The evolution of administrative law in Albania and the impact of the decisions of the European Court of Justice in the Albanian legal reforms in administrative justice

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Abstract

The selection of the thesis was generally motivated by the lack of legal treatise focused in the arguments of Administrative Court importance in Albanian Judicial system as a new judicial structure, whose role would be to check the legality of decisions of the state administration with the aim to guarantee effective protection of human rights and legitimate interests of private persons through a regular, conform, fast and reasonable judicial process.

The aim of this study is to describe the institutional steps taken from Albanian Government in administrative justice evolution, enormous differences between the administrative law before and after 1990, and the impact of European Court of Justice case law and EU law in the Albanian legal reforms in administrative justice.

By analyzing the development of the administrative law in Albania is highlighted that the factors which influenced the transformation processes of this branch of law are the level of political culture, the heritage of the paste and the European Union , which has long been engaged in direct support for the modernization of public administration in Albania .

In conclusion studying and analyzing the recent reform undertaken in the establishment of administrative court in Albania is necessary to make an evaluation of the impact of this reform in amending the legal framework for administrative procedures and adoption of a new Code of Administrative Procedure.

Keywords: *administrative justice, administrative court, Reform, judge, Code on Administrative Procedures, evolution, protection*

JEL Classification: K23, K33

I. Introduction and constitutional framework

This paper seeks to analyse the latest stage in the evolution of the Albanian administrative justice, namely the changes introduced by the Government's 2012[2] Reform, the influence of current European jurisprudence and the impact of the decisions of the European Court of Justice in the Albanian administrative justice.

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[2] Law no. 49/2012 on Organisation and Functioning of Administrative Courts and the Adjudication of Administrative Disputes"

The article offers an overview of the state of the Albanian administrative system and its relationship to developments in European law, in order to describe the principal features of administrative organization, activity (which chiefly means administrative procedure) and justice in Albania.

Administrative law in Albania has changed markedly over the last two decades, especially after 1990, with the collapse of the communist regime, a phenomenon which is attributable to various causes, one of which is the impact of European law (this should be taken as referring to both EU and ECHR law). These changes had two key objectives: on one hand, the strengthening of the principle of equality of the parties; on the other, the strengthening of the effectiveness of the judicial protection.

The influence of European regulation on Albanian administrative law would seem to be very important, especially in the fields of the organization and protection of citizens[3] vis-à-vis the public administration. The dismantling of the system of public intervention in the economy was a direct consequence of the new European economic order, as well as the creation of a certain number of independent authorities.

Neither the impact on the Albanian justice system, nor the fundamental nature of the protection provided have affected its structure, but several aspects have, concerning the detailed implementation of EU and ECHR principles, such as certain procedural mechanisms and some substantive types of protection offered by the courts.

1.1 General considerations

The main goal of administrative justice is to protect fundamental rights of private parties in their relationships with public bodies, and, simultaneously, to protect the public interest, which constitutes the expression of the state's sovereignty.

The proportional weight of each of these elements has changed over time in the Albanian administrative justice as result of a long process of evolution that involved historic circumstances, succession of different laws, a change of mentality regarding public administration and, in particular influences of the European law. Administrative authorities used to be seen as placed on a higher level, associated with secrecy and privilege, and never as an equal by the private partners. Now, administrative authorities are placed in a position of *near equality*, both by the Constitution and by ordinary law. The old privileges of public administration have been abolished (only a very few – when justified by law – still remain), and the decision-making powers of administrative judges are now stronger.

Another important cornerstone of the evolution in administrative justice has been the increased effectiveness of judicial protection through the administrative courts, regarded as a long-held ambition doomed never to be

[3] Ratified by Law No 9509 of 27.07.2006 "on the ratification of the Stabilization and Association Agreement"

achieved without a complete overhaul of the legal system, which finally came about through the Reform analysed in this article.

1.2 Constitutional framework

After the communist period, the Administrative Law as an integral part of the legal frameworks in Albania, have been reviewed to be in accordance with democratic developments based on the Recommendations of the Council of Europe[4]. The Stabilization-Association Agreement and several documents adopted in the integration advancement process require the country to meet the Copenhagen Criteria. Public Administration Institutions should be able to implement the acquis communautaire, provide favorable conditions for a competitive private sector and be equipped with the institutional capacity to participate effectively in future decision-making within the Europian Union after accession.

