by recourse to its now established interpretation principle that the Convention is a living instrument which should be read in the light of the present-day conditions [4], it read into the classical rights which the Convention guarantees, particular entitlements which can hardly have been intended by its founders.

Nonetheless, elements of what is today referred to as good administration are present in various strands of the Court's case law. Elements of good administration can be traced in many individual rights as interpreted and applied by the Court. It is not open to doubt that effective enjoyment of human rights requires that public powers observe certain principles of good administration present in various instruments of national and international law.

The principles relevant to the good administration as developed in the Court's case-law are as follows:

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[1] Committee of Ministers of the Council of Europe, Interim Resolution DH(2001)80.

[2] Por. A. Skóra, Administracja w europejskim porządku konstytucyjnym: ochrona praw podstawowych w Konstytucji dla Europy na przykładzie prawa do dobrej administracji, w: Administracja pod wpływem prawa europejskiego, red: B. Dolnicki, J. Jagoda, Bydgoszcz-Katowice 2005, s. 65 – 74; I. Lipowicz, Prawo obywatela do dobrej administracji, http://bip.nik.gov/pl/bip/rzecznik/posiedzenia_seminaryjne/sem_2005_04_20/px_lipowicz_pd

[3] Prawo do dobrej administracji, Biuletyn Biura Informacji Rady Europy, p. red. H. Machińskiej, Warszawa 2003, Nr 4.

[4] See, among many other authorities, *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, pp. 15-16, § 31; *Johnston and Others v. Ireland* judgment of 18 December 1986, Series A no. 112, pp. 24-25, § 53; *Loizidou v. Turkey* judgment of 23 March 1995 (*preliminary objections*), Series A no. 310, pp. 26-27, § 71.

Firstly, public powers have a negative obligation to abstain from acts in breach of individual rights.

Secondly, the Convention imposes on public powers – or rather reiterates – an obligation of acting in compliance with laws. Any act of public administration must have a legal basis and must comply with legal provision enacted by competent power prior to such act. "The rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention". [5] Compliance with the rule of law also implies that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights guaranteed by the Convention. [6]

In addition, domestic law should itself comply with certain minimal quality requirements. First, it must be established that the interference with the right has some basis in national law. Secondly, the law must be **accessible** and, thirdly, the law must be formulated in such way that a person can foresee, to a degree that is reasonable in the circumstances, the consequences which a given action will entail. It is of no relevance whether the legal basis of an administrative act is of a statutory character or not. Provisions of law of character other than statutory must also comply with these requirements. In particular, the state cannot successfully exonerate itself from its international responsibility under the Convention on the basis of the argument that legal norm concerned in an individual case was contained in an ordinance or another legal, non-statutory act. [7]

It can be noted, in passing, that the case-law of the Court does not address the issue whether the legal norm concerned (or an individual decision based on that norm) was "fair" or "just". The case-law does not furnish any interesting material on the basis of which to ponder the question of substantive justice in the public administration. [8] In this connection, it should be noted that it has been, time and again, said by legal scholars that the Convention is an instrument of procedural, not substantive, justice. [9] On the other hand, it can arguably be said that the principle of proportionality as applied by the Court does play such a role, in so far as it obliges the states to strike a fair balance between the individual and public interests involved in any given case.

Thirdly, Article 13 of the Convention imposes on the states an obligation to provide an effective national remedy to persons whose rights have been violated, notwithstanding that the violation has been committed by persons acting in their official capacity. Hence, such procedures must be available in national law which make it possible to make a claim against the State to desist from acts causing a violation, to acknowledge that it has occurred and to remedy its results.

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[5] E.g. *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II; *Carbonara and Ventura v. Italy*, no. 24638/94, § 63, ECHR 2000-VI; and *Capital Bank AD v. Bulgaria*, no. 49429/99, § 133, ECHR 2005-...; Amuur v. France judgment of 25 June 1996, *Reports* 1996-III, pp. 850-51, § 50. All judgments of the ECHR are available at its Internet site: www.echr.coe.int/HUDOC.

[6] *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, p. 32, § 67; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI.

[7] E.g. *Silver and Others v. the United Kingdom*, 25 March 1983, Series A no. 61, §§ 86-88; *Drozdowski v. Poland*, § 25.

