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The Principle of Legality and Administrative Punishment under the ECHR: A Fused Protection

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Abstract

The principle of legality permeates the entire legal system based on the rule of law. It is especially well-pronounced in criminal law. However, what are its content, scope and implications when it comes to prescribing and punishing for offences which are supposedly less reprehensible, namely – administrative offences? How precisely should they or the sanctions that they stipulate be defined in legal provisions? Furthermore, is there any room for interpretation while imposing sanctions by public bodies? This article seeks to delve into these vexed questions by examining the relationship between the principle of legality and administrative punishment within the framework of the Council of Europe ('CoE') and the implications stemming therefrom. This will be done by dissecting the rationale and notion of this principle in the normative sources of the CoE with a special emphasis on Article 7 of the European Convention on Human Rights and its (autonomous) application in the case law of the European Court of Human Rights as well as by identifying the shortcomings of the current perception of the legality principle in the context of administrative punishment.

1. Introduction

Punitive administrative measures by whose means a retributive detriment is inflicted upon a transgressor strike at the very core of human dignity. They are indubitably the bluntest manifestation of administrative repression. Thus, including a fundamental rights' dimension into their understanding, should be indispensable for any state wishing to avoid the use of unjust coercion and revere this dignity as well as to increase its legitimacy. The said measures, for their part, can broadly be described as public admonitions that pursue general and individual deterrence whose main purpose is reassuring

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society at large about the validity and effectiveness of administrative law provisions.[1] In comparison to other administrative sanctions, such as preventive or remedial ones, they tend to retribute for the (administrative) transgression itself rather than laying emphasis on its by-products, such as damage or danger that a particular administrative offence may cause. This implies that a breach of an administrative law provision (and, hence, the committing of an administrative offence) – in contrast to other types of administrative sanctions[2] – is an indispensable condition for imposing sanctions. This maxim was (earlier) rudimentarily conceived by Thomas Hobbes and highlighted by one of the greatest 'sanctionists' of all times – Hans Kelsen. It can be said to express the principle of legality that is coextensive with the development of administrative law itself in the continental legal system[3] and embodies both – the limits and the *raison d'être* of any administrative action.

Against this backdrop, this article intends to explore (the meaning, the manifold declinations and implications of) this principle in the context of administrative punishment within the framework of the Council of Europe (henceforth the 'CoE') as offering a fundamental rights dimension on the pan-European level. Needless to say, defining what constitutes the said administrative transgressions and prescribing sanctions to be attached to them is far from being an easy ride for the lawmaker. It, among other things, raises a host of sub-questions that this article will also strive to delve into, namely: how precisely should an administrative law provision the breaching of which is capable of triggering the imposition of a sanction be drafted? Should an obligation to act in one way or another be unambiguous or is there any discretion left for an administrative body in assessing whether a particular breach has been committed? Furthermore, is there any space for punishment by analogy or extensive interpretation of legal wordings expressing the said behavioural obligations when it comes to inflicting detrimental administrative measures?[4] What about (the precision of) administrative sanctions themselves – can, for example, a

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1 P Caeiro, 'The influence of the EU on the "blurring" between administrative and criminal law' in F Galli and A Weyembergh (eds), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU* (Editions de l'Université de Bruxelles 2014), 174.

2 The nexus between an administrative offence and a sanction is not necessary for all types of administrative sanctions. For example, the imposition of preventive administrative sanctions as *ex ante* measures aimed at precluding a certain danger or other interests may be detached from the committing of an actual offence, see *infra* fn 19.

3 cf Sordi, 'Révolution, Rechtsstaat and the Rule of Law: historical reflections on the emergence and development of administrative law' in S Rose-Ackermann and PL Lindseth (eds), *Comparative Administrative Law* (1st edn, Edward Elgar 2010), 30.

4 The infamous 'principle of analogy' in the Soviet Union basically outlawing any 'socially dangerous act' is meant here, see more in D Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2008), 11ff. It may seem like a distant cry from the past but it is still worth checking whether administrative punitive law might sometimes go down this dangerous path.

penalty without an upper limit be stipulated? Or can someone be punished for breaching not a legal provision but, say, a general legal principle? Such a situation is easily imaginable in so-called 'administrative offences law' inoculating such broad concepts into legal provisions as, for example, 'decency' of behaviour.[5]

It should be highlighted at the very outset that currently, the term 'legality' may be used in a variety of ways;[6] however, within the framework of administrative law it, broadly speaking, primarily presupposes the need to base any intervention by public authorities on a legal basis, thus aiming to prevent arbitrary infringements of the rights of the individual.[7] This legal basis should also be clearly indicated in decisions taken in exercises of public power that encroach upon individual rights.[8] In the punitive administrative context the principle of legality can furthermore be conceptually broken down into four sub-principles neatly encapsulated in the Latin adage *nullum crimen (nulla poena) sine lege scripta, praevia, certa, stricta*.[9] Despite its crucial role, together with another cornerstone substantive principle of sanctioning, i.e. proportionality, the principle of legality in the (punitive) administrative context seems somewhat overlooked as compared to its application within the framework of criminal law wherein it was originally conceived.[10] This academic gap is glaring considering that public bodies exercise their penalizing powers in an ever-expanding number of regulatory domains. In some of them there are clear deficits regarding the proper application of this principle.[11] This gap is even more unwarranted because there are abundant cases in competition or data protection law in which the level of coercion inflicted by administrative authorities approaches or even exceeds that which is typical for criminal law.[12]

To fill the said academic gap and explore the principle of legality within the selected context, the rationale and notion of this principle in the normative

5 See, eg, on breach of the peace and behaviour *contra bonos mores* as 'vague' concepts in *Hashman and Harrup v the United Kingdom* App no 25594/94 (ECtHR, 25 November 1999).

6 A Somek, 'Is Legality a Principle of EU Law?' in S Vogenauer and S Weatherill, *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017), 53.