The current Constitution of Albania[5] guarantees the intervention of judicial power to protect the human rights and constitutional and legal interest of the citizens and requires that public administration be regulated by law and positions inpublic administration be filled through competition and transparency. The Constitution requires that state organs respect the laws into force-principle of legality. In the Constitution of 1998 are provided a number of fundamental principles, as the principle of effective judicial protection, dealing with administrative justice.

This principle has always existed at a European level. It is imposed by the European Convention on Human Rights and by the Charter of Fundamental Rights of the European Union. It is also recognized by the case law of both the European Court of Human Rights and the European Court of Justice.

The Code on Administrative Procedures, approved in 1999, regulates several issues such as: identifies the range of administrative organs and bodies subject to it; defines the meanning of the administrative actions; general principle fundamentals to be respected in administrative processes;provides for necessary steps during the initiation, investigation and finalization of a decision making process.

In the constitutional frameworks and following the continuous challenge to improve the administrative and judiciary system, Albanian government[6] was engaged to have an Administrative Court, to resolve the legal conficts between business and state administration.

The establishment of this institution as part of the justice system is made by adoption of the law on Administrative Courts which intend to strengthen the

[4] Recommendation CM/Rec (2010)7 adopted by the Committee of Ministers of the Council of Europe on 11 May 2010

[5] Law No. 8417 of 21.10.1998 "The Constitution of the Republic of Albania," approved in referendum on 22.11.1998 and promulgated with President's Decree No. 2260 of 28.11.1998. Published in the Official Gazette no. 28/ 1998, dated 7.12.1998. It has been amended with Law No 9675 of 13.1.2007 and Law no. 9904 of 21.4.2008.

[6] Council of Ministers decision No. 1340, date 1.10.2008

justice system of the country, improve access to justice for citizens and businesses, and facilitate faster procedural actions and trials.

The adopted law sets clear criteria for selecting and further promoting administrative court judges in a transparent manner, based solely on their merits and with due regard for their qualifications, integrity, ability and efficiency. For the first time, this law stipulates an independent judicial review that will allow for the courts' scrutiny of any legal infringement by an administrative body, including lack of competence, procedural impropriety and abuse of power.

1.3 Principles

The Albanian legal system has a large number of principles concerning the organisation and the action of the public administration and the legal protection of private individuals[7] with whom it interacts. These are special principles that constitute a special branch of the law, different from those governing relationships between private citizens. In this branch of the law, principles play an essential role, so much so that we can say that in Albania, as in other countries, administrative law has evolved more on the basis of principles of case-law and the input of legal scholars, rather than on precise rules set down in formal legal acts. These principles have been codified, some at constitutional level, and the others are been provided by the Code on Adminisrative Procedures.

These principles deal mainly with the relationship between the law, the public administration and the courts. This relationship and the way it operates define the role of the public administration and the conditioning of its power, as well as the guarantees of individuals' protection. Administrative power pursues the public interest and is separated from legislative and judicial powers; it is the law that determines the powers pertaining to the public administration and defines the objectives that it has to pursue; the exercise of administrative power is subject to control by the courts, which verify its compliance with the law.

This synthesis is obviously simplified. The system is not static and the referents themselves alter so far as their content is concerned. In Albanian administrative jurisprudence the relationship linking the three entities is changing considerably: the law is less and less law in the formal sense and tends to take on a more universal sense.

As mentioned above, the Reform came into force in 2012. It is, therefore, still too soon to have a clear and complete picture of all its consequences. Some of the remedies have yet to be tested or are still awaiting a final decision on the first specific case. Nevertheless, it is possible to reach some general conclusions, based on the new rules established in the law on Administrative Courts, dhe bill on the Code of Administrative Procedures and in the case-law which already exists.

[7] Articles 15 of Albanian Constitution

The main innovations in the new system, in comparison with its predecessor, may be identified as follows:

- Equality of parties;
- Effective judicial protection.

