COMMON PRINCIPLES OF JUDICIAL REVIEW OF ADMINISTRATION IN EUROPE:A COMPARATIVE STUDY OF FRANCE, THE UK, THE ECHR AND THE EU

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ABSTRACT

The purpose of this dissertation is to examine whether common principles for judicial review of administration exist in the European legal area. Today, law has been transforming into a form of internationalization in many areas in the world. This process is more visible in some fields of law in recent decades. In Europe, law has become more international from 1950s onwards; it is called as "Europeanization of law". Naturally, administrative judiciary has not stayed out of this process. The author attempts to find principles within the context of the Council of Europe and EU legal areas as well as French and British administrative judicial systems as two examples of European national jurisdictions by using a mixture of historical and comparative methods. This study presents that European national administrative judicial systems have been still continuing to preserve their own peculiar characteristics to a large extent, therefore divergences among different European administrative judiciary systems are much bigger and more obvious than convergences. Also, the study presents that, no matter how this divergence is wide, these systems have been in a strong supranational or international interaction by the impact of the case law of the ECtHR and the ECJ. This dissertation concludes that this interaction, however, has not reached a sufficient level yet to assert that common principles of judicial review have been formed. This study suggests that more explicit, distinct and leading case law from the both the ECtHR and the ECJ is needed for the emergence of "European ius commune of judicial review".

Keywords: administrative acts, administrative judicial systems, judicial review, administrative justice, European ius commune of judicial review, rule of law, separation of powers.

ÖZET

Bu çalışma Avrupa'da idari yargının ortak prensiplerinin mevcut olup olmadığını tespit etmeyi amaçlamaktadır. Bugün hukukun pek çok alanında yaşanan uluslararasılaşma

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süreci bilhassa 1950'lerden itibaren Avrupa'da artarak devam etmektedir. Diğer hukuk alanları kadar belirgin olmasa da, idare yargıda doğal olarak bu uluslararasılaşma sürecinin dışında kalamamıştır. Yazar, bu çalışmada idarenin yargısal denetiminde Avrupa'da ortak ilkelerinin mevcut olup olmadığını tespit etmek için Avrupa Konseyi ve Avrupa Birliği hukuk alanları ile Kıta Avrupası Hukuk Sistemi (civil law) ve Anglo Sakson Hukuk Sisteminin (common law) önde gelen temsilcileri olan Fransız ve İngiliz idari yargı sistemlerini, mukayeseli hukuk usulüne göre incelemeye çalışmaktadır. Bu makalede, Avrupa'daki ulusal idari yargı sistemlerinin kendilerine özgü karekteristik özelliklerini halen daha önemli ölçüde muhafaza ettikleri, bu sistemler arasındaki farklılıkların benzerliklerden çok daha fazla ve belirgin olduğu, bununla birlikte söz konusu sistemler arasındaki farklılık ne kadar fazla ve geniş olursa olsun bu sistemlerin, bilhassa Avrupa İnsan Hakları Mahkemesi ve Avrupa Birliği Adalet Divanı içtihatları sayesinde güçlü bir uluslarüstü ve uluslararası etkileşim sürecine girdiği sonucuna varılmaktadır. Çalışmanın sonunda, söz konusu etkileşime rağmen henüz Avrupa yargı alanında idari yargının ortak ilkelerinden henüz söz edilemese de, hem AHİM hem de ATAD'ın daha cesur, açık ve sürükleyici içtihatları ile gelecek onyıllarda 'Ortak Avrupa İdari Yargısı'nın ortaya çıkabilmesinin mümkün olduğu öngörülmektedir.

Anahtar kelimeler: idari yargı, idari yargı sistemleri, yargısal kontral, Avrupa Ortak idari yargısı, hukukun üstünlüğü, kuvvetler ayrılığı.

INTRODUCTION

The history of conflict between power and law goes back to the antiquity. We know a number of political figures in history that once gaining a strong "power" they always wanted to be above "law" so that their authorities would be "limitless".

However, concentration of state powers in one authority is vitally dangerous for fundamental rights. Mankind has seen numerous examples of this danger throughout history. Lattermost, Europe witnessed such a danger of this concentration just before WWII in particular with totalitarian administrations of Fascist Italy and Nazi Germany, inter alia. And Europe paid a heavy price for this devastating war; it is estimated that about 50-70 million people were killed. Therefore, today, it is well-accepted in modern democratic societies that sovereign powers must not be gathered in one authority. According to the principle of the separation of powers, authorities of a state must be divided into three branches; namely legislative, executive

and judicial powers. The aim of this division is to enable these powers to perform checks and balances on each other and therefore to abstain from absolute autocratic governments. The independency of each power keeps the other ones from exceeding and exploiting their authorities and thus ensures the principle of the rule of law and protects fundamental rights.

In this division of powers, interconnection and interaction between executive and legislative powers are reasonable, tolerable and acceptable to some extent. However, the relation between judiciary on the one hand and executive and legislative powers on the other hand, is very sensitive. Independency of judiciary must be self-evident, absolute and distinct.

As a matter of fact, it is extremely difficult to strike the right balance in this division of powers. While some public law scholars assert very strong judicial review over legislators and administrations, others argue that too strong judicial control over political powers could lead to "*extreme judicial activism*" or "*juristocracy*" and such a "*government of judges*" would not be less dangerous than autocracy.

Moreover, some jurists claim that there are some public activities such as foreign affairs, national security, national defence, international agreements etc. that should be exempted from the scope of judicial control. The challenging point here is to determine the border of these exceptions. In European legal space, currently there is no any principle for this demarcation. Although all national legal systems in Europe have judicial review systems, the scope and content of this judicial control are various in domestic jurisdictions of Europe.

From the 1950s onwards, it was commonly accepted by most of jurists -both from legal positivism and natural law circles- that administrative acts and decisions must be subject to judicial review. However, there were not any principles which administrative judicial authorities of European countries followed. Because all administrative justice systems in Europe had their own distinctive features arising from unique historical, cultural and political backgrounds of European countries. Moreover, in some jurisdictions for a long time administrative judiciary even was missing or its

scope and content was very limited, it was not regarded as an independent judicial area as ordinary (civil and criminal) judiciary was. Therefore until quite recently, notion of "*the principles of judicial review*" has not come to agenda within the European legal tradition.

How about today? Are there common principles of judicial review in the European legal area? If any, what are these principles? What is the importance of them for the rule of law and fundamental rights? By whom and where they have been generated?

Administrative judiciary was one of the most closed areas of law for comparative law studies. For a long time, administrative justice systems of European countries were regarded closely related to the sovereignty of states. However, some jurists have been arguing that administrative justice systems of European countries have been involved in an intensive interaction in recent decades.

We will be able to evaluate the accuracy of this argument only in the end of this study. However, there are several indications supporting this argument.

First, due to the globalization, European countries want to attract more foreign direct investments and international trade. However, the international/foreign investors need first to see legal security and political safety to invest or trade; for example they need to be convinced and satisfied that acts and decisions of administrations comply with at least minimum legal standards and sufficient legal remedies in case of infringement.

Second, an incremental exchange and interaction have been occurred among the Western European Countries since the end of WWII and between the Central and Eastern European countries and Western Europe since the collapse of Berlin War. More and more administrative judges, legislators and administrative authorities have participated various exchange, training and working programmes. Therefore, they probably have become aware of good and best practices, standards, principles of other administrative justice systems.

Thirdly, and most importantly, Western European countries, in order to avoid the recurrence of totalitarian regimes led to disastrous WWII, wanted to establish a legal space in which the rule of law prevails. As a consequence of several attempts to reach to this objective in 1950s, two parallel legal spaces emerged; the Council of Europe (an intergovernmental structure) and the European Community (mainly supranational structure). In Strasbourg legal space, the case law of the ECtHR has attempted to include judicial review of administrative acts into the scope of Article 6 (*the right to a fair hearing*) as well as Article 13 (*the right to effective remedy*) of the ECHR by construing these provisions widely. Further, the Committee of Ministers of COE proclaimed several principles in *the Recommendation [Rec(2004)20] on judicial review of administrative act*s. This Recommendation has a special place in the development of Europeanization of judicial review because for the first time several exclusive principles for judicial review of administrative acts were expressed officially in the European legal area. Also, in Luxembourg legal space, even if just a drop, the ECJ has contributed to the interaction of administrative judicial review systems by its case law. However the ECJ's contribution remained minimal because the ECJ usually has made references to the former judgments of the ECtHR in this matter *(*the right to an effective remedy and the right to a fair trial*)*. Most recently, with the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the EU (CFR) has become legally binding and enforceable for both the judges of the ECJ and national judges as community judges. These judges can use the CFR as a ground for judicial review of EU measures and national administrative acts implementing EU law, because the CFR brings together all fundamental rights contained in the ECHR and existing EU rights. In particular, Article 47 of this charter stipulates two fundamental rights regarding judicial review, namely *the right to an effective remedy before a court* and *the right to a fair hearing.*

The purpose of this study is to pursue the answers to two questions. First, this study examines whether and to what extent common principles of judicial review of administration has been in existence. Secondly, this study examines whether these common principles, if any, are important for the

European legal area to maintain the rule of law and to protect fundamental rights.

It is difficult to give the answers smoothly to these questions because arguments in both directions could be said. On the one hand national administrative justice systems in Europe still continue prominently to own their peculiar characteristics. On the other hand, in the last fifty years, in particular since the end of WWII, in parallel with the economic and political convergency in Europe, the legal systems of Western European countries have considerably interacted. Therefore this study seeks the answers to these questions by examining two leading national administrative judiciary systems in Europe, namely French and British administrative judicatures as well as the Council of Europe and the European Union legal spaces.

The methodology of this study was a mixture of historical and comparative method. A long step back was taken throughout the history by looking at the important cornerstones of the development of the rule of law and judicial review. Then the considerable similarities and differences of French and British administrative justice systems were examined as each of both is one of the principal examples of civil law and common law legal systems respectively. Then we traced judicial review of administrative acts within the Strasbourg and the Luxembourg legal spaces. The primary sources such as books, law review articles, relevant case law of the ECtHR and the ECJ, relevant provisions of treaties, conventions and published documents of the COE along with the opinions of legal scholars were materials which were benefited throughout the study.

This study does not deal with the broad meaning of judicial review as research subject because *"judicial review*" as a broad concept includes both judicial controls of legislative and administrative acts. Therefore, due to the limited space, this study focuses only on judicial review of administrative acts. However, analyzing the judicial review of administrative acts without touching on judicial review of legislative power would be deficient. Because, the both areas of judicial review are interrelated in many ways, at least they share the same historical journey. Thus in the first chapter, we

examine the judicial review as broad notion and then in the subsequent chapters we focus mainly on judicial review of administrative acts.

Similarly, instead of choosing a wide focus of analyse such as *"Western legal tradition*", which consists of the development of both the European and American legal tradition, we examine only the *"European legal tradition*" due to the limited space again. However we occasionally refer to American judicial review system when necessary.

Furthermore, an important delimitation of this dissertation is that it does not analyze most of significant national administrative justice systems in Europe. When taking into account the existence of abundance of unique individual features of national administrative justice systems, such extensive analyze would be impossible in this limited paper due to the limited space. Therefore, we only focus on French and British administrative justice systems as the examples of civil law and common law legal systems respectively.

Another principal delimitation of this study is related to judicial review in EU legal order. Principles of judicial review of acts of the EU institutions are not evaluated within this dissertation. In other words the case law of the ECJ, if any, related to the principles of judicial review of the legality of the EU measures is excluded from the scope of this thesis due to the limited space. Instead, the paper only looks for principles of judicial review in EU legal order to which national judges -as community judges- are supposed to conform when they judge the legality of national administrative acts which allegedly have violated the rights of individuals granted by the EU acquis.

In the first chapter, we briefly examine historical development of the rule of law and judicial review of legislative and executive powers throughout the European legal tradition starting from antiquity through middle ages and eventually to the present. This chapter presents how judiciary emerged among a branch of state and proved itself as a control mechanism over legislative and administrative branches. In this evolution, we underline pre and post-WWII events as cornerstones in the emergence of the modern rule of law principle

In Chapter 2, in order to understand differences and similarities of national administrative judiciary systems in Europe, we look into the French and British administrative judicature as examples of European national systems because they are leading of common law and civil law systems. Since the both systems have their own characteristics and structures, it is obviously a necessity to use a similar template to be able to compare these systems. Therefore, we use the principles of judicial review stated in *Recommendation [Rec(2004)20] of the Committee of Ministers of COE on judicial review of administrative acts* as a model in the subtitles of this Chapter.

