AJJL Journal ISSN 1946-4699

Academic Journal of Justice and Law

LEGAL PRINCIPLES IN ADMINISTRATIVE LAW AND ADMINISTRATIVE PROCESS IN ALBANIA

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ABSTRACT

Dominance of laws upon state institutions and administration assumes the fact that are well defined the limits of state power and the limits of control as in situations of violation of law and supremacy through control exercised by judicial authorities. Generaly speaking we can accept that the principle of legality is the eccence of the rule of law, because by regulating social relations ensure the rule of law. In way to assure a complet overview of the situation this paper will analyse in comparative way some european legal sistems and frameworks.

The legal principles are known by everybody for their importance on regulating a civil, criminal or administrative procces. This paper aims to analyse the aplication of some of the most important principles by Albanian jurisprudence. Principles as the right to a due process, or principle of presumption of innocence, principle of legality are basis for a democratic state that is caracterised by the rule of law. Some form comunist countries often were focused on having a state of law without understanding that it is only a fist step to the rule of law but is not the same thing with the rule of law in a democratic state.

This paper aims also to find some differences between common terms which at least in Albanian Legal system are often confused with one another. It is not enough for an administrative institution to deliberate and administrative act, but this act ain way to be valuable must at the same time be legal and neccessary. Much more this problem is evident at

the process of control done by judges in an administrative process to the administrative acts deliberated by different administrative institutions.

Keywords: legality, due process, legal principles, rule of law

INTRODUCTION

Trying to define the rule-of-law state, we notice that there exist many definitions, due to the complexity of its significances and implications. In the doctrine is hold that the shortest definition and apparently the clearest one is the definition given by Rudolf Wassermann, according to which the rule of- law state is the state whose activity is determined and limited by law.

In the specialty literature has been expressed the opinion that two elements are always present in defining the rule-of-law state, namely: the relation between state and law, as well as the subordination[1].

In some contries such as France or Germany the principle of legality is usualy interpreted in broad sense. In France the principle of legality is cvasi – synonymous with that of rule of law. The source of legitimacy is examined based on the difference between written rules but which aren`t stipulated by the administration (Constitution, International Conventions and laws), imposed rules by judges trought case law and general principles of law and after all by rules that are stipulated by the administration itself, such as regulations or individual decisions. The guarantee of administrative legality is given by the administrative justice, esspecially by the Council of State which played a decisive role in limiting executive power tby recource to exess power.

[1] http://www.proceedings.univ-danubius.ro/index.php/eirp/article/viewFile/1320/1186. Iulian Nedelcu, Short Remarks on the Rule of Law State Concept, The 7-th Edition of the international Conference, European Integration Realities and Perspectives, pg 4

This way the principle of legality is expanded as a general principle of constitutionality of the activity of administrative bodies which can act only when it is autorised / alowded to deliberate it[2].

An administrative act must be issued by an administrative body by means of procedure provided by law in full compliance with the extisting legal rules that govern the behavior of administration in order to respect fundamental rights and to not involve a breach of the basic conditions set by the law, and all this in way to consider the act legal.

Another important issue that will be analysed in this paper is the right to a due process in Albanian administrative legal framework.

The fair process is a fundamental constitutional principle, sanctioned in the 1998 Constitution as a fundamental right. Moreover, this principle goes beyond our domestic legislation, emerging to European levels, sanctioned in Article 6 of the European Convention on Human Rights and also wide acknowledged by the European Union legislation as an important principle which is taken into consideration at the European Court of Human Rights.

The Constitution of the Republic of Albania is the highest and the fundamental law in the country that provides the right to a fair legal process in certain articles, but does not provide a clear definition. However, the meaning of a fair process shall be provided by the Albanian juridical doctrine, and most importantly, the decisions of the Constitutional Court shall be mentioned as the later is the one which interprets the Constitution. *The Constitution is what its court says about it.*

The protection offered to the individuals from the clause of due process is not limited only to the rights provided by the Constitution, but it is completed by another legal norms in ordinary and organic laws. The Albanian Constitution identifies the due process as a guarantor not only against arbitrary actions that can perform state authorities on freedom, or property but also the procedural and fair trial rights.