7 J Schwarze, *European Administrative Law* (rev edn, Sweet and Maxwell 2006) (Schwarze), cxxi.

8 See, eg, *Frizen v Russia* App no 58254/00 (ECtHR 24 March 2005); *Adzhigovich v Russia* App no 23202/05 (ECtHR, 8 October 2009).

9 Despite its Latin name the legality principle was first conceived in the aftermath of the French Revolution and the Enlightenment era, see C Peristeridou, *The principle of legality in European criminal law* (Intersentia 2015) (Peristeridou), 33ff.

10 See, eg, for recent scholarship exploring the topic M Timmerman, *Legality in Europe: on the principle 'nullum crimen, nulla poena sine lege' in EU law and under the ECHR* (Intersentia 2018) (Timmerman) and Peristeridou (n 9).

11 Schwarze (n 7), cxxiv – cxxvi.

12 See, eg, on 'draconian' administrative fines in data protection law S Golla, 'Is Data Protection Law Growing Teeth? The Current Lack of Sanctions in Data Protection Law and Administrative Fines under the GDPR' [2017] Journal of Intellectual Property, Information Technology and Electronic Commerce Law 70.

sources of the CoE will first be dissected, including a recommendation adopted as early as the '90s, namely Recommendation No. R (91) 1 on administrative sanctions to the Member States of the Committee of Ministers of 13 February 1991 (hereafter 'Recommendation No. R (91) 1'). Subsequently, Article 7 of the European Convention on Human Rights (hereafter the 'ECHR'), as enshrining the principle of legality in the context of *ius puniendi*, will be elucidated together with a pertinent analysis of the European Court of Human Rights (hereafter the 'ECtHR'). At the end of the article a reflection on the application of this principle and whether the current level of protection is sufficient will be offered.

2. Legality in the 'Soft Law' of the CoE

As noted above, the term 'legality' is variegated; thus, before moving on to a more concrete analysis it is important to extract its specific meaning within a particular normative framework. The first relevant source in this regard – Recommendation No. R (91) 1 – although not legally binding *stricto sensu* is instrumental because not only does it reveal the European consensus on the matter but the governments of CoE Member States may also be requested to inform the Committee of Ministers of the CoE of the actions taken with regard to such recommendations, implying a sort of 'comply with or justify' duty on them.[13] Besides, even though Recommendation No. R (91) 1 is by no means novel, it is still relevant today because it has "political and moral authority by virtue of each member state's agreement to their adoption ... and the extent to which they are widely applied in the law, policy and practice of member states"[14] since the adoption of these legally non-binding acts (paradoxically) requires unanimity.[15] Finally, it is able to serve as a tool for interpreting the Convention provisions and rendering their meaning more concrete.[16]

Recommendation No. R (91) 1 accords the principle of legality a prominent place quite in line with the tendencies discernible on the domestic level in countries having a tradition of adopting special codes dealing with administrative

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13 As stipulated by Article 15 (b) of the Statute of the Council of Europe, see more in A Andrijauskaitė, 'Creating Good Administration by Persuasion: A Case Study of the Recommendations of the Committee of Ministers of the Council of Europe' (2017) 15 International Public Administration Review 39, 43.

14 Council of Europe, *The Administration and You – A Handbook* (2nd edn, Council of Europe 2018), 6.

15 G de Vel and T Markert, 'Importance and Weaknesses of the Council of Europe Conventions and of the Recommendations addressed by the Committee of Ministers to Member States' in B Haller, H-C Krüger and H Petzold (eds), *Law in Greater Europe* (Kluwer Law International, 2000), 347.

16 See for the acceptance of this approach *Demir and Baykarav Turkey* App no 34503/97 (ECtHR, 12 November 2008), para 128 and *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR, 8 November 2016), para 123.

sanctions or in other legal frameworks.[17] Namely, Recommendation No. R (91) 1 designates legality as 'Principle 1' stipulating that 'the applicable administrative sanctions and the circumstances in which they may be imposed shall be laid down by law'. This principle has to be read in conjunction with the definition of administrative sanctions also enunciated in the same recommendation: an 'administrative sanction … is a penalty on persons on account of conduct contrary to the applicable rules, be it a fine or any punitive measure, whether pecuniary or not'. It becomes evident from this definition that an administrative sanction is conceived only in terms of a punitive dimension that is congruent with the overall 'autonomous' perception of an administrative sanction found in the case law of the ECtHR.[18] This may sound like a truism because sanctioning is usually by definition associated with punishing, but, as noted above, administrative sanctions pursuing other aims exist too, namely preventive[19] and remedial ones. The latter in particular are guided by a different logic, i.e. vindication rather than retribution, as found in the idea of commutative justice – a form of justice that governs interpersonal relationships.[20]

The content of 'Principle 1' is laid down in a somewhat laconic fashion, i.e. only emphasizing the need to base administrative punishment on law. However, the recommendation neither specifies what kind of 'law' should serve as a basis in this regard nor determines its level of precision in any way. Thus, one is left to speculate if this 'law' has to be understood in the 'parliamentarian' sense or if the sub-statutory level also suffices.[21] Alongside the imposition of sanctions, 'Principle 1' also includes 'the circumstances in which administrative sanctions may be imposed' within its ambit. It is not entirely clear whether 'circumstances' means legal wordings entailing obligations whose breach presupposes the imposition of the sanctions (within the meaning of *nullum crimen*) or whether it goes beyond that, hinting at the need for 'high' regulatory quality in the context

17 Eg, it is enshrined in Article 1 of the Austrian Code of Administrative Punishment and Article 2 of the EU Regulation No. 2988/95 of 18 December 1995 on the protection of the European Communities financial interests.

18 See regarding various sanctions' goals, eg, *Ezeh and Connors v the United Kingdom* App nos 39665/98, 40086/98 (ECtHR, 15 July 2002), paras 102, 105; *Sergey Zolotukhin v Russia* App no 14939/03 (ECtHR, 10 February 2009), para 55.

19 A good example of a preventive administrative sanction can be found in *Leela Förderkreis E.V. and Others v Germany* App no 58911/00 (ECtHR, 6 November 2008) (*Leela Förderkreis*), a case that concerned a public warning issued with regard to certain religious associations that touched upon their good reputation.

