

The Influence of European Court of Human Rights' Jurisprudence on Public Administration Governance Processes

Abstract

In the modern world of globalisation and integration the question arises as to whether the legal processes (namely law application processes) that occur at the international level may affect the unification of processes and decisions undertaken at the national level by the state authorities. This article is an attempt to answer the question about the potential impact of the jurisprudence of the European Court of Human Rights (ECHR) on public administration discretionary powers in governance processes.

There are at least three important aspects of this phenomenon that correspond with the main questions of the paper. The first one (1) whether the ECHR system is efficient enough to prevent the infringement of human rights at the national level, especially when we consider discretion of public administration bodies. The second one (2) how the jurisprudence of the ECHR may affect said discretion. The last question is the consequence of standards of protection of human rights that are introduced by the ECHR and which are binding on the countries that have signed the Convention of Human Right Protection. That is why it is worth analysing how a supranational court (like the ECHR) can influence the national decision making processes and at the same time whether we can observe unification of those processes in different states. In this context the question is (3) - whether the ECHR can be seen as an institution of global governance and if its jurisprudence does not breach the principle of separation of powers at the national level.

1. Introduction

In the modern world there are newer tasks presented to public administration in governance processes in the state or in specific areas of social life, that are meant to meet the individual and collective needs of its citizens. In order to make the implementation of these tasks possible the legislature grants public authorities a certain range of discretion. At the same time the scope of this discretion can be influenced by a variety of factors of a diverse nature - legal, economic, social, political, etc. Legal factors include national and international legislation and the practical application of law - earlier legal decisions like court rulings or decisions of public administration. These decisions can more or less directly affect the scope and manner of use of the discretionary powers of the administration.

At the same time the influence of extra legal factors on public administration may lead to a decision that violates human rights. Different states introduce in their legal systems specific mechanisms that should prevent this kind of situation. Of course those mechanisms are not always efficient enough to counteract the aforementioned infringements. Therefore there is a functioning international human rights protection system part of which is the system of the Council of Europe in which an important role is being played by the European Court of Human Rights (ECHR). It is worth emphasising whether the jurisdiction of the ECHR can successfully prevent the violation of human rights, especially when we consider decisions undertaken in the scope of discretion.

At the same time, it is worth considering how, in the world of globalisation and integration, decisions of public administration bodies taken within their scope of discretionary powers can be subject to the influence of judgments by international courts (namely the ECHR as an example of a court whose jurisdiction is mandatory for all countries that signed the European Convention of Human Rights). It is worth considering how the processes of application of law (court rulings) at the international level may affect the decisions taken at the national level, not just for individual cases, which have been the subject of adjudication but primarily on the governance processes in the state.

At this point, one can suppose that the case law of the ECHR may have a significant effect on the management processes in the country, becoming an instrument of global governance, unifying the scope and content of decisions and actions taken in each state. At the same time one can formulate another hypothesis that such interactions can violate the principle of separation of powers in the state.

2. Public Administration Activities and its Discretionary Power

Public administration activities can be divided into two groups that correspond with the goals of the administration and the scope of its discretionary power. On the one hand there is a "simple" performance of its duties resulting from binding specific legal provisions or imposed (in the limits set by general legal provisions) by the government. This is the case when the tasks of the public administration body are determined in an unequivocal and categorical way and the public authority has no other option of "behaviour" but to fulfil it. These obligations play an important role in the public administrations activity but they do not exhaust the whole range of its functions.

On the other hand there are actions of public administration that can be seen as independent and creative activity undertaken, within the law, to implement

broadly defined state (social) objectives such as, generally speaking, ensuring public order and safety or providing adequate support to citizens; in other words, the implementation of widely understood activities in favour of the public interest. In this sense administrative authorities are fulfilling, generally defined by the law (and within the framework of the law), duties of governance in the state in different areas of social life to the point where a conflict with the public interest occur (and within the limited financial resources).