[8] A. Nowak-Far, Sprawiedliwość a podstawowe funkcje administracji publicznej, Służba Cywilna, Jesien-Zima 2001/2002, Nr. 3, s. 35 -54.

[9] C. Gearty, The European Court of Human Right and the Protection of Civil Liberties: An Overview, Civil Liberties Journal, 1993, s. 89-127.

These measures do not necessarily need to be of a judicial character. Nonetheless, they must be effective. There must be a possibility for an individual to hold the state accountable for acts carried out in its name, and an individual cannot be helpless in trying to vindicate his or her claims against the state.

Fourthly, in all situations in which the Convention allows for the exercise of individual rights to be limited, such limitation or restrictions must meet, cumulatively, certain conditions. It has already been mentioned that such restrictions must be lawful. The mere fact that a restriction of individual right did not have any legal basis will suffice for a finding of a violation. Furthermore, such restriction must be carried out in order to pursue one of legitimate aims listed in the provisions of the Convention. These aims include national security, public safety, economic well-being of the country, public order and prevention of crime, protection of health or morale or the protection of the rights and freedoms of others; the preventing of the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. The list of permissible aims varies depending on the right concerned.

The restriction of rights must also be "necessary in a democratic society". The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aims pursued. [10] The power to assess whether such a pressing need exists belongs to the Contracting States and they have a certain margin of appreciation in this respect. However, it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. [11] The assessment carried out by the Court will not be limited to examining whether the state, when restricting individual rights, has acted reasonably, with due diligence and in good faith, but also whether relevant and sufficient grounds have been invoked by the domestic authorities. [12] In other words, the principle of proportionality is, for the Court, an indispensable and frequently resorted to instrument.

Fifthly, the Convention imposes on public authorities certain obligations of a positive character, because for an effective exercise of certain rights it is not sufficient for the state to abstain from acting. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention requires States to take measures designed to ensure that individuals within their jurisdiction can enjoy such rights. Hence, the public administration is obliged to take relevant measures in order to make such enjoyment possible. The boundaries between the State's positive and negative obligations do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, regard being had to the margin of appreciation left to the states.

To establish what kind of positive measures should be undertaken in a given individual situation it is necessary to take into consideration the diversity of social landscape in various States-Parties. In addition, regard must also be had to the range of choices left to the public administration when setting its priorities of action and when allocating resources it has at its disposal. Given that the public administration is often referred to as public service,

[10] *Matter v. Slovakia*, no. 31534/96, § 66, 5 July 1999; *Gorzelik v. Poland*.
[11] *Malisiewicz-Gąsior v. Poland*, no. 43797/98, 6 April 2006, § 58; *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V, and *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 88, 17 December 2004.
[12] *Gorzelik*, loc. cit, § 96.

the notion of the state's positive obligations can lead – and indeed does lead – to the imposing on the state of new responsibilities, which can hardly be said to be, at first sight, related to the classical civil rights and fundamental freedoms. In this context, it should not be lost from sight that in the light of the Court's case-law, many individual interests of a clearly pecuniary character can be presented as human rights.

The positive obligation to make it possible for the individuals to enjoy their rights is closely related to another Convention principle, namely that it guarantees practical and effective, not theoretical and illusory, rights. [13] It is not enough that they are guaranteed in law in books; they also must be secured in law-in-action. It is the Court's duty to **look beyond** the appearances and the language used and concentrate on the realities of the situation. Hence, it is not only the state which is obliged to take positive measures, but also the Court to examine whether these measures proved to be sufficient; also when a decision whether to take such measures or not falls into the ambit of administrative discretion.

These principles, when compared with specific principles of good administration, cannot be said to be of a great novelty. They are currently present in more detail in the Recommendations of the Council of Europe relevant for good administration. They are also to be found and, likewise, in a more detailed form, in the Code of Good Conduct developed by the Ombudsman for the European Union. Hence, there is largely a certain overlap between the indications for good administration that can be deciphered in the Court's case law and the guidance to be found in these specific instruments. This can be said to somewhat diminish the interest of the Court's case-law for scholars and institutions interested in developing principles of good administration.