20 See more in D Priel, 'Private Law: Commutative or Distributive?' (2014) Osgoode CLPE Research Paper No. 56/2013 <https://papers.ssrn.com/sol3/papers.cfm?abstractid=2318587> accessed on 25 May 2020.

21 At least in the case law of the ECtHR the term 'law' has always been interpreted quite broadly in its 'substantive' and not in its 'formal' sense. This means that both enactments of lower rank than statutes and unwritten law have been included within its ambit, see, eg, *De Wilde, Ooms and Versyp v Belgium* App nos 2832/66, 2835/66 and 2899/66 (ECtHR, 18 November 1970), para 93.

of sanctioning. The inclusion of 'circumstances' of sanctioning in any event implies that the legality principle should be construed broadly when it comes to exercising *ius puniendi* by public bodies – thus, shrinking their room for manoeuvre to the minimum. Further clarifications on the content of this provision are provided in the Explanatory Memorandum of Recommendation No. R (91) 1 and are worth quoting at length:[22]

'in a democratic society, it is not possible for the administration at the same time to lay down rules of conduct, determine the sanctions applicable in case of non-observance and put sanctions into effect. Legislation is required, at least to lay down the scale of pecuniary sanctions applicable, to empower the administrative authorities to apply such sanctions so as to ensure observance of particular legislative measures and to define those cases in which sanctions restricting the exercise of fundamental rights can be applied. The references to "the law" encompasses the well-established rules of common law. However, a lesser degree of precision may suffice in the definition of the specific circumstances in which the sanctions may be imposed'.

Several things transpire from this passage: firstly, the principle of legality requires a separation between (legislative) bodies stipulating administrative sanctions and the (executive) ones imposing them. This effectually reflects the competency (empowerment) of public authorities as a key concept of European public law[23] and means that a situation in which an administrative authority created a legal basis for itself, e.g., by means of an executive order, and, hence, 'self-empowered' itself to punish could hardly be compatible with the legality requirement. Instead, democratic legitimation via legislative procedure is necessary. Indeed, this legitimation perceived as the input of citizens into the law-making process regarding intrusive practices of the State such as punishment is of heightened significance. It may furthermore lead to better quality drafting of legal provisions (especially when it comes to the clarity and proportionality of a penalty) in that these provisions receive more scrutiny from democratic representatives.[24] Secondly, the said clarifications stipulate the need for laying down the scale of pecuniary sanctions (thus, requiring *lex certa* of penalties) and a clear definition of those sanctions that may impinge upon fundamental rights. The formulation 'at least' in the passage hints at the very minimum standards; however, they ought to intensify when it comes to [legally defining]

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22 Available in the book Council of Europe, *The administration and you: Principles of administrative law concerning the relations between administrative authorities and private persons* (Council of Europe 1996) (Council of Europe), 455-466.

23 cf J Ziller, 'The Continental System of Administrative Legality' in BG Peters and J Pierre (eds), *Handbook of Public Administration* (2nd edn, Sage 2017), 169.

24 See more on these points within the criminal law context in J Chalmers and F Leverick, 'Criminal law in the shadows: creating offences in delegated legislation' (2018) 38 Legal Studies 221, 221-224.

any situation threatening fundamental rights. This seems to be quite in line with European tendencies on the national level.[25] Finally, the inclusion of common law, i.e. judge-made law,[26] into the definition of 'law' may be seen as reflecting the diversity of European legal thought, i.e. the fact that in some countries judicial creation of offences and penalties was historically allowed and no separation of powers between the legislature and judiciary was deemed necessary.[27] The case law of the ECtHR resonates with this approach by accepting judicial law-making or embracing interpretation of the statutory rules in light of the meaning attributed thereto by pertinent (domestic) case law.[28] In fact, interpreting the term 'law' in its substantive meaning and not requiring a particular form thereof, enables the ECtHR to reconcile the myriad of different instruments, varying from Acts of Parliament to bylaws and policy measures to case law and the like, found in the forty-seven State Parties of the Convention.[29] On the flip side, it is also plausible that the very same diversity also precluded Recommendation No. R (91) 1 from specifying what is to be understood as 'law' within its meaning. In any event, the term 'law' in the sanctioning context should be interpreted in harmony with the case law of the ECtHR wherein its more precise meaning has been expounded on numerous occasions and according to its many facets.

3. Legality in the (Punitive Context of the) ECHR

3.1. Article 7 (1) ECHR: Autonomous Meaning of Punishment

The principle of legality in the context of *ius puniendi* is enshrined in Article 7 (1) ECHR as 'No punishment without law', which the ECtHR has described as an essential element of the rule of law on multiple occasions:[30]

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25 Eg, German constitutional case law recognizes that 'the degree of precision relating to the imposition of sanctions should correlate with the size of the penalty', see Decision No. BvR 2559/08 of the German Constitutional Court of 23 June 2010. In France, fundamental rights are also considered in adjudicating on sanctions. The general jurisprudential rule is that fundamental rights can by no means be limited by the executive will; see the famous Decision of the *Conseil Constitutionnel* No. 2009-580 DC of 10 June 2009, in which administrative authorities tried to limit the right to internet use of an individual by an administrative act bearing no legal basis.

26 'The body of law derived from judicial decisions, rather than from statutes or constitutions'. See: BA Garner, *Black's Law Dictionary* (10th edn, West Group 2014), 334.

27 Timmerman (n 10) 32ff.

28 See in this regard the seminal case of *Sunday Times v UK (No. 1)* App no 6538/74 (ECtHR, 26 April 1979), paras 46-53 accepting an offence created by common law, i.e. not enunciated in legislation.

29 J Gerards, *General Principles of the European Convention on Human Rights* (CUP 2019) (Gerards), 199.

30 See, eg, *Varvara v Italy* App no 17475/09 (ECtHR, 29 October 2013) (*Varvara*), para 52.

'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed'.