In Chapter 3, we look for principles of judicial review of administrative acts in the European legal order. Again, we make use of five principles of judicial review stipulated in *Recommendation [Rec(2004)20]* as a model in order to research in the Strasbourg and Luxemburg legal areas. In this examination, we mainly refer to the case law of the ECtHR, the ECJ, provisions of the ECHR, the CFR, the TFEU and the TEU.

Lastly, we attempt to conclude whether there are common principles for judicial review of administration in the European legal area and bring forward several proposals.

I.HISTORICAL DEVELOPMENT OF THE RULE OF LAW AND JUDICIAL REVIEW

A. Power v. Law: Eternal Rivalry

"Power" and "law" are inherently inseparable notions. Throughout history, there have always been tensions between them; law has always had a

tendency to differentiate and distinguish itself from power and power has always wanted to be independent from law.[1]

These tensions between them go back to antiquity.[2] Plato (428-348 B.C.) once said;

1 Aguilera 2010, 15.
2 Commission 2011, 3.

"*Where the law is subject to some other authority and has none of its own, the collapse of state, in my view, is not far off, but if the law is the master of government and the government its slave, then the situation is full of promise and men enjoy all the blessings all the gods shower on a state*".[3]

According to Aristotle (384-322 B.C.), men tend to surrender to power and follow the rules, because of the reality that men are political and social animals. Later, the followers of scholastic philosophy, such as Thomas Aquinas (1225-1274), inter alia, incorporated this reasoning in their systems until "the natural law" theory of the 17th century.[4]

1)The First Means of Limiting Power: Written Law

It can be said that the first way to limit power in history was the appearance of written law. Law started to be written in early moments of human history either by individuals or legislative councils; for example the Code of Hammurabi (1800 B.C.) and the Law of the Twelve Tables (450 BC). Today, the need of written law is still quite undisputable. One of the essential principles of the rule of law today is that the law must be known publicly, it cannot be applied until it is promulgated somehow; either orally, for instance as it was in the past, by a manservant of a king by shouting in the village with a hand horn, or written, for example in an official journal.[5]

2)The Second Means: The Realm Of Religion

In the European legal tradition, the law of God was another means to limit the power of the emperors. Indeed the struggle between religious and civil powers started once Theodosius (346-395) made Christianity[6] the religion of the Roman Empire by the Edict of Thessalonica in 380.[7] Saint Augustine (354-430) generated an *"intellectual synthesis of Greco-*

3 Plato 1997, 1402.
4 Aguilera 2010, 16.
5 *Ibid*, 16.
6 According to some, the origin of "*the submission of humankind to rules of power*" may be found in the Bible; the expulsion of Adam and Eve from Paradise for disobeying the rule of God. They were living in Paradise without the "need to submit to social power" but then, out in the world, they started to fight with each other, became tired and eventually needed a set of laws and rules of power. (Aguilera 2010, 16)
7 Aguilera 2010, 16.

Roman and Judeo-Christian traditions".[8] In time, the Roman emperors felt an obligation to comply with the power of the Church, namely the representative of the divine will. But this relationship of Roman civil law and Canon law was very challenging. When the Western Roman Empire fell in 476, the power of the Catholic Church prevailed over the power of kings; the Church started becoming one of the essential pillars of the state. It was believed at that time that the kings could deserve their name if they acted justly ("*recte igitur faciendo, regis nomen tenetur"*), but if they did not, they could lose their royal power *("rex eris si recte facies, si non facies non eris").*[9]

This primacy of the Church reached its peak when the Papal States were established in the 8th century. When it came to the 13th century, the sovereign pontiffs had the authority to legitimize the power of kings via the rite of coronation. Supreme Pontiffs gathered legislative, executive and judicial powers of Catholic Church on their own personalities.[10] However, at the beginning of the 14th century when Philip IV of France denied the civil power of the papacy and asserted his independence from the Church, in particular at the time when the Western Schism started, papal power began to decline and this process reached its peak with the Protestant Reformation of Luther in the 16th century.[11]

In the meantime, the laicization process was starting in Europe and consequently the Church could not resist this change. When Henry VIII of England divorced Catherine of Aragon and married Ann Boleyn, the Church excommunicated him in 1533 but he dared to "burn his bridges" with the Roman Church and declared himself the head of the national church. Meanwhile, the Wars of Religion (1562-1598) and Thirty Years War (1618-1648) spread the conflict to the European continent.[12]

8 Bono 2011, chapter 3
9 Aguilera 2010, 17.
10 Bono 2011, chapter 3
11 Aguilera 2010, 18.
12 *Ibid,* 18.

3) The First Efforts To Secularize Political Power And Law: Natural Law

Eventually the submission of the people to divine law started to lessen and the power of the Church began to fade when religious conflicts fractured the religious unity. A need arose in Europe to find a new reason to induce peoples to submit to power and law; it was *"natural law", which was* formulated first by Hugo Grotius (1583-1645).[13] Grotius's role also was very important for the evolution of natural law.[14] Later, Thomas Hobbes (1588-1679) asserted his own theory of distinguishing the natural state from the social state in order to justify his famous *"social pact"* and *"Leviathan"* theory[15]. In Hobbes' theory, once the individual accepts submission to Leviathan, it is irreversible and therefore social pact has not ability to limit power.[16]

The ongoing tensions between political powers and law were virtually previews of prospective revolutions in Europe. Meanwhile, later philosophers of Grotius such as John Locke (1632-1704), Montesquieu (1689-1755) and Jean-Jacques Rousseau (1712-1778) transformed the concept of the social pact into the *"social contract"* by establishing the notion of the liberal state. According to their liberal "social contract" theory, as could be understood from the use of the word "contract", there were two important limitations on submission to power; first of all, fundamental rights were exempted from the scope of the social contract, second, unlike Hobbes's irreversibility idea, submission to Leviathan was reversible. This liberal state idea was going to be modeled in America in 1776 and in Europe by the French Revolution of 1789. [17]

13 *Ibid*, 19.
14 Vetterli and Bryner, 1993, 371.
15 According to Hobbes's "absolute social pact theory" (so absolute monarch theory), members of civil society gathered and voluntarily ceded and renounced some individual rights to Leviathan so that other members of the society would do the same in order to avoid constant violence and chaos. As a consequence, this mutual agreement resulted in the establishment of state, which had power to create social rules.
16 Aguilera 2010, 19.
17 *Ibid*, 19.

4) The Roots of the Principle of the Rule of Law

Throughout the Middle Ages, power was relying on *"the vassalage system/ agreement"*.[18] However, the vassalage system later played very important role to weaken absolute monarchic powers and transformed them. Indeed monarchs indeed started to feel obliged to share their powers with vassals and to take into consideration the vassal's opinion before making rules. The power of the vassals was institutionalized in *"Curia Regis",* a kind of advisory council, because kings felt obliged to listen to the opinions of their vassals, bishops, barons and nobles in these councils.[19] For instance, in England in 1215, the barons and bishops who comprised the English Parliament could eventually impose the Magna Carta, which was the first constitutional text in the European legal tradition to put several limits on the King's Royal Prerogative.[20] Even though the Pope was going to annul Magna Carta after a few months by claiming that barons and bishops extorted it from King John, Magna Carta was very important milestone for the historical development of the rule of law because within the circumstances of that era. It clearly objected to Kings' unlimited power and asserted that royal power must be subject to several overwhelming rules.[21] To counteract this influence of the nobles and bishops, the kings in many European kingdoms resorted to admitting representatives of the cities to participate in this Curia Regis. Thereby, the traditional "Curia Regis" gradually turned into a real "assembly" and eventually reached a position in which consent would be given to important monarchic legislative measures and approval given for the additional budgetary rules of kings. Moreover these representatives of the cities obtained a very important advantage for controlling monarchic power because they were elected and so they had greater legitimacy than vassals, nobles, bishops

[18] Today this concept might be a very negative image in European legal tradition because one of aims of the French Revolution was to fight and to overthrow this system.

[19] It is interesting to see that "the parliament" word originated from these meetings; indeed as from 1066 the kings of England were speaking Norman French and speeches occurred in these meetings ("parler" in French means "to talk" in English) became basis of the notion of "parliament". However, the famous French parlements were sort of judicial courts rather than political councils.

[20] Aguilera 2010, 19.

[21] Bingham 2010, 12.

and even, in one sense, kings. Eventually, in the 16th century, kings ceased imposing on the assemblies in almost all European kingdoms except in the Kingdom of England.[22]

B.The Rise of Liberal State Model

According to some academics, the situation of England had more impact on European public legal history[23] due to the English Parliament's efficient limit on the power of kings, as a result of the Hundred Years War (1337-1453) that eventually diminished the monarchic power in favor of the Parliament.[24] By virtue of the revolutions and the English Civil War (1642-1689), the English Parliament managed to increase its limitations on the kings' royal prerogative. For example, Parliament challenged the authority of the King Charles I, then started a civil conflict against the Kings' forces and eventually executed him. Indeed this revolution totally transformed English public law. Moreover this transformation was spreading throughout Europe, especially owing to the ideas (regarding legal limitations on power) of *John Locke (1632-1704)*.[25] Lock's ideas about civil society, free exercise of the most basic human rights, etc. were developed in Europe by other eminent philosophers such as *Jean-Jacques Rousseau (1712-1778)* in his masterpiece *"the Social Contract"* and *Montesquieu (1689-1755)* in his masterpiece *"the Spirit of the Laws*". These philosophers distinguished *"law"* from "*power"* on the grounds that law precedes power, which is based on the social contract and they asserted that the political authorities could not establish civil laws arbitrarily. Eventually *the idea of the liberal state, the model of "the Laissez-Faire State"* was born. In this sort of state, the power and functions of political authority were very limited'; liberal state could only maintain the basic human rights by guaranteeing Jacobinism, in which the bourgeoisie had power to control the State via the

22 Aguilera 2010, 19.
23 Bingham 2010, 13
24 The English Parliament was divided into two. The House of Lords was the council of nobles and the House of Commons was the council of the local representatives.
25 This distinctive phenomenon (legal limitation of political power) later was going to influence the USA deeply because Locke also inspired *Thomas Jefferson (1743-1826),* who was one of the founding fathers of the United States, third President (1801-1809) of the country and author of the Declaration of Independence.

representative assemblies (parliaments). Also another characteristic of the liberal states was that it had a constitution which set limitations to State intervention.[26]

C. From the Social State to the Totalitarian State

The Industrial Revolution (1750-1850) had a profound impact on social, economic and cultural life in the European societies and also led to intense social conflict. Workers organized themselves into labor movements in order to protect their rights and interests. As a result of the publication and dissemination of *"The Communist Manifesto" of Karl Marx (1818-1883) and* Friedrich *Engels (1820-1895)*, *socialism* was transformed into an international movement. In its early periods, the Socialist movement sometimes resorted to violence but later it had to renounce this as a consequence of the Paris Commune's failure due to cause a split between anarchists and Marxists and eventually used legal means via democratic elections. Indeed with the establishment of the first workers parties in Europe (1875-1905), history witnessed the emergence of *social democracy*.[27]

That amounted to the end of the liberal state in this new political atmosphere. So to speak, the spirit of the *"social contract*" came back; the states felt obliged to abandon their passive role and to take action to maintain basic individual and worker rights.

This transformation process led the European countries to take new model of state. At the beginning states were more active and influential in many areas of life. However this activism and interventionism began to transform itself into a totalitarian form in particular with the victory of the Soviet Revolution of the Bolsheviks in 1917. European politicians had to resort to the implementation of social programmes in order to avoid such a Bolshevik revolution and to solve "the social question" within their own jurisdictions. In the meantime, Mussolini in Italy (1922) and Hitler in Germany (1933) begun to exploit and manipulate this new active role of state when they came into power. The trouble was that there were no

[26] Aguilera 2010, 24.
[27] Ibid, 27.

any judicial controls over their administrative decisions. Eventually both Italian and German administrations abused their unlimited authorities by transmuting their countries into the totalitarian state.[28]

D. Europe's Dilemma: How to Restrict Unlimited State Powers

Both the failure of the liberal state in the 19th century and the cruelty of the notorious totalitarian governments in Europe (Nazism in Germany and fascism in Italy) at the beginning of 20th century led Western jurists to contemplate on past experience. The "painfully learned" lesson was that both legislative and executive powers of states must be subject to law.[29] Among others *Hans Kelsen (1881-1973)* came up with the notions of a *"pure theory of law"*, which enhanced *"the fundamental principles of the validity of law*" and *"the theory of logical structure",* which led to the development of "*the principle of a normative hierarchy*".[30] Actually the ideas of Kelsen were a rediscovery of the social pact theory of Hobbes. However there was a unique novelty in Kelsen's theory; the state was subject to law, in other words, law was "pure", law was distinguished from the state, and the most important one was that law was not subject to the mercy of the sovereign's power. [31]

Bright side of the picture was that unlimited monarchs in Europe eventually started to share their authorities with legislative powers at the end of 19th century and in particular at the beginning of 20th century. Dark side was that the political powers were still immeasurable. Unlawfulness started to be imposed this time by parliamentary majorities instead of monarchic powers.[32] Because political powers were not subject to law, or in other words law still was subject to unrestricted discretion of political power.

