

HUMAN RIGHTS AND PUBLIC ADMINISTRATIONS

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1. SUBJECT MATTER AND PROBLEMATIC ISSUES

Since the second half of the XXth century, activities carried out by public authorities and the relations with private parties are subject to a growing number of ultra-national standards (beyond those descending from the European Union), enshrined into intergovernmental treaties or set out by ultra-national bodies. In this context, ever growing relevance is being gained by ultra-national standards on human rights. These standards are firstly acknowledged in international conventions on human rights, among which the 1950 European Convention on Human Rights – ECHR and the 1966 United Nations Covenant on Civil and Political Rights – ICCPR. Yet, they owe their noticeable diffusion to the implementation and specification put in place by the administrative or jurisdictional bodies set up by the conventions themselves, notably the European Court on Human Rights – ECtHR and the Human Rights Committee – UNCHR.

ECHR standards thus multiplying and spreading out rise some controversial issues. First of all, the ECHR only contains very few provisions regarding administrative procedures; the latter, altogether, are being the subject to ever more numerous judicial standards set out by the ECtHR. So, which types of administrative procedures are under the ECHR? What do these standards envisage? As aforementioned, the ECHR standards stem from a variety of legal sources, laid down by different bodies. So, what is to be intended as “standards”? Do they include only written provisions or also unwritten statements (like those settled down in the ECtHR case law)? What legal effects do they produce on national and supranational public authorities? Once set out, then, these standards penetrate the national and the EU legal orders. What are the mechanisms through which the ECHR directly imposes them to national legal orders? And how does it indirectly impose them onto ultra-national regimes?

The hypothesis will be developed that the ECHR gives rise to an authentic “ECHR legal regime on administrative procedures”. This regime: i) stemming from written provisions, has then developed through judicial decisions; ii) rooted in continental and

common law legal traditions, has slowly forged an autonomous conceptual framework; iii) originally circumscribed to very few procedures, has in time widened its scope of action, strengthened its prescriptive force and restricted the margin of appreciation of States; iv) conceived of to operate at the international level, has progressively penetrated national and the EU legal orders; v) set up to be legally binding only upon national authorities, ended up to influence the EU and global entities; vii) built up to exert an essentially defense function of private persons, has step by step evolved into a legal machine enabling the public at large to participate to decision making processes and allowing public authorities to adopt complex decisions. In these terms, the ECHR legal regime on administrative procedures seem to work as the catalyst of a slow process of construction of an integrated regime on administrative procedures at the global stance.

2. GENERAL PRINCIPLES GOVERNING PUBLIC ACTIVITIES

In general terms, there exist at least four main groups of human rights standards on ad-ministrative procedures. The first group affects all types of administrative procedures and re-fer to the notion of public authority and the general principles on public activities.

2.1 The notion of public authorities

Firstly, the ECtHR elaborated a notion of “public authorities”, which is material to determine the sphere of application of the standards. To this end, the Court adopted a functional interpretation of the ECHR provisions according to which, on the one hand, the

“States” recognize the rights and liberties enshrined in the Convention¹; on the other hand, the Court itself may be invested of any application coming from, inter alia, “non governmental organizations”². As a result, many acts are attributable to the States, including those adopted by the administrations of the State and of the local powers along with two other categories: i) acts of subjects which, despite being private in nature, are nonetheless subject to a derogatory regime and are placed under command and control of State or local public authorities (herein falling some publicly owned private companies³ or professional councils⁴); ii) acts adopted by subjects which, despite being private in nature, and operating like private parties, carry out activities which are public in nature or were originally exerted by public authorities (herein falling some private teaching institutions⁵, administrators of bankrupted companies⁶, private law foundations acting in the public interest⁷).

¹ Art. 1, ECHR

² Art. 34, ECHR

³ ECHR, Judgement 30 november 2004, applications no. 35091/02 e altri, *Mykhaylenky e altri v. Ucraina*. Nello stesso senso, ECHR, Judgement 22 February 2005, application no. 47148/99, *Novoseletskiy v. Ucraina*; ECHR, Judgement 1° December 2009, application no. 31761/04, *Khachatryan v. Armenia*.

⁴ ECHR, Judgement 23 November 1983, application no. 8919/80, *Van der Mussele v. Belgium*; ECHR, Judgement 24 February 1994, application no. 15450/89, *Casado Coca v. Spain*.

⁵ ECHR, Judgement 25 March 1993, application no. 13134/87, *Costello-Roberts v. United Kingdom*.

⁶ ECHR, Judgement 14 January 2010, application no. 54522/00, *Kotov v. Russia*.

⁷ In ECHR, decisione 1° March 2005, application no. 22860/02, *Wos v. Polonia*.

As to the notion of non governmental organizations, the Court has recently made clear, following to the *Unedic* decision⁸, that no such subjects are non governmental organizations as those sharing the exercise of public power (*puissance publique*) or carry out a public service under control of other authorities. Therefore, such subjects are “public authorities” as all the administrations of the State and of regional and local powers, together with subjects which, despite being regulated by private law, act in the pursuance of the general interest or anyway exert public activities under command and control of governmental bodies (herein falling companies carrying out public service in quasi-monopolistic conditions)⁹. Conversely, non governmental organizations are to be found in those subjects which, despite being public in nature, do not act in pursuance of the general interest or anyway do not exert public activities (herein falling few “moral entities”¹⁰); or those subjects which, despite pursuing the general interest, act under the private law in free competition conditions (like companies in charge of a public service which is not closed to free competition¹¹).