Even though this Article speaks of a 'criminal offence' and not of 'administrative offences' and 'administrative sanctions' the ECtHR interprets the (general) notion of punishment autonomously, i.e. going beyond appearances and assessing the substance of a particular measure. This means that punitive administrative sanctions also could be and have been included within the ambit of Article 7 ECHR. The existence of a criminal conviction is hence not a decisive factor triggering the use of this provision (see *infra* 4.3). Instead the nature, purpose and severity, characterisation under national law and other elements capable of indicating a regime of punishment are taken into consideration.[31] In doing so the ECtHR is relying on the so-called *Engel* criteria developed as early as the '70s, when it first started grappling with the 'extremely varied forms' of punishment and their implications for the individual.[32] Albeit these criteria were primarily conceived against the 'mislabelling' tendencies of sanctioning that some countries undertook in order to escape the enhanced procedural guarantees of Article 6 ECHR, the practice has attested to their conceptual (even if, as will be demonstrated below, somehow limited) suitability for shielding from the very same tendencies when it came to this substantive guarantee, i.e. the clear requirement to base punishment on law and not on the whims or political necessities of the executive.

Article 7 (1) ECHR explicitly encompasses both *nullum crimen* and *nulla poena* components of punishment as well as international law within its wording. In its case law the ECtHR has clearly established that this provision entails, among other things, the non-retroactivity of criminal law,[33] the prohibition against construing criminal law extensively to an accused's detriment, for instance by analogy,[34] and a prohibition on imposing a penalty without a finding of liability (see *infra* 4.3). Thus, this provision – modelled on criminal law logic – is more extensive than the one found in Recommendation No. R (91) 1. However, it has limitations too: the case law of the ECtHR clearly hints that Article 7 ECHR generally encompasses substantive guarantees and not procedural ones even if sometimes the distinction between the two is blurred since

31 See more on the concept of penalty in *Welch v the United Kingdom*, App no 17440/90 (ECtHR, 9 February 1995).

32 A Andrijauskaitė, 'Exploring the Penumbra of Punishment under the ECHR' (2019) 10 New Journal of European Criminal Law 363 (Andrijauskaitė).

33 See, eg, *Scoppola v Italy (no. 2)* App no 10249/03 (ECtHR, 17 September 2009), para 28.

34 See, eg, *Cantoni v France* App no 17862/91 (ECtHR, 11 November 1996) (*Cantoni*), para 29.

procedures are known to determine outcomes.[35] Hence, substantive guarantees cannot be interpreted separately from procedural ones. Due to this and other considerations, in contrast to Article 6 ECHR enlisting procedural guarantees of sanctioning, no derogations from Article 7 ECHR are allowed in times of war or other public emergencies according to Article 15 (2) ECHR. This – once again – renders a very high salience for the legality principle and is in tune with the prominent place accorded to it by Recommendation No. R (91) 1. Such a 'normative harmony' is conducive to the overarching goal of the ECHR to shield individuals from arbitrariness by setting clear legal boundaries on the power to punish over which the state has a monopoly. At the same time, as the following part of the article will demonstrate, the ECtHR 'activates' Article 7 ECHR with regard to administrative punishment somewhat parsimoniously.

3.2. Article 7 (1) ECHR: A Hurdle or a Blessing for Administrative Punishment?

The analysis of the case law carried out for the purposes of this article has revealed that Article 7 ECHR, despite being an autonomous concept whose invocation bears a resemblance to the '*Engel* test', is a not-so-easily surmountable hurdle for administrative sanctions. Whereas the ECtHR is at times willing to include even 'trivial' administrative fines within the ambit of Article 6 ECHR and subject them to the procedural guarantees set out therein,[36] the required 'punitive connotation' or 'punitive regime' needs to be particularly strong when it comes to the application of Article 7 ECHR. The case law shows that even rather severe public order measures such as compulsory hospitalisation measures[37] or placement on a sexual offenders register[38] do not make the cut let alone administrative sanctions of a more 'fused nature', i.e. wherein the punitive element is not especially well-pronounced and/or is blended with other aims. This is problematic because the 'hybrid' nature of administrative sanctions is a recurrent phenomenon in practice, even though for an individual on whom an administrative sanction has been inflicted it is

35 For example, in *Coëme and Others v Belgium* App nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96 (ECtHR, 22 June 2000) it was made clear that an extension of limitation periods through the immediate application of a procedural law – even if frustrating the expectations of the applicant – was compatible with Article 7 ECHR. See more on the link between procedures and outcomes in G della Cananea, *Due Process of Law Beyond the State* (OUP 2016), 11. See also *Orlen Lietuva Ltd. v Lithuania* App no 45849/13 (ECtHR, 29 January 2019), para 97.

36 Provided that it identifies a potential danger to fundamental rights, such as structural deficiencies in a legal system, by any kind of punitive measures, see more in Andrijauskaitė (n 32).

37 *Berland v France* App no 42875/10 (ECtHR, 3 September 2015).

38 *Gardel v France* App no 16428/05 (ECtHR, 17 December 2019).

of little importance how a particular sanction is classified, as the 'grey zones' of this typology demonstrate.[39]

This was clearly showcased in the recent judgement of *Rola v Slovenia*[40] concerning the divestment of the applicant's licence as a liquidator following his criminal conviction, i.e. additionally placing a professional ban on him. This divestment was permanent and was imposed in accordance with administrative law provisions, namely the Financial Operations Act – that classified such a measure as a 'legal consequence of a conviction'. The ECtHR did not perceive this sanction as a 'punishment' within the meaning of Article 7 ECHR in spite of its rather dense 'retributive content' for the applicant, highlighting its aim of ensuring public confidence in the profession in question instead.[41] Hence, Article 7 ECHR was declared not to be applicable in the present case. This stands in stark contrast to the case law on 'professional bans' regarding Article 6 ECHR, in which a more *pro persona* stance has been adopted by the ECtHR.[42]

