Legal Changes about Administrative Contracts in Republic of Kosovo

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Abstract: Legal arrangement of administrative contracts in the Republic of Kosovo represents a novelty of the administrative procedure and law in general. An administrative contract is considered any contract-agreement in which at least one contracting party is a public authority, through which it is constituted or amended a certain legal-administrative relation. Since the work volume of administration is extremely wide, an important part of which constitute the administrative contracts, then in addition to deserving to be in the scope of attention by the legislators, a necessity arises for them to be part of treatment even by the very legal-administrative doctrine. The goal of treatment of this topic in this work is the explanation and analysis of novelties of the Law no. 05/L-031 on the General Administrative Procedure (LGAP) of the Republic of Kosovo, regarding the administrative contracts. Also, this publication through empiric and comparative aspects makes efforts to put into the light if the administrative contracts promoted by the new legislation of the administrative procedure in Kosovo have an impact on the protection of procedural freedoms and rights of the parties and on decrease of illegality of administration during its work.

Keywords: administrative contracts; public administration authority; substitutive administrative contracts; compromise administrative contract

1. Introduction

Administrative activity, as it is known, is a legal activity which derives (gives rise) to the creation, change or extinction of legal consequences and appears in the form of an individual or collective administrative act, the administrative contract and the real administrative act. Within the administrative activity, an important part is represented by the so-called "Administrative Contracts", which, in contrast to all the other administrative acts, represent bilateral administrative acts.

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In general taken, the administrative contracts, in contrast to the other parts and institutions belonging to the administrative activity, enjoyed in the past less legal arrangement regarding administrative justice in Kosovo. In fact administrative contracts in relation to almost all the other institutions of administrative procedure, have been less treated even by the administrative law science itself, therefore, also due to this reason, in this work, in addition to making efforts to treat them from the viewpoint of positive legislation, I have also presented administrative contracts as one of relevant novelties of the Law on General Administrative Procedure in the Republic of Kosovo. A large number of administrative contracts find application in a large number of administrative authorities (bodies), mainly such as Ministries or Municipal Departments. In this sense the tender procedures going through the public administration bodies, in almost every case, are materialized through the conclusion of an administrative contract, in which the parties are the authority (body) that has published the procedure and the winning operator.

Through the treatment of administrative contracts in this work I intend to cover the gap in the Albanian legal doctrine and wider, at least a little, regarding this institution of the administrative procedure. Among other things this work tries to shed light into the importance of legal arrangement of administrative contracts, due to the fact that they take part in the administrative activity in a considerable number of administrative cases or issues.

1.1. Meaning and nature of administrative contracts, comparative aspects

When it is taken into consideration the fact that administrative contracts are the only case in which the implementation of the principle of subordination of the party in the administrative process wanes, then their treatment in the scientific and legal aspect becomes even more important, always with a tendency of analyzing their practical meaning. It is almost impossible for the administration authorities (bodies) to exercise their activity completely without the application of an administrative contract. Not always issuing an administrative act corresponds to the arrangement of a concrete administrative situation. In not rare cases, administrative contracts serve as the right and most appropriate means to be applied in a certain administrative situation. Since the administrative contracts become evident in each case when it comes to exercising a certain public service, then an administrative act might not be an appropriate means to determine the rights, responsibilities or duties of the holder of the public service, so that the administrative contract, as an agreement between an administrative body and the holder of a public service,

appears as an adequate act as far as this is concerned. The administration does not have a discretional competence (power) to choose a contracting party, but it is obliged to present to and invite for competition the bidder of a certain public service, and the administration is also limited in choosing of duration of the public service offered through an administrative contract. (Weil & Pouyaud, 2006, p. 67) So, this means that who is to be a contracting party with the administrative body, depends on the winning operator offering a certain public service, rather than the one who has managed along with other operators to meet the criteria in advance.