Theoretically, it was clear in minds of public scholars that independent judicial controls could be the strongest safeguard against potential

28 *Ibid*, 28.
29 Bingham 2010, 26.
30 Aguilera 2010, 25.
31 *Ibid*, 29.
32 For example, the legislative hegemony of English Parliament was so great that it was said at that time *"Parliament can do anything but make a man a woman, and a woman a man"*.

unlawfulness of political powers, namely legislative and executive branches of states.[33] However, at this point of the history, it was the dilemma for the European legal system was that how the normative rules of legitimately elected parliaments could be judged by judges which were not elected. It was really an unacceptable idea by most people that the decisions of political powers could be judged by judges whose posts usually were either bought by bourgeois or appointed by royal at that time. On the other hand, there was a good example in the United States where judges were either elected or selected with a more legitimate manner than Europe. However in continental Europe, judges were lacking such legitimacy. Therefore the new elites of Europe who had obtained the primacy in parliament by striving and fighting against the monarchies were extremely reluctant to give the power (reviewing and questioning legislative and executive acts) to judges of ordinary courts.[34]

E. Judicial Review: One Of The Core Pillars Of The Rule Of Law

Parliaments had played a very important role to limit absolute monarchic power in the 17th and 18th centuries. Because they could at least predicate this legitimacy on the grounds that they were representing local people. In the course of events, *"the principle of the supremacy of law"* (legislative power) emerged as a balance against the monarchic political authority (executive power).[35] However, this time the potential of despotism of majority in parliament made itself evident as a threat against the rights of minorities.[36] Therefore need of a further mechanism arose in order to control both legislative and executive powers without prejudiced to their legitimacy and lawful discretion.

At the beginning of 20th century, the rule of law was not seen as the backbone of a democratic society because at that time discretions of executive and legislative powers were regarded as the vital element of "welfare state"

33 Bingham 2010, 26.
34 Aguilera 2010, 31.
35 *Ibid*, 24.
36 *Ibid*, 24.

of modern society.[37] However, oppressive totalitarian regimes of Italy and Germany as well as the devastating impacts of WWII resulted in the paradigm shift in Europe. Henceforward it became clear that legislative and executive authorities must not have unlimited discretionary power. And *the rule of law* was accepted as a vital principle in order to strike the right balance in this limitation.

The rule of law handles the relationship between state powers and individuals by setting up principles for the way of exercise of these powers. One of the most comprehensive definitions of the rule of law[38] is Tom Bingam's; *"...all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."*[39]

According to *the Report on the Rule of Law (2011)* adapted by the Venice Commission (The European Commission for Democracy through Law) of the Council of Europe, although the definition vary depending on various law systems, there is at least a consensus on the elements of the rule of law. These elements are;

(i) "legality" ("supremacy of the law"):

(ii) "legal certainty":

(iii) "prohibition of arbitrariness":

(iv) *"access to justice before independent and impartial courts, including judicial review of administrative acts"*

(v) "respect for human rights"

(vi) "non-discrimination and equality before the law"[40]

Among them, the forth element is directly related to this study. According to the report, *"everyone should be able to challenge governmental actions*

[37] Venice Commission 2011, 4.
[38] *Ibid*, 4.
[39] Bingham 2010, 26.
[40] Venice Commission 2011, 11.

and decisions adverse to their rights or interests. Prohibitions of such challenge violate the rule of law…" Only if is judiciary independent and impartial, it can perform its vital role to realize the rule of law. Hearings must be fair and open as well as within a reasonable time. Judgments of courts must be implemented immediately and effectively.[41]

In the principle of the rule of law, legislative and executive powers are subject to judicial review. Judges may annul the legislative and executive acts if these acts are found inconsistent with law, for example the provision of a written constitution or general principles of law. In the European legal tradition, there are two distinct but parallel legal systems; namely civil law and common law systems and also two distinct theories, namely the principle of legislative supremacy and the principle of separation of powers.

First, with regard to common law-civil law divergence, judicial review, with reference to both the procedures and scope of judicial review, has been interpreted differently in the various European national legal jurisdictions. For instance, unlike civil law judges, in the common law system, judges have the capability of both creating law and rejecting legal rules contrary to law. Therefore judges in the common law systems have been seen as the main sources of the law.[42]

Second, with respect to principles of legislative supremacy and separation of powers divergence; the gist of the principle of separation of powers[43] is *"checks and balances"*. In other words, in order to establish and maintenance balance among all powers (legislative, executive and judiciary), not only should no power/branch of state be more powerful than any other power/branch, but also, each branch must have a check on the other branches. Accordingly, within the jurisdictions which are based on *the separation of powers*, in principle judicial review plays a very crucial

41 *Ibid,* 11.
42 Aguilera 2010, 33.
43 Even though French philosopher Montesquieu introduced the principle of separation of powers for the first time, the Supreme Court of the United Stated later institutionalized it with the judgement of Marbury v. Madison of 1803.

role.[44] However, since a number of jurisdictions which are based on *the principle of legislative supremacy* became aware of the potential pitfalls of unbounded legislative and executive branches owing to the painful lessons derived from history, judicial review have started to become one of the backbones of the rule of law in these systems as well.[45]

II. JUDICIAL REVIEW IN FRANCE AND THE UK

A. Introduction

Since the beginning of the 21st century and in particular in the aftermath of WWII disaster, most Western legal systems have adopted judicial review mechanisms. Naturally, due to their own historical, cultural and political backgrounds, these various national jurisdictions have developed different types of judicial review systems.[46]

In this chapter, in order to understand differences and similarities of European national administrative judiciary systems, we examine the French and British administrative judicatures as the examples of national systems because they are leading of common law and civil law systems in Europe. The both systems have their own characteristics and structures; hence we need to use a similar template to be able to compare them. For this purpose, we use several principles of judicial review stated in Recommendation *[Rec(2004)20] of the Committee of Ministers of COE on judicial review of administrative acts* as a model in the subtitles of this Chapter.

B. Judicial Review in France

1) The Historical Development of Judicial Review

The evolution of judicial review in France has seen many transformations throughout its history. The milestones in this process of transformation were, respectively, the period of the ancient regime, the Revolution of 1789, the Fifth Republic of 1958 and the constitutional reform of 2008.

44 For example, judicial review is the key point in the United State in this check-balance system.
45 Aguilera 2010, 32.
46 Aucoin 1992, 443.

In the ancient regime, the parlements[47] were performing regional legislative and judicial functions. Since the 16th century and in particular in the early 18th century, parlements started their systematic opposition to monarchic power[48]. They were opposed to all reforms that royalty tried to impose. However they failed to become the representatives of the nation, they could not control governmental acts due to their ill-advised interventions. Therefore, in the end, due to the infamous privileges and reactions caused by these parlements, they were removed from the scene of history just after the French Revolution of 1789. However they left behind an implication of loss of esteem and the notorious notion of "the government of judges.[49]

The origins of judicial review date back to the period of the Curia Regis of the 13th century. At that time, Curia Regis (means the King's court) of France had different sections and the Conseil d'État was one of them. Although it gained prestige in time and even was called *"the pivot of the State"*, the French kings never allowed this council to have a constitutional place and power. Initially, the Conseil d'État consisted of four or five men who met in the presence of the kings. It gathered several times a week to talk about matters of State. The members could express their opinion but in the end could not take any decisions because this was solely in the King's power. Furthermore, the decisions of the Council were not recorded.[50]

Besides the Conseil d'État, there was another important council, namely the *Conseil Privé*, which was regarded as *"the highest judicial court in the land"* and representing judicial authority of the king. Even though the meetings of this council were held in the palace, the kings did not preside over them. This council was consisted of a number of prominent lawyers.

47 Parlements were the French Ancien Régime institutions and wholly different from present-day (post-Revolutionary) institution, namely the French Parliament. Parlements emerged from their antecedents the Curia Regis, the council of the kings (We briefly mentioned them in the first chapter). In the 13th century, a quasi-judicial function was added to their initial consultative functions. Their powers were gradually increased and before the Revolution, they could even refuse to register laws if they considered these laws to be contrary to fundamental law, in fact to the local customs. In the 16th century, the crown and the people knew that the members of parlements started to accept bribery. Moreover, the membership of parlements began to be bought from the royal authority and was commonly regarded as hereditary.

48 With the exception of the reign of Louis XIV (1643–1715).

49 Aucoin 1992, 447.

50 *Ibid*, 447.

The *Conseil Privé,* technically speaking, could definitely not be regarded as a Supreme Court of Appeal because its functions were deliberately left vague.[51]

Even though the kings afterwards delegated judicial authority to the royal courts, they continued for a long time to retain this authority with themselves as the last resort. In other words, they had discretionary power to reverse all the judgments of the courts, in particular when it came to the judgments regarding the issue of administrative acts and decisions. Indeed, the judgments of the Conseil d'État could only be issued under the King's residual proper jurisdiction (*justice retenue*; restricted justice).[52]

But, in the pre-revolutionary period, parlements (judiciary) were not alone; the executive also exceeded its powers and caused serious injustice. Therefore, just after the Revolution of 1789, these negative memories led to the adoption of a strong "*principle of legislative supremacy"*. Indeed, as a result of this reaction, one of the main elements of the French Declaration of the Rights of Man and of the Citizen was strong legislative sovereignty. The French people believed that only the common will, namely the French National Parliament, could protect their fundamental rights.[53]

However, at that time, it was difficult for the citizens of the newly established post-Revolutionary State to imagine a problem and to ask such a question; if the majority in the legislative and executive branches belongs to the same group or party, could this cumulative power pose a risk to the fundamental rights of minorities?

Under the influence of this historical background, it was natural for public scholars and decision-makers of the post-Revolutionary France to think that granting to judges too strong a judicial power to review the constitutionality of the laws of the Parliament could pose a serious threat to the legislative supremacy.[54] The same concern existed for judicial review of administrative acts.[55]

51 Geant 2012., 11.
52 *Ibid,* 11
53 Aucoin 1992, 447
54 *Ibid,* 449.
55 Auby and Metayer 2007, 61

In the very next year of the Revolution of 1789, *the Revolutionary Act of 1790 on the separation of the administrative and the judiciary* was adopted as the self-evident aforesaid negative approach toward the judiciary. And in tenth year of the Revolution, in 1799, the Conseil d'État was established. This body simultaneously was an advisory body on legal issues to the government, drafted significant laws and also had, although initially to small extent, a judicial organ empowered with the authority of judicial review of administrative acts.[56]

In the beginning, since the Emperors presided over its meetings, the Conseil d'État performed a kind of executive function. Afterwards, owing to the restorations of 1814-1830, the Conseil d'État gained the position of a sort of administrative court, but this time it lost the initial importance and prestige until the Act of Parliament of 1872.[57] According to many scholar the judicial competence of the Conseil d'État begun with this Act of 1872. But until this law, the struggle of the Conceil d'État for enhancing its judicial function and obtaining judicial independency from executive was noteworthy. For example, the veto power of the emperors over the decisions of the Conseil d'État was gradually removed.[58]

The Conseil d'État eventually evolved into a sovereign power in adjudicating administrative matters. French jurists call this transformation *"a change from (justice retenue) restricted/retained justice to (justice déléguée) delegated justice".*[59] At the end of 19th century Conseil d'État already developed very unique judicial review techniques for the review of administrative decisions; the most important one was the action for annulment [*recours pour exces de pouvoir*].[60]

The second major reform occurred in 1889 when, in that year, French Conseil d'État became officially the first instance court for the administrative justice system. This competence was going to be transferred to the newly established administrative tribunals in 1953. The final main reform was

56 *Ibid,* 61
57 Geant 2012, 11.
58 Lageot 2010, 73.
59 *Ibid*, 73.
60 Auby and Metayer 2007, 61.

made in1987 in which the regional administrative courts were established. With this reform, the function of appeal review was transferred to the regional administrative courts and the Conseil d'État became the last resort and the highest administrative judiciary organ.[61]

2) The Scope of Judicial Review

France has had a dual judicial system since *the Revolutionary Act of 1790 on the separation of the administrative power and judiciary*. The reaction to the courts of pre-Revolutionary led the leaders of the Revolution to have the perception that courts should not interfere with the legislative and executive powers. Thus, in the the post-revolutionary period, especially with the establishment of the Conceil d'État in 1799, ordinary judiciary and administrative judiciary have been structured separately.[62]-[63]

The administrative judiciary is organized on three levels. From bottom to top, as of 2012, there are 38 first instance administrative tribunals, 8 regional administrative courts of appeal and finally the Council of State as the Supreme Court of administrative judiciary. The regional administrative courts of appeal may re-adjudicate on the judgments of first instances tribunals. However the Conceil d'État can only check the judgments of the regional administrative courts of appeal in terms of procedural rules and question of law, not question of fact.[64]

The very essence of the French administrative law is the principle of legality. According to this principle, administrative authorities must respect the law in all administrative acts. There are two enforcement mechanisms for the carrying of this principle. The first one is judicial review; the second one is administrative liability.[65]

61 Lageot 2010, 73.
62 Auby and Metayer 2007, 79.
63 On the other hand, one of the essential characteristics of French administrative judiciary has been to be composed of non-specialized courts. In principle, French administrative courts are not specialized in various areas. But exceptionally, there are several specialized administrative courts, they deal with litigations such as public accounts monitoring, social welfare, discipline of judges, etc. And the judgments of these courts are appealed directly to the Conseil d'État.
64 Auby and Metayer 2007, 79.
65 *Ibid*, 77.