One is left to speculate why the threshold for 'Article 7 guarantees' is set so high by the ECtHR – whether it is because this provision is modelled on criminal law logic or due to its non-derogability. At the same time it has to be stated that the dividing line between ECHR articles and their guarantees is especially blurry in this context because when speaking of 'law' Article 7 ECHR alludes to the very same concept as that to which the ECHR refers elsewhere. The ECtHR demands a legal basis for any interference with fundamental rights by a public authority, as defined in the very wordings of articles 8-11 ECHR as well as in Article 1 of Protocol No. 1 ECHR.[43] More precisely, all of these provisions encompass the words 'in accordance with the law' and 'prescribed by law' and this is the first factor that the ECtHR will take into consideration whilst assessing whether a limitation to these substantive rights was justified in a particular

39 A good example in this regard is anti-terrorism measures, such as freezing of funds, adopted by the Security Council of the United Nations (UN). Technically, they are not even classified as 'sanctions' by the UN but are perceived as 'preventive in nature' or 'temporary precautionary measures'. However, it goes without saying that freezing of funds causes an obvious detriment to the individual concerned; see more in G della Cananea, 'Global Security and Procedural Due Process of Law Between the United Nations and the European Union: *Yassin Abdullah Kadi & Al Barakaat International Foundation v Council*' (2009) 15 The Columbia Journal of European Law 349, 514. Also see F Galli, 'The freezing of terrorists' assets: preventive purposes with a punitive effect' in F Galli and A Weyembergh (eds), *Do labels still matter? Blurring boundaries between administrative and criminal law(The influence of the EU)* (Editions de l'Université de Bruxelles 2014).

40 *Rola v Slovenia* App nos 12096/14 and 39335/16 (ECtHR, 4 June 2019) (*Rola*).

41 For a critique, see the Partly Concurring and Partly Dissenting Opinion of Judge Kūris in *Rola* (n 40), paras 20-23.

42 See *Grande Stevens v Italy* App no 18640/10 (ECtHR, 4 March 2014).

43 See, eg, *July and SARL Libération v France* App no 20893/03 (ECtHR, 14 February 2008), para 50ff; *Leela Förderkreis* (n 19), para 85ff.; *Dogru v France* App no 27058/05 (ECtHR, 4 December 2008), para 49ff.

case.[44] The *Rola* case is a clear example of this 'blurry' protection: even if the divestment of the applicant's licence was not recognized as a punishment within the meaning of Article 7 ECHR, the domestic legal framework governing the said 'legal consequences of convictions', i.e. professional bans, was not deemed to have been reasonably foreseeable for the applicant when the ECtHR considered the same question from the perspective of Article 1 of Protocol No. 1 ECHR and the 'lawfulness' requirement enshrined therein.

4. Unlocking the Legality in the Case Law of the ECtHR

As noted above, Article 7 (1) ECHR, despite its 'autonomous nature', is applied with moderation when it comes to administrative punishment. It has been, among other things, successfully invoked in cases concerning administrative detention, annulment of a driving licence, and the impounding of a car. All these sanctions are of a severe nature, whereas the legality of sanctions of a 'lesser calibre' is assessed using another normative toolbox, namely the 'lawfulness' requirement entrenched in the wordings that stipulate the protection of various substantive ECHR rights outlined above. Any interference with these rights has, first and foremost, to be based on law before the ECtHR goes on to assess other factors. Administrative sanctions, for their part, encroach upon property and other individual rights and, hence, most of the time are covered by the said 'lawfulness' test in the case law of the ECtHR, which also seems to serve the very same purpose – ensuring the absence of arbitrariness by checking whether a particular (punitive) interference by a public authority was guided by law. Both approaches used by the ECtHR have been taken into consideration in order to crystalize precepts on the legality of administrative punishment that can broadly be classified into 1) regulatory quality, 2) non-retrospective application of administrative punishment and 3) the need for personal liability.

4.1. Regulatory Quality of Administrative Punishment

The principle of legality firstly implies the need to sustain a 'regulatory quality' in administrative punishment that encompasses manifold requirements. Among them, the foreseeability, accessibility and precision of legal provisions on which a punitive measure is based need to be highlighted.

44 See more broadly on the requirement for lawfulness as justification of restrictions in Gerards (n 29), 198ff; N Lupo and G Piccirilli, 'European Court of Human Rights and the Quality of Legislation: Shifting to a Substantial Concept of 'Law'?' (2012) 6 Legisprudence 229; R Weiss, *Das Gesetz im Sinne der europäischen Menschenrechtskonvention* (Duncker und Humblot 1996), 108ff.

Importantly, all these traits ought to sufficiently enable an individual to ascertain whether or not her behaviour is lawful. In other words, individuals should know in advance which actions will expose them to the risk of sanction by the governmental apparatus.[45] While the accessibility requirement is usually not hard to satisfy as it demands some official publication of a relevant legal provision, and the ECtHR seldom establishes violations thereof,[46] the foreseeability requirement (also sometimes referred to as 'fair notice') presents more challenges and is highly context-dependent, i.e. contingent upon a particular regulatory field. More precisely, the foreseeability requirement depends on the regulatory content and complexity, the number, status and expertise of those to whom it is addressed, etc. In highly technical, entrepreneurial or other risky spheres, such as, for example, taxation or telecommunications law, the case law of the ECtHR invites applicants to take 'special care' in assessing the risks that their professional activity entails.[47] However, there are certain defective practices that by their very nature are hardly compatible with the said requirement and the whole 'regulatory quality' logic. The absence of regulations (1) is the most straightforward of these practices but so is the prolixity of laws – (over)regulation encapsulated in convoluted wordings can achieve the same detrimental effect by not allowing the individual to ascertain the contours of her lawful behaviour. Overly broad formulations, a set of loosely defined situations that are considered to be administrative offences or overly broad discretion given to the executive (2) will also not be compatible with the principle of legality. Finally, ambiguities, antinomies or contradictions (3) used in regulatory provisions may also very easily upset the said requirement especially if compounded by inconsistent interpretation by domestic authorities applying them and/or judicial authorities interpreting their application.[48]

4.1.1. Absence of Regulations

A striking example of administrative punishment in spite of a (complete) lack of provisions stipulating the required behaviour can be found in the *Vyerentsov v Ukraine* case[49] concerning the exercise of the freedom of peaceful assembly. More precisely, the applicant was punished for holding a demonstration in breach of the relevant procedure. The ECtHR recognized that

45 BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004), 119.

46 Timmerman (n 10), 86ff.

47 See, eg, *Cantoni* (n 34), para 35; See further *Groppera Radio AG and Others v Switzerland* App no 10890/84 (ECtHR, 28 March 1999), para 68.