In other words administrative contracts represent a voluntary agreement between two entities (subjects), on the one hand, an administrative body, such a body which is vested with an administrative power, and, on the other hand, the holder or bidder of a certain public service. (Pequignot, 1945, p. 170) The modalities of an administrative contract are determined in harmony with the applicable legislation, depending on the object of the contract. An administrative contract is subject to a legal regime, whose essence is its consensual nature combined with the due functioning of the public service. (El Mahdi, 2016, p. 1001) However, despite the fact that in administrative contracts the principle of subordination is considerably more livid (faded) in comparison with the relation of the administration with a party, then when the administration issues an administrative act, in administrative contracts the principle of full equality of the parties is put into question especially in the exclusive right of the administrative authority (body) to cancel the contract unilaterally due to the failure of its fulfillment. A right which according to many legal administrative systems is not possessed by the public service bidder, as a contracting party. On the other hand, the principle of full equality of the parties is an essential element in legal-civil contracts.

Administrative contracts, both by their content and also by the participants in them, differ from the other contracts, respectively legal-civil contracts. This difference is primarily expressed in the very basic condition, which is not expressed also in legal-civil contracts. Hence, if in a contract the administrative authority (body) does not appear as a party, then it is eliminated also the possibility for that contract to be treated as an administrative contract. Consequently an essential condition for the qualification of a contract as an administrative contract is at least one of the contracting parties to be the body being vested with the administrative power.

Whereas this is not said also about the legal-civil contracts, which moreover are considered completely as contracts signed between private persons, respectively legal persons or natural persons. On the other hand, when it comes to the content of

an administrative contract, then, its subject is offering of a certain public service by the other contracting party. The French legal literature claims, in contrast to the administrative contracts of the public law, the private law contracts have two distinguishing features: on the one hand, their object is not provision of any public service, respectively they do not deal with the public interest, and, on the other hand, in legal-civil contracts, the administration does not appear as the owner of the contract. (Pascariu, 2010, p. 408)

Also it has to be emphasized that keeping due records by the contracting parties about what was discussed, as well as the creation of a formal contract for both parties by signing it, helps in elimination of future confusions, which may arise and may defend the position of one party, if the party renounces its duties. (Speidel, 1972, pp. 63-94) This has to do also the attention required to be achieved by the parties at the moment of the administrative contract conclusion. Under such circumstances, the implementation and formation of an administrative contract legally starts, after the parties have accepted its conclusion. Then if the parties have the ability to express their agreement legally and if the object of their contract is shortly determined, reliable and legal. (Wakene, 2009, p. 4) However, despite the fact of the attention of the contracting parties in an administrative contract, not rare are the cases when one of the parties does not stick to the duties deriving from the contract.

2. Administrative Contracts with an Observation on the Laws of Kosovo

In the Republic of Kosovo, until October 2017, the administrative procedure was regulated through the provisions of the Law no. 02/L-28 on the Administrative Procedure (LAP), of 22 July 2005. One of the greatest defects of this Law was the fact that it regulated (arranged) quite sporadically the administrative contracts, respectively it did not pay the due attention to them. Such an absence fortunately was avoided by the Law no 05/L-031 on the General Administrative Procedure (LGAP), which in an evidently broader manner treated the administrative contracts as an important part of the work of administration in the Republic of Kosovo.

All that LAP anticipated regarding the administrative contracts was the article 1 of the Law which ordered that the provisions of LAP find application also for those administration bodies which by the law were given the right and duty to exercise powers of public importance, also through an administrative contract or any

enactment. On the other hand, this part of the administrative activity represents a complete novelty of the Law no. 05/L-031 on the General Administrative Procedure (LGAP), which through chapter II of part III, regulates administrative contracts by means of 9 articles.

An administrative contract is a special kind of an administrative act which in contrast to an administrative act, which is unilateral, it is a bilateral act, signed by an administrative body with a private or public legal entity, but in the same procedure determined by law whose object or subject is carrying out a public service or implementation of a public interest (Stavileci, Batalli & Pepaj, 2017). Thus, also the administrative legal doctrine has identified this definition of administrative contracts: an administrative contract is every agreement in which one party is a public authority, including therein the fulfillment of a public service. In general, an administrative contract, as principal part of the administrative activity has been so far not sufficiently treated by the very Albanian legal doctrine. This hush of the Albanian legal doctrine related to the administrative contract can be explained in the first place by the fact that an administrative contract, as a legal notion, has entered into the administrative law and into the Albanian law, in general, very late. (Dobjani, 2015, p. 10)