Administrative acts in France are two types; normative (obligatory acts) and non-normative acts.[66] Also, normative acts are divided into two sorts; regulations and individual decisions. For normative acts, there are certain remedies in French administrative law. The first one is called "the remedy for abuse of power", namely an action for annulment (*recours pour exces de pouvoir*). In the second type of remedy, which is called "the remedy of full jurisdiction" (*recours de plein juridiction*), the plaintiff who has suffered from the administrative act can demand pecuniary compensation in administrative courts.[67]-[68]. However non-normative acts are not subject to judicial review because they are non-bindings".[69]

As in other jurisdictions, judicial review is not absolute in France; some administrative acts are exempted from the scope of judicial control. There are six types of exemptions. The first category is "*the government's acts", for example* administrative acts relating foreign affairs, national security and national defence. The nature of these acts is markedly different from normal administrative acts. Another category of exemption is the "*measures of interior order"*. These are administrative acts/measures which are related to organization and discipline of educational, penitentiary and military institutions.[70] The limit of the government's acts has been gradually lowered by virtue of Article 13 [*the right to an effective remedy*] of ECHR. At this point, the *"detachable acts theory"*[71] has become important. By means of this theory, French administrative judges have kept the right to judge these acts and to find the administration responsible for the infringements.[72]

66 At the beginning of twentieth century, as a necessity of social state model, the importance of administrative judiciary and administrative judges was understood almost throughout Europe and thus administrations started obtaining the power to act delegated law (decrees, ordinances, orders, by-law, regulations, etc.), namely normative acts. (Lageot 2010, 74.)

67 Lageot 2010, 80.

68 According to French Constitution, in exceptional and urgent situations –with the aim of saving time-, with the clear "delegation from the parliament" and only until the parliament passes an authorization act, the French administration can issue "ordinances" in order to legislate "in the field of legislative organ.

69 Lageot 2010, 80.

70 Lageot 2010, 81.

71 According the *"detachable acts theory",* judges can separate the unlawful part of an act in order to save the remaining legal part or parts of that act.

72 Lageot 2010, 82.

In the French judiciary, another important exception to the judicial review of administrative acts is stipulated by the Constitution itself. The President of the Republic, according to Article 16 of the French Constitution, can exercise all the legislative, executive and judicial powers at the same time temporarily[73], until the imminent danger ends. Another exception to the judicial review in French law is the State Emergency Act of 1955. In case of an armed conflict, the imminent threat of a serious breach of peace or important public disasters the Council of Ministers can decide to apply this Act.[74] However, if the situation may exceed 12 days, an extension can be decided solely by the Parliament.[75]

Another exception to judicial review in French law is *"the theory of exceptional circumstances",* which was developed by French administrative judges for the first time during the period of the WWI. According to this doctrine, in "exceptional circumstances", the administrative power must be permitted to breach the law within a "special regime" via some administrative acts; these acts will be regarded as legal due to exceptional situations. According to the case law of Conseil d'État, the gravity of the exceptional circumstances and infringement level of administrative acts can be checked by judges.[76]

Also, purely interpretative, informative or declaratory administrative acts or proposals and consultations are beyond the scope of judicial review. In other words only administrative acts producing or changing legal effects in natural or legal persons are subject to judicial review.[77]

3) Access to Courts

Plaintiffs must meet some preconditions before taking conflicts to administrative courts. In French administrative law, any natural person as well as public or private legal persons (civil and commercial companies,

[73] General de Gaulle performed this authority between April and September 1961, during the failed Algiers putsch in Algeria.
[74] The Council of Ministers resorted to this Act on 8 November 2005 in order to suppress the riot in the suburbs of Paris.
[75] Lageot 2010, 82.
[76] Lageot 2010, 82.
[77] *Ibid*, 83.

public corporations/companies, foundations, associations, etc.) can go to the courts. The capacity of natural persons is evaluated according to the civil law rules. Accordingly minors and some major persons whose mental faculties are impaired or persons who are placed under judicial interdiction cannot have access to the courts.[78] Legal persons (private legal persons such as foundations, associations, commercial firms, groups, etc. and public legal persons such as the state, communes, public corporations, etc.) can have access to the courts provided that they have the legal personality. Also foreign individuals and legal persons can be plaintiffs in French administrative courts.[79]

Plaintiffs must have legitimate interest (*intérêt pour agir*) to commence a suit at the time of bringing the case to court. Legitimate interest may be in different natures such as individual, collective, moral, ideological, economic, material, etc.[80] as well as legal or solely factual.[81] Also this legal interest must be *direct* and *certain*.[82]

The French administrative judges has consistently interpreted legal interest issue in a liberal approach and therefore enlarged its spectrum rather widely, even for the collective interest or moral interest. However for *"the remedy of abuse of power"* (full remedy action, administrative lawsuits for damages) judges interpret this subjective rights more strictly.[83] Legal persons may sue administrative acts harming the collective interests of their members.[84] However, in French administrative justice system, *public interest actions* (actio popularis) usually do not exist.[85]

Another precondition for being able to bring a case to the administrative courts in France is "the rule of preliminary decision" (*regle de la decision prealable*). Accordingly, the (potential) plaintiffs must make written

78 Auby and Metayer 2007, 84.
79 Lageot 2010, 83.
80 *Ibid*, 83.
81 Woehrling 2006, 43
82 Auby and Metayer 2007, 84.
83 Lageot 2010, 83.
84 Auby and Metayer 2007, 84.
85 Lageot 2010, 84.

application at first to relevant administrative authorities. If these authorities dismiss written applications explicitly or implicitly in administrative acts, then plaintiffs can bring these acts to courts.[86]

Judicial review of administrative acts in France is also subject to time limits. Plaintiffs must refrain from delays (*delai de droit commun*). The limitation of action (statute of repose) is two months from the official notification or publication of disputed administrative acts. As an exception to the two-month time limit, there is the rule of *"the exception of illegality*". According to this exception, if a new individual administrative act is later issued relying on a former general administrative act, the plaintiff can sue this general act, either together with the later individual act or separately, even if he or she could not bring an action against this general act within the legal two-month limitation.[87]-[88]

C. Judicial Review in The United Kingdom

1) The Historical Development of Judicial Review

Some jurists argue that judicial review of administrative acts has a long history in England.[89]-[90] However, in fact, in the modern sense it is a very young term in the UK in comparison to the the civil law system in Europe.[91]

Following the Revolution of 1688, the Court of King's Bench was assigned for judicial review over administration.[92] Later, in the 19th century, the High Court was vested for this power. At the present time, this jurisdiction

86 See ACA Europe, the UK, question 1

87 Lageot 2010, 84.

88 This rule is not only applied to general acts, but also exceptionally to individual decisions in two cases; namely for "*damaging decisions*" and *"complex operation"*. For example, if the plaintiff loses his chance to bring a suit against the declaration of public utility (for expropriation), he can bring a suit against a later administrative decision by invoking the exception of illegality. (Lageot 2010, 84.)

89 Jaffe 1965, 1

90 On the other hand, eminent British constitutional theorist and jurist A.V. Dicey (1835-1922), who popularized "the rule of law" notion, asserted that that there was no such terms as judicial review of administrative acts in English law tradition and that the notion of "judicial review of administration" were unknown by English judges and courts. (Thompson and Jones 2007, 221.)

91 Thompson and Jones 2007, 221.

92 See ACA Europe, the UK, question 1

is performed by the Administrative Court, established in 2000 as a branch of the High Court.[93]

When taking into account of the conditions of the 17th century, naturally there was not an effective judicial protection for citizens due to the principle of privileges for higher officials of the crown. For example, when officers of the crown such as bailiffs or sheriffs committed a "common law wrong", people could appeal against this wrong to the Court of the King's Bench provided that this appeal would not give harm to this principle of privileges.[94] This level judicial review remained the same until the 20th century[95] and it was called as "*the collateral fact doctrine"*.[96]

In 1933 the Administration of Justice (Miscellaneous Provisions) Act brought a *"procedure for obtaining judicial review remedies"*. This act required a claimant to obtain permission from the High Court of Justice (the Administrative Court) to apply for the judicial review. The case would proceed only if permission from the High Court was given. Afterwards, the House of Lords gave two cornerstone decisions in 1963 and 1969 by demonstrating the unacceptability of any attempt of legislative and executive bodies to limit judicial review of administrative decisions. Then, in 1977 an important amendment was made in the procedural rules of judicial review of the time (*Order 53 of the Rules of Supreme Court)*. Accordingly, applicants were allowed to apply for judicial review by seeking one (or more) of five kinds of remedies: mandamus, certiorari, prohibition, declaration and injunction. We will explain these remedies below.[97]

Then, a further and clearer legal basis (statutory footing) for judicial review emanated with the subsequent legislative acts such as the section 31 of *the Supreme Court Act* in 1981 and with Part 54 of *the Civil Procedure Rules* in 2000, which replaced the former procedural rules and became the

93 Thompson and Jones, 251.
94 Franklin 1970, 21
95 See ACA Europe, the UK, question 1
96 Craig 2009, 2.
97 see ACA Europe, the UK, 2009, q.1

current procedure for judicial review.[98]

"The principle of legislative supremacy" or in other words *"the principle of sovereignty of parliament"* is still -to a large extent the fundamental character of the English law. According to Dicey, this principle means that the Parliament has the right to make or alter any law, and no person or body has a right to overrule these legislative decisions of the Parliament. Although this principle was absolute and indisputable a hundred years ago, it is no longer absolute in today's modern British law. Indeed within the emerging new constitutional system in the UK, the courts may review legislation at least in certain extreme circumstances. The decision of the House of Lords in Jackson v Attorney-General[99] in 2006 is one of the milestones in this transformation. The opinion of Baroness Hale is quite remarkable: *"The Courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial powers*".

Similarly, in the past forty years, judicial review of administrative acts has been regarded by British jurists more positively. Also, in this period, various special areas [from revenue law to immigration law and from planning law to public service law] have emerged within the English administrative law. One of the reasons for this emergence has been the interaction between the British law and the EU law in particular under the influence of *"the principle of primacy of EU law"* manifested by the case law of the ECJ (the van Gend&Loos/NL and Costa/Enel cases).[100]

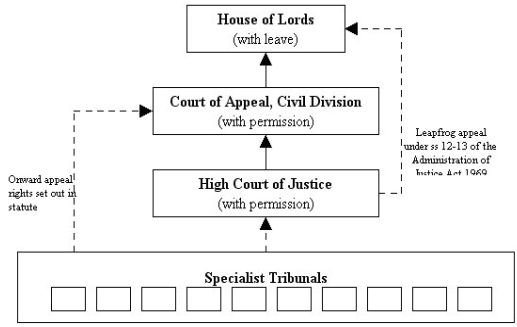
Unlike most of Romano-Germanic legal systems in Europe, the administrative judiciary is part of ordinary courts. The Administrative Court is a "specialist court" in "the Queen's Bench Division of the High Court of Justice" (this reflects the historical role of the Court of the Queen's Bench for the judicial review function). However, judges from the Chancery and the Family Divisions of the High Court are also assigned to the Administrative Court. The Administrative Court performs the

98 see ACA Europe, the UK, 2009, q.1
99 The case was about the validity of the Hunting Act 2004
100 Thomson and Jones, 222.

judicial review function (the supervisory jurisdiction) of the High Court over inferior (administrative) tribunals and courts as well as other public bodies. It may consist of a single judge or a group (at least two judges), i.e. a Divisional Court. A Divisional Court generally consists of a Lord Justice of Appeal and a judge from the High Court.[101] The hearings of single judges are generally held in public. The Administrative Court sat only in London in the past but currently sits in five courtrooms; namely the Royal Courts of Justice in London, Birmingham Civil Justice Centre, Cardiff Civil Justice Centre, Leeds Combined Court Centre and Manchester Civil Justice Centre. In the event that a case is heard by a Divisional Court (at least by two judges) the hearing in principle takes place in London.[102]

Normally, acts or failures to acts of a "body" exercising a public law function are subject to judicial review procedure in British law. This means that not only administrative bodies but also judicial bodies are included in this notion of "body exercising public law function". But, although the decisions of inferior courts and administrative are in the scope of judicial review, decisions of the High Court and the Court of Appeal are not subject to judicial review.[103]

Figure 1: Internal Organisation of English Administrative Judiciary System[104].