Art.42 of Albanian Constitution shows that constitutional protection will be present and necessary in any intervention if implemented two basic conditions, the first is associated with the violation of the rights of liberty and property and then second with the fact that it haven't been a fair trial.

[2] Ioan Alexandru, *Administarive law in European Union*, 2007, pg. 154

Art. 131 letter "f" of Albanian Constitution provides the due process but in this case as a competence of the Constitutional Court when it considers complaints from individuals. The Albanian Constitutional Court has the right to consider complaints from individuals about violations of their constitutional rights to a fair trial, after that individuals have exhausted all legal remedies to protect this rights:

- The right to be heard before the trial;
- the right to be presumed innocent until proven guilty by the court;
- the right of the accused to be informed within a shortest time and in his own language to the charge;
- the right to him to defend the right to ask questions and request the calling of witnesses:

All these components for a due process are constituted under Article 6 of the European Convention on Human Rights. But is important to underline that the core of procedural rights of due process are not an integral part of Article 42 of the Constitution. In addition to Article 42 of the Constitution are also its other provisions as Article 27, Article 28, Article 29, Article 30, Article 31, Article 32, Article 33, Article 34 that meet the requirements of Article 6 of the European Convention on Human Rights .

The Constitutional Court of Albania has reviewed and accepted the demand of individuals, in the case of non-execution of court decisions final by the bailiff and in the end decided: Accepting the request that established the violation of the constitutional right to a fair trial as a result the failure of a final court decision. Some cases to be mentioned are CCA no.6 / 2006, No.20 / 2007 and No.43 / 2007.

I. Analyse of legal principles and overview on Albanian Legislation

1. The principle to have the right to a due process

At the moment the bigest part of these laws is under reform because of the obligations that Albania has to fullfill on her path to UE. One of the most important normative acts that is under modification is Administrative Procedural Code (Law 8485 dt.12.5.1999). For example

the *Law on the organisation and functionation of High Court of Justice* had last modification in 2013 because after the creation of administrative courts it was necessary to provide at the law for High Court of Justice the creation of Administrative colege. This provision was introduced at the law for High Court of Justice with law 151/2013 avoiding this way the gap that was created for more that 6 months from the adoptation of the law 43/2012 *On organisation and function of the administrative courts and judgments of administrative disputes.*

In my opinion such countries as Albania are under a process of reformation of legal framework so this gaps that can have place between new laws and existing laws are normal and help on the improvement of entire legal framework.

1.1 Albanian administrative laws regading to the right for a due process

1. Administrative Procedural Code (Law 8485 dt.12.5.1999)
2. Law about the function of collegial administrative organs of state and public ents (Law 8480 dt. 27.5.1999)
3. Law about the organization and functionation of Council of Ministries (Law 9000 dt 30.01.2003)
4. Law about the Albanian Ombudsman (Law 8454 dt4.2.1999)
5. Law about the organization and functionation of Local Government (Law 8652 dt 31.7.2000)
6. Code of civil procedures (Law 8116 dt 29.3.1996)
7. Law on protection of personal data (Law dt 22.7.1999)
8. Law on the right of information on official documents (Law 8503 dt30.06.1999)
9. Law on the organisation and functionation of High Court of Justice (Law. 8588 dt15.3.2000)
10. Law on organisation and function of administrative courts and the judgements of administrative disputes (Law 43/2012)

1.2 Does this principle have the right understand and application in Albania?

The principle to a due process is relatively new for the Albanian jurisprudence and doctrine being introduced legally only after "90-s. Actually this principle is pretty undefined and is understood by the Albanian subjects and justice actors in a quite different mood compared to the classic European justice. For example *the completion of the trial within a timely manner* is an actual topic for Albanian jurisprudence and courts. Sometimes the delays in the administrative juridical process result not only in the denial of the right based on an ancient principle *"justice delayed, justice denied"* but it also can result in the loss of the right.