1.3.1 Equality of parties

The principle of equality of parties (public bodies and private parties), is enshrined in article 10 CPA, and finds expression in several of the Code's rules and also in the article 3 of the Law on Administrative Court. Basically, it means that the new system has removed the administrative authorities' remaining privileges, e.g. exemption from court costs, immunity from a finding of "*mala fide* litigation" (abuse of process) and exemption from nenforcement of judicial decisions in many cases on public interest grounds.

Administrative authorities were previously exempted from court costs. It was considered that, as both courts and public administration were "state" bodies, the payment of costs by the State to the State would make little sense.

However, the change of attitude towards administrative authorities in the new system, along with the concerns about equality of parties, made it necessary to abolish this traditional privilege.

Under the old system, administrative authorities were primarily in charge of enforcing judicial decisions, which could constitute a problem when judicial decisions were not in their favour. If they failed to enforce the decision spontaneously, the claimant could then apply for enforcement against administrative body and a judicial process would then follow. This solution was justified by the principle of separation of powers. Now, with the enlargement of the ruling powers of administrative judges, administrative courts finally fully play this role.

1.3.2 Effective judicial protection

In order to assure effective judicial protection, administrative courts must have a real chance to restore legality and, if necessary, order the administrative authorities to take the proper steps or conduct themselves in a determined way. The previous interpretation of the principle of the separation of administrative and judicial powers led to the conclusion that this sort of ruling was not possible. Therefore, administrative authorities detained an excessively broad margin of discretion, especially regarding enforcement of judicialn decisions.

In addition, because of the procedural law previously in force, conduct of administrative justice ran up against a plethora of formal obstacles. The system favoured formal justice, to the detriment of material justice.

In practice, the *pro actione* principle means fewer opportunities for dismissing cases on formal grounds, for instance due to the failure to meet procedural requirements which are not essential, or which may be corrected.

Administrative judges are now obliged to adopt a more flexible position, with a view to providing material justice. This obligation has also brought with it an increase in the ruling powers of the administrative judges, who are no longer straitjacketed by a series of merely formal requirements. Closely related to this, the administrative judge has now the duty of analysing all the causes of illegality of the administrative act, and not only the causes invoked by the claimant. This means the judge should not refrain from striking down an administrative act based on reasons other than the ones pointed out by the claimant.

In order to assure effective judicial protection, administrative courts must have a real chance to restore legality and, if necessary, order the administrative authorities to take the proper steps or conduct themselves in a determined way[8]. The previous interpretation of the principle of the separation of administrative and judicial powers led to the conclusion that this sort of ruling was not possible. Therefore, administrative authorities detained an excessively broad margin of discretion, especially regarding enforcement of judicial decisions.

It is only possible to ensure effective judicial protection when judicial decisions are taken in reasonable time. This is stated in article 3, no 1, of the Law on Administrative Courts. The reasonable time requirement has been amply explored in the case law of the European Court of Human Rights.

II. Historical evolution of administrative law in Albania

The development of the law on administrative justice should be viewed in relation to the nature and extent of government action in Albania. Administrative law in Albania has not had a long tradition of judicial review of administrative authorities.

Traditionally, legal protection has been organized mainly within the administrative system. Administrative powers are created and regulated in separate statutes, which frequently create special legal procedures as well. This has given rise to a highly fragmented system of administrative procedures. Actually there is a clear-cut divide between administrative and judicial bodies, but this has not always been the case.

2.1 The period between 1912 and 1944

For over 400 years (1481-1912) Albania was part of the Ottoman Empire, with its sultanate imperial system and legacy of patrimonial and personalistic rule of law, which were implemented also and after the declaration of independence of the Albanian state[9]. One of the most importance adminisrative act adopted in

[8] *L'art. 21 octies della novellata legge sul procedimento amministrativo nelle prime applicazioni giurisprudenziali: un'interpretazione riduttiva delle garanzie procedimentali contraria alla Costituzione e al diritto comunitario,* www.giustamm.it; Diana Urania Galetta, *L'annullabilità del provvedimento amministrativo per vizi del procedimento,* Milano, 2003.

[9] Albanian State Archive Decision date 28.12.1912.

22.11.1913 was the Current Kanun on the Civil Administration in Albania[10], which aimed at regulating the civil administration in the country. Only in the period from 1925 to 1932 it was possible to lay the foundations a new Albanian administrative legislation, based on the principles of European law.