In those situations, carrying out the affairs of state and seeking to meet the needs of citizens (governance processes), public administration bodies, in the framework of general goals, will need to determine the optimal way of fulfilling them as to the form and method of their implementation. The accomplishment of those goals can include issuing a single decision to a citizen, releasing several decisions of similar content in similar factual circumstances, passing a legal act, or undertaking other imperative or non-imperious actions.

In order to realise governance tasks and to ensure that the activities of public administration take into account the dynamics and specifics of a rapidly changing world and society, public authorities are equipped by the lawmaker with a certain range of freedom - discretionary power. Public administration discretionary power is defined in various ways and its different aspects are highlighted. In my opinion, however, the most scientifically useful aspect is its *sensu largis- simo* understanding as a certain range of freedoms of a decisional body that can be identified at every stage of the decision making process (see Galligan, 1986, pp. 46-74; Treves 1947, pp. 276-291).

Such understanding of discretionary power may concern the freedom to choose between action and inaction, between forms and methods of action, ways of collecting the information needed to undertake a decision, freedom of interpretation of the law, or the possibility to choose among potential contents of the final decision, the one that in the intentions of decisional body should fully realise its goals. For example, during the phase of determination of the facts of the case it can be seen as the freedom to determine which facts are subject to its reasoning, how they are going to be determined and, of course, freedom of assessment of the facts of the case. Discretionary power during the phase of validation and interpretation can be seen as the freedom to choose the source of legal norms (from the sources accepted in specific legal order) and its interpretation in order to recessive the normative basis of the decision in the specific case.

Discretionary power of public administration is particularly apparent in two stages of the decision making processes - the initial stage and the final one. In the former, it can be seen as the possibility of deciding to take or not to take any

action and the correct selection of legally acceptable forms of this action. In the so-called pre-decisional phase, the authorities shall undertake reasoning to answer the question about the possibility and/or the need to initiate a process leading to changes in the social reality. In the latter one, discretionary power is particularly noticeable when the lawmaker introduces to the law the construct of administrative approval, which generally speaking grants decisional body with the possibility to choose from at least two legally permissible contents of the final decision the one that in its opinion is the right (optimal) one in the specific case (see Jaśkowska, 2010, pp. 292-298).

At the same time in decision making processes one can find also other sources of said discretion that are not the outcome of conscientious legislator's actions (such as imperfections of the legal language, the social context of the law, etc.) (see Leszczyński, 2001,54). All of this together creates a sphere in which the administration possesses a certain level of freedom in the scope of argumentation and the content of issued decisions.

One needs to remember that public authorities can be affected by a number of factors - legal, organisational, political, and social - and the decision making process may be influenced by many different and sometimes conflicting interests. A variety of factors both within legal norms and outside the scope of the law influence the decisions made by public administrations.

The larger the scope of the discretionary power wielded by the public administration, the bigger the impact of non-legal (extra-legal) factors on the entire decision making process and the shape of the final decisions. At the same time, it should be remembered that the administration is a type of organisation with specific goals that is responsible for their implementation. Its authorities are not independent and function within complex organisational and political structures. *Ipsa facto*, the particular characteristics of the administration are the reasons for its being interested in the content of the decisions it makes. This can lead to situations in which the legitimacy of an act may be "sacrificed" due to other criteria such as thrift or the need to act in accordance with political objectives.

3. Judicial Review of Public Administration and Protection of Human Rights

In order to counteract law infringements by the public administration, modern democratic states implement a number of solutions in their legal systems that protect the individual from arbitrary, unwarranted, or illegal decisions made by the administrative authority that violates human rights. An essential and necessary

element of control by public authorities in the states providing for the principle of rule of law is the control exercised by independent courts.