This important principle is stipulated at art.28 of Albanian Civil Procedural Code *"the court should declare the decision within a reasonable period" (this text is from 1995) evaluated in a new way of this principle in 2009 at the Administrative Procedures Code, art.16 (The Principle of the efficiency and debureaucratisation)*[3] *and art* 3 of Law for organisation and function of administrative courts and the judgements of administrative disputes which provides that*: "administrative courts assures through a due process of law in a reasonable time …*

Conform the opinion of ex-president of Constitutional Court, Mr. Abdiu me too, stick to the view that the legal definition of procedural deadlines for adjudication in administrative justice (but not only) is necessary because we Albanians lack a tradition of efficiency, lacks proper control over actors that affect the adjudication of cases, as the judges and prosecutors.

These actors failed to coordinate their work on identifying the responsibilities of each unjustified delays that often exceed even years[4].

[3] Art 16 APC: "*1.The public administration and the process of decision-making have to be structured in a such mood that can assure to private persons a large access in decision-making. 2. The Public administration and public servants are obliged to serve allways to the public in the most efficient way.*"
[4] http://drejtesiashqiptare.com/?p=677

1.3 The standards of European Court of Human Rights

The Court of Strasbourg has set up a standard for a certain group of cases which should be resolved within a short period, such as: Cases related to the individual's civil status; pensions; cases related to juridical capability; cases of compensation and remuneration in case of accidents, etc.

The threatening of the judgment principle within a reasonable period applies not only to processes lasting in time, but also to ones which are completed within a very short time, not allowing the parties to present every juridical mean to defend.

a) *Case Marini vs. Albania 18.12.2007*

"To construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would indeed be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6. A delay in the execution of a judgment may be justified in particular circumstances. But the delay may not be such as to impair the essence of the right protected under Article 6 § 1 (see, among other authorities, *Hornsby*, cited above, p. 510, § 40; *Jasiūnienė v. Lithuania*, no. 41510/98, § 27, 6 March 2003; *Qufaj Co. Sh.p.k. v. Albania*, no. 54268/00, § 38, 18 November 2004; and *Beshiri and Others v. Albania*, no. 7352/03, § 60, 22 August 2006[5]).

Thus, the Court considers that from 1993 to 2001, notwithstanding the applicant's requests for the enforcement of the State Arbitration Commission's final and binding decisions of 1993, upheld by the domestic courts in final decisions, the authorities failed to enforce the decisions in question. Indeed, as it transpires from the parties' submissions, the State entered into an agreement with third parties, ignoring the applicant's status as a 50% shareholder in the company.

[5]http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"languageisocode":["ENG"],"respondent":["ALB"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"nonviolation":["6"],"itemid":["001-84061"]}

Moreover, the Court considers that the respondent Government did not provide any explanation as to why the arbitration decision and the final court decisions in the applicant's favour were not enforced for over ten years from the date they were delivered, until 2003, when the company was wound up and later ceased to exist. It does not appear that the bailiffs or the administrative authorities took any effective measures to comply with those decisions[6].

135. There has therefore been a violation of Article 6 § 1 of the Convention in this respect."

Albanian beginning from 1995 had a lot of cases in ECHR and most of them have as object the art 6 of ECHR. In this regard on 17 December 2012 the Strasbourg Court analyzing the decision "Manushaqe Puto vs. Albania" took a pilot decision. This pilot decision gave to Albanian State 18 months to find solutions for the compensation of citizens which had a definitive decision from ECHR. At the same time the court decided that all claims that will be presented after 17 December 2012 will raise to 18 months.

1.4 Law 43/2012 for the Organization and Competences of Administrative Courts in Albania

This law did a revolution in Albanian jurisprudence and justice because it provided for the first time the competence that judicial power has over administrative activity exercising an efective control over the administrative activity.

Until 2012 this administrative control was considered as an external one because it was done by the administrative sections of ordinary courts. The novelty of law 49/2012 was the creation and organisation of administrative courts in Albania that will have as main scope the control of administrative acts. This law brought a new reform in system of justice protecting better interests of entities and thus increasing the efficiency of asministrative adjudication process.