[101] See www.wikipedia.org
[102] See www.justice.gov.uk/courts/rcj-rolls-building/administrative-court/applying-for-judicial-review
[103] See www.justice.gov.uk/courts/rcj-rolls-building/administrative-court/applying-for-judicial-review
[104] See ACA Europe, the UK, question 10

The Administrative Court is itself a court of first instance for judicial review but it is also an *"appellate court"* for judicial review of decisions of inferior courts, tribunals and other public bodies (the supervisory jurisdiction). Against the decisions of the Administrative Court, one may go for an appeal to (the Civil Division of) the Court of Appeal (see above figure). In judicial review cases, plaintiffs must obtain a *"permission to appeal"* from the Administrative Court. If the Administrative Court rejects such a "permission to appeal" application, a further application may be made to the Court of Appeal. In principle, "permission to appeal" is only granted if there is a "real prospect of success" in appeal or if there are other "compelling reasons" for appeal. Moreover, if plaintiffs obtain *"certificate*" from the High Court judge and the House of Lords grants *"leave"* of appeal, then one can go a further appeal to the House of Lords.[105]

2) The Scope of Judicial Review

Like other jurisdictions in Europe, there are several administrative acts exempted from the scope of judicial review in British law because of *"nature and subject matter"* of these acts. Some of them has already been mentioned in the case law; *"...the making of treaties, the defence of the realm,...the grant of honours, the dissolution of Parliament, and the appointment of Ministers".*[106] In particular, national security has always been the most sensitive issue. So the judges usually exempt national security issues from judicial review provided that the administrative body in question shows to the administrative court at least a minimum convincing evidence for justification of contested administrative acts.[107]

Moreover, the parliament also may prevent the courts to review two kinds of "governing legislation"; *"ouster clauses"* (exempted completely from the scope of judicial review) and *"preclusive clauses"* (allowed to judicial review but only for a short time, for example one month, six weeks, etc.). However, judges always tend to maintain their judicial functions in order to review the legality of administrative actions. Therefore the administrative

[105] Thompson and Jones, 252.
[106] Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 418.
[107] Thompson and Jones, 261.

court interprets ouster clauses quite narrowly despite the existence of the principle of legislative supremacy of parliament.[108]

For commencing a judicial review in the Administrative Court, the claimant must bring one of the two claims; either, a public body or person was under a legal duty to make a decision or to act but it has unlawfully refused or failed to do so; or, such a decision has been taken or such an action has been performed by that responsible body or person "ultra vires", namely "beyond the powers".[109]

In principle, there are three types of grounds for judicial review in the legal system of the UK. The first one is *"illegality"*. Every decision maker (public body) must correctly understand and apply the law which regulates decision making power of that body. If this public body, according to the law, has no power to make a decision or to act but it has made a decision or acted, or it has exceeded its power, that action or decision may be found "illegal" by the courts via judicial review process. Such illegal action is described as *"ultra vires"*[110] (beyond/outside powers). Illegal activities are classified in four groups: A public body may i) refuse to act in a certain way that the law commands; ii) misuse its discretionary power for a wrong purpose or fetter its discretionary power by putting unlawful limits on discretion, iii) take into account irrelevant factors or fail to take account of necessary relevant factors; iv) fail to comply with the Human Rights Act of 1998 (and therefore not acting in concordance with the ECHR).[111]

The second ground for judicial review is "*unfairness"*.[112] If a public body acts or makes a decision so unfairly that it is tantamount to an abuse of power, such an action or decision constitutes unfairness. Accordingly,

[108] *Ibid,* 261.

[109] The Public Law Project (the grounds for judicial review), 2006, 1.

[110] By applying *"ultra vires doctrine"*, the Administrative Court ensures that the administration remains within the law during its all actions. Although the separation of powers principle exists in the British legal system, the principle of legislative supremacy prevails in England. Therefore the courts enforce "the will of parliament" while they are ruling that the administration has exceeded its power granted by the Parliament's will, i.e. parliamentary legislation. (Thompson and Jones, 251.)

[111] The Public Law Project (judicial review procedure), 2006, 2.

[112] "*Fair hearing*" is also another constituent of fairness but this issue will be dealt with below under the title of *"access to courts*".

public bodies must follow procedures enacted by legislation. Also public bodies must not violate the principles of natural justice and they must always seem impartial.[113] Breaching of "legitimate expectation" is another potential constituent of unfairness". If a public body promises a benefit to a person but later it breaks its promise, taking such a benefit away could amount to "an abuse of power", thereby "unfairness". Lastly, according to the recent case law, in certain circumstances, depending on the nature of the acts and how important they are to a person, public bodies must give reasons for their acts; otherwise this could amount to unfairness.[114]

The third ground for judicial review in the UK is *"irrationality and proportionality"*. When courts consider that administrative acts are *"so demonstrably unreasonable*" and create *'irrationality'* or *'perversity'*, then the courts may quash these acts. The famous Wednesbury case of 1948 has been a benchmark judgment on "irrationality" principle;

"If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere... but to prove a case of that kind would require something overwhelming..."[115]

Normally, proving such unreasonableness is quite difficult in practice. However, such a threshold is lower when it comes to the infringements of ECHR by virtue of the Human Rights Act of 1998 or the EU law owing to the *"proportionality"* requirement. Indeed according to the doctrine of proportionality, there must be a balance between the protection of the rights and interests of the individual and the general public interest. Therefore the questions which should be asked are whether the objective of the administration is legitimate, whether the measure is suitable to achieve this objective, whether the measure is necessary to achieve this aim and whether the results justify the means. Unlike the normal threshold of the irrationality, the onus probandi for these requirements is on the administration.[116]

113 The Public Law Project (the grounds for judicial review), 2006, 1.
114 *Ibid,* 3.
115 Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223 CA, Court of Appeal
116 *Ibid,* 4.

If the Administrative Court upholds the claim of the plaintiff, in other words if an application for judicial review is successful, the court has wide discretionary to choose one of five remedies that are unique to administrative law; The most commonly required judicial review remedy is *"quashing order"*.[117] The Administrative Court may quash an invalid decision that has already been taken by an inferior court or an administrative body that is performing quasi-judicial or judicial functions. Then the inferior court or the public body must take a new decision by taking into consideration the quashing order of the Administrative Court.[118]

Second, the court may issue a *"prohibition order"* to inferior courts or tribunals only before they have given a final decision in order to ensure that they do not exceed their jurisdiction and infringe the natural justice's rules. In other words, if an inferior court or a tribunal has already given a final decision, then a quashing order may not be issued.[119] For example, before an administrative tribunal has given a final decision on expropriation, the court may prevent this administrative tribunal from taking an unlawful decision.[120]

Third, the Administrative Court may issue a *"mandatory order"* to an administrative body to perform a public duty. With the mandatory order, the court may require from administrative bodies to make an action or to take a decision but may not order that public body to take a certain decision in a specific way. For example, a person applied to public body and this body has failed to act in line with this application. Then if this person resorts to judicial review and the court finds the public body's failure to act unlawful, the court then may order this public body to reconsider the applicant's request, however may not order the body to take a certain decision in a specific way such as giving a license or paying a benefit etc.[121]

117 *Ibid,* 3.
118 Thompson and Jones, 253.
119 *Ibid,* 253.
120 The Public Law Project (the grounds for judicial review), 2006, 3.
121 *Ibid,* 2006, 3.

Fourth, the court also may occasionally issue an *"injunction"* in order to restrain an unlawful action. With injunctions, the Administrative Court may enforce a public authority to perform a duty or prevent this authority to act illegally. The Court rarely issues injunctions because mandatory orders and prohibition orders have similar objectives. Injunctions may be granted as a "temporary order" during the proceedings of the trial before the case has been fully considered by the court in the final hearing. For instance, when a person challenge a decision which withdraws a community care service, the court may, at an early stage of this case, issue an injunction toward the public authority in question and require it to keep providing that service during the case if the court considers this withdrawal is unlawful prima facie.[122]

Fifth, the court also may occasionally issue a *"declaration"* to express what the lawful position.[123] With the declaration, the Court may, without making any other above-mentioned orders, simply declare the relevant rights and obligations of the parties or how the law in question should be construed.[124]

Moreover, since the entering into force of Human Rights Act of 1998, a sixth remedy has been widely issued; *"damages"*. Now, the Court may award damages in judicial review if a public body has breached a human right with unlawful administrative acts. Before that Human Rights Act, the Court seldomly was awarding damages.[125] However, people cannot claim only their damages in administrative court, in other words applicants can claim their damages only together with a judicial review case in the administrative court. For example, if he or she wants to claim solely a recovery of damages, then it is possible to file a private law case in an ordinary court.[126]

122 *Ibid*, 2006, 3.
123 Thompson and Jones, 253.
124 The Public Law Project (the grounds for judicial review), 2006, 3.
125 *Ibid*, 2006, 3.
126 Thompson and Jones, 253.

3) Access to Courts

Once the claimant brings an action to the Administrative Court, he or she must hurdle an obstacle to proceed with the case; it is a prerequisite for claimant to obtain ***"permission"*** from the court via two ways; in principle "permission" is granted on the paper without oral hearing by a judge and without delay. If the judge refuses to grant permission or grants conditional permission, the claimant may demand oral hearing in the court. However, if the judge still rejects to grant permission, then the claimant may appeal to the Court of Appeal for permission within seven days.[127]

Any claimant must have and show that he or she has a *"sufficient interest"* to be able to initiate a judicial review case and to proceed with it both during the period of permission demand and hearing. However, there is not any clear definition, neither in the legislation nor in case law, what "sufficient interest" means. Indeed it is controversial in the British law that to what extend *"locus standi"* in judicial review is in the discretion of the courts.[128] In this issue there are several conflicting views; some asserts that the *question of standing* is purely in the realm of the discretion of the administrative court.[129] But some jurists argue that the House of Lords relaxed several restrictions in the interpretation of "sufficient interest" requirement in a leading case[130] and therefore in recent years "*there has unquestionably been a considerable liberalization of what is required to found a sufficiency of interest for the purpose of standing*."[131]

It can be seen from the case law that *"sufficient interest"* requirement has been interpreted with a more liberal approach when it comes to *public interest challenges* and groups affected by administrative acts.[132] In particular for *environmental matters*, the courts tend to become rather

127 *Ibid*, 254.
128 *Ibid*, 254.
129 *Lord Wilberforce in R v Inland Revenue Commissioners*, ex parte Self-Employed and Small Business Ltd [1982] AC 167, 631
130 Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd [1982] AC 167, 631
131 R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs [2004] 1 WLR 1761 par.21
132 Thompson and Jones, 256.

liberal to grand locus standi to responsible and respected bodies "*with a genuine concern for the environment…with its particular experience in environmental matters, its access to experts in the relevant realms of science and technology (not to mention law) is able to mount a carefully selected, focused, relevant and well-argued challenge"*.[133]

Although "fair hearing" is one of the grounds for judicial review in the UK legal system, "oral hearing" is not always an essential constituent of fair hearing. In principle, every person has a right to be closely acquainted with the case against him/her and must have the right and opportunity to prepare and put his/her case duly. According to the case law and the legislation, the following practices create unfairness; *"failing to tell the individual what the case was against them, or taking into account evidence or factors which s/he was not aware of, failing to allow the individual to put their case forward, failing to give the individual the facilities for putting their case forward properly, refusing to hear evidence which might have led to a different decision, denying access to relevant documents, holding a hearing in the absence of the individual when they had a good reason for not being able to attend, failing to notify the individual of the time and place of the hearing that would lead to the decision being taken, failing to consult those who the public body had a duty to consult, or those who had a legitimate expectation that they would be consulted before the decision was made, perhaps because they had been consulted in the past or because it would seem obvious that someone has an interest in a matter and should be consulted."*[134]

Lapse of time to bring a judicial review case to the administrative courts is three months after the grounds first arose. However according to case law of the House of Lords[135] the administrative court may grant an *"extension of time"* if the court is satisfied that there is a good and justified reason for delay.[136]

133 R v Her Majesty's Inspectorate of Pollution, ex parte Greenpeace Ltd [1994] 4 All ER 329 par. 350
134 The Public Law Project (the grounds for judicial review), 2006, 3.
135 R v Dairy Produce Quota Tribunal for England and Wales, ex parte Caswell [1990] 2 WLR 1320
136 Thompson and Jones, 254.