The judicial oversight of the legality of decisions made within the scope of the discretion is not just restricted to a declaration of compliance or inconsistency with the content of norms enclosed within the legal provisions of material and procedural law, but it is also confronted with the axiology of a given branch of the law, the entire legal system, or even the legal order. The "legality of the goal" criterion assumes that the action of an administrative authority must not only be in accordance with the text of the legal provision but also with the purpose for which it was established (see Jakimowicz, 2010, 52). In this sense, incompatibility with this goal can be assessed as an action in violation of existing norms. In French doctrine this is found to be a part of "public administration morality" (*détournement de pouvoir*).

Thus the question is in what manner and how "deeply" and "broadly" may the judicial decision influence the scope and manner of implementation of the discretionary power of the administration. One might say that taking into account the separation of powers principle jurisprudence should not interfere directly with the content of public administration actions especially in the situation when legal norm grants the body with a certain range of discretion. In those situations the court should rather verify whether administrative authorities acted within the scope of legally permissible forms with the use of legally acceptable methods and whether the process of interpretation of law was carried out in a proper way. As well as whether the content of the final decision does not violate legal norms. However as it was mentioned legality and especially the legality of the issued decision must be understood widely. But sometimes it can be seen as a justification for a court to interfere in the governance processes, which can eventually lead to the violation of separation of power principle.

At the same time it is worth emphasising that jurisprudence can affect the discretionary power of public administration in various ways. Besides the direct impact in a situation of verification of a specific actions or decisions there can also be seen other aspects of a court ruling that can be recognised as an example of indirect impact. It can be seen especially in the situation when there is a fixed line of judgements in certain kind of cases. In this sense jurisprudence can influence the reasoning of a decisional body even in governance processes for the pragmatic reasons - administrative body will probably prefer to issue a decision in accordance to previous judgements than accept the consequences of constant repeal of its decisions.

Therefore we can see that the courts that oversee the legality of public administration actions, in a direct or indirect manner, influence the scope of the administrations' discretion in the decision making process, restricting it on the one hand and directing it on the other.

The effective system of national control over public administration, especially over decisions undertaken within the scope of discretion, should prevent aforementioned violations. However in reality many different situations appear in which such breaches happen anyway. As we consider the decisional processes at the national level and the relationship between public administrative bodies and the judiciary, at least three possible situations may occur.

In the first situation, the administrative authorities violate human rights and the court recognises and prevents it. In this situation comes the elimination of the decision from the legal system or its correction (in terms of how competent the courts are in respect to such decisions), because of its incompatibility with human rights.

In the second situation, the administrative decision breaches the rights of its addressee and the court, for various reasons, does not prevent it. In this case, there is a breach of human rights and the national authorities responsible for the review of decisions didn't oppose it and a faulty (as in it does not comply with law and human rights) legal decision or action remains in force and has certain legal effects.

In the third situation, the administrative body acts in respect to human rights but the court changes the content of the decision in a way that violates those rights. This is perhaps the worst possible situation, as it means the lack of proper preparation of the court (regardless of the reasons and motives for the court to change the decision) and probably in the most severe way infringes on the principles of legal certainty and the confidence of citizens in the state.

The effect of the second and third situation is a legal decision that violates human rights that can be a subject of control of the ECHR. For the state authorities and courts of the countries that have signed the European Convention of Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms and its additional protocols) the jurisdiction of ECHR is obligatory.

Therefore the question arises whether the supranational system of human rights protection (namely Council of Europe system) can efficiently control decisions and actions of public administration bodies (even those connected with governance processes) and whether the system is sufficient to protect people from arbitrary decisions made by public administration. While trying to answer this question, it is necessary to look at the human rights protection system from two different perspectives: procedural and material.

The first perspective concerns the problem whether the procedure before the ECHR makes it possible to verify decisions of state authorities, especially those undertaken in the scope of discretionary power. Often it can be difficult because the true motivations and reasoning of public administration bodies can be hidden under a well prepared justification of a decision.

However, the contradictory procedure before the ECHR allows each side to present its statement - first in the written version and then oral arguments. It allows individuals to point out to the ECHR issues that were, in their opinion, subject to violation. At the same time the ECHR establishes the facts of the case and tries to answer the question of whether a human rights violation actually took place. The lack of procedural restrictions in this regard in conjunction with the contradictory process provides an opportunity to determine whether the decision of public authorities, even if taken within discretionary powers, have breached human rights.