An administrative contract is called an agreement in which at least one of the parties is a public body and which builds, changes or extinguishes a concrete legal relation of the administrative law. (Act on the general administrative procedure of 2016 – Republic of Kosovo) Therefore, in contrast to the private law contracts, which are contracted between the private law entities, in administrative contracts always one contracting party is an administration body. Administrative contracts can be signed for the realization of a public interest, without harming the legal rights and interests of the third parties, such as e.g. an administrative contract is considered an agreement signed between a competent administrative body and a private legal entity, which has won a tender for the supply with wasting material of a Ministry, Department or a certain administrative body.

LGAP has ordered also the form of the administrative contracts anticipating them to be signed in a written form, unless another form of administrative contracts is ordered by the law. The form of the contract is a condition for its validity and, as it can be seen, the legislator has ordered that administrative contracts must be concluded in the written form and signed by the contracting parties, respectively the administration body and the private or public law entity, which shall offer the

certain service being object of an administrative contract, for the purpose of implementation of a public interest.

3. A Substitutive Administrative Contract and Compromise Contracts

By the LGAP two kinds of administrative contracts have been promoted:

1. Substitutive contracts;
2. Administrative contracts of compromise (article 62 and 63 of LGAP).

Through substitutive contracts, an administration body substitutes an administrative act by concluding an administrative contract with a party to which it would address the administrative act, when the body assesses that the public interest can be fulfilled better by concluding an administrative contract. Thus, same as with the administrative act, it is recognized to the party, through a substitutive administrative contract, the right to carry out or not to carry out a certain action or to give something. As long as an administrative act expresses among other things also the authorship of the administrative body upon the party, in issuing such a contract as a substitution to an administrative act, it becomes more evident the equality of the party with the authority (body) in the process, rather than the subordination of the party against the authority (body).

The main objective, among other things, of this work was also the analyzing and interpretation of the Substitutive Contract and the Compromise one, in protection and realization of the rights of citizens by the administration in the Republic of Kosovo. Since now the new legislation in the field of administrative procedure has anticipated the possibility to substitute the issuance of an administrative act by the administration for the party through the contract, this is a good possibility to wane (weaken) the arbitration in the work of administration, on the one hand, and in the protection of the citizen rights, on the other hand. The reason for this is the simple fact that in an administrative contract the principle of subordination and of ordering of administration against a party wanes (dims).

Through an administrative contract the flexibility of the administration becomes more evident, so that in a common way the authority (body) and the party decide about a concrete matter, always with the pretension of realization of a better interest both for the party and for the common interest. As it will be seen also in administrative substitutive contracts, but not letting aside also the compromise contracts as the new legislation recognizes them, the party has a more active role

and in a way it is asked also about the way of deciding about the administrative issue. Since in the issuance of an administrative act, the participation of the party in its issuance is almost minimum, so that due to the "discretion-freedom of deciding" about the administrative issue by the administrative officials, it can occur arbitration, respectively the harming of procedural freedoms and rights of the parties.

Hence, the substitutive contract constitutes a completely new procedural institute as far as the administrative law is concerned in the Republic of Kosovo. Among other things this contract enables also a more interested party in the procedure to be more active in its role, so it appears like the contracting parties in the administrative contract, of which it benefits a legal right or interest.

On the other hand, an administrative contract of compromise is concluded when the administration authority (body) that is to issue the act, expresses a kind of insecurity related to the content of the administrative act so that it makes a compromise with the party in the process through concluding an administrative contract. Thus, upon conclusion of a compromise administrative contract, the parties determine the content of the administrative act which is issued afterwards, in accordance with the content of a compromise contract. Therefore, in this act the parties through agreement determine the most appropriate content of an administrative act, to whose issuance a compromise contract anticipates. Thus, it is avoided the possibility for the party to contest afterwards the illegality of the administrative act.

A compromise administrative contract is a typical example of the active participation of the party in a relevant decision of the administrative issue. Thus the party has a "hand" in issuance of an administrative act. Since the party itself through an administrative contract of compromise agrees about the content of the administrative act, then this in a way amnesties (pardons) the administrative body for the illegality or harming of any right against the party, if that happens. Although, in fact, the latter should take care ex-officio of the legality of an administrative act.