48 The consistency of interpretation by domestic authorities is a factor that the ECtHR includes in its assessments of the ambiguity of such terms, see, eg, *Žaja v Croatia* App no 37462/09 (ECtHR, 4 October 2016) (*Žaja*), paras 99-105.

49 *Vyerentsov v Ukraine* App no 20372/11 (ECtHR, 11 April 2013) (*Vyerentsov*). See also *Shmushkovych v Ukraine* App no 3276/10, (ECtHR, 14 November 2013).

a sanction was imposed on him in line with domestic law, namely the offence of a breach of the procedure for holding demonstrations was provided for by the Ukrainian Code on Administrative Offences. However, the basis of that offence, i.e. the said procedure, was not established in the domestic law with sufficient precision. Instead a tangle of unclear and somewhat contradictory provisions some of which dated back to Soviet times existed regarding the said procedure. Naturally, the applicant was not able to ascertain precisely what kind of action was expected from him especially because he tried to 'follow the procedure' to the best of his understanding, which included notifying the City Council of his intention to carry out the demonstration at issue.[50] This meant that 'the law breached' was in force but the 'law to be observed' was missing. The whole problem was exacerbated by the fact that the Ukrainian Constitution itself required regulation of such a procedure but the legislator had been inactive for over 20 years[51] and these considerations inevitably led the ECtHR to declare a violation of Article 7 ECHR.

4.1.2. Overly Broad Provisions or Overly Broad Discretion given to the Executive

An example of an overly broad interpretation of what is considered to be an administrative offence leading to a sort of punishment *ad infinitum* was furnished in *Navalnyy v Russia*.[52] In this case the Russian legislator subjected participation in 'public gatherings, meetings, demonstrations, marches or pickets' organized in unduly manner to administrative fines stipulated by the relevant provisions of the Code of Administrative Offences. The interpretation of this legal provision was so broad that it factually resulted in penalising any kind of unwanted behaviour of political activists, including the simple fact of finding oneself amidst an impromptu group of people that, among other things, the applicant was sanctioned for. The said practice and its sheer regulatory breadth in empowering executive authorities to end any kind of public event and subsequently penalise the ones involved in it even in absence of any nuisance led the ECtHR to declare a violation of the ECHR.

Another Russian case, namely *Liu v Russia*,[53] demonstrates that not only overly broad wordings of legal provisions or 'loose' interpretation of them but

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50 *Vyerentsov* (n 49), para 6.

51 ibid para 55. The general rule in such cases is that the longer the state fails to repeal legislative mistakes, the harder it is to use them as a defence.

52 *Navalnyy v Russia* App nos 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 (ECtHR, 15 November 2018)

53 *Liu v Russia* App no 42086/05 (ECtHR, 6 December 2007). See, for a broader discussion on the implications of this judgment, MB Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpart* (OUP 2008), 470-472.

also giving overly broad discretion to the executive may also be detrimental to the 'quality of law' requirement. In fact, administrative discretion is a field in which an individual may feel particularly defenceless,[54] thus it should be expressed with sufficient clarity, i.e. by indicating its scope and manner of exercising, the latter of which should in no way morph into unfettered power making the assertion of individual rights impossible.[55] In the said case two parallel procedures for the removal of foreign nationals unlawfully residing in Russia were established within the domestic legal framework – one with attendant procedural guarantees and another one without them or any form of independent review or adversarial proceedings. This case illustrates that given a choice of procedure the executive will most likely not be induced to apply higher safeguards of individual protection against arbitrariness. Instead, it will gravitate towards a more convenient solution that enforces the executive will and escapes judicial scrutiny as happened in this particular case – an executive order stating that a foreign national's presence on Russian territory was undesirable without any reasons and no possibility of appealing against this decision was deemed to be enough by the domestic authorities but did not sit well with the ECtHR.

4.1.3. Ambiguities and Vagueness

Administrative punishment should furthermore not be based on legal provisions drafted in ambiguous terms. The case of *Žaja v Croatia*[56] is a telling example thereof: in this case the source of uncertainty and ambiguity was caused by inconsistency in the translation of legal sources. More precisely, the applicant's car was impounded with a view to collecting the customs debt for the alleged importation of his car upon his entry from the Czech Republic, wherein he was habitually residing, to Croatia. In addition, administrative penalties were imposed on the applicant. These measures were taken by Croatian authorities claiming that the applicant – a Croatian national – had his 'domicile' in Croatia and thus failed to satisfy the conditions for exemption from payment of customs duties set forth in the Istanbul Convention on Temporary Admission, which stated that the registered owner of a vehicle registered abroad must, in order to qualify for the exemption, have his domicile outside the territory of the state into which the vehicle was being brought. The applicant, for his part, contended that the Croatian authorities falsely equated the (original) term

54 Council of Europe (n 22), 371.

55 In fact, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power, see *Weber and Saravia v Germany* App no 54934/00 Decision on Admissibility (ECtHR, 29 June 2006), para 94 and the case law indicated therein.

56 Žaja (n 48).

'persons resident' in the Istanbul Convention with 'persons having domicile', which had a different meaning in the domestic legislation. The ECtHR found force in the arguments of the applicant and took the view that the imprecise translation of the said term that could not be clarified by consistent interpretation by the domestic authorities, resulting in the applicant's inability to foresee with the sufficient precision required by Article 7 ECHR that entering Croatia from another country in his car would constitute an offence.