Nonetheless, it should be first stressed that the principles of good administration as they are known today to European law have originally been inspired also by the Court's case-law.

Moreover, the case-law of the Court is not static. A reference has already been made to "the Convention as a living instrument" principle. Its potential lies in that the Convention's case-law evolves over time as the Court is faced with new applications concerning new factual and legal situations from all over Europe.

In particular, the doctrine of the State's positive obligations necessary to make it possible for individuals to effectively enjoy their rights leaves much room for future developments, including imposition on new, or more detailed, obligations on the State, also in the sphere of public administration.

In national administrations where the basic European approach is – or at least is assumed to be – largely based on ideas of *Rechtstaat* and which are dominated by lawyers, there is a certain risk that predominantly lawyerly thinking might occasionally undermine an effective respect for human rights. It is in the nature of legal thinking to perceive acts and conducts compliant with laws as correct and good. Compliance with the applicable laws is regarded as necessary, but also sufficient, for an administrative decision or administrative act to be acceptable. This natural professional approach of lawyers can make it difficult for them to step outside and to perceive situations in which administrative bodies have to act and give decisions differently than from strictly legal perspective.

[13] Airey v. Ireland, judgment of 9 October 1979, Series A no. 32; Zwierzyński v. Poland, …

Moreover, also the administrative discretion in any given substantive area of administration can be exercised in routine ways which have been accepted by the national administrative bodies as appropriate and normal.

The judgments of the Court which has held that certain individual rights were breached by individual administrative decisions and acts, or by a failure of the administration to act, provide an opportunity for national administrations to look at their established ways from a different external perspective. The assessments made by the Court can therefore provide sometimes surprising, and often salutary, impulse for re-examining national methods of dealing with a given administrative issues. This is so even if the Court has made its assessment in the context of cases against other Contracting States, if the situations arising in these States are comparable, or if tradition of administrative law in certain areas is similar.

Under Article 46 § 1 of the Convention, the contracting states *"undertake to abide by the final judgment of the Court in any case to which they are parties"*. The judgments of the Court are executed by way of proceedings conducted before the Committee of Ministers of the Council of Europe. A judgment, once it becomes final, is transmitted to the Committee which supervises its execution. [14] The execution consists in individual measures the aim of which is to remedy a breach of individual rights found in the case. In addition, the execution of the judgments involves also taking general measures by the contracting parties. The purpose of general measures is to make the national legal system draw effective lesson of a systemic character from the judgment. This can be done essentially in three ways: by amending legal provisions which gave rise to the violation, by changing the practice of application of legal provisions in force by the judiciary or executive branch of the government so as to avoid further violations by the same kind of practice. The general measures also necessitate that information about the judgments be disseminated to the state agents, in order to make them aware of violations of individual rights have arisen in certain legal and factual contexts and that similar practices should be avoided or simply abolished.

On the domestic level the task of execution of the Court's judgments falls to the executive power. In this context an issue arises how in any given domestic system the execution of these judgments is organized. A number of institutional and procedural question arise in this connection.

- Which administrative body is charged with the execution of the judgments?
- Has it been vested with comprehensive competences as regards the execution or, rather, such competences are dispersed among different bodies?
- How is such a body situated in the system of national administration?
- Have procedures been put in place clarifying obligations of various national bodies as regards the execution of the judgments?

For the effective enforcement of the Court's judgments and for the effective promotion of respect of human rights within national branches of executive power it is important that the national bodies entrusted with the enforcement have high visibility, both in institutional and political terms.

[14] Article 46 para. 2 of the Convention.

The effectiveness of such bodies depends on the concept of their role accepted by the national legislature and administration. Quite often a central role in the national approach to the Convention is being played by the agents of the governments whose primary responsibility is to represent the governments in the proceedings before the Court. The role of the agents can be therefore seen as being essentially that of a legal representative; hence, a role comparable with a role of a lawyer in judicial proceedings. Alternatively, the role which this body plays in the national legal landscape can be construed to be of a more comprehensive character: that of a pivotal authority, charged with full competences within the system in respect of the Convention. In other words, this body can be seen either as a fire brigade, extinguishing fire where it has already occurred. Or, alternatively, as a strategic planner willing and able to acquire and develop over time a full picture of the respect for human rights as guaranteed by the Convention within the domestic system.