In conclusion, the notion of public authorities brings together at least three categories of subjects: i) the State, local entities and public bodies which exercise public functions; ii) private companies subjected to a derogatory regime and placed under command and control by public authorities; iii) private companies in the exercise of public activities, especially where there are no free competition conditions. In these terms, the notion of public authorities presents three main features: a) it has a bipartite origin, descending as it does by the different definitions of State and non governmental organization; b) it features an ambivalent function, by serving as a criterion to single out

⁸ ECHR, decisione 18 March 2009, application no. 20153/04, *Unédic v. France*.

⁹ ECommHR, decisione 8 September 1997, application no. 35216/97, *Renfe v. Spain*.

¹⁰ ECHR, Judgement 9 December 1994, applications no. 13092/87, 13984/88, *Santi monasteri v. Greece*.

¹¹ ECHR, Judgement 23 September 2003, application no. 53984/00, *Radio France v. France*.

subjects bound to respect human rights and those entitled to address the Court to declare their violations; c) it is composite-natured, as it brings together functional, normative and organic elements. Therefore, it is not very dissimilar from notions of public administrations spread throughout Europe.

2.2 General principles for the activities of public authorities

After defining what “public authorities” are, the EctHR has set out a number of principles on public activities. The first is the rule of law principle. In this context, the Court has drawn from the provision according to which civil liberties can only be limited in case provided for by the law, four fundamental principles: i) there fall into the notion of law every rule stemming from normative acts producing legal effects, including written law, case-law, bylaws, the EU law, international conventions¹²; ii) accessibility, clarity and foreseeability are to be ensured as basic characters of the law; iii) the rule of law imply the obligation to establish conditions and forms for exercising discretionary activities; iv) the rule of law even imply the obligation upon public authorities to set up appropriate procedural guarantees. In these terms, the rule of law principle implies not so much that public activities must be regulated by legislative provision as that they are subjected to the law; it is assumed within the conceptual framework of a monistic vision of the relations among legal orders; it is considered not only as the matrix of the formal equality principle but also as the source of limitations to public powers; it is built around both the existence and quality of the law.

The second principle is reasonableness and proportionality. In this context, the Court has drawn from the provision according to which the rights enshrined in the ECHR

¹² ECHR, Judgement 26 April 1979, application no. 6538/74, *Sunday Times v. United Kingdom*, ECHR, Judgement 24 April 1990, application no. 11801/85, *Kruslin v. France*, ECHR

are limited only when and to the extent that it is necessary in a democratic society three fundamental consequences: i) public authorities enjoy a margin of appreciation as to how ensuring the effective respect of the rights¹³; ii) the margin of appreciation finds a limit in that public authorities are bound to respect the reasonableness and proportionality; iii) the latter principles imply that constrains onto the rights have to pursue a legitimate aim and strike a fair balance between the general interest of society and the needs of protection of fundamental rights, notably by ensuring that a reasonable relation of proportionality is guaranteed among the means employed and aims pursued¹⁴. In these terms, reasonableness and proportionality are devised as judgemental criteria for balancing competing interests, and are then turned into general principles for public activities; they appear as two parts of a single principle finding application to all decision-making functions, either legislative, executive or judicial. The third principle is non discrimination, which is directly foreseen by the ECHR¹⁵.

¹³ ECHR, Judgement 7 December 1976, application no. 5493/72, *Handyside v. United Kingdom*.

¹⁴ ECHR, Judgement 24 October 1986, application no. 9118/80 *Agosi v. United Kingdom*; ECHR, Judgement 18 January 2001, application no. 25154/94, *Jane Smith v. United Kingdom*.

¹⁵ Art. 14, ECHR.

3. PROCEDURAL GUARANTEES FOR THE PROTECTION OF SUBSTANTIVE RIGHTS

A second group of standards includes procedural guarantees aimed at preventing violations of fundamental substantive rights. These standards are judicially drawn from ECHR provisions which foresee those rights and may find application to all public activities possibly determining constraints upon them.

3.1 Procedural guarantees for the protection of personal rights

With reference to procedures impinging upon personal rights, a first set of guarantees relate to child care. In this context, a few procedural standards are envisaged by specific international conventions¹⁶ and the related implementing acts¹⁷. Nonetheless, the ECtHR has drawn similar standards from the ECHR right to respect of private and family life. Thus, it has stated, since the *B., W. and R case*,¹⁸ that, although Art. 8 of the ECHR does not contain explicit procedural requirements, nonetheless the procedure leading to decisions drawing on the relations between parents and children has: a) to be grounded on

¹⁶ In particular, the 1967 European Convention on adoptions, the 1989 United Nations Convention on the rights of the Child and the 1996 European Convention on the Exercise of Children's Rights.

¹⁷ Committee of Ministers of the Council of Europe, Recommendation R(77)33, *on the placement of children*; Committee of Ministers of the Council of Europe, Recommendation R(98)8, *on children's participation in family and social life*; Committee of Ministers of the Council of Europe, Recommendation Rec (99)23, *on family reunion for refugees and other persons in need of international protection*; Committee of Ministers of the Council of Europe, Recommendation Rec(2005)5, *on the rights of children living in residential institutions*.