The second perspective, the material one, is concentrated on the scope of the activity of the ECHR - the scope of its control. One needs to remember that the European Convention of Human Rights introduces general rules that are then developed into detailed and specified by the judicial activity of the ECHR. The ECHR's jurisprudence permanently raises the standards of human rights' protection, which allows it to keep pace with the rapidly changing world and dynamics of social life. In this context we can say that because of the judicial standards of the ECHR the system is effective enough and can prevent further violations even in the situation of decisions made in the scope of discretion of public administration.

4. Influence of the ECHR's Jurisprudence on Public Administration Discretion

The issue of judicial review over the activity of the administration has acquired additional meaning in a globalised world with enhanced legal and social integration. In this context the impact of supranational human rights protection systems on decisions taken at the national level is an important issue. The question is to what extent does the system of human rights' protection within the Council of Europe affect decision making processes of public administration bodies in the governance processes.

It should be pointed out that the subject of ECHR jurisdiction are cases where a violation of human rights has already occurred and the judgement of the ECHR can only compensate the injured individual grievances or his or her losses. At the same time, however, the decisions of the ECHR have to also prevent human rights' violations in the future, thereby accomplishing a preventive function. The

consequences of the judgements of the ECHR may consist of a change of the legal provisions in national law or changes in the decision making practice (judgment of the ECHR of 6.11.2007, Bugajny and others v. Poland 22531/05). »

While analysing potential impact of judgements of the ECHR on governance processes in the state, we should pay attention to the way in which judgments of the ECHR may influence the public authority actions, the levels of said impact and types of reasoning of the decision maker that are being affected the most.

The case law of the ECHR influences the functioning of public administration and thus the governance processes either directly or indirectly (see Andenas & Bjorge, 2013, pp. 225-234). The direct impact is visible with regard to the specific case (decision passed by an administrative body) that have become the subject of the ECHR ruling and other cases of a similar type (decisions passed by other bodies but in similar state of affairs to the one that is in the range of competences of specific administrative body). Indirect impact is associated with the formation of a specific line of decision making and jurisprudence at the national level based on the standards of the ECHR jurisprudence and mainstreaming judgements of the ECHR as an argument of interpretation or decisionmaking. The indirect impact through judgements of national courts that control actions of a public administration body may concern the practices of the state authorities in which there was a violation of human rights but also other states whose case is not directly concerned.

The judicial decisions of the ECHR may affect the public administration and its activity at different levels.

The first level is associated with direct ways of impact. This is the situation when the authority draws conclusions from its own case or cases carried out by other bodies in similar cases, and in which the ECHR passes judgement stating that a violation of human rights took place. Here a decision passed by a specific administrative body was found to be violating those rights and was eliminated from the legal order. In this case administrative authorities should either act in order to undertake another decision in a given state of affairs in accordance with human rights or take no activity at all because any action in this situation can be seen as a breach of those rights.

At the same time one needs to remember that the content of a specific decision or the reasoning of a decisional body can also be affected by the jurisprudence of the ECHR in other cases similar to the one that are in the competence of an administrative body. For example while recognising a decision of an administrative authority acting in a specific area in the state the judgement of the ECHR can influence the decision making process of other administrative bodies acting in

other areas of that state. In this sense one might say that administrative bodies follow the "precedent" (judgement) of the ECHR.

What is more, in some cases public administration authorities of one state follow the content of the ECHR judgement addressed to administrative authorities in other states. So some kind of unification of decisional processes can be observed. Moreover even if public administrative authorities from different states do not follow the case law of ECHR that is not addressed to them directly, a certain level of unification can be seen because of the introduction to the jurisprudence of the ECHR human rights' protection standards that are identical for all states and their authorities.

