

Judicial control of administration in Kosovo

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Abstract

The development of administration went through various phases after the war in Kosovo (1999). Right after the war we cannot talk about the clear administration with the local sense, since Kosovo based on the UN Security Council Resolution 1244 was put under the international civil administration. Ten years later Kosovo Parliament approved the Declaration of Independence after which the Kosovo Constitution was adopted, whose main attribute was to create the state of Kosovo. Thus, based on this, the administration in Kosovo was developed firstly as the internationally organized one; then it was locally organized supervised by the international power and finally it is being developed based on Kosovo Constitution and Kosovo Laws. With this paper author by explaining the process of administration development, using: method of historical analysis, method of comparison analysis, method of systemic analysis, etc., with the specific analysis of the judicial control of Kosovo administration during these phases, as the basic form of the administration control which is exercised by courts in Kosovo. Conclusions and recommendations of the paper are expected to be used not only for academic debates.

Keywords: parliament, administration, constitution, judicial, control.

JEL Classification: K23, K41

1. Introduction

Kosovo is one of the eight federal units of the former federation of Yugoslavia that became an independent state after the process of dissolution of Yugoslavian federation. The creation of the Kosovo state was a complicated and difficult process on which the engagement of the international community was crucial. And this engagement was of various forms, including military intervention against Yugoslav/serb forces during the NATO 78 days' air strikes. The air strikes ended in June 10, 1999 which actually was the date to be considered as the date when in Kosovo started the establishment of the international civil administration. This was the date when the UN Security Council adopted Resolution 1244² and this was the date to end the war in Kosovo. International Civil Mission in Kosovo called UNMIK³ started its mission and actually the first transfer of power done by UNMIK was the management of the public administration. During the first five years of post-conflict period in Kosovo, building process of public administration

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² This resolution among the other gave the duties and responsibilities in the political and administrative field as per: temporal administration of Kosovo, establishing the self-governing institutions in Kosovo and gradual transfer of responsibilities to Kosovo institutions.

³ See more at: <https://unmik.unmissions.org/> (accessed April 17, 2018).

has gone through three major phases: the establishment of the Interim Administration of the United Nations (UN), the foundation of the Provisional Institutions of Self Government (PISG) and the launch of Kosovo Standards Implementation Plan.⁴ Indeed the International Civil Administration begun to establish the local administration as early as it was itself established in 1999. This was done in form of joint structures that were called Joint Interim Administrative Structures. In year 2000 there were organized the first local elections and as a result the Joint Interim Administrative Structures were replaced by the so called Provisional Institutions of Self Governance. The main power nonetheless remained in the hands of Special Representative of UN Secretary General whose power sometimes was considered to be equal to the power of a king in a strong kingdom. In order to divide and specify the power and the responsibilities of Provisional Institutions of Self Government and the UNMIK the Special Representative of UN Secretary General signed the Kosovo Constitutional Framework that in fact was a regulation, since UNMIK legislation was in form of regulations.

UN Pillar for Public Administration in Kosovo and Provisional Institutions of Self Governance in 2003 started the process of building the Strategy for public administration in Kosovo. Since December 2003, UNMIK had transferred responsibilities in the field of public administration to the Provisional Institutions of Self Governance and that in all fields that were not reserved only for UNMIK including budget.⁵ The transfer of power from international civil administration to the local institutions was a gradual process whereas in Kosovo there was developed a process of so called standards before status. This was a policy based on which Kosovo institutions had to fulfill certain standards before the talks for determining the final status of Kosovo. Thus Kosovo had to fulfill the conditions based on determined benchmarks after what the negotiations for the final status were developed. The negotiations regarding the final status were led by former President Ahtisaari⁶. The process of determining the final status were not finalized with an international agreement and thus Mr. Ahtisaari came up with the Comprehensive Proposal for the final status of Kosovo.⁷ After all of this on February 17, 2008 Kosovo Parliament adopted the Declaration of Independence which opened the door for recognition of the Kosovo state by the states and by the international community. Since that date Kosovo started its state building process and in this regard strengthened its inner structures, including the structures of the public administration. The process of state building has been always monitored by the international community and in fact achievements were measured. Below there will be drawn shortly some findings found in the EC Progress Reports for some