¹⁸ ECHR, Judgement 8 July 1987, applications no. 9840/82, 9749/82, 10496/83, *B., W., R. v. Regno unito*.

all relevant elements, non to one-sided, not to be or appear to be biased; b) to be fair and ensure the adequate respect for the competing interests of the parties; c) ensure that the interested parties be enabled to present their views, which are taken in consideration in the decision-making process, and be put in the condition to access an effective remedy. Similar standards have lately been set out by the UNCHR¹⁹ and the UNCRC²⁰.

A second set of guarantees concern expulsion of aliens. In this context, a few procedural standards are expressly envisaged by the ECHR²¹ and have found application in the EctHR case law²² as well as in recommendation by the Committee of Ministers of the Council of Europe²³. In addition to them, more standards are enshrined in the UN Convention against torture, according to which nobody can be expelled or extradited toward a State where there are substantial grounds for believing that he would be in danger of being subjected to torture²⁴. Thus, the Court has drawn similar standard from the ECHR Article 3 prohibition of torture. Therefore, it has stated, since the *Soering* case²⁵, that national authorities are bound to avoid expelling aliens when there substantial grounds for

¹⁹ UNCHR, *General Comment 7* April 1989, no. 17: *Rights of the child (Art. 24)*.

²⁰ UNCRC, *General Comment 20* September 2006, no. 7: *Implementing child rights in early childhood*, ###/Rev.1.

²¹ Art. 1, par. 2, Protocol 7, ECHR.

²² ECHR, Judgement 21 October 1997, application no. 25404/94, *Boujlifa v. Francia*; ECHR, Judgement 18 October 2006, application no. 46410/99, *Üner v. Paesi Bassi*.

²³ Committee of Ministers of the Council of Europe, Recommendation Rec(80)9E, *concerning extradition to states not party to the European Convention on Human Rights*; Committee of Ministers of the Council of Europe, Recommendation Rec(98)13E, *on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights*.

²⁴ Art. 3, United Nation Convention against Torture..

²⁵ ECHR, Judgement 7 July 1989, application no. 14038/88, *Soering*.

believing that he would be in danger of being tortured. Standard of the same type have then been set out by the UN Committee against Torture²⁶ and the UNCHR²⁷.

A third set of guarantees concern medical treatments. Also in this area, a few standards are already envisaged by the 1997 Council of Europe Convention on Human Rights and Biomedicine or laid down in recommendations by institutional organs of international organizations²⁸. Referring to that Convention, the Court drawn similar standards on therapeutic abortion from the right to respect of private and family life. Therefore, it has requested, in the *Tysiak* case²⁹: a) that procedures in this field be set up so as to ensure that any pregnant woman is personally heard on the opportunity to proceed to abortion and that her view is taken into account; b) that the decisions be adequately reasoned; c) that, due to the crucial importance of timing, decision regarding abortion be taken timely, so as to curb and prevent damages to the pregnant woman.

3.2 Procedural guarantees for the protection of civil liberties

With reference to procedures impinging upon civil liberties, a first group of standards concern searches and seizures. In this area, the ECtHR has stated, since the *Niemietz* case but particularly with the *Buck* case, that such procedures ought to be conducted exclusively for relevant and sufficient reasons and comply with proportionality. On this subject, the general legal framework and the single procedures should be examined

²⁶ UN Committee against Torture, *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22*, 21 November 1997.

²⁷ UNCHR, *General comment no. 15*, 11 April 1986.

²⁸ UNESCO, *Universal Declaration on the Human Genome and Human Rights*, 11 November 1997.

²⁹ ECHR, Judgement 20 March 2007, application no. 5410/03, *Tysiak v. Polonia*.

separately. Under the first point, the relevant legislation should afford adequate and effective protection against abuses. Under the second point, any single procedure should be carried out in a way that reduces its impact within reasonable bounds. To this end, competent authorities should keep to the subject matter and the conditions established in the related authorizations, and should take account of many different factors, including seriousness of the violations, relevance of the evidence already taken, consequences on reputation of those affected.

A second group of standards concern regulation and control of dangerous and polluting activities. In this field, the ECtHR has established, particularly with the *Hatton* case, that, with a view to evaluate compliance with the ECHR of decisions having a noticeable impact on the environment, all procedural elements should be taken into account, including the type of policy and the nature of decision to be taken as well as the degree to which those affected are enabled to take part to the decision-making process. More in details, public authorities are called to strike a fair balance among the competing interests involved in the matter, even by carrying out studies and surveys. Moreover, it is mandatory to let the public access the results of such studies and surveys, as well as to any relevant information which might allow those affected to evaluate the dangers to which they are exposed. Furthermore, interested subjects should be put in condition to proceed in court against the acts of public authorities allegedly taken without giving sufficient weight to their allegations.

Standards similar to those aforementioned were subsequently declared applicable by the ECtHR to rule-making procedures, as it was the case for artificial insemination legislation. In this subject, since the *Evans* case the Court has declared that there is no violation of the ECHR right to respect of private and family life where national legislative acts are adopted as a result of procedures in which in-depth studies and inquiries are carried out on the major critical issues, adequate consultations of those interested are undertaken and the opportunity for private individuals to be adequately informed on the

consequences of their choices is guaranteed³⁰. More detailed standards are laid down in recommendations by international organizations. In line with this, the Committee of Ministers of the Council of Europe has set out a group of standards on administrative procedures affecting a large number of persons, of which it analytically identified the scope of application and regulated the issues regarding prior information of the beginning of the procedure, access to public documents, participation of private individuals, adoption of final decision, reasoning and notification of the latter, remedies against violation³¹.