Law 49/2012 provides the organisation of administrative courts of first instance, of Apeal and a special administrative college at the Hight Court of Justice. Also law 49/2012

[6] Case Marini vs. Albania 18.12.2007

provides the way will be selected the administrative judges their competences and the jurisdiction of these courts. The parties of an administrative process and the subjects of administrative process also were stipulated in this law. New and clearer definitions for terms such as administrative act, normative act, administrative tribunal, public body or public entity are given by the new law. Beside the existing principles are added new principles. The most important providement in this law consist in guarantees that are given through new legal instruments in respect to the principle of having a due process in an efective and reasonable period of time.

A novelty in this law was the fact that the burden of proof falls on the public state authority. Also important is the fact that law provides that the analisation of a case can be done in a public session or based on documents that will be analysed by the advisory section.

The administrative courts are separated in 3 levels. The first level are administrative courts of 1-rst instance which are totaly 5 all over Albania, one central Apeal Court that is in Tirana and the Administrative Section at the Hight Court of Justice. Another novelty of this law is the requirement conform which for cases regarding the disputes with object an administrative public contract the panel of judges must be composed by 3 judges (lit `d` and `dh` of art 7 law 49/2012).

Conform art 40 of law 40/2012 it's observed that the jurisdiction of administrative courts is very large. Administrative courts can deliberate themselves administrative acts, can do unavailable totally or partially the administrative act, can change partially or totally the administrative act or can oblige the public institution to change the administrative act.

This law seems to resolve the big problem of execution of court decisions. Conform art 65-66 of the law 49/2012 the judge himself after deliberating a decision based on the request done by parties or bailiffs orders at the room pf advising without the presence of the parties to be done all the special actions in way to establish deadlines and concrete measures that will be undertaken with the aim to execute the court`s decision. In cases when the decisions are not executed gave to the judge the right to undertake disciplinary sanctions till criminal sanctions.

2. Legal relationship between the principle of legality and oportunity or neccesity

The principle of legality defines the limits of the activity od administration and takes the form of an absolute thing only as log as it is treated as a principle, because the administration has the necesity to exercise a margin of liberty in order to take decisions, to which coincides discretionary power. It actually means the power that is given to the administration deliberately choosing between more decisions based on assessment and being oriented to achieve the purpose pursued by the lawmaker.

We have to underline that the discretionary power is not contrary to the principle of legality because is exactly the freedom of appreciation the result of the fact that legality does not impose a certain type of behavior.

Consequently in relation to the requirements of legality, discretionary power begins where legitimacy stop while the administration has the obligation to provide results and to satisfy the public interest. As regards the relationship between public interest and legality albanian administrative doctrine shows that the purpose of public interest is always an element of legitimacy and the tools used related to the need and the opportunity. However in this situation should be taken into account the proportionality between legality and neccesity, by application of the principle of proportionality in adopting the tools that lead to the decision that is already taken. Violation of the principle of proportionality does the overcome of assessment power of administration and ultimately leads to excess or exceeding of powers.

Interesting is the fact that in a comparative overview oto albanian and romanian doctrine they generaly have one point of view. So when the administration has the power to assess if is or not neccesity do issue an administratuive act all this process of assesment and deliberation must be legaly[7]. By another point of view we also have to accept that the legality of an act does not always include his neccesity, but the neccesity to issue and after that to deliberate an act always includes its legality.

I think that will be usefull for this paper to analyse the two big different Romanian Schools regarding to the relationship between legality – neccesity. On one side is the opinion

[7] Paul Negulescut, *Puterea de apreciere a executivului in infaptuirea actelor de putere publica,* Pandectele saptamanale, Bukuresht, 1959, p.225

of Cluj Napoca University which consideres that legality and neccesity are two different conditions of valibility of administrative acts, and on the other side is the Law School of Bucharest which consideres that neccesity is nothing more than an element of legitimacy[8].

The criteria of proporcionality is also provided by Albanian and Romanian Constitutions, for example in Romanian Constitution it is stipulated at parag. 2 of art 53 which regards the exercise of some rights or freedoms but also the fact that some measures can be taken in way to limit this rights and freedoms but all of them have to be proporcional with the real situation.