⁴ Mirlinda Batalli, *Reform of Public Administration in Kosovo*, Thesis, no 1. (<https://aab-edu.net/uploads/docs/thesis/2012/01-2012-anglisht/01.%20Reform%20of%20Public%20Administration%20in%20Kosovo-%20Mirilinda%20Batalli.pdf>) (accessed April 17, 2018).

⁵ Esat Stavileci, Agur Sokoli, Mirlinda Batalli, *E Drejta Administrative*, Universiteti i Prishtinës, Prishtinë, 2010, p. 305.

⁶ See more at: www.osce.org/kosovo/24787?download=true (accessed April 17, 2018).

⁷ <https://www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf> (accessed April 17, 2018).

years. In general, in almost all reports there are seen weaknesses and there are given recommendations about how to go further. Thus below shortly from three EC Progress Reports.

2. Administration in the eyes of Progress Reports

In the coming year Kosovo should in particular:

→ effectively monitor implementation of the PAR strategic framework under the umbrella of the wider development strategy, ensuring a clear link between PAR and economic development;

→ improve accountability through a thorough review of all agencies and improve access to administrative justice by addressing the backlog of administrative cases;

→ adopt a comprehensive public financial management reform programme.⁸

The civil service law also regulates uniform criteria for dismissals. It provides for disciplinary measures, including appeal possibilities. Few recommendations of the independent oversight board are implemented – rulings are not followed up. Administrative judges are overburdened, often leading to delays in decisions. Many Ombudsperson recommendations are not implemented, often without explanation.⁹

Kosovo has some level of preparation in the reform of its public administration. Some progress was made with the adoption of a comprehensive public financial management strategy and of the law on general administrative procedures. However, Kosovo did not address the Commission's recommendations in the area of accountability. Non-merit-based recruitment continues to adversely affect effectiveness, efficiency and professional independence of public administration. The first monitoring reports on implementation of the public administration reform package indicate considerable delays.¹⁰

The new law on general administrative procedures, adopted in May 2016, aims to improve the right to administrative justice, together with the planned new law on administrative disputes.¹¹

There is some level of preparation in the area of **public administration reform**. **Some progress** has been made especially with the review of agencies and (semi)independent bodies. The continued politicisation of the public administration remains a concern, and adversely affects the efficiency and professional independence of the public administration.¹²

⁸ https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2015/20151110_report_kosovo.pdf (accessed: April 17, 2018).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² <https://europeanwesternbalkans.com/2018/04/17/key-findings-2018-european-commission-report-kosovo/> (accessed: April 18, 2018).

By judicial control is meant the power of the courts to examine the legality of the officials act and thereby to safeguard the fundamental and other essential rights of the citizens.¹³ And the power of court in this process of judicial control is not done in an automatic manner and we are not discussing for any possibility to have courts act *ex officio* while doing the judicial control. With this paper and under the Kosovo circumstance we discuss about the judicial control when the act of the court is requested by a party who pretends that his/her rights were violated by a decision taken from administrative authority or in cases when the administration did not act based on the requests---in the so called the administration silence. Thus, "the underlying object of judicial review is to ensure that the authority does not abuse its power and individual receives just and fair treatment and not ensure that the authority reaches a conclusion, which is correct in the eye of law."¹⁴