III. THE PRINCIPLES OF JUDICIAL REVIEW IN EUROPEAN LAW

A. Introduction

Most of Western European countries have become the member of both the COE and the EU since the end of WWII. So the legal systems of these countries have been involved in an interaction, parallel with the convergency of their economic and political systems. As a consequence, this interaction has yielded the Europeanization of law in two parallel legal spaces; on the one hand the ECHR and the ECtHR has formed a unique legal space [Strasbourg legal space], especially for the protection of fundamental rights, on the other hand the EU law [Luxembourg legal space], which has direct and indirect effects on the domestic laws of the member states, has been generated.

For sure, this convergency has been occurred in various degrees in the different areas of law. For example while this convergence is very obvious in some civil law areas, such as competition and commercial law, it is difficult to see the same level of convergency in other law areas such as administrative judiciary. Obviously, the reason of this is the fact that administrative judiciary is very much related to the sovereignty (external dimension) and very sensitive issue in particular for the separation of powers (internal dimension). However, despite the fact that European national administrative judiciary systems have been still maintaining their own unique features, administrative courts in these European countries have been feeling obliged to provide for stronger protection for human rights and more secured implementation of the rule of law especially under the influence of the case law of the ECtHR and ECJ. In other words, case law of these courts has led to convergency to some extent among national administrative justice systems in Europe.

The ECHR does not contain any specific provision regarding judicial control of administrations. However according to the case law of the ECtHR, judicial review over the public activities is indispensable requirement of the rule of law. Indeed the Strasbourg Court has repeated

and referred several times to the rule of law as a fundamental principle when interpreting and applying the right to a fair trial set in Article 6 (1) of the Convention.[137]

The writers of the ECHR originally did not intent to apply it to judicial review of administrative acts, but it has been gradually extended to administrative justice area by means of the case law of the ECtHR. However, the Strasbourg Court has not expressed any *"principle of judicial review"* so far.

In the European legal area, for the first time the Committee of Ministers of the Council of State officially expressed the notion of *"principle of judicial review"* with *the Recommendation [Rec(2004)20] on judicial review of administrative acts*. Therefore this Recommendation has a special place in the development of Europeanization of judicial review. According to some scholars, this recommendation codifies the existing case law of the ECtHR regarding judicial review and represents the European standards on this issue.[138]

Although this Recommendation has been legally non binding over national jurisdictions, it will be an important starting point in the development of principles of judicial review. It remains to be seen how the Strasbourg Court will apply these principles and how national administrative judiciaries will follow them in practice. In this chapter, however, we try to analyze these principles by examining not only the case law of the ECtHR but also by pursuing the traces of these principles in the EU Acquis and in particular within the context of the ECJ.

Notion of "*judicial review*" and "*administrative acts*" are defined in the Recommendation. Accordingly, *"judicial review"* means that a court/ tribunal examines and determines the lawfulness of an administrative act and adopts appropriate measure. In other words, notion of judicial review in the Recommendation does not include the judicial review by constitutional courts over legislative acts.

137 Ruiloba and Galera 2010, 192.
138 *Ibid,* 193.

Notion of *"administrative acts"* are meant two concepts*;* firstly it may refer to legal (both individual and normative) and physical acts provided administrations may exercise these acts with public authority. If administrative acts affect the rights and interests of natural or legal persons, only then they are subject to judicial review. Secondly, administrative acts refer to situations that an administrative authority may refuse to act or fail to act in cases where this administration is under an obligation to exercise a procedure following an application.[139]

In the EU legal space, we could examine judicial review in two levels. In the first level, the decisions of the EU institutions are subject to judicial review in the EU level. The second level is national jurisdictions, because the EU law is implemented by the member states in national jurisdictions. There are no specific principles regarding judicial review of administrative acts used by neither the ECJ nor national courts as "community judges".[140] Normally and naturally, judges in the national courts of the Member States perform judicial review over domestic administrative acts by applying domestic rules and procedures. However, these national judges as "community judges" have also another essential task; to ensure effective application of EU law. Indeed, since the EU Acquis is implemented within the national legal spaces of the MS, judicial control of this implementation is performed by these "community judges". These national judges apply directly Community law, interpret national law in compliance with EU law, and if necessary refer preliminary ruling applications to the ECJ.[141]

As aforesaid, it is difficult to find *"exclusive"* principles regarding judicial review of administrative acts in the primary and secondary EU law as well as the case law of the ECJ. Surely, the Luxembourg Court has established several *"general"* principles of law, both for substantial and procedural rights[142] but they are not exclusively related to judicial review. In addition to these general principles such as *the principles of supremacy of the EU*

[139] See Recommendation of the Committee of Ministers [Rec(2004)20] on judicial review of administrative acts
[140] Winkler 2008, 893.
[141] *Ibid*, 893.
[142] *Ibid*, 893.

law, royal cooperation and *subsidiarity*, the most related principles in the area of administrative justice are the principles of *"non-discrimination* and *effectiveness of administrative justice"* as well as *"fundamental procedural rights"*.[143] Further, the ECJ ruled in Baustahlgewebe case that the right to a fair hearing and the right to an effective remedy stipulated both by the ECHR (Art 6 and 13 respectively) and the CFR (Art 47) do not cover only civil and criminal cases but also cover fully administrative procedures and administrative judiciary cases.[144]

Notwithstanding, despite these supranational and international effects in Strasbourg and Luxembourg legal spaces and limited convergency, the organization of the court systems, procedural rules and principles vary among national administrative judiciary systems of European countries. And in particular two problematic issues, among others, come to the forefront; first, the issue of acts of government which are exempted from the scope of judicial review; second, the issue of limitation of discretionary power of administrations. [145]

Below, we examine whether and to what extent the five principles set out in the *Recommendation [Rec(2004)20] exist within the context of the COE and EU legal areas*.

B. The Scope of Judicial Review

As a principle, it is a general obligation for all contracting parties to the ECHR to *"secure to everyone within their jurisdiction the rights and freedoms"* (Article 1) and it is aimed *"to ensure judicial review of all administrative activities by the administration"*. The ECtHR states this general rule in its *Ilaşcu and others v. Moldova and Russia* case[146] in 2004; whenever a state exercises its jurisdiction, it is *"to be held responsible for ac ts and omissions imputable to it which gives rise to an allegation of the infringement of rights and freedoms set forth in the Convention"*. Therefore, in principles all administrative acts are subject to judicial review

143 Widdershoven 2007, 292.
144 ECJ, *Baustahlgewebe*, C-185/95 P, par.16.
145 Winkler 2008, 893.
146 ECtHR, Ilaşcu and others v. Moldova and Russia, no. 48787/99 § 24

and merely some specific types of acts can be exempted from judicial review.[147]

But, what can these exemptions be? According to the case law of the ECtHR, *"acts of government"*, by their political nature, are laid beyond the scope of judicial review due to the principle of separation of powers. Also, the Court delimits this exemption by underlying that "*it would be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 paragraph 1".*[148] These exemptions are also stated in the Recommendation[149]: *"...does not prevent States from defining very limited exceptions established by law, for example certain acts in the field of foreign affairs, international agreements, defence or national security".*[150]

The principle regarding "scope of judicial review" in the abovementioned Recommendation is as follows;

"a. All administrative acts should be subject to judicial review. Such review may be direct or by way of exception. b. The tribunal should be able to review any violation of the law, including lack of competence, procedural impropriety and abuse of power."

*As is seen, t*he notion of *"administrative acts"* is broadly described; it covers legal acts (both individual and normative ones) and physical acts of administrations. Also pursuant to the Recommendation, *"administrative activities*" include the situations of refusal to act and act of omission in cases where administrations are under an obligation to act following an application. Because European states are not only supposed not to intervene with the exercising of fundamental rights granted in the ECHR as negative obligations but also have some positive obligations in some cases in order to enable that these rights are put into practice. In these cases, refusals or omissions of administrations may cause the breach of the ECHR[151], as

147 Albarino and Galera 2010, 198.
148 ECtHR, *Fayed v. the United Kingdom*, no. 17101/90 § 49,50
149 See Recommendation on judicial review of administrative acts, 2004, 2.
150 Albarino and Galera 2010, 198.
151 *Ibid*, 199.

expressed by the ECtHR; *"the fulfillment of a duty under the Convention on occasion necessitates some positive action on the part of the State."*[152]

"The right to an effective remedy" is set out in Article 13 of the ECHR. The acts of persons *"acting in an official capacity"* may lead to the liability of contracting states[153]. According to the ECtHR[154], European states may become strictly liable for the acts of these persons even in the event they act ultra vires or contrary to law or further in case of "*acquiescence or connivance of the authorities of a contracting state in the acts of private individuals which violate the Convention rights of the other individuals within its jurisdiction...*".

Originally, at the time of writing of the ECHR, "*the right to a fair trial"* set out in Article 6 was intended to refer only to *"civil rights and obligations"* and *"criminal charges against an individual".*[155] Indeed, this was clearly expressed in the dissenting opinion of Judge Lorenzen (and joined by six other judges) in Ferrazzini v. Italy case.[156]

"(1)it was the intention of the drafters to exclude disputes between individuals and governments on a more general basis mainly owing to difficulties at that time in making a precise division of powers between, on the one hand, administrative bodies exercising discretionary powers and, on the other hand, judicial bodies;...(3) the exclusion of the applicability of Article 6 should be followed by a more detailed study of the problems relating to 'the exercise of justice in the relations between individuals and governments'; accordingly, (4) it seems not to have been the intention of the drafters that disputes in the field of administration should be excluded forever from the scope of applicability of Article 6 § 1".

As is seen, thanks to the liberal approach of the Strasbourg Court which has interpreted this right according to the object and purpose of the

152 ECtHR, *Airey v. Ireland*, no.6289/73, § 24
153 Article 13 of ECHR: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".
154 ECtHR, Ilaşcu and others v. Moldova and Russia, no. 48787/99 § 23
155 Albarino and Galera 2010, 200.
156 ECtHR, *Ferrazzini v. Italy*, no. 44759/98, dissenting opinion of Judge Lorenzen et al.

Convention as well as the principle of the rule of law and the needs of democratic societies, the scope of *the right to a fair trial* (Article 6) has been extended to a considerable number of relations between public authorities and individuals.[157] Moreover, the examples of disputes regarding judicial review of administrative acts covered by Article 6 were specified in the same dissenting opinion of Ferrazzini v. Italy case:

"(a) proceedings concerning expropriation, planning decisions, building permits and, more generally, decisions which interfere with the use or the enjoyment of property,

(b) proceedings concerning a permit, license or other act of a public authority, which forms a condition for the legality of a contract between private persons,

(c) proceedings concerning the grant or revocation of a license by a public authority which is required in order to carry out certain economic activities,

(d) proceedings concerning the cancellation or suspension by a public authority of the right to practice a particular profession, etc.

(e) proceedings concerning damages in administrative proceedings,

(f) proceedings concerning the obligation to pay contributions to a public security scheme,

(g) proceedings concerning disputes in the context of employment in the civil service, if "a purely economic right" was asserted, for instance the level of salary, and "administrative authorities' discretionary powers were not in issue".

If, on the other hand, "the economic aspect" was dependent on the prior finding of an unlawful act or based on the exercise of discretionary powers, Article 6 was held not to be applicable".[158]

[157] Albarino and Galera 2010, 202.
[158] ECtHR, *Ferrazzini v. Italy*, no. 44759/98, dissenting opinion of Judge Lorenzen et al.