3.1. Invalidity, Change and Cancellation of the Administrative Contract

The law has also ordered the cases when an administrative contract is invalid and as such are:

1. When an administrative contract is not ordered by the law about a certain issue;

2. When on the occasion of an administrative contract conclusion it is not observed the form requested by the law;

3. When the conditions for the conclusion of a substitutive or compromise contract have not been observed; as well as

4. When an administrative act having administrative contract content would be illegal.

Also, the alteration and cancellation of an administrative contract by the contracting parties has as consequence the cease of production of further effects by that contract. If due to the circumstances created after the administrative contract conclusion, which could have not been predicted at the time of its conclusion and in the presence of which the meeting of duties springing from a contract has become extremely difficult for any of the contracting parties, the contracting parties may agree about its alteration or cancellation. (Act on general administrative procedure of 2016 – Republic of Kosovo, article 66) In addition to an agreement between the contracting parties, an administrative contract can be cancelled unilaterally also by the administrative body itself, which appears as a party in that contract. The unilateral cancellation of the contract by the administrative body is done when it is necessary to avoid, prevent or eliminate any serious damage that may be caused to the public interest, whereby to the other contracting party (not to the administrative body) belongs the right of experienced damage compensation on the occasion of unilateral administrative contract cancellation.

Of course an administrative contract is considered an administrative act in which the party claiming unjustly to be cancelled the contract with the administrative body, attacks this action in a regular administrative procedure which is pursued for the attack of the administrative act, either in administrative or judicial way. (Act on the general administrative act of 2016 – Republic of Kosovo, article 67, 68) I consider that the regulation of the administrative contracts by the new law on the general administrative procedure in the Republic of Kosovo constitutes an important novelty and the initiative of the legislator to regulate this part of the administrative activity should be greeted, which was not done by the previous law. Also the promotion of the administrative contracts by the new law has a tendency of reducing the illegality of the work of administration and of protection of procedural rights of the parties in the process, because now the party has gained a more active position in deciding the administrative issue (matter).

4. Comparative Aspects of Administrative Contracts

Administrative contracts, regardless of the legal systems of different countries, respectively of the functioning of the state according to the written law (continental system) or the system of unwritten law (Anglo-Saxon system), enjoy a legal support and regulation (arrangement). In order to make this work richer, I have included into this part comparative aspects of administrative contracts, with a view into the administrative legislation of some of the countries being object of the treatment.

From the comparative viewpoint, administrative contracts can be said to have an important position in the relevant administrative legislation in countries like the Republic of Albania, Republic of Croatia, France, etc. It is important to emphasize that the Law on the General Administrative Procedure of the Republic of Kosovo, approved in June 2016, has kept pace with the legislation of contemporary countries as far as the regulation of administrative contracts is concerned, granting them the due attention. In this part of this work the focus shall be on how the administrative contracts are regulated in the legal systems of some countries. According to the Code of Administrative Procedures in Albania, an administrative contract is an agreement which creates, changes or extinguishes a concrete relation, according to the public law in which at least one of the contracting parties is a public body (authority). A public body (authority) for the realization of a public interest, to which it serves, without harming the interests or the rights of the third parties, can conclude an administrative contract, if the following conditions are met:

a) The contracting form is not expressively banned by the law or it does not come to contradiction with the nature of the administrative issue itself;

b) The public body (authority) is authorized by the law to decide on an issue through discretion (Code of Administrative Procedures of Albania, 2015, article 2).

It is important the fact that the Code of Administrative Procedures of Albania, when it comes to administrative contracts, has interfered also through the provisions of the Civil Code of Albania, anticipating that in the event of an absence in the regulation of the administrative contracts by the Code of Administrative Procedures of Albania, these failures in a subsidiary manner shall be filled in by the Civil Code of Albania. The interference of legal-civil provisions in the administrative contracts, as the Code of Administrative Procedures of Albania has anticipated, let us understand that in addition to differences, the administrative

contracts and the legal civil ones have also similarities with one another. Among main similarities is the will of the parties to enter into contractual relations with each other.