After a short period of liberation and rudimentary democracy following World War I, Albania became an authoritarian monarchy under King Zog's rule, on which under the influence of Italian legislation was drawn a considerable number of administrative acts. Legal rules on organisation and functioning of the government are provided on Fundamental Statute[11]. In this normative act were defined some procedurial provisions on the agenda of the cabinet of ministers meeting, the discussion at the meeting, despite the fact that the solution that was given to issues was in full accordance with the instructions that the prime minister had previously received from the king.

A special place was reserved for the recognition and regulation tw local governmental bodies , which act to implement the law "On civil administration", including the Administrative Council[12]. In this period of time exist the concept of the municipality which was a separate legal entity. The law "On the organization and functioning of municipalities" dated 12.01.1928 provided the way of creation of this local government body and its decision-making process through the Council of permanent.

2.2 After the Second World War and the Communist Period

Based on the study of the legal acts in the field of administrative law for this period of time conclude that doesn't exist codification of administrative law or a special law concerning administrative procedure. However it is to be mentioned that elements such as the withdrawal of the opinion of the working class, otherwise it was not providede as a rule law, was originated in theories based in the system in force in that period in Albania.[13]

This does not mean that the procedural elements are not taken into consideration by the state authorities in their decisions.

In 1946, under the constitutional provisions materialized in the law "On popular councils"[14], these councils were entitled to exercise the administrative powers in materials and procedural cases and to give the administrative punishment to the persons who have committed administrative offenses.

During 1968-1990 most of administrative rules weree stablished to reflect the high centralization of the organization and functioning of the state: all administrative norms were reviewed in a hierarchicals ystem, at the top of the

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10 Drejtoria e Përgjithshme e Arkivave Shtetërore të R.P.Sh, "*Qeveria e Përkohshme e Vlorës dhe veprimtaria e sa* j", *[TemporaryGovernment and its Activity]* Tiranë 1963, p. 43.

11. Offical Newspaper named "Dit e re" nr. 57, viti 1928

12. Offical Newspaper 12.2.1928

13 Como, J. *E Drejta Administrativ*, (Administrative Justice), Shtëpia botuese Kinostudjo, Tiranë, 1983.

14 Official Newspaper nr.83, date 4.9.1946, Albania

pyramidalsystem remained the Council of Ministers,administrative acts were at large not reviewed by the court expect forexceptional cases related to civil status or the right to vote.

2.3 Administrative Law in Post Communist Period

The year 1990 represented the beginning of the decentralized system, marked by political, legislative, institutional, and economic reforms. Albania started public administration reform building new institutional "models"and "experiences, which were personalized through the characteristics of structural,functional and cultural elements. The normative and legislative fundamental issues of the administrative reforms are based on constitutional provisions, laws and relevant documents describing specific aspect of reforms. The pace and depth of reforms were differentiated in each stage and correlated with the overall development.

Adoption of the Main Constitutional Dispositions in 1991[15] provided that the state duty is to respect and protect constitutional order, equality before the law, social justice, pluralist and that the powers are separated and that political parties and other organizations are fully separated from the state.

A number of laws and sublegal acts were approved to establish such a separation of the political parties from the administration, structuring of the state administration, privatization of institutions and services.

For the first time in the country a very important law on the civil service was adopted in 1996[16], substituted in 1999 with a new one[17], aiming at the meritocracy, a politicism and meritocracy of a pool of public employees. Sustainability, competitiveness which adds to meritocracy also is a feature of the public administration required by the Constitution of the Republic of Albanian adopted in 1998.

The new law on Civil Servants no. 152/2013[18] was part of package of reforms pushed by the European Commission in 2012, in order for Albania to receive EU candidate country status. The law aims to create a truly professional civil service that is not affected by political interference, containing guarantees for public employees and penalties for managers that might dismiss them illegally.The law also provides rules for the evaluation of the performance of civil servants, disciplinary measures and appeals process, outlining the rights and duties for the employees of the public administration.

A second and deep wave of changes in administrative law continued after the adoption of a Code on Administrative Procedures in 1999[19], which provided

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[15] Law no. 7491,date 29.04.1991

[16] Law "On the Civil Service of the Republic of Albania" No. 8095 of 21 March 1996.