When assessing whether in any national system the administrative authority representing the state before the Court tends to fit either the first or the second model, it is useful also to have regard to the practical and political weight which it carries – or does not – within the national administration.

In order for this body to be visible, it is useful to consider whether it is obliged to prepare and submit either to the government, or even to national parliament, annual surveys on the Court's judicial activity in respect of the state and on the response of the national system to these judgments. Such surveys are a good manner of conveying a general picture of respect – or non-respect, as the case may be – of human rights by the state to the public opinion, the national administration and, last by not least, to the judiciary.

Another element essential for the practical and effective response of national administrations to the obligations imposed on the state by the Convention depends on whether the national administration is at all aware of them. The knowledge of the judicial practice of the Court in respect of a given state should constitute a part of training dispensed to the agents of national administrations. It falls to the state to find ways of ensuring that such dissemination is effectively carried out. In this respect the relevant questions to be addressed are:

- Who is obliged to take measures to disseminate information about the Court's judgments among civil servants?
- How is the effective dissemination of relevant information ensured?
- Is the information about the Court's case law a stable element of the training of civil servants? [15]
- Are any established practices in place to update the knowledge of civil servants at all levels of national administration about the Court's case-law?
- Is there a national practice of making judgments – which can serve as both bad or good examples - against other Contracting States known to the civil servants?
- More generally, is there a general training strategy in place to make information about the Convention a part of the institutional memory of national administrations?
- If so, is the dissemination of relevant information tailored to the tasks and competences of various branches and levels of national administration?

[15] The same question is obviously also important as regards the judiciary.

The replies to these questions will of course depend on whether a contracting party is of unitary or federal character. In both cases, they will also on the distribution of powers between the central administration of the contracting party and its components.

In addition, the Court judgments have certain added pedagogical value in the human rights education, be it among general public, or among civil servants. Namely, when compared with the mere normative content of the principles of good administration, they can be said to be good attention-catchers. A judgment of the Strasbourg court, like any good judgment of any court, is, among other things, a story. It is relatively easy to translate for the use of non-legal public the principles of good administration in the form of a story which for obvious reasons, is more colourful and easier to retain than mere dry and technical principle. Hence, the judgments as illustrations of principles may be simply a good way to make principles of good administration comprehensible to the general public and to national civil servants.

At a legislative level, for the effective enforcement of the obligations under the Convention it is important to make the assessment of the compliance with the Convention a normal part of the legislative procedure. In this respect, the following issues are of significance:

- Are there any mechanisms in place to ensure that the parliament is aware of the developments before the Court in respect of the contracting party?
- Is the assessment of compliance with the Convention of bills submitted to parliament a normal and established element of the legislative process?
- Is the national agent of the Government for the representation before the Court involved in the legislative process?
- If so, what is her or his role?

By way of conclusion, it can be said that for every contracting party there is a range of choices and decisions to be made, both of an institutional and procedural character, to ensure that the judgments of the Court are given national relevance and, so to speak, a new lease of life after they are pronounced in Strasbourg. It is important that the options which have been adopted by the contracting states in this respect are reviewed from time to time by the national administrations in order to adopt them best to the changing picture of respect of human rights in any given country as it evolves over time and as the subject-matters and character of the violations found in respect of that country change together with legal and social realities of that country.

In the determination of what it takes for a national system to comply with the requirements of good administration as we see it today we should not lose from sight that good administration, quite simply, should respect human rights. This is all the more so, as respect for human rights enshrined by the Convention has long been agreed to form a basis of European legal order. [16] Finding or developing ways and means to make the reception of the

[16] European Court of Justice, among other authorities: *Stauder v. City of Ulm*, Case 29/69 [1969] ECR 419; *Internationale Handelsgesellschaft*, Case 11/70 [1970] ECR 1125; *Nold v. Commission*, Case 4/73 [1974] 291; *Rutili v.Minister of the Interior*, Case 36/75 [1975] ECR 1219.

Convention by national administrations a living reality; to have the Convention requirements become a genuine element of everyday administrative practices and an universally accepted standard against which acts of national administrations are measured, is an interesting challenge for legislators, administrators and scholars alike.