However, as stated in majority opinion of the same case (Ferrazzini v. Italy), the Strasbourg Court concluded in various judgments that Article 6 of the Convention, apart from these aforesaid disputes, could not be applicable to all disputes between administrative activities and individuals. Accordingly, for example –to name a few- the right to stand for election, decisions regarding the entry, stay and deportation of aliens, political asylum, deportation and extradition are not within the scope of judicial review. Most public scholars commonly accept, by depending on the principle of separation of powers, that these ***"acts of government"*** are the fundamental political decisions of a state and therefore these foreign affairs, national security and national defence issues may be exempted from the judicial control.[159]

C. Access to Courts

Article 6 of the ECHR does not explicitly contain *the right of access to court*.[160] However, according to the case law of the ECtHR, access to the courts, in civil and criminal proceedings, is one of the essential constituents of *the right to fair trial*. Further, the Strasbourg Court, even if not explicitly, but implicitly- stated[161] that *"the right of access to a court"* was guaranteed in Article 6, basing on the principle of the rule of law. A few year later, court expressed in another case[162] that litigants may not be deprived the opportunity to submit effectively their case to courts.[163]

Even though, at the beginning, the right of access to court was referred in the case law of the ECtHR for *'civil rights or obligations'*, namely for civil actions, later the Court expressed in Deweer case[164] that *"the right of access to court*" also applies to criminal issues.[165] Finally, the Court has, in the same direction, extended "the right of access to court" to administrative judiciary by its subsequent decisions. For example, it is clearly expressed

159 Albarino and Galera 2010, 202.
160 Kuijer 2004, 11.
161 ECHR, Golder v. the United Kingdom, no. 4451/70
162 ECHR, *Airey v. Ireland*, no.6289/73 [1979], § 24
163 Kuijer 2004, 1.
164 ECHR, *Deweer v. Belgium*, no.6903/75 [1980]
165 Albarino and Galera 2010,203.

in the judgments of the Court[166] that if administrative decisions are not subject to a judicial control of a body which has *'full jurisdiction'*, such a situation constitutes a violation of the Convention.[167]

In a similar vein, within the context of the ECJ, by being inspired Article 6 of the ECHR, the protection of fundamental procedural rights are not only limited to criminal and civil issues, but also applies to all procedures, including administrative ones.[168]

Article 34 of the ECHR states that,

"The Court may receive applications from any person, non-governmental organization or group of individuals claiming of a violation by one of the High contracting parties of the rights set forth in the Convention or the protocols thereto. The High contracting parties undertake not to hinder in any way the effective exercise of this right."

But for the first time, the principle regarding *access to the courts* was codified in the Recommendation[169] within the European legal area in 2004;

"a. Judicial review should be available at least to natural and legal persons in respect of administrative acts that directly affect their rights or interests. Member states are encouraged to examine whether access to judicial review should not also be opened to associations or other persons and bodies empowered to protect collective or community interests.

b. Natural and legal persons may be required to exhaust remedies provided by national law before having recourse to judicial review. The length of the procedure for seeking such remedies should not be excessive.

c. Natural and legal persons should be allowed a reasonable period of time in which to commence judicial review proceedings.

d. The cost of access to judicial review should not be such as to discourage applications. Legal aid should be available to persons lacking the necessary financial resources where the interests of justice require it."

166 ECtHR, *De Geouffre de la Pradelle v. France*, no. 12964/87, §34, ECtHR, *Schmautzer-Austria*, no. no. 15523/89 §§34-37, ECtHR, *Bellet-France*, no. 23805/94, §36.

167 Kuijer 2004, 11.

168 ECJ, *Baustahlgewebe*, C-185/95 P, par.16.

169 See Recommendation of the Committee of Ministers [Rec(2004)20] on judicial review of administrative acts

The Strasbourg Court interpreted Article 34 of the ECHR in the manner that[170] applicants, at first place, must prove that they are one of the categories of petitioners aforesaid in the Article. Second they must prove that they are the victim of a breach of the ECHR. To prove, they must show that there is a sufficient direct link between them and the damage which is the result of alleged breach.[171]

According to the Strasbourg Court,[172] the right to access to court is not *"absolute"* and therefore may be subject to several national requirements and legitimate restrictions such as "statutory limitation periods", "security for costs orders", "regulations concerning minors and persons of unsound mind". It goes without saying that these limitations are also subject firstly to judicial review in administrative courts within the domestic jurisdictions and then to the evaluation of the ECtHR. Courts will assess whether these limitations are consistent with "*the essence of the right to access to court",* pursued "*a legitimate aim*" and whether there is proportionality between prospective results and aims of these limitations.[173]

D. Judicial Independence

Judicial independency is based on the double essential conditions according to the Strasbourg Court; namely *the right to a fair trial* (of Article 6 of the ECHR) and *the rule of law*. Accordingly, any attempts from the legislative and executive bodies to influence the judicial independency are strictly prohibited. In addition to the interventions of legislative and executive powers, some behaviors and practices within the judicial power itself are also regarded as crucially dangerous to the independency of judiciary. For example, the manner and procedure of appointments of judges and their term of office must conform to the principle of judicial independency.[174]

170 ECtHR, Gorraiz Lizarraga and others v. Spain, no. 62543/00 § 34
171 Albarino and Galera 2010, 204.
172 ECtHR, Z. and others v. The United Kingdom. no. 29392/95; ECtHR, Waite and Kennedy v. Germany, no. 26083/94
173 Albarino and Galera 2010, 205.
174 *Ibid*, 195.

In a similar vein, the Recommendation[175] reiterates the important principles which have been already stated in the previous case law of the Strasbourg Court and the other recommendations of the Council of Europe;

"a. Judicial review should be conducted by a tribunal established by law whose independence and impartiality are guaranteed in accordance with the terms of Recommendation Rec(94)12,

b. The tribunal may be an administrative tribunal or part of the ordinary court system."*[176]*

Below, we examine the case law of the Strasbourg Court regarding judicial independency from the executive and the legislative powers as well as within the judicial power itself.

As regard to judicial independency from the executive power, the Chevrol case[177] set a good precedent. The applicant, Mr. Chevrol, was a French national who was born in Algeria in 1942, qualified as a doctor in Algeria in 1969. Her several applications to be registered as a member of a Medical Association were not accepted. As part of one such application in 1995, she relied on the Government Declarations of 1962 on Algeria, which was known as the Evian Agreements. These agreements had provided for, inter alia, mutual recognition of qualifications - including Ms. Chevrol's field- awarded in France and Algeria. The issue finally was appealed to the Conceil d'État. The Conceil asked from the Ministry of Foreign Affairs its observations. The Ministry said that the provision of these international agreements had not legal force, because the condition of reciprocity had not been satisfied. Finally the Conseil d'État, on the basis of the opinions of the Ministry, dismissed the applicant's appeal in 1999 by pointing out that it was not for the administrative judges to rule on the conditions for the implementation of an international treaty. Ms. Chevrol complained of interference of the executive power over the judicial power relying on the right to a fair hearing (Article 6/1 of the ECHR). The applicant's

[175] See Recommendation of the Committee of Ministers [Rec(2004)20] on judicial review of administrative acts
[176] Albarino and Galera 2010, 195.
[177] ECHR, *Chevrol v. France*, no.49636/99

arguments were that the Ministry's intervention had been crucial to the judgment of her case and that she was deprived from the means to challenge this judgment in an independent court. The defensive argument of French government was that since foreign policy was within the scope of *"acts of government"* and so was a governmental prerogative, it was the competence of diplomatic authorities to assess conducts of a foreign state, not of the judges.[178]

The following four points underlined by the ECtHR are important for the independency of administrative justice from the executive power.[179]

First, the Strasbourg court defines *"independency of a court"*; when the court is dealing with a case, the executive power on no account cannot dictate any solution to the court regarding this case."

Second, *"interpreting legal rules"* is one of the indispensable and fundamental functions of the courts and this function cannot be waived without mutilating the judicial character of a court. However, the ECtHR accepts that it would be convenient to put requirement for judges to consult with the diplomatic authorities of Ministries of Foreign Affairs since the latter naturally have better information regarding how foreign states apply a treaty.

Third, it cannot be accepted that the opinions of the Ministry of Foreign Affairs, namely the executive power, are not binding on the courts.[180]

Fourth, as a consequence, the case of the applicant had not been heard by a "tribunal" with full jurisdiction and therefore her right to a fair hearing (Article 6/1 of the Convention) had been breached because *"the applicant could not be considered to have had access to a tribunal which had, or had accepted, sufficient jurisdiction to examine all the factual and legal issues relevant to the determination of the dispute*."

178 See http://sim.law.uu.nl/sim/caselaw
179 ECHR, Chevrol v. France, no.49636/99
180 Albarino and Galera 2010, 194.

The Strasbourg Court, as regard to judicial independency from the legislative power, has stated that any interference from the legislature power over judiciary is not consistent with the rule of law and the right to fair trial. The exceptional ground in this issue is *"compelling general interest"*. Otherwise, as the ECtHR underlined in its several judgments such as Draon v. France, Maurice v. France, Arnolin and 24 other v. France that while cases are still pending before national courts, if legislative power adopts a law which has a retroactive effect on these cases or the rights of the applicants, such a legislation breaches Article 6 of the ECHR.[181]

As regards judicial independency within the judicial power itself, the Strasbourg Court stated that it is not possible to mention about independency and impartiality of a court if higher courts give directions to first instance courts and these first instance courts have no room or little as regards how to dispose the cases they deal with.[182]

According to Auby and Metayer, the dual position of the French Conseil d'État [being both has the consultant to the executive power and the judicial function] poses a problematic situation when taking into account the case law of the Strasbourg Court regarding Article 6 of the ECHR, in particular Procola Case.[183]

Within the context of the Luxembourg Court, the notion of "court" has been defined as any independent authority *"ruling in a legal dispute"* and "*meeting the requirements of independency*", "*having impartiality and sufficient term of office*" and "*lacking of appearance of partiality*".[184] For examples even though some administrative authorities are not established structurally within the judiciary branches, they may be qualified as "the court" in the meaning of Article 267 TFEU and Article 6 ECHR if they preserve certain qualifications specified in the case law of the ECJ.[185] In a similar vein, according to the settled case law of the ECJ, a tribunal can

181 *Ibid*, 197.
182 ECtHR, *Brumarescu v. Romania*, no.28342/95 [1999]
183 Auby and Metayer 2007, 61.
184 Winkler 2008, 893.
185 *Ibid*, 893.

be regarded as a "court" if it has "*full jurisdiction over law and facts*" as a superior instance over administrative authorities.[186]

Neither within the COE nor the EU legal area, we do not see any principle regarding how many tiers administrative courts should be. In Europe, most countries have two-tier administrative court structure, while few of them have three-tier structure. The sole example of one-tier administrative justice is Austria.[187] Although it is not a small size state, there is only one administrative court in Austria. On the other hand, Austrian administrative judiciary system offsets this situation by having numerous quasi-judicial administrative authorities whose administrative procedures are special and decisions have res judicata effects over inferior administrative authorities.[188]

Similarly, in the European legal area, there is nothing about how internal relations between lower and higher courts in national administrative judiciaries should be. The types of these relations differ considerably in most administrative justice systems. However, it is accepted by both ECtHR and ECJ, at least one level of administrative court must exist in order to meet the requirement for the principle of fundamental procedural rights. In fact, it is much more important to have an administrative justice system whose process is speed, functioning is efficient and case law is consistent, coherent and cohesive.[189]

E. The Right to A Fair Hearing

In recent decades, a number of sub-principles regarding the right to a fair hearing such as the adversary principle, the principle of equality of arms, the right to access to information, etc. has been developed in the case law of the Strasbourg Court. In fact, the right to a fair hearing is a very indispensable constituent of the right to a fair trial of Article 6 of the ECHR. In a similar vein, the Council of Ministers of the Council of Europe has pronounced these important principles in the Recommendation Rec(2004)20 of the Council of Europe on judicial review of administrative acts.

186 *Ibid,* 893.
187 *Ibid,* 907.
188 *Ibid,* 899.
189 *Ibid,* 908.

"a. The time within which the tribunal takes its decision should be reasonable in the light of the complexity of each case and of the procedural steps or postponements attributable to the parties, while respecting the adversary principle."

"The right to a hearing within a reasonable time" is one of the general principles of law in EU legal order. This right is stipulated in Article 47 of the CFR. The ECJ construed "*the reasonableness of time*" in its Buastahlgewebe case[190]. "*Reasonableness*" should be assessed according to the time between the outset of an administrative procedure and the end of a judicial review. The ECJ has ruled in this judgment that "reasonableness" can be judged by three criteria: i) each case's own specific circumstances (economic, legal, etc.), for example economic significance of the case for the applicant, ii) the complexity of the case and iii) the behaviors/ approaches of the applicant and the administration of the case, for example delaying tactics. The ECJ said one of these three criteria is enough to justify the length of a hearing.[191] However, a bigger problem emerges if multi-level administrative procedures proceed with multi-tier judicial reviews. However the Strasbourg the Court has not given a judgment on this issue so far.[192]

"b. There should be equality of arms between the parties to the proceedings. Each party should be given an opportunity to present his or her case without being placed at a disadvantage."

According to the case law of the ECtHR, parties to a judicial review must have equal possibilities to advance their own arguments.[193] Within the context of the ECJ, "*the principle of equality of procedural rights*" is of vital significance for judicial review of administrative acts because normally administrative authorities are in superior position over individuals during administrative procedures but once judicial review begins, their positions become equal with applicants before the administrative courts.[194]

190 ECJ, *Baustahlgewebe*, C-185/95 P, par.20.
191 Borraccetti 2011, 104
192 Winkler 2008, 896.
193 Woehrling 2006, 46.
194 Winkler 2008, 893.

"c. Unless national law provides for exceptions in important cases, the administrative authority should make available to the tribunal the documents and information relevant to the case."