[17] Law No. 8549, dated 11 November 1999 "On the Status of the Civil Servant"

[18] Official Journal 95, 2013, approved in 30.05.2013

[19] Law no. 8485 dated 12.5.1999, "On the Administrative Procedure Code of the Republic of Albania"

general principles such as legality, unbiasness, responsibility, equality and proportionality, transparency, reasoning of decision-taking process, control, etc. which are foreseen as inherent elements of the administrative in Albania. This Code will be promulgated be a new Code on Administrative Procedures, which is approved by the Albanian government and is in Parliamentary proceeding.

Durind these period several other administrative laws were adopted including a law on collegial state organs, a law on the right toinformation of official documents, on the state secret information, on the protection of personal data, Adoption Procedures and Albanian Adoption Committee, the Law on Private International Law, on State Administration[20] etc.

III. The new administrative jurisdiction system of Albania in the perspective of the accession to the European Union

3.1 The reform of Albanian system of Administrative Justice

The Reform of Albanian system of administrative justice was guided by a central aim – that of increasing the effectiveness of judicial protection of human rights and legitimate interests of private persons through a regular, conform, fast and reasonable judicial process. The administrative justice is, therefore, no longer the "poor relative" of Albanian judicial system (regarding effectiveness of judicial protection), and has now been brought fully into line with European law.

From the end of 2013 Albania has adopted the law "On the organization and functioning of administrative courts and the judgment of administrative conflicts"[21]. This law aims to reform the administrative legal framework in order to guarantee the protection of human rights and interests in a regular judiciary process. The law aims to have a fair and fast judgment toward the unfair actions that affect the interests of people from the administrative body's actions; it is considered an attempt to stop the arbitrarity and to respect the equality of the citizens or public subjects that have conflicts with administrative bodies. It is expected to strengthen the justice system of the country, improve access to justice for citizens and businesses, and facilitate faster procedural actions and trials.

The concrete object of the law is to define obligatory rules for:

a) *the organization and functioning of administrative courts, the status of the administrative judges;*
b) *jurisdiction and competence of administrative courts;*
c) *the principles and procedures of the trial, the parties in the process and others in administrative adjudication;*
d) *administrative judicial decisions and their execution.*

[20] Law no. 8480, dated 27.5.1999, Law no. 8503, dated 30.6.1999, no. 8510, dated 15 July 1999, law no. 8457, dated 11.2.1999

[21] Law No.49/2012, Date: 03.05.2012, Dt.of Approval: 03.05.2012, Official Bulletin No.53, page 53

For the first time, this law stipulates an independent judicial review that will allow for the courts' scrutiny of any legal infringement by an administrative body, including lack of competence, procedural impropriety and abuse of power. The law sets clear criteria for selecting and further promoting administrative court judges in a transparent manner, based solely on their merits and with due regard for their qualifications, integrity, ability and efficiency.

3.2 Influences of the European law

The system of guarantees offered by Albanian administrative law in regard to dealings with administrative bodies does not differ from the protection, under art. 41 of the Nice Charter[22], of the right of individuals to see issues concerning them dealt with in an impartial and equitable way, within a reasonable time-span. The administration is under a duty to act in an impartial and evenhanded way, and the penalty for infringement of this obligation is the consequent annulment of the act. The power must be exercised within a certain period of time which is fixed by law. The expiry of this period with no result opens the way for judicial review.

Art. 41 sets out three precise circumstances giving rise to a right to good administration:

- the individual's right to be heard prior to measures which are unfavourable to him being adopted;
- the right of access to decisions which concern him and
- the duty of administrative authorities to give reasons for their decisions.

The right to be heard in the context of a pre-established procedure preceding the adoption of an unfavourable measure is guaranteed under the participation provisions laid down by the Code of Administrative Procedures. To guarantee the participation process there are special provisions placing duties on the administration, from communicating the initiation of administrative procedures that are disadvantageous to them, to announcing in advance the rejection of applications relating to measures in their favour.

Putting all matters before the administrative court avoids the private individual having the burden of starting two sets of proceedings before two different courts.