Regardin to legal control over administrative acts in the concept of representativesof Cluj Napoca`s oppinion, the control will consist only in verifying the legality and necessity thus an administrative act issued in exercise a power of assesment that has public authority selected one of several possible legal solutions can`t be canceled by the administrative court. But is accepted that this principle allows exeptions especially by special laws provided for the right of administrative courts to examine the necessity of administrative act and when the need does not conflict with legality.

This way the representatives of Cluj Napoca School argue with different aspects of jurisprudence as for examle a decision which had as object an administrative claim regarding one decision of Local Council for the dismissal of the vice of Local Council. This claim was accepted by the court with the motivation that the decision was taken violating the law 215/2001 which provides that all decisions of Local Council should be motivated.

In this case the necessity of taking the measure of discharge and taking into account the legality back whi can control censored by the administrative court, if the act of dismiss is sufficiently motivated. The justification of this argument is based on the principle of separation and balancing of powers which prevents judicial authorities to interfere with the activity of the executive power excepting some special cases in which are expressly provided by law.

However is known the fact that doesn`t exist a contradiction between legality and necessity because they cann`t reach the conclusion that necessity is synonimous with

[8] Ilie Iovanas, *Drept Administrativ vol 2,* Servo-Sat, 1997, p. 49-51

lawlessness and discretionary power can be understood as an administrative illegal behaviour which conflicts with the principle of legality[9].

3. Principle of Presumption of inocence

The presumption of innocence is recognised as an element of due process in the light of Article 6 parag 2 of ECHR. This principle means that the defendant is presumed innocent until is issued a definitive gulity decision by the court. The ECHR has repeatedly acknowledged that the guarantee provided by Article 6 parag 2 of ECHR aims to force the prosecutor in a criminal proceeding convincingly prove the charges against the accudes "without resort to resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused"[10].

This is linked inseparably with thw peinciple of presumption of innocence. It is recognized by the practice of the provisions that provide for the presumption of innocence and procedures. The maner of provement of guilty is competence of national legal framework whwereas the ECHR has the right to exercise control over the acts and decisions in case of missuse of the legal space that provides it. The presumption of innocence protects not only the accused but also the suspect before that against him are raised charges.

The presumption of innocence is a basical principle and at the same time human right that must be aplyed allways in justice. The aplication of this principle is connected also to another principles like: process legality, process publicity and the right to have a defender.

ECHR jurisprudence is very rich regarding the principle of presumption of innocence so some examples that have as an object administrative acts will be related below.

In the case *Daktaras vs. Lithuania*, a decision dated October 10, 2000, the Court underlines the importance that state authorities should give to the manner in which that make statements formulated in relation to an individual, before it be tried and sentenced for committing a criminal offense. The principle of the presumption of innocence may be

[9] C.R. Radulescu, *Protectia juridica a cetatenilor in raport cu administratia*, Craiova, 2008, p.64
[10] Saunders k.Mbretërisë së Bashkuar, 17 dhjetor 1996 dhe Allenet de Ribemont k. Francës, 10 shkurt 1995

breached not only by a judge but also by other public authorities, including prosecutors, especially when the prosecutor in a case is exercising a quasi-judicial function if he decides to dismiss a criminal case without trial and thereby exerts absolute control in the procedural field.

In way to decide if the statement of a representative of the public authority constitues or not a violation of the principle of innocence, we need to analyze the context of specific circumstances in which the statement was made. The Court notes that in this case, statements were made by the prosecutor not in an independent context of criminal proceedings as may be a press conference, but in a reasoned decision during the preliminary investigation by means that rejected the request of complaint to close the criminal investigation. In this case the applicant had made a request to the prosecutor asking for dismissal of the criminal investigation for lack of evidence, while the prosecutor rejected by claiming the existence of evidence in the file. Claiming that the applicant`s guilt “is provided” by the evidence which is located in the file, the prosecutor responded that by the existing evidence is “not proven” that the complainant is guilty. If use of the term "is proven" is not the right one, the court considers taking into account the context in which it is found that the prosecutor did not refer to whether the applicant's guilt is proved, as this issue is not in the competence of the prosecutor to be proven, but his power is to know whether or not the file contains sufficient evidence in the sense of guilt that the applicants examination to justify dismissal, motive for which the court has estimated that the prosecutor's statements did not violate the presumption of innocence.