Regarding the judicial control of the administration in theory there are many definitions and many viewpoints. Judicial control of the administrative work of the administration is principal form of judicial control over the administration which is done by the courts over the administration.¹⁵ Courts while acting based on the process of the control in a way they contribute the process of legality. In determined cases judicial control in this field not only is not excessive but often taking into the consideration the position of judicial organs in the overall system of the state organs and the means and methods they use, judicial control is the most suitable control that exists in our state system.¹⁶ The judicial control has its specific characteristics which makes it to differ from other forms of control of the administration. These characteristics could be divided in: formal and material ones. Specific formal characteristics of the judicial control are: 1. organ which makes that control and 2. procedure according to which the control is exercised. Competent organ which exercises the control is court whereas procedure is judicial.¹⁷ Among many and various forms of judicial forms, as it is being said, in the administrative conflict, court decides on the legality of administrative final acts by which organs of administration decide on human rights, obligations and legal interests of private or public persons.

¹³ *Judicial Control over Administration and Protect the Citizen's Rights: An Analytical Overview*. Available from: https://www.researchgate.net/320442968_Judicial_Control_over_Administration_and_Protect_the_Citizen's_Rights_An_Analytical_Overview [accessed Apr 18 2018].

¹⁴ *Judicial Control over Administration and Protect the Citizen's Rights: An Analytical Overview*. Available from: https://www.researchgate.net/publication/320442968_Judicial_Control_over_Administration_and_Protect_the_Citizen's_Rights_An_Analytical_Overview [accessed Apr 18 2018].

¹⁵ Esat Stavileci, Agur Sokoli, Mirlinda Batalli, *E Drejta Administrative*, Universiteti i Prishtinës, Prishtinë 2010, p. 139.

¹⁶ Emir Dobjani, *E Drejta Administrative* 1, Tiranë, 2003, p. 225.

¹⁷ Esat Stavileci, Agur Sokoli, Mirlinda Batalli, *E Drejta Administrative*, Universiteti i Prishtinës, Prishtinë 2010, p. 141.

3. Two objectives of judicial control of the administration and the Kosovo and the Law on administrative conflicts

Europe has historically been divided between two conceptions of control of the administration by the courts:

– a »subjective« conception: Courts are responsible for establishing the subjective rights of individuals who have been wronged by the administration. This is the idea of *Rechtsschutz*: developed especially in Germanic countries and in Central Europe where the role of the courts is to ensure judicial protection of individuals against the administration.

– an »objective« conception: The courts control the administration's respect for legality. The subject of appeal is the objective legality and the regular legal functioning of the administration. This idea of judicial control of administrative actions follows the French tradition (including Belgium, Portugal, Greece, etc.).¹⁸

Kosovo Parliament in 2010 adopted the Law on Administrative Conflicts which aims is provision of judicial protection of rights and interests for legal and natural persons and other parties, the rights and interests that have been violated by individual decisions or by actions of public administrative authorities.¹⁹ Having this analyzed we can say that Kosovo is more affiliated towards the subjective conception as mentioned above.

This law is applied for terms under the as following: 1. body-public administration bodies, central government bodies, local government bodies and bodies on their dependence, when during exercising public authorizations decide on administrative issues; 2. administrative act – every decision from above bodies which shall be taken in the end of the administrative procedure on exercising public authorizations and which effects, in favor or not favor manner legally recognized rights, freedoms or interests of natural or legal persons, respectively other party in deciding the administrative the administrative issues and 3. administrative issues – according to this law is special uncontested situation and with public interest, in which directly from legal provisions, results the need to define the behavior of next party in legal-authoritative manner.²⁰

Kosovo Law on Law on Administrative Conflicts numerates principles based on which the procedure could be developed. The Lawfulness Principle according to which the courts should decide based on the constitution and the laws regarding the administrative conflict.²¹ Further law gives recognizes the principles

¹⁸ Jean-Marie Woehrling: *Judicial Control of Administrative Authorities in Europe ... HRVATSKA JAVNA UPRAVA*, god. 6. (2006.), br. 3., str. 35–56 - https://www.google.com/search?q=judicial+control+of+administration&rlz=1C1CHBD_enXK764XK764&ei=t6DXWqu9KYKakwXblTg&start=10&sa=N&biw=1366&bih=662 - (accessed on April 18, 2018).