So, like in legal-civil contracts, also in administrative contracts, none of the contracting parties can force the other party to enter into contractual relations, but that is only a free will among them. The Code of Administrative Procedures of Albania has ordered the above-mentioned criteria that are to be met in a cumulative (common) manner in order for an administrative contract to exist, respectively if the issue, for which the administrative contract has been concluded, constitutes an issue for which by the law it has been anticipated that an administrative contract cannot be concluded, then in such a case the concluded contract shall not have either force or effect according to the Albanian law. Taken in general this criterion is almost in most of legislations of different countries.

The common part of the legislation of Albania and of Kosovo related to the administrative contracts is that both laws have anticipated the substitutive contract as a special contract within administrative contracts. Thus, a substitutive contract, as it was explained above, its regulation by the Law on General Administrative Procedure in the Republic of Kosovo, means a contract which offers a larger security on the legality of decision of the administrative issue, both for the party and for the administrative body (authority). Also, according to Code of Administrative Procedures of Albania, a substitutive contract means an agreement between the administrative body (authority) and the party by which an agreement is reached that instead of issuing an administrative act, to have an administrative contract concluded, if it is assessed that thus the public interest will be better realized.

A treatment of the administrative contracts is also done by the provisions of Administrative Procedure Act of Croatia. These provisions refer more to the consequences of the failure to observe an administrative contract, whereby, according to the article 153 of this law, if a party included in an administrative agreement does not observe its provisions, then the administrative body shall have the right to cancel the administrative contract unilaterally. And in case the damage caused by the failure to observe an administrative contract is large, then the administrative body (authority) shall have the right to ask for the reimbursement for the damage caused. Of course the damage reimbursement in such a case could be asked in a judicial way. So, the Administrative Procedure Act of the Republic of Croatia for the administrative contract pursues the same logic as far as the damage

reimbursement is concerned with the failure to observe the contract, same as in the rules that apply for the civil-legal contracts. The sole difference here is that the suing party appears in front of a public administration authority (body), as a contracting party, and that the issue is treated by the administrative court.

In contrast to the legislation of Kosovo and of Albania, the Croatian law, when referring to the cancellation of an administrative contract, recognizes this right, after the specific legal conditions have been met, to both parties, respectively both to the authority (body) and also to the other contracting party. (Act on General Administrative Procedures in the Republic of Croatia, 2009, article 153) In contrast to another case, when this right had only the administrative authority (body). So, also from the aspect of administrative contract cancellation, the Croatian law has equalized both contracting parties, making the administrative contract almost identical to the legal-civil contracts. Such a fact represents an advancement of the procedural position for the party creating to the latter a larger legal security. When referring to the administrative contract cancellation, the Croatian law orders that the other party, so, not the public authority (body), requesting the cancellation in case of illegality, initially should follow a regular procedure of appeal, so, it can file an appeal to the higher body (authority) that has concluded the administrative contract, whereas against the decision related to the appeal, it can open an administrative conflict at the Administrative Court.

The legal systems of different countries follow a logic according to which, although formally in a certain administrative situation there is not administrative act but an administrative contract, it is considered that there is an administrative act, which can be attacked in a regular procedure of control as well as through an action for an administrative conflict. Thus, the administrative contract is equalized with the administrative act according to the effect it produces. This logic was pursued also by the Law on Administrative Procedure of Kosovo, Croatia, as well as the Code of Administrative Procedures of Albania.

The French Administrative Code also contains provisions based on which the administrative contracts are regulated. According to the provisions of this Code, an administrative contract includes agreements of a public administrative authority with another entity, with the purpose of offering a certain public service. Compared to the legislation of the administrative procedure in the Republic of Kosovo, that of Albania and Croatia, but also of other countries, the French administrative code appears considerably wider (broader) as far as the administrative contracts are concerned. This is natural also for the fact itself that France is considered as a

country in which for the first time the term "public service" was mentioned by the scholar of this field Leon Duguit (Harlow, 1979, p. 34), and where, on the other hand, offering a public service is the main object of an administrative contract. The rules related to the criteria when there is considered that an administrative contract exists, then when an administrative contract is invalid, as well as the way of its cancellation, remain almost the same with the legislation of other countries, such as Albania, Croatia and other countries.