On the second level, the influence of the ECHR jurisprudence on national governance processes involves the public administration taking into account (while undertaking specific actions) judicial decisions (line of jurisprudence) of national courts competent to review the decisions of the administration, the judgements of which are (to a lesser or greater extent) influenced by the judgments of the ECHR. On this level the impact of the Court jurisdiction is less noticeable which does not necessarily mean that it is less instanced.

The third level is the one in which the judicial decisions of a ECHR affects other supranational courts (for example the Court of Justice of the EU) or authorities, and those then become an argument in cases before national courts to verify the functioning of public administration. Benvenuti (1999,843) puts forward an interesting formula that the ECHR is a court that on an international level can be seen as an authoritative one and its judgments are a source of inspiration not only to national courts but also for judges and members of committees of other international bodies.

The impact of the jurisdictions of the ECHR requires taking into account the standards of human rights protection for decision making processes undertaken by the state authorities. Those standards developed by the ECHR define the absolute limit for the activity of public authorities introducing a certain sphere of personal freedom that in principle cannot be infringed by those authorities (at least without changing the national legislature first).

Thus those standards can affect the reasoning of a public authority both in the decisions related to the exercise of unequivocal obligations as well as on management activities (connected with governance processes) of public administration. In this sense it will affect the discretionary power authority on different stages of the decision making process.

In the pre-decisional phase, it is linked to the question of whether the implementation of tasks set by public administration in the context of human rights

protection requires any action. If the answer to that question is positive it may influence the choice of one of the legally permissible methods to accomplish this task. In this context, for example, it is worth mentioning the proportionality principle which is not stated at all in the text of the Convention, but only proclaimed in the case-law of the ECHR (the ECHR judgments: judgment of 25.03.1992 *Campbell v. The United Kingdom* 13590/88; judgment of 13.06.1979 *Marckx v. Belgium* 6833/74; judgment of 26.04.1979 *Sunday Times v. The United Kingdom* 6538/74; judgment of 24.08.1998 *Lambert v. France* 23618/94; judgment of 07.12.1976, *Handyside v. The United Kingdom* 5493/72).

The principle of proportionality requires that there should be a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective (see Clayton & Tomlinson, 2000, 278). It is considered one of the most important legal principles under the ECHR (see Kalisz, 2012, pp. 102-103). The proportionality principle means the “fair balance” between the protection of individual freedoms and the interests of the general public (see Aleinkoif, 1986, 943). The test of suitability and necessity (undertaken within aforementioned principle) can restrict the freedom of the decisional body. Thus the jurisprudence of the ECHR can be considered a kind of directive of choice of action.

The ECHR's jurisprudence standards can also play an important role in the interpretation of law. As pointed out by Lizewski (2015,403), interpretive arguments can help both in the interpretation of national legislation and in gaining a proper understanding of the provisions of the convention. He points also to the legislative nature of the ECHR's standards, because they shape the substantive understanding of individual human rights. In this sense, even in countries of civil law (continental) culture, adjudications become, along with legal provisions, a full-fledged source of law.

Finally, the judgments of the ECHR influence the final shape of decisions, particularly in cases where the authority is granted with the administrative approval construction. Then the ECHR's standards can become one of the directives of choice of the consequences (directives that need or can be taken into account while passing the final decision) that the authority may (it is not legally binding so the body is not obligated to do it) take into account when making a decision. At the same time these standards determine the absolute limit for authority - for example, by eliminating one of the potential contents of the final decision, because it may infringe in some sense standards of protection of human rights. In this context one might say that these standards are limiting the discretionary

power of public administration even in the situation in which its actions are in accordance to the law.

In this regard, it is clear that the jurisprudence of the ECHR, on the one hand, limits the discretionary power of public administration in all decision making processes and, on the other hand, directs the reasoning of a public authority.