Another example of 'vague' legislation upsetting the requirement for regulatory quality was *mutatis mutandis* furnished in the *Kakabadze and Others v Georgia*[57] case. In this case the applicants were sanctioned for protesting outside a courthouse. This behaviour attracted liability under two legal provisions within the domestic legal framework between which the material difference could not be clearly established. Furthermore, their wordings stipulating 'breach of public order' and 'contempt of court' as offences were deemed 'vague' even by the apex domestic court. All this was compounded by the fact that the applicants' protest was halted by the court bailiffs arbitrarily expanding the territorial application of the said provisions, i.e. by carrying out an administrative arrest of the applicants outside the courthouse whereas the law enabled them to use force exclusively inside the courthouse.[58] This lack of regulatory quality stipulating respective liability, as well as its arbitrary application, led the ECtHR to declare that the applicants could not have reasonably foreseen that their protest would attract any liability at all.[59]

4.2. Non-Retrospective Application of Administrative Punishment

Another highly important precept for (proper) application of administrative punishment is non-retrospective application to the detriment of the accused. It is rather evident that a public authority is not allowed to inflict administrative punitive measures for a certain socially unwanted behaviour that is established *post hoc*. However, the *Mihai Toma v Romania*[60] case demonstrates that even this 'clear cut' rule may quickly be forsaken when it comes to more complex situations even though it goes to the very heart of justice.[61] In this case the Romanian legislator had changed the legal framework

57 *Kakabadze and Others v Georgia* App no 1484/07 (ECtHR, 2 October 2012).
58 ibid para 59.
59 ibid para 69.
60 *Mihai Toma v Romania* App no 1051/06 (ECtHR, Judgement of 24 January 2012) (*Mihai Toma*).
61 In this regard, an eloquent example provided by legal theorist Fuller can be named, ie the attempt in the former Soviet Union to increase the sentence for robbery retroactively, ie to those sentenced for this crime in the past. This attempt provoked a strong reaction even in Soviet Union, which was not known for its adherence to the rule of law, and was perceived as a matter of justice, see B Bix, 'Natural Law Theory' in D Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Blackwell Publishing 2010), 220.

concerning the annulment of a driving licence. More precisely, the legal provision stating that 'a driving licence *may* be annulled if its owner has been convicted of a criminal offence under the regulations on driving on public roads' was changed into 'automatic annulment of the driving licence' if there was a relevant conviction for a road safety offence. Both measures were to be imposed by the police. The applicant in this case was deprived of his driving licence by virtue of the new law ten years after the fact, i.e. committing the relevant road safety offence. The unfavourable change of legal regime, namely elimination of discretion regarding the annulment of a driving licence, was not deemed to be compatible with the ECHR because in this way the applicant was deprived of the possibility of not having such a punitive measure taken against him.[62] It was established that not only was the said *lex posterior* way more detrimental to the applicant but it also lacked any rules on retroactivity or a statute of limitations, i.e. provisions that 'operationalized' its application. This additionally resulted in a considerable lack of foreseeability for the applicant who, according to the ECtHR, must have been comforted by the thought that the police had decided not to annul his driving licence years earlier when the relevant offence was committed.[63]

4.3. No Punishment Without Personal Liability

A string of Italian cases – *G.I.E.M. S.r.l. and Others*, *Sud Fondi* and *Varvara*[64] – presents further insights pertinent to a comprehensive understanding of the limits on administrative punishment stemming from the ECHR. These cases dealt with non-conviction-based confiscation of property on grounds of unlawful land development – a sanction whose 'true' nature remains heatedly debated[65] – and can be said to be relevant for any other 'derivative' administrative sanctions.[66] The impugned confiscation measures were imposed on the applicants in the absence of formal convictions regarding unlawful site development,

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62 *Mihai Toma* (n 60), para 28.

63 ibid para 29.

64 *Varvara* (n 30), *G.I.E.M. S.r.l. and Others v Italy* App nos. 1828/06, 34163/07 and 19029/11 (ECtHR, 28 June 2018) (*G.I.E.M. S.r.l.*); *Sud Fondi S.r.l. and Others v Italy* App no 75909/01 (ECtHR, 20 January 2009). See for a discussion on their impact on Italian law in D Tega, 'The Italian Way: A Blend of Cooperation and Hubris' (2017) 77 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 685, 697-699.

65 In fact, the Italian Construction Code classified them as 'criminal sanctions' but Italy claimed it was a 'technical' mistake (not repealed for sixteen years) and pleaded their administrative nature aimed at restoring legality and not punishing. The situation was further compounded by the fact that domestic courts considered such confiscations to be administrative sanctions, see, eg, *G.I.E.M. S.r.l.* (n 64), paras 200, 202 and 220, *Varvara* (n 30), para 49.

66 Such as, for example, excluding tenderers for violating competition law, see, eg, Article 57 (4) of the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and Directive 2004/18/EC.

the issuing of such convictions having been barred by the statute of limitations. The ECtHR made it clear that Article 7 ECHR requires that confiscation must follow a finding of personal liability by the national courts enabling the offence to be attributed to and a penalty to be imposed on its perpetrator.[67] The ECtHR – once again – went 'beyond appearances' and assessed a finding of such personal liability 'in its substance' rather than 'in its form', noting that the applicability of Article 7 ECHR does not have the effect of imposing 'criminalisation' by states of procedures which, in exercising their discretion, they have not classified as falling strictly within the criminal law.[68]

Hence, the ECtHR did not see the infliction of the said sanction lacking attendant formal convictions as being at variance with the ECHR as long as the offence could have been proven to be 'made out, based on both the material element and the mental element' in compliance with the procedural guarantees of Article 6 ECHR. The so-called 'conviction in substance', even if (formally) discontinued due to statutory limitations, sufficed for the ECtHR to ascertain the existence of the said criteria and not declare a breach of the legality requirement. However, the coin was flipped when it came to some of the applicants, namely the companies at issue that were not parties to any kind of proceedings by virtue of the *societas delinquere non potest* principle recognized in Italian law. The ECtHR found this practice to be at variance with Article 7 ECHR having regard to the principle that a person cannot be punished for an act engaging the liability of another.[69] In the present situation the companies at issue were nothing but 'third parties' to the proceedings of relevant natural persons involved in unlawful site development; hence, they could not have been subject to the impugned confiscation measure. This is a welcome development since it "makes little sense unless those who are punished are indeed responsible for the wrongs that trigger a punitive response".[70]