In the case *Khuzhin and others vs. Russia*, decision dated 23 October 2008, the Court notes that several days before the trial of the complainants, a state television channel has broadcast a talk show in which participated persons who investigate the applicant's case, the city prosecutor and the head of the task force for serious crimes at the regional prosecutor's office. The participants discussed in detail the issue of the complainant adding commentaries about the case. Then, the show was also ritransmeted two another times, once during the juridicial rewiew and second time before the appeal. Regarding the content of the show, the Court finds that the three prosecution functionaries have described the actions of the complainants as "criminal acts" committed by them ... the statements were not content with the description of the status of the investigation procedure, and did not talk about the fact that

the complainant had denied everything. Moreover prosecutor Mr. Zinterekov was referred to the testimony of complainants presenting as inveterate criminals and claimed that this crime was committed is due to the "personal qualities" - "inhuman and brutal". In his closing statement he mentioned that a good solution of the tribunal shall be the issuing of a decision for some time to convict the defendant as the sole result of this judicial review. The Court assessed that the statements constituted declaration prosecution functionaries guilty of violating the complainants to you for the right to be presumed innocent and to further damage the assessment of facts by judicial authorities. Since these two functionaries held senior positions in the prosecutor office they were careful in selecting the description of the procedure against complainants. However taking into account the content of the statements mentioned above, the Court finds that their statements could have another effect except that of encouraging and influencing the public to believe in the guilt of the complainants before they are legally recognized as guilty. Accordingly the Court considers that we are dealing with the violation of the principle of presumption of innocence of the complainants.

CONCLUSIONS

1. The Albanian legal framework regarding to the right to a due process in administrative law is a rich one. The Albanian Constitution itself has a lot of articles referring to this fundamental right. Also it is important to stress that art 131 lit “f” of Albanian Constitution recognizes the right that individual have to initiate an action directly to Constitutional Court if they estimate that their right to a due process is infringe.

2. Actually this principle is pretty undefined and is understood by the Albanian subjects and justice actors in a quite different mood compared to the classic European justice. For example *the completion of the trial within a timely manner* is an actual topic for Albanian jurisprudence and courts. Sometimes the delays in the administrative juridical process result not only in the denial of the right based on an ancient principle *“justice delayed, justice denied”* but it also can result in the loss of the right. Albanians lack a tradition of efficiency, lack proper control over actors that affect the adjudication of cases, as the judges and

prosecutors. These actors failed to coordinate their work on identifying the responsibilities of each unjustified delays that often exceed even years.

3. The relationship betweent legality and neccesity is very thin so during to administrative reforms that are lately done in Albania often administrative insitution are more interested do issue legal orders than neccesary one.

REFERENCES

Books

Ioan Alexandru (2007) , *Administarive law in European Union,* All Beck, Bucharest

Paul Negulescut (1959), *Puterea de apreciere a executivului in infaptuirea actelor de putere publica,* Pandectele saptamanale, Bucharest

Ilie Iovanas (1997), *Drept Administrativ vol 2,* Servo-Sat

C.R. Radulescu (2008), *Protectia juridica a cetatenilor in raport cu administratia,* Craiova.

E. Dobjani (2011), *E drejta Administrative,* Morava, Tirane

S.Sadushi (2013), *E drejta Administrative – Vol 2,* Morava, Tirane

S. Sadushi (2013), *Drejtësia Kushtetuese,* Tirane

Legislation and Jurisprudence

Albanian Constitution

Romanian Constitution

Albanian Code of Administrative Procedures

Saunders vs. United Kingdom, 17 December 1996 and Allenet de Ribemont vs. France, 10 February 1995

Case Marini vs. Albania 18.12.2007

Website

http://www.proceedings.univ-danubius.ro/index.php/eirp/article/viewFile/1320/1186. Iulian Nedelcu, Short Remarks on the Rule of Law State Concept, The 7-th Edition of the international Conference, European Integration Realities and Perspectives

http://drejtesiashqiptare.com/?p=677

http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"languageisocode":["ENG"],"respondent":["ALB"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"nonviolation":["6"],"itemid":["001-84061"]}