The ECJ underlined the importance of availability to the documents and information relevant to the case by making reference to the principles of "the right to be heard" and "the right to a fair hearing" in its Corus judgment.[195] The ECJ stated that if one of the parties to the case is deprived of the opportunity to access to facts or documents on which the Court has based its judgment, then these principles are breached.[196]

"d. The proceedings should be adversarial in nature. All evidence admitted by the tribunal should in principle be made available to the parties with a view to adversarial argument."

According to the case law of the ECtHR, all parties to the judicial review must be informed of all contradictive arguments and elements in the case.[197] Similarly, the ECJ underlined that being able to hearing the other party's position and obtaining information must be realized during all judicial review process.[198]

"e. The tribunal should be in a position to examine all of the legal and factual issues relevant to the case presented by the parties."

"f. The proceedings should be public, other than in exceptional circumstances."

"g. Judgment should be pronounced in public."

"h. Reasons should be given for the judgment. Tribunals should indicate with sufficient clarity the grounds on which they base their decisions. Although it is not necessary for a tribunal to deal with every point raised in argument, a submission that would, if accepted, be decisive for the outcome of the case requires a specific and express response."

195 ECJ, *Corus UK Ltd*, C-199/99 P, par.19-25
196 Borraccetti 2011, 105
197 Woehrling 2006, 46.
198 Winkler 2008, 893.

The ECJ underlines the importance of reasons to be given for judicial decisions because they both hinder administrative courts and tribunals to give arbitrary judgments and provide legitimacy for judicial review.

"i. The decision of the tribunal that reviews an administrative act should, at least in important cases, be subject to appeal to a higher tribunal, unless the case is directly referred to a higher tribunal in accordance with the national legislation."

F. Effectiveness of Judicial Review

One of the crucial constituent elements of an efficient judicial review is the enforcement of judgments of courts. Otherwise all efforts to maintain the separation of powers and the balance among the branches of a state become meaningless. However, in almost all jurisdictions, the track records regarding the enforcement of judgments have not been at optimal level due to the unique nature of the relationship between the executive and judiciary branches. The political, historical and psychological reasons of the tension in this power-law relation have been mentioned in the first chapter of this study. By distilling the case law of the ECtHR, the Council of Ministers of the Council of Europe promulgated several principles in *"Recommendation (2003)16 on the execution of administrative and judicial decisions in the field of administrative law"*.

Accordingly, it is the responsibility of the European countries to ensure that administrations "effectively" implement judgments of the courts "within a reasonable period of time". In case of non-implementation, countries will provide appropriate procedures and measures to seek execution of these judicial decisions via an injunction or a coercive fine. Moreover, European countries should ensure that administrations will be responsible if they "refuse or neglect" to execute judicial decisions. Besides, if public officials fail to implement judicial decisions within a reasonable period of time, European countries should take necessary measures to hold these officials liable in disciplinary, civil or criminal proceedings.[199]

[199] See Recommendation (2003)16 of the Committee of Ministers on the execution of administrative and judicial decisions in the field of administrative law

The ECJ has established another "*effectiveness principle*" together with the *"principle of non-discrimination*". According to the Luxembourg Court's settled case law, administrations of the Member States cannot discriminate against EU Law while applying in their jurisdictions in order to guarantee effective application of the EU law. In case of inconsistency of a national legislation or administrative decision with the EU law, for example with the case law of the ECJ or an EU Decision, the administrative authorities cannot discriminate against the EU law and so must apply it effectively within the national jurisdictions.[200]

Another result of the effectiveness principle of the EU law is that *locus standi* is interpreted widely even if proving of a well-defined subjective right is a mandatory requirement to proceed with judicial review in national administrative justice systems. Also, in the light of this principle, the national judges of the Member States must construe domestic legislations to grant interim injunctions to the parties to judicial review when it comes to the provisional protection of interests and rights endowed under the EU law.[201]

CONCLUSION

We aimed to examine whether there are common principles regarding judicial review of administrative acts in the European legal area and, if such common principles exist, to what extent they are adopted by European national administrative judicial systems.

What is the importance of such common principles for Europe? The old continent has witnessed serious disasters and gross human rights violations caused by unlimited administrative authorities so many times throughout its history. Recently, during the Second World War, the unbounded totalitarian governments (Nazism in Germany and fascism in Italy) caused 50-70 million deaths. Eventually, in the light of lessons learned from history, western jurists have commonly accepted that limiting the authority of administrations by judicial review is vital. Moreover, when we

200 Winkler 2008, 894.
201 *Ibid*, 894.

consider the future challenges of Europe, several problems increasingly underline the significance of limiting the discretionary powers of European administrations and the importance of an effective judicial review of administrative acts. For instance, severe Euro crisis and other economic, political and demographic problems may lead national administrations to hold stricter policies and to take too restrictive administrative acts. Thus, it is vital to identify common principles of judicial review in order to maintain the rule of law and to protect fundamental rights before irrecoverable problems arise in the European legal area.

Frankly, finding comprehensive, exact and precise answers to the above mentioned research questions would be beyond the scope of the limited space of this study because of two main reasons. Primarily, unlike other legal areas, the administrative judiciary systems of European countries considerably differ from each other due to their unique historical, social, legal and political backgrounds. Secondly, it is difficult to make an in-depth analysis of these national administrative justice systems in such a limited study. Therefore, because of the space limitations of this paper, the scope of this dissertation has become circumscribed and naturally, the findings should be regarded as limited answers to these research questions.

We examined [in Chapter 2] two leading examples of national administrative judicatures as the representatives of the common law system and the civil law system in the European legal area; namely, the French and the British administrative judiciary systems. Then, I have searched [in Chapter 3] common principles of judicial review of administrative acts in the legal areas of the COE and the EU mainly through analysis of the provision of the ECHR, TEU, TFEU, CHR and the case law of the ECtHR and ECJ.

However, before proceeding to these examinations, I have looked at history [in Chapter 1] to see the historical evolution of the struggle between power and law in Europe from antiquity to the twentieth century as well as the development of the principles of the rule of law and the separation of powers. In this chapter I attempted to understand how judiciary emerged as one of the branches of state and proved to be a control mechanism over political branches of states.

At the end of the examinations of above-mentioned chapters, we concluded that almost all national administrative justice systems in Europe have been in either in a supranational (the European Union) or in an international organization (the Council of Europe) since the end of the Second World War and as a consequence they have been not "rigid and closed models"[202]. In fact, in the last fifty years, in parallel with the economic and political convergency, these domestic legal systems have been considerably involved in interactions within these international and supranational legal areas. However, have several common principles regarding judicial review of administrative acts emerged during these interactions in recent decades?

In Strasbourg legal space, at first the case law of the ECtHR paved the way for this interaction. Several cornerstone judgments of the Strasbourg Court incorporated judicial review of administration into the scope of the ECHR by interpreting Article 6 (*right to a fair hearing*) and Article 13 (*right to an effective remedy*) widely. Then, the Committee of Ministers of the Council of Europe proclaimed several principles, albeit non-binding character, in the Recommendation *Rec(2004)20 on judicial review of administrative acts*.[203]

In similar vein, in the Luxembourg legal space, several general principles, albeit not be directly related to judicial review, have been developed by virtue of the ECJ such as the principles of equality, defence, proportionality, effective judicial protection, state liability, etc. Most recently, the Charter of Fundamental Rights of the EU (CFR) has become legally binding with the entry into force of the Lisbon Treaty. The CFR brings together all fundamental rights contained in the ECHR and existing EU rights. Henceforward the CFR is legally binding both in EU and national jurisdictions. Both judges of the ECJ and national judges as community judges can use the CFR as a ground for judicial review of EU measures and national administrative acts implementing EU law. In particular, Article 47 of this charter stipulates two fundamental rights regarding judicial review,

[202] Winkler 2008, 887.

[203] Actually these principles were codifying the case law of the European Court of Human Rights regarding judicial review of administrative acts.

namely *the right to an effective remedy before a court* and *the right to a fair hearing.*

However, having examined the French and British administrative justice systems as well as the Strasbourg and Luxembourg legal areas, we concluded that the interactions among national administrative judicatures in Europe have not reached to a sufficient level to be able to say that there are common principles for judicial review of administrative acts in the European legal area.

In order to justify this assertion, we denote below several conclusions derived in the light of the comparisons, analysis and findings of Chapter 2 and 3.

- ✓ Throughout the European legal area, there is no common principle regarding "*exemptions"* from judicial review. The scope and content of exemptions have different degrees in various national administrative judiciary systems.[204] As explained above, there are sound justifications to exempt some kinds of administrative acts such as "*government acts"* due to their political sensitivity or their nature. These exemptions cannot be consistent with the rule of law if the limits of these exemptions are left too vague or wide.

- ✓ There is no any principle or rule regarding *"the question of standing*" in European law. The implementation of this issue alternates in national administrative judiciaries between the broader systems of qualified interest (for example "*intérêt pour agir*" in French law) and the subjective right system (for example in German administrative justice system).[205] Similarly neither Strasbourg nor Luxembourg legal spaces put any principle or rule regarding "*actio popularis"* and "*collective interests*" (the possibility of judicial review application by groups or associations that represent).[206]

[204] Woehrling 2006, 43
[205] Winkler 2008, 906
[206] Woehrling 2006, 43

- ✓ There is no answer to the question how far European administrative judges must respect *"discretionary powers"* of administrative authorities.[207] It is very difficult to maintain the balance between two necessities. On the one hand administrative courts must control discretion of administrative authorities and annul any arbitrariness of "*margin of appreciation*". On the other hand administrations must have enough flexibility because of complexity and modernity of public services.[208] However in European law, there is not any standard and principle for courts to strike the right balance.[209]
- ✓ The legal natures of judgments of administrative courts vary from jurisdictions which follow *"the principle of cassation"* to jurisdiction which follow *"the principle of reformative decision"*[210].[211]
- ✓ The role of administrative judges is considerably different in inquisitorial and adversarial judiciary systems in Europe.
- ✓ There is no any rule and principle regarding how many instance/tier should be in administrative courts. It alternates between one-tier to three-tier in various European national jurisdictions.
- ✓ Considering today's modern economic and administrative life, the length and speed of trials are one of the most important problems in judicial review. However, the European legal area has no any principle relevant to this, in particular relating interim relief or interlocutory injunctions. [212]
- ✓ The European legal area keeps silent regarding to what extent administrative courts must have power to scrutinize facts established by administrative authorities. The degree of this scrutiny varies among administrative justice systems of European countries.[213]

[207] Winkler 2008, 904
[208] Venice Commission 2011, 11.
[209] Woehrling 2006, 45
[210] According to *"the principle of cassation",* the power of administrative courts is limited to annul administrative acts; they cannot alter the content of administrative acts. They have to refer back the case to relevant administrative authorities. However under "*the principle of reformative decision"*, courts can annul as well as alter the content of administrative acts.
[211] Winkler 2008, 904
[212] Woehrling 2006, 55
[213] Winkler 2008, 903

- ✓ There is a legal lacuna in European law concerning the issue of failure or omit to act of administrations. If administrative authorities fail to act, what will the role of courts be against administration? Can administrative courts only give judgments on the illegality of failure to act or can they also undertake the task and power of administrations?[214] The answers to these questions vary from jurisdiction to jurisdiction.[215]
- ✓ Regarding the enforcement of judgments of administrative courts, there are different possible sanctions against non-compliance with enforcement of judgments in various national administrative justice systems (from disciplinary to criminal character; from liability of state to officials etc.), but there is no any principle or rule in the European legal area in this issue.[216]

As it is seen, even in these fundamental issues, there is no a considerable extent of convergency among European national administrative judiciary systems. Of course it is undeniable that judicial review systems in European countries have been involved in a close interaction for recent decades in the Strasbourg and Luxembourg legal spaces. But the intensity of this interaction has not reached to the level of "*European Ius Commune of judicial review"* yet, because these national judicatures preserve a large degree of autonomy. Thus, it would not be down-to-earth argument that the Europeanization of administrative justice/judiciary has been materialized.

On the other hand, it seems that new international and transnational public, private and hybrid actors generated by globalisation may affect and change the traditional state-individual relationship models. Furthermore, they may create new restrictions and infringements on fundamental rights in national, regional and international levels. Therefore, Europe should deal with these challenges with new judicial review approach, if she still claims to continue being the cradle of the rule of law.

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[214] Although Article 258 TFEU stipulates that the Commission may bring an action to Luxembourg Court if a Member State has failed to fulfill its obligation under the Treaties, neither EU Acquis nor Strasbourg legal space say anything what administrative judiciaires should do in case of national administrative authorities have failed to act (failed to fulfill their obligation) under the national legislation.

[215] Winkler 2008, 904

[216] *Ibid,* 908

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