¹⁹ Article 2 of the Law on Administrative Conflicts.

²⁰ Article 3 of the Law on Administrative Conflicts, No. 03/L-202.

²¹ *Ibid.* art. 4.

of efficiency, the principle of verbal review and the principle of assistance to the uninformed party.

According to Kosovo Law, administrative conflict starts: only against the administrative act issued in the administrative procedure of the court of appeals; and an administrative conflict can start also against the administrative act of the first instance, against which in the administrative procedure, complain is not allowed.²²

Law quite precisely defines the fact when final administrative act can be objected and that is as follows:

1.1. for the reason that, the law has not been applied at all or legal provisions have not been correctly applied.

1.2. when the act has been issued by a non-competent body;

1.3. when in the procedure that preceded the act, was not been acted according to the procedure rules, the factual situation has not been correctly verified, or if from the verified facts, incorrect conclusion in the light of factual situation has been issued;

1.4. when with the final administrative act issued based on a free evaluation, the body has exceeded the limits of legal authorization or such act was not issued in compliance with the purpose of this law;

1.5. when the accused party has issued again her earlier act, annulled before with the final decision of the competent court.²³

But, the administrative act cannot be rejected for incorrect implementation of the provisions, when a competent body has decided according to free assessment based on authorizations and within the limits given with legal provisions, in accordance with the aim for which the authorization was given.²⁴

When an administrative process ends with the administrative act against which there are no more means of attacking within the administration, the authorized bodies as mentioned initiate and start the court control – administrative conflict. Thus, for the indictments against administrative acts of all bodies shall decide the competent court for administrative matters in first instance, unless otherwise provided by other legal provisions, and against the issued decision on administrative conflict, complain shall be submitted to the competent court for administrative matters of second instance.²⁵

Within the court procedures regarding the administrative conflicts, according to the Kosovo law, there are three instances. The first instance is the Principal Court in Prishtina, the second instance is the Court of Appeal with the residence in Prishtina and the third instance court belongs to the Kosovo Supreme Court.

For the administrative conflicts as the first instance court serves the Principal Court in Prishtina – Department for Administrative Disputes. Whereas

²² *Ibid.* art. 13.

²³ *Ibid.* art. 16.

²⁴ *Ibid.*

²⁵ *Ibid.* art. 23.

the final form decision taken from the competent court for administrative matters, can be attacked with the request for extraordinary review of the legal decision. In determined cases, against the final form decision, the public Prosecutor may submit to the Supreme Court of Kosovo the request for protection of lawfulness, if by such a decision the law, other provisions or general act have been violated.²⁶

4. Conclusions

Kosovo administration has gone through various phases of development and it was established and developed with a big support of the international community. In the early phase it was a combined one with the joint responsibilities between international civil administration and the local administration.

The administration in Kosovo in sense of this paper, still remains to be politicized, polarized, under patronage and not enough professional. It still remains to be slow and not efficient. It is very overloaded. In almost all international reports and in particular in the EC Progress Reports one can see findings that are similar to the above mentioned. The formal legal infrastructure for judicial control in cases of administration conflict is well established, formally. There is a law that regulates the issue, but this is still to creation of the sound foundation that could practically be at the disposal for authorized parties to raise issues in the court in cases of administrative conflict.

The first instance court based on the law is the department for administrative conflicts and this is far for being an instrument for solving the cases that are brought in court in sense of administrative conflict. Courts are anyway very overloaded with unsolved cases which wait for ages to get the court solution. The administrative conflicts are not rare issues, whereas there is only e department within one court to deal with cases that may appear. A public administration which is more than overloaded with as it is said (every day this is seen in media) has around 82000 employed, says itself enough.

The weaknesses of the judicial system with all their characteristics are similar to those that belong to the department which deals with the administrative conflict.

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²⁶ *Ibid.* art. 25.

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