5. Jurisprudence of the ECHR and Governance Processes

If the jurisprudence of the ECHR can affect the scope of the discretionary power of public administration one more question remains: is it possible that it can lead to the unification of decisional processes of administrative authorities in different states? Is it possible that standards of protection of human rights created by the ECHR will affect administrative bodies and governance processes in the way that will draw closer the decisional processes in different states? If the answer to those questions should be positive it could mean that the ECHR can be seen as an institution of global governance.

At this point one must remember that the introduction of the standard of protection of human rights does not presuppose its immutability, and most importantly does not prevent the autonomy of states that are high contracting parties to the European Convention of Human Rights. On the contrary, the Convention permits, with respect to certain rights, so-called limiting clauses (the concept of "margin of appreciation" - see Yourow H.C. 1996; Arai-Takahashi 2001, the ECHR judgements: judgment of 20.09.1994 *Otto Preminger Institute v. Austria* 13470/87;. judgment of 22.10.1981, *Dudgeon v. UK* 7525/76; judgment of 21.02.2002, *Ghidotti v. Italy* 28272/95). An example are the "freedom rights" which are characterised by being highly "axiologically sensitive" and for which the ECHR cannot work out a uniform or acceptable standard with regard to their reference to morality or religion (see Lizewski, 2015,281).

The perception of the Convention as a living instrument for the protection of human rights which should be interpreted in relation to the current needs and the specificities of the country allows for the flexible protection of human rights and relieves tension between national authorities and the ECHR (see Brems, 1996, pp. 312-313).

In this respect, it should be argued that the jurisdiction of the ECHR may significantly influence the decisions of public authorities including those which are undertaken in the area of governance. In formulating standards of jurisprudence the ECHR at least to some extent affects the development of uniformity in governance processes in the sphere of public decisions in states that have signed the European Convention on Human Rights. At the same time it does not mean

an absolute unification and is associated with certain minimum requirements in a democratic state while maintaining the autonomy and axiological individualism of specific countries and societies (see Kalisz&Szot,2011,pp. 153-154). This happens regardless of how and on what level the decision of the ECHR affects public administration as well as the stage of the decision making process in which this occurs.

So the answer to the aforementioned question is rather negative - the ECHR cannot be seen as an institution of global governance despite the fact that its jurisprudence can affect governance processes at the national level, sometimes leading even to its unification. This is not a result of a conscious decision or intention of the ECHR and even if it takes place it is caused by similarities of legal systems or decision making policies of different states that reacts to the ECHR judgments in a similar way rather than is it a result of a deliberate activity of the ECHR.

6. Conclusions

The issue of the actual or potential influence of the ECHR's judgements on public administration decisions (especially governance decisions) is very complex. The considerations of this paper are the best example of it. Some problems were only signalled in the text and can be a subject of further research. The main goal of this paper was to answer three questions and for those answers to be clear to the reader they should be highlighted one more time.

Because of the complex procedure before the ECHR and at the same time because of the standards of human rights' protection given by the ECHR that all states that signed the Convention must respect in every action of its authorities the system of protection of human rights within the Council of Europe is efficient enough (1) to prevent the infringement of human rights at national level. It applies also to actions and decisions undertaken by the public administration within the scope of its discretionary power.

The ECHR's jurisprudence may influence administrative authorities' discretion (2) in two different but related ways. First, it restricts the scope of said discretion to the activities, reasoning and decisions that are in accordance with human rights and human rights protection standards. Secondly it can be seen as one of the directives of choice for the national authorities in the sense of it being a guideline for all of the activities, reasonings, and decisions of public administration bodies.

In the current world of globalisation and integration the unification of legal systems and decision making processes (also governance processes) in different states can be seen more clearly. Despite the fact that the jurisprudence of the ECHR can be seen (mainly because of the obligation to come along with standards

of protection of human rights that are created by the ECHR) as a mechanism or factor of this unification of governance processes in reality it is not (3). One may observe that because of the rulings of the ECHR some decisional processes of administrative bodies and their outcomes are becoming similar or even identical in different states but it can be seen as an additional (marginal) effect of influence of jurisprudence the ECHR on governance process at the national level.

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