A fourth group of standards regard cases where public administrations is called to certify or to register private status or conditions. In this subject, the Court has stated, in particular since the *Ramazanova* case, that the competent authorities omitting or delaying registering professionals or private entities in public lists or registers represents an interference into the privates' rights, notably the right to association. Consequently, listing and registering procedures must be terminated with a reasonable time provided for by the law. In this subject, unreasonable delays cannot be justified on account of heavy workloads while national authorities are bound to organize their state-registration systems as well as to adopt effective measures so as to ensure that the competent authorities do not step over reasonable delays.

3.3 Procedural guarantees for the protection of property rights

With reference to procedures impinging upon property rights, the ECtHR has set out a number of common principles and has then developed a few standards regarding specific subjects and procedures. The Court has therefore stated, since the *Jokela* case, that

³⁰ ECHR, Judgement 10 April 2007, application no. 6339/05, *Evans v. Regno Unito*.

³¹ Recommendation no. R (87) 16 of the Committee of Ministers to member states on administrative procedures affecting a large number of persons, 17 October 1987.

restrictions upon the right to property are not in themselves contrary to the ECHR, because they are expression of State sovereignty. Nonetheless, whenever discretionary powers are employed, public authorities are called to act fairly. Therefore, decisions imposing restrictions on property rights are illegitimate if taken absent procedures respectful of the equality of arms principle and enabling the parties to express their observations. Moreover, only those restrictions may be imposed which are provided for by the law and are strictly necessary and where no alternative means would be at hands to attain the same result producing the least possible impact on personal conditions of those affected. Similar standards have been set out regarding seizures, confiscation and forced transferal of goods.

Regarding urban planning and landscape protection, the ECtHR has affirmed, since the *Sporrong e Lönnroth* case, that, in such complex fields as development of big cities, State parties enjoy a wide margin of appreciation in implementing their urban planning policies. Nonetheless, a fair balance must be struck between the needs of general interest and the protection of fundamental rights. In particular, with regard to restrictions on the right to enjoy one's own possessions, especially when pre-ordinated to expropriations, public authorities hold the interest to expropriate private estates with a view to implementing urban plans. Nonetheless, there should not be excluded that the public interests pursued by public authorities and those of private parties are re-examined at regular intervals during the period of validity of the issue³². Standards similar to those aforementioned have been set out in the context of rescissions on contracts and fiscal confiscations³³.

Regarding State pre-emption right of works of art, the Court has stated, especially in the *Beyeler* case, that control over the transfer of works of art pursues a legitimate public

³² *A contrario*, ECHR, Judgement 25 October 1989, application no. 10842/84, *Allan Jacobsson v. Svezia (no. 1)*.

³³ ECHR, Judgement 23 February 1995, application no. 15375/89, *Gasus Dossier- und Fördertechnik GmbH v. Paesi Bassi*.

interest, notably the need to protect the artistic and cultural heritage. In particular, even in the light of the 1970 Unesco Convention, public authorities are allowed to adopt measures aimed at facilitating in the most efficient way wide access of the public to the works of arts, that in the general interest to universal culture. Therefore, they are allowed to require prior communication of the intention to sell works of art and to ask for further information as to the purchaser's identity and nationality. Nonetheless, the right to pre-emption is exercised upon the conditions provided for by the law and within a reasonable time, without prolonging beyond what is necessary the status of uncertainty of the parties as to the power to enjoy and transfer one's property³⁴.

Concerning exercise of private economic activities, the Court has stated, since the *Fredin* case, that public authorities are allowed to revoke or re-examine licenses, concessions or claims previously issued provided that related procedures are conducted in good faith, taking into account the legitimate expectations of those interested³⁵. Thereafter, it has specified, in the *Capital Bank* case, that competent authorities have the power, in case of crisis, to revoke licenses to exercise banking or financial activities with a view to preventing serious damages to banks, depositors and other creditors, or to the whole banking and financial system. Except for in cases of overarching urgency, public authorities are called to guarantee a minimum degree of procedural safeguards in favor of those interested. Moreover, should alternative options be available, public authorities should give precedence to solutions impinging to the least extent on private rights and conferring upon those interested to adequately participate to the decision-making procedure³⁶.

³⁴ ECHR, Judgement 5 January 2000, application no. 43509/08, *Beyeler v. Italia*; ECHR, Judgement 28 June 2011, application no. 28979/07, *Ruspoli Morenes v. Spagna*.

³⁵ ECHR, Judgement 18 February 1991, application no. 12033/86, *Fredin v. Svezia*; ECHR, Judgement 29 November 1991, application no. 12742/87, *Pine Valley Developments Ltd e altri v. Irlanda*.

³⁶ ECHR, Judgement 24 November 2005, application no. 49429/99, *Capital Bank AG v. Bulgaria*.