An almost identical definition with the other above-mentioned countries regarding the administrative contracts does also the Code of Administrative Court of Ukraine (Code of Administrative Court in Ukraine, 2005), Code of Administrative Procedure of Poland (Code of Administrative Procedure in Poland, 1960), Administrative Procedure Court of Greece, 1999, etc. In fact according to the Code of Administrative Procedure of Poland, the administrative authority (body) is authorized, during the development of the administrative procedure, until before the issuance of the administrative act (decision), to interrupt it and order a reasonable deadline for the party, within which the party is offered the possibility to conclude with the administrative authority (body) an administrative contract in a certain administrative issue. (Code of Administrative Procedure in Poland, 1960 article 116)

This code anticipates also an extremely important element, which is not included by the legislations of the other countries, which has to do with the situation when in the first instance session of the administrative authority (body), regarding an administrative issue, it has been decided by an administrative decision against which the party has had an appeal, at the request of the party the second instance authority (body) may cancel the attacked act by the appeal provided that the party along with the administrative authority (body) of the first instance conclude an administrative contract. Such a regulation (arrangement) is suitable both for the party and for the administrative authority (body), so that the administrative issue may not be solved in an authoritative way by the second instance authority (body), but that both parties may reach an agreement.

Conclusion

In generally, administrative contract (as a bilateral agreement in which one party is a public body) have not been regulated in the best way according to the previous legislation on administrative procedure in Republic of Kosovo.

Administrative procedure in Kosovo it was regulated through the provisions of the Law no. 02/L-28 on the Administrative Procedure (LAP), of 22 July 2005. One of the greatest defects of this Law was the fact that it regulated (arranged) quite sporadically the administrative contracts, respectively it did not pay the due attention to them. The Law no 05/L-031 on the General Administrative Procedure (LGAP) of 2016, has avoided the deficiencies of the previous law on administrative contracts.

It's to be welcomed proper treatment of administrative contract with in new law, because the work volume of administration is extremely wide, an important part of which constitute the administrative contracts, therefore then in addition to deserving to be in the scope of attention by the legislators, a necessity arises for them to be part of treatment even by the very legal-administrative doctrine. In contrast to the legislation of Kosovo, the Croatian law of administrative procedure, when referring to the cancellation of an administrative contract, recognizes this right, after the specific legal conditions have been met, to both parties, respectively both to the authority (body) and also to the other contracting party, which not foreseen with act on general administrative procedure of Republic of Kosovo. The solution offered with Croat legislation in this case, i consider is the best solution, because it promotes the principle of equality of contracting parties, also in cancelled of contracts.

The main objective, among other things, of this work was also the analyzing and interpretation of the Substitutive Contract and the Compromise one, in protection and realization of the rights of citizens by the administration in the Republic of Kosovo. Since now the new legislation in the field of administrative procedure has anticipated the possibility to substitute the issuance of an administrative act by the administration for the party through the contract, this is a good possibility to wane (weaken) the arbitration in the work of administration, on the one hand, and in the protection of the citizen rights, on the other hand. So, it's to be welcomed regulation of this two administrative contracts, as like a mechanism to protect procedural right of the parties.

I consider that the regulation of the administrative contracts by the new law on the general administrative procedure in the Republic of Kosovo constitutes an important novelty and the initiative of the legislator to regulate this part of the administrative activity should be greeted, which was not done by the previous law. Also the promotion of the administrative contracts by the new law has a tendency of reducing the illegality of the work of administration and of protection of

procedural rights of the parties in the process, because now the party has gained a more active position in deciding the administrative issue (matter).

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*** Act Nt. 05/L-031 on General Administrative Procedure of Republic of Kosovo.

*** Code No. 44/2015 on Administrative Procedures of Republic of Albania.

*** Act No. 71-05/1-09-2 on General Administrative Procedure of Croatia.

*** Code No. 2747-IV of Administrative Procedures of Ukraine.

*** Code No. 30 of Administrative Procedures of Poland.

*** Code No. 45 of Administrative Procedures of Greece.