In general, however, it is clear that, even leaving aside the areas of exclusive jurisdiction, the cases which fall within the jurisdiction of administrative courts are more numerous by far than those involving the ordinary courts. Whenever a private party's position is pitted against a power exercised by an administrative authority, this tends to take the form of a legitimate interest and therefore comes under the administrative courts' jurisdiction.

Furthermore, the results achieved in the area of judicial protection with regard to administrative authority and in particular the considerable effectiveness

[22] Charter of Fundamental Rights of the European Union (2000/C 364/01) Official Journal of the European Communities

and wide-ranging nature of appeals for judicial review of administrative action are primarily the results of the work of the administrative courts. They have developed the criteria for judicial review of the administrative exercise of discretion, and have modelled the administrative process in order to provide fuller legal protection for the positions of private individuals. The administrative courts reach decisions in the context of a specific process, namely the administrative process, which is regulated in a fairly approximate way, with few legal rules[23]. Administrative jurisprudence had filled this gap brilliantly, whether by applying civil procedure rules as far as possible, or finding original solutions which are the product of their creative law-making.

3.3 Enlargement of the ruling powers of the administrative judge

The enlargement of the ruling powers of administrative judges derives from a change in the attitude towards administrative authorities, now reflected in law, and from a less conservative interpretation of the principle of the separation of powers. The principle of the separation of powers is no longer perceived with the disproportionate breadth previously accorded to it, allowing for new types of rulings against the administrative authorities, namely whose nature is considered to be more "intrusive"[24]. It is now undisputed that the court may order the anticipation of an administrative act or behaviour, and even that it may issue "substitutionary orders", albeit in exceptional cases (when the margin of discretion permitted to administrative authorities is practically nil, or/and where an act is simply due in accordance with strict legal rules).

Taking into account the increase of effectiveness and equality in judicial protection, administrative authorities are expected to take all measures in order to avoid litigation and, therefore, become more accountable. This will mean increased openness in their dealings with private parties. The strengthening of accountability will, thus, hopefully lead to greater transparency.

4. Conclusions

This article has sought to provide a picture – necessarily in outline – of Albanian system of administrative justice as it stands today. I has aimed to highlight the main shortcomings of the previous system, and set out the principal achievements and implications of the Reform's changes.

This was more than a simple reform of administrative justice: it was a revolution in the current judicial model, which has brought it into line with European requirements. The two main innovations analysed by this paper are the

[23] Recommendation NO.R(87)16 of the Committee of Ministers to member states" On Administrative Procedures affecting a large number of persons" adopted on 17 Sept 1987

[24] D. Sorace, Il principio di legalità e i vizi formali dell'atto amministrativo, „Dir. Pubbl." 1/2007, p. 385

strengthening of the principle of the equality of the parties and the assurance of effective judicial protection.

In more general terms this reform is key for the improvement of the Albanian judiciary for the following reasons:

- It contributes to a further democratization of the system introducing a system in line with fundamental rights international standards
- Better serving the citizens and the public interest
- Contribute to strengthen the judiciary system increasing its capacity to serve the society
- Brings Albania a step closer to the EU

Regarding these more general aspects I would like to remind that the role of the Administrative justice is to make sure that public administration respects the Law and compensate possible damages that wrong decisions might have caused.

The legal review of administrative decisions by independent courts is part of the EU standard and an important contribution to ensure the Rule of Law. Administrative court is not only responsible for the practical implementation the law and has to ensure the efficient enforcement of judicial decision in sectors like pensions, health insurance, construction and residential law, residence permit.

The latter has had consequences at various levels: a shift in paradigm with regard to the possibility of applying for judicial review, the strengthening of the ruling powers of the administrative judges, and the guarantee that jurisdictional decisions will be rendered in reasonable time.

I trust that Albania will succeed on this task and that the new administrative jurisdiction system of Albania will be a successful development within the more comprehensive judicial reform. Although it is still too early to make a definitive assessment, it may be that administrative judicial protection in Albania and is now taking its first steps with increased effectiveness and a much clearer focus on the rights of private parties, obliging the administrative authorities to adjust their practices to higher standards of openness and democracy, and leading them to become more accountable.

It is now time to take stock, to learn from experience – an experience which overall has been positive – and to make adjustments where possible, as we move towards the better provision of justice.

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