With reference to bankruptcy or special procedures, instead, the Court has affirmed, in particular in the late *Družstevní Záložna Pria* case, that private companies under bankruptcy procedure must be given access to any relevant documents, including business and accountancy documents. Nonetheless, the right to access is not absolute; however, any limitation should not jeopardize the essence of the right. This is particularly the case where access is consented by a employee of a regulatory authority. In these cases, the executive branch of the State might put at risk the result of a judicial recourse simply by denying access to absolutely necessary documents detained by them. Deny of access must therefore be subject to judicial scrutiny by an independent tribunal³⁷. Lastly, the Court has stated, e.g. in the *Bruncrona* case, that public authorities may one-sidedly interrupt or revoke financial contributions, provided that those interested receive communication of the start of the procedure and are admitted to present their views³⁸.

3.4 General features

In the light of the aforementioned, standards on administrative procedures imposing limitations on ECHR substantial rights display two main features. In the first place, these standards are structurally oriented to ensuring the concrete fulfillment of those rights. This means, on the one hand, that they result in mainly a protection-oriented guarantees (even if non always defensive-oriented); on the other hand, that substantial rights get enriched with a procedural component. In the second place, standards feature variable width and intensity depending on the relevance of the human rights impinged upon as well as of seriousness of the impingement. This means the public activities impinging most seriously upon relevant rights are, normally, subject to a higher level of

³⁷ ECHR, Judgement 31 July 2008, application no. 72034/01, *Družstevní Záložna Pria e altri v. Repubblica ceca*.

³⁸ ECHR, Judgement 16 November 2004, application no. 41673/98, *Bruncrona v. Finlandia*.

proceduralization, with two consequences. On the one side, procedural guarantees are likely to be generally applied to all procedures imposing limitations on substantial rights; on the other side, those guarantees appear concretely suitable to enhance the level of proceduralization of public activities aiming at a higher protection of human rights.

4. THE RIGHT TO FAIR ADJUDICATORY ADMINISTRATIVE PROCEDURE

A second group of standards include a set of guarantees descending from an authentic procedural right, the ECHR right to a fair trial. As a matter of fact, according to the ECHR, «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»³⁹. In general terms, the provision at stake was laid down with specific reference to judicial proceedings, either civil, criminal or administrative. The Court has, nonetheless, admitted that the latter find application, more generally, to every procedures aiming at adjudicating disputes, including, under certain conditions, administrative procedures. In this light, procedures falling into the area of application of these standards can be conventionally named adjudicatory procedures. These standards are, therefore, functionally different from the aforementioned procedures imposing restrictions upon substantive human rights.

³⁹ Art. 6, par. 1, ECHR.

4.1 Is the right to a fair trial applicable to administrative procedures?

As just seen, the Court has admitted that standards deriving from the right to a fair trial may be applicable, beyond judicial proceedings, to all procedures aimed at adjudicating disputes, including, under certain conditions, administrative procedures. To this end, the Court has elaborated the following criterion: i) when an administrative decision adjudicating a dispute is subject to a following judicial control fully compliant with the right to a fair trial, then it is not necessary that the administrative procedure leading to that decision be fully compliant with the same right; ii) conversely, when such a decision is not subject to any subsequent judicial control or the latter is not fully compliant with the right to a fair trial, then it is necessary that at least the administrative procedure leading to the decision be fully compliant with that right.

Following to the application of this criterion, the standards deriving from the right to a fair trial may find application to administrative procedures suitable to adjudicate disputes, that is to say to adjudicatory administrative procedures. Yet, these procedures are to comply with the right to a fair trial only where the final decisions are not subject to a subsequent judicial control, or the latter is not fully compliant with those standards. This implies that adjudicatory administrative procedures could *in abstracto* be subject to *every single* standard deriving from the right to a fair trial (provided that they appear to be fit to case at stake). In judging single disputes arisen before it, yet, the Court has in time set out a few particular standard, regarding certain adjudicatory administrative procedures. In order to find out what the standards covering administrative procedures are, it is therefore necessary, at first step, to outline the scope of application and the prescriptive contents of the standards as *in abstracto* applicable to all adjudicatory administrative procedure; at second step, to take into account more analytically standards set out *in concreto* with reference to particular procedures.

4.2 Standards applicable in abstracto to administrative procedures

With reference to standards finding *in abstracto* application to adjudicatory administrative procedures, it is necessary to distinguish applicability requirements from their prescriptive contents. As to the first, the Court has adopted a particular interpretation of the sentence according to which any *dispute* (which, in the Court's view, must be *genuine* and of a *serious nature*) drawing on civil rights and obligation or on a criminal charge must be *determined*. To establish if the right to a fair trial covers a particular administrative procedure it is therefore necessary to ascertain a) whether there is a dispute; b) whether the dispute is genuine and of a serious nature and draws on private expectations recognized as relevant within the national legal order; c) whether those private expectations qualify as civil rights or criminal charges.

As to the second point, the Court has adopted a particular interpretation of the sentence according to which everyone is entitled to a fair and public trial within a reasonable time by an independent and impartial tribunal established by the law. In order to establish whether a procedure is compliant with the right to a fair trial, it is necessary to verify: a) if there exist a decision into the merit of a dispute; b) if those affected has the right to have that dispute determined by such a decision; c) if there exists a tribunal endowed with sufficient decisional power, including the power to find a violation, to redress the victim, to guarantee the effective execution of the final decision; d) if the tribunal is effectively independent, impartial and provided for by the law; e) if those affected have effective access to the procedure, f) if the procedure is fair and public and come to conclusion within a reasonable time.