Importantly, the saga of non-conviction-based punishment, even if not undisputed, as, among other things, demonstrated by a range of dissenting opinions given in these cases, not only helped to cement and clarify the concept of 'personal liability' within the legality context of punishment but also once again demonstrated the link between substantive and procedural protection in the ECHR. Finally, the 'conceptual blessing' of administrative punishment was reconfirmed: the ECtHR made it clear that the 'criminal logic' of Article 7 ECHR is not a hindrance to Member States diversifying their 'legal responses' to a

67 *Varvara* (n 30), para 71.
68 *G.I.E.M. S.r.l.* (n 64), para 253.
69 ibid para 274.
70 GP Fletcher, 'Punishment and Responsibility' in D Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Blackwell Publishing 2010), 509.

variety of socially unwanted practices.[71] This seems to be in line with the 'push towards decriminalization' of the legal systems of the Member States expressed already in the very first cases dealing with administrative sanctions.[72] However, such an openness should by no means be equated with an unbridled 'licence to punish' because the ECtHR also made it clear that it is ready to defend compliance with the procedural safeguards embedded in the ECHR that ought to shield individuals from the arbitrary ways of a state exercising *ius puniendi*.

5. Conclusion

The tendency of the ECtHR to apply the embodiment of the principle of legality – Article 7 ECHR – autonomously and go beyond a domestic legal designation of a particular punitive measure is laudable. This, among other things, provides a bulwark against the ever-enticing possibility of Member States watering down standards of individual protection by 'mislabelling' punitive measures. It furthermore unlocks a host of 'quality-of-law' standards regarding administrative sanctions as well as requiring CoE Member States to refrain from pernicious retrospective punishment practices and unfettered (misuse of) discretion given to administrative authorities that at times degenerates into executive arbitrariness. At the same time this study has somewhat paradoxically shown that this tendency is marked by parsimony. The ECtHR appears to wish to reserve applying Article 7 ECHR to the most severe punitive measures with dense retributory content be they criminal or administrative. By doing so, however, it excludes from its scope such sanctions as, for example, professional bans by overemphasizing their preventive goals but overlooking the actual deleterious effects of a punitive character on the individual as seen from the intrinsic viewpoint of punishment. In extremis this results in a jurisprudential 'cacophony', i.e. attributing procedural safeguards to these types of sanctions when it comes to applying Article 6 ECHR but not fully granting the substantive protection enshrined in Article 7 ECHR.

Put differently, the rather high threshold required by the ECtHR to trigger the application of Article 7 ECHR for administrative punishment is capable of leading to the weakening of individual protection and not providing effective safeguards against arbitrary punishment practices. This, in turn, may not be fully compensated for by performing the 'test of lawfulness' embedded in other

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71 Once elegantly termed a 'calibrated regulatory approach' by the ECtHR, see more in this regard in *A and B v Norway* App nos. 24130/11 and 29758/11 (ECtHR, 15 November 2016), paras 106, 124.

72 'The Convention is not opposed to States, in the performance of their task as guardians of the public interest, both creating or maintaining a distinction between different categories of offences for the purposes of their domestic law', see, eg, *Öztürk v Germany* App no 8544/79 (ECtHR, 21 February 1984).

provisions of the ECHR because Article 7 ECHR is modelled on criminal law logic and thus offers a higher level of protection due to its formal character and strict binding force when contrasted with the generally accepted principles of administrative law.[73] Even more, Article 7 ECHR bears an expressive (awareness-raising) value that is especially significant in punitive domains of law.[74] Currently, the relationship between administrative punishment and the principle of legality can be described as a fused one with no evident conceptual sharpness between the application of Article 7 ECHR and the test of lawfulness. This seems to be partially predetermined by the binary nature of the principle of legality, namely it being a general prerequisite for every manifestation of public action and acquiring an enhanced 'dignitarian' meaning and undertones when it comes to administrative punishment.

A modicum of caution should thus be used in this principle's mode of application to make sure that inconsistencies in the case law are avoided and the level of protection not diluted because administrative punitive measures reflect a strong form of public censure and, as mentioned above, impinge on human dignity, respect for which is essential for State legitimacy. Hence, their drafting should be imbued with precision and clarity and kept under scrutiny not only to help people transgress less by enabling them to plan their legal actions and consider their consequences but also for the people who are called upon to apply the said sanctions. The principle of legality should in any event be construed in a broad manner as stipulated by Recommendation No. R (91) given the fact that not all of the questions posed at the beginning of this article have been conclusively answered in the case law of the ECtHR so far. Whereas the case law on regulatory quality regarding the definition of administrative offences (the *nullum crimen* side) as a bulwark against unfettered administrative discretion or other forms of arbitrariness, as well as precepts such as 'no retroactive punishment' and 'no punishment without personal liability', is quite well-developed, many vexing questions touching upon the '*nulla poena*' side of the notion of the principle of legality, i.e. connected to the precision and proportionality of penalties themselves, are still looming. However, it seems to be only a matter of time before they will have to be confronted as more and more punitive powers are making their way into the modern regulatory state in the guise of administrative sanctions.[75]

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73 Schwarze (n 7), cxxvi.

74 CR Sunstein, 'On the Expressive Function of Law' (1996) 144 University of Pennsylvania Law Review 2021, 2044-2045.

75 The burgeoning field of data protection and the exorbitant fines prescribed therein illustrate the point quite well. In the future, adjudication on the 'human rights' dimension' of these fines is likely to spill over to the ECtHR, as has happened with, for example, competition law.