4.3 Standards purposely tailored on administrative procedures

Turning to the standards purposely tailored on adjudicatory administrative procedures, the scope of application and the prescriptive contents are to be examined separately. As to the scope of application, the Court has subjected to the right to a fair trial standards at least three types of administrative procedures: i) sanction and disciplinary

procedures; ii) appeal procedures and those following to a request for examination; iii) a set of variously-natured procedures leading to licenses, authorizations, apportionment of funds, approval of urban plans and so on, as it has been, e.g., for those aimed at approving of real-estate agreements⁴⁰, licensing economic activities (including games⁴¹), paying social security allowances (including pensions benefits⁴², and social housing⁴³), approving urban plans⁴⁴, imposing bans on buildings prior to expropriation⁴⁵, approving farmer's consolidation plans⁴⁶, issuing binding opinions (e.g. on the possibility to dismiss disabled workers⁴⁷).

After delimiting the scope of application, the Court has set out a few standards specifically concerning adjudicatory procedures. At least three different groups of standards may be found. As to the powers and the internal organization of the decisional body, the Court has laid down three main principles. Firstly, decisions adopted at the end of adjudicatory procedures must be definitive and binding (unless they are subsequently

⁴⁰ ECHR, Judgement 16 July 1971, application no. 2614/65, *Ringeisen v. Austria*; ECHR, Judgement 22 October 1984, application no. 8790/79, *Sramek v. Austria*; ECHR, Judgement 3 October 2000, application no. 29477/95, *Eisenstecken v. Austria*.

⁴¹ ECHR, Judgement 7 November 2000, application no. 35605/97, *Kingsley v. Regno Unito*.

⁴² ECHR, Judgement 21 July 2005, application no. 52367/99, *Mihailov v. Bulgaria*.

⁴³ ECHR, Judgement 14 November 2006, application no. 60860/00, *Tsfayo v. Regno unito*.

⁴⁴ ECHR, Judgement 25 November 1994, application no. 12884/87, *Ortenberg v. Austria*.

⁴⁵ ECHR, Judgement 27 October 1987, application no. 10930/84, *Bodén v. Svezia*.

⁴⁶ ECHR, Judgement 23 April 1987, application no. 9816/82, *Poiss v. Austria*; ECHR, Judgement 23 April 1987, application no. 9273/81, *Ettl e altri v. Austria*; ECHR, Judgement 23 April 1987, application no. 9616/81, *Erkner e Hofauer v. Austria*.

⁴⁷ ECHR, Judgement 28 June 1990, application no. 11761/85, *Obermeier v. Austria*.

subject to judicial control). On the subject, the Court has stated, since the *Van de Hurk* case, that it is inherent to the notion of tribunal the power to adopt decisions binding upon the parties and not subject to revocation or amendment on the part of other non-judicial authorities in prejudice to one of the parties; this power being conceived of as a fundamental consequence of the principle of independence.

Moreover, decisional bodies must afford sufficient guarantees of independence in respect to political institutions and of impartiality in respect to public authorities when they are parties to the dispute. On the subject, the Court has specified, particularly in the *Bentham* case, that, for the right to a fair trial to be fully complied with, it is necessary not only that the decisional body have the power to adopt a final decision in the merits of the dispute, but also that it presents some common fundamental features, the most important of which are independence and impartiality as well as the existence of the guarantees of the judicial proceedings. Finally, there must be afforded sufficient guarantees that the components of the decisional bodies are organically and functionally separated from the public administrations when parties to the dispute. The Court has, therefore, declared, starting from the *Ringeisen* case, that it is not of central importance the fact that those taking part to decisional bodies are subordinated to public authorities, in terms of their duties and the organisation of their service. Yet it has specified, in particular after the *Sramek* case, referring to the “theory of appearances”, that, when the public administrations the employee of which takes part to the decisional body, the other parties may legitimately doubt on the independence of the decisional body itself.

Furthermore, concerning the structure of adjudicatory administrative procedures, the Court has found, in the *Dubus* case, that an adequate separation must be ensured, in the context of sanction and disciplinary procedures, between the preparatory phase and the decision phase; in the *Messier* case, that full respect must be given to the principles of adversarial proceedings and equality of arms; in the *Diennet* case, that adequate publicity of the hearings must be guaranteed in disciplinary proceedings. Lastly, regarding the conclusion of the procedures, the Court requested, especially in the *Geouffre de la Pradelle* case, that, once adopted, administrative decisions must be notified to those affected and communicated to the public at large, while adjudicatory procedures must be closed within a

reasonable time. More specific standards on sanction proceedings have then been laid down in the Council of Europe Recommendation on administrative sanctions⁴⁸.

5. DOES A ECHR REGIME OF ADMINISTRATIVE PROCEDURES EXIST?

As anticipated at the outset, the hypothesis of this study is that the standards here examined would give rise to an authentic ECHR regime of administrative procedures, as part of a wider international human rights regime. The ECHR regime would not be dissimilar from analogous general regimes enshrined into national or ultranational legal frameworks, to which it would be integrated from above, thus strengthening the substantially constitutional nature.

5.1 Structural features

The ECHR regime on administrative procedures display five main features. In the first place, that regime originally grounded on codification of human rights into the ECHR, has subsequently developed especially by its judicial application, only to end up by finding a definitive consolidation into recommendations of institutional organs of the Council of

⁴⁸ Principles 6, Committee of Ministers of the Council of Europe, *Recommendation No. R (91) 1 to member states on administrative sanctions*, cit.,

Europe. Far from remaining limited to the bare ECHR provisions, it went further developing along three main lines. Thus the Court has expanded its scope of application; has specified its prescriptive contents, e.g. by pointing out the meaning of such expressions as “independent and impartial tribunal”; has intensified the standards binding force, either by tightening the proportionality principle, stiffening particular requirements or procedural terms, widening the group of procedural obligations set on public authorities. Nor did these developments take place in a historical-cultural vacuum, the Court being placed under the influence of different European legal traditions.

As a result of these complex origins, the ECHR regime appears to be broken up into a noticeably high number of legal sources and to bring together a set of different normative provisions; thus rendering a fragmented and uncertain image of itself, descending from the irregular combination of heterogeneous, sometimes overlapping, legal materials. Despite being internally fragmented and diversified, the ECHR regime assumes, nonetheless, a unitary and coherent shape along with a general scope of application. In more detailed terms, on the one side, the regime appears to be made out of a complex of standards scientifically sortable and amenable to a systematic and harmonious normative body. On the other side, the ECHR regime is potentially applicable, though with varying means and intensity, to all administrative procedures falling within the ECHR scope of application.

Moreover, the ECHR regime features a neutral and functional character and assumes the nature of a “system”. Under the first point, in fact, it appears to bring together a set of basic normative elements, defined on the basis of the functions which they are built up for, not depending upon their specific qualification within the national legal orders: along this path, the Court has elaborated its own notion of dispute, decision, independent and impartial tribunal, procedure and so on. Under the second point, after laying down those normative elements, the Court has established a few invariable relations among them and has inserted specific rules on those elements and reciprocal relations. In this way, the ECHR regime gives birth to an authentic “procedural system”, that is to say an autonomous and organic group of normative relations among basic elements which are intelligible in their complex and let it to be conceived of as a regime.

Lastly, the ECHR regime on administrative procedures tributes central importance to proceedings and procedure. On the one hand, it goes as far as to identify the procedure as the general way of action of public authorities. By establishing procedural obligations, in fact, the Court can more easily be sure that national authorities will adopt decisions better compliant with human rights, meanwhile avoiding to set out more complicated standards. On the other hand, the regime identifies ever more clearly the proceedings as the general model to which the entire adjudicatory activity, either judicial or administrative, should stick to. Proceduralization of public activities brings about a significant systemic impact: it helps overcome the traditional distinction between administrative procedure and proceedings.

5.2 Pivotal principles

The first pivotal principle of the ECHR regime is participation. Participation represents, in fact, the *raison d'être* of most procedural standards, especially for those descending from ECHR substantial rights. Participation is ensured in the ECtHR case-law by means of a set of instruments, notably i) by informing those interested of the beginning of the procedure; ii) by allowing them to access all relevant documents; iii) by allowing them to present written observations; iv) by allowing them to be personally heard; v) by notifying of the final decision. In these terms, participation assumes a defense function in adjudicatory procedures as well as in some restrictive procedures and a cooperation function in other restrictive procedures. Lastly, participation may have different dimensions depending on the role assumed case by case by the two crucial principles of adversarial proceedings and equality of arms.

The second pivotal principle is equidistance of the decisional body. Equidistance is ensured by a set of principles, notably i) the “provided for by the law” principles, which brings together standards regarding the powers and the scope of actions of decisional bodies; ii) independence, which brings together standards on institutional and organizational relations among decisional bodies and the relations among the latter and

other authorities involved in the decision-making process; iii) impartiality, which groups up standards concerning personal conditions of the members of the decisional bodies and the relations among the latter and private parties. Equidistance is functional to ensure that the decisional body is unbiased in respect of the parties as well as to guarantee the most attainable degree of properness and balance in the decision.

The third pivotal principle is transparency of public authorities' activity. Transparency is ensured through a set of standards, providing for: i) decisions to be adequately reasoned; ii) decisions to be delivered in public or published; iii) hearings to be kept openly; iv) access to administrative documents; v) publicly relevant documents to be published or widely accessible by the general public. Also transparency is functional to different ends, including enhancing the opportunity for the public to take part to the decision-making procedure and exerting control over public activities. Thus, transparency allows for human rights protection in two ways: directly, by letting those interested to effectively and actively participate; indirectly, supporting the consolidation of democratic institutions and culture, counting among the essential conditions for concretely protecting human rights.

The fourth pivotal principle is effectiveness of public activities. Effectiveness finds acknowledgment in four places: as to the first, everyone has the right to an effective remedy against human rights violations; as to the second, the right to a fair trial includes the right to have a dispute effectively determined; as to the third, the principle of proportionality demands for decisions imposing restrictions upon rights to be effectively able to attain the aims pursued; as to the fourth, restrictions upon human rights cannot go so far as to deprive rights holders of the effective enjoyment of those rights. As it is for transparency, also effectiveness is a widespread principle permeating the overall ECHR regime. In these terms, transparency is made out of two distinct cores apparently in conflict among themselves. On the one hand, it can be seen as a general criterion for conducting public activities, and is approximately substantiated in the efficacy and efficiency of public action; on the other hand it represents the threshold beyond which procedural rights cannot be restricted, and is substantiated in the hardcore of procedural guarantees of private parties.

5.3 Open issues and further perspectives

Once examined the main features of the ECHR regime on administrative procedures, let us isolate a few open issues and figure out possible future outcomes. A first issue draws on the degree of proceduralization of public activities and on the relations between the latter and processualization. On the one hand, despite the ultra-national regime's scope of application being general, standards drawn from the ECHR substantial rights have insofar been applied to a relatively limited number of procedures. This has, therefore, implied a lack in proceduralization of non adjudicatory public activities. On the other hand, instead, despite standards on adjudicatory procedures being envisaged for activities aimed at solving disputes, they have sometimes been applied to common public activities, like license and authorization procedures. This has, on its part, purported an excess in processualization of essentially non adjudicatory public activities. Then, two problematic issues arise. Firstly, the lack of proceduralization of non adjudicatory activities risks to jeopardize the internal coherence of the ECHR regime and favor an undue expansion of the right to a fair trial. Secondly, the excess of processualization risks to overly burden non adjudicatory procedures and to "put under pressure" the very notion of adjudicatory procedures.

A second issue deals with the necessity to balance procedural rights expansion with public action effectiveness. In the general terms, while entailing significant benefits, the expansion of procedural rights risks limiting or jeopardizing public action effectiveness, particularly by delaying the decision-making processes. How is it possible, then, to join procedural rights and effectiveness? The Court followed two separated but partially overlapping paths while imposing a barrage. Along the first path, it has allowed for procedural rights to be subject to such restrictions as are necessary to ensure public action effectiveness; but at the same time it has admitted those restrictions to the extent strictly necessary to attain effectiveness while ensuring respect of the essential core of those rights. Along the second path, instead, it has acknowledged an authentic "right to public action effectiveness"; but at the same time it has admitted for this right to be subject to such restrictions as are necessary to ensure procedural rights of the parties and others. To sum up: on effectiveness grounds procedural guarantees may sometimes be reduced but only so

far as to protect the essential core of the rights, beyond which improving public action effectiveness becomes mandatory.

A third issues regards the need for combining the unity of the ECHR regime and the differentiation internal to national regimes on administrative procedures. In other words, how to confer unity to the ECHR regime in the framework of a noticeable variety of national laws? And how to preserve diversity of national laws while giving concrete application to a sole ultra-national regime? In this context as well, the Court has followed two paths. Along the first path, it has explicated only a relatively low number of standards, most of which widely known in national legal orders; it has elaborated those standards in neutral terms, detached from the theoretical assumptions adopted by the States; it has, at the same time, conferred upon those standards an essentially functional character. Along the second path, instead, the Court has graduated the State margin of appreciation in relation to the degree of divergence of the single legal orders; it has, then, newly legally qualified national actions in the light to ultra-national autonomous notions while leaving untouched, to the possible extent, national dogmatic assumptions; lastly, it has often had care to limit the effects of its own judgments only to those States directly affected, so as to avoid normative spill-over effects onto other legal orders.

Having regard to the perspectives for further developments of the ECHR regime on administrative procedures, a first point in connected to the legal relevance assumed by the Convention in national and the EU legal order. Despite formally descending from purely international legal sources, it could be argued that the ECHR regime has substantially come to gain a constitutional relevance as well. As a matter of fact, a few indicators lead to this conclusion. Firstly, the ECHR regime derives from acknowledgement of human rights, which, as universally known, are typical “constitutional matter”. Moreover, standards similar to those set out by the EctHR have insofar found recognition in the case law of judicial authorities of several States, which thus contribute to feed up the number of “constitutional traditions” of the Member States. Furthermore, in most national legal orders, the ECHR regime ranks among the constitutional or sub-constitutional sources of law, thus entailing a conformative effect over primary legislation. Once indirectly acknowledged in the UE legal order, then, the standards slowly pour into the national legal

order, prevailing, under the conditions provided for in each constitution, over conflicting national legal provisions.

From the substantial constitutional relevance of the ECHR regime two main consequences may be drawn. As to the first, the ECHR regime should, as somewhere it does, go as far as to qualify as the general interposed criterion referring to which to ascertain the constitutional legitimacy of legislative (and administrative) action. From what just said a valid and original answer could be found to the long-lasting discussion around the constitutional relevance of the due process principle as applicable to administrative procedures. As to the second, still in conjunction to what just mentioned, the very national regimes on administrative procedures appearing to be compliant with the ECHR regime could, in turn, benefit from a sort of constitutionalizing effect, so as to render them more resistant to abrogation or avoidance by following provisions of primary legislation.

A second point concerns the capacity of the ECHR regime on administrative procedures to filter into the national and the EU legal orders. In general terms, the regime tends, in the short run, to recede *vis à vis* national and European regimes on administrative procedures, mainly on account of national judges to abide by legal directives coming from less legitimated international bodies. Yet in the long run it tends to prevail – notably due to the overarching needs to avoid pecuniary sanctions and as a consequence of the direct effects of the EU law often adopting the ECHR standards – entailing progressive adjustments of national and the EU regimes. As a result, national legislations are admitted to temporarily diverge from the ECHR regime, but the divergences is in time absorbed (normally following to the alignment of the national regime, sometimes to the withdrawal of the ECHR regime). This state of fact gives way to a particular form of primacy of the ECHR regime in respect to national and the EU legislation, which displays some specific peculiarities. There remains, then, to ask oneself whether it might not be already made out, through the imperfect composition of the ultra-national standards on human rights, the structure of a newly born European and universal regime on administrative procedures.