The Concept of Public Services in the State of Law

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Abstract: At the beginning of its development, public service's object of regulation was the social issue, which was very present. In this period, public service included mutual aid of poor people, providing their food and placement. But later, social protection was set at the level of health care. For this reason it was even considered that the genuine public service is the service of public health care. Because of this it experienced a conceptual rebirth, meaning the creation of a larger number of public services that have fulfilled population's needs as well. The state and collectivity have defined the objective and social interests, but in all cases, the services were done by social collectivities. Many other functions, not only social, were transformed like this in public rights that were realized through public services. Despite this the continuity in action is also required, meaning that the general interest should always be protected with public services activitie.

Keywords: Public services; administrative division; administrative courts; legal officer

1. Introduction

Administrative judiciary presents some type of control upon administration, respectively upon the administrative act, in first place the particular and individual administrative act. This kind of control is realized in the field of administrative activity through which it's most important form of function is developed. The first experiences with administrative judiciary show us that it was installed organizationally in three ways, regarding to its carriers: a) Administrative judiciary through administration bodies, b) Administrative judiciary through regular courts, and c) Administrative judiciary through special administrative courts. These three ways of administrative judiciary installation installed three systems to solve administrative conflicts. Administrative judiciary through his administration

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bodies, in principle, wasn't seen as a good choice, because by exercising this kind of control, she, in fact, would become a "judge in its own case" and, consequently, her independence and objectivity would be questioned.

Therefore, the best ways of administrative judiciary organizational installation are regular courts and special administrative courts. Administrative judiciary is spread all over European Union countries. According to the condition of 2007, in 16 countries of European Union, from 27 members in total, as in Germany, Austria, Belgium, Finland, France, Greece, Italy, Latvia, Luxemburg, Holland, Poland, Czech, Sweden, Romania and Bulgaria, administrative courts operate as specialized courts. What about the condition in other countries of European Union?

In the other 11 countries of European Union, as in Cyprus, Estonia, Denmark, Ireland, Litany, Hungary, Malt, Spain, Slovenia, Slovakia, and Great Britain, specialized branches operate for the administrative right, within high (supreme) regular courts. Talking about judicial proceeding's scale, we encounter two organization models: a) Two-tiered model, b) Three-tiered model. The two-tiered model is encountered in 11 states, while the three-tiered model in 15 states. From the large number of administrative judiciary's priorities, we will mention only some of them.

Primarily and above all, I would emphasize administrative judiciary's priority in the "democratization of judicial system". Another priority of administrative judiciary is its functional separation from the system of courts of the general competence. A detached priority of administrative judiciary is increasing citizen's and public opinion's belief in the legal work of the administration. And last, the protection of citizens from "administration's arbitrariness" is another priority of administrative judiciary.

Among the important functions of administrative judiciary, two are essential: the preventive function and the repressive function. Administrative courts protect preventively individual's rights. Of course that we can talk about other favors of administrative judiciary as well. Without listing them based on their importance, these favors of administrative judiciary should be seen as more opportunities to: a) Specialize, b) Resolve conflicts, c) The creative role of administrative judiciary in the development of administrative right.

From the way they have structured the bodies that "judge administrative disagreements", countries in the region seem to be closer to the Anglo-Saxon system, because they haven't accepted the existence of administrative courts. The

conflicts are reviewed next to the courts of the random system. However, if the object, mode of trial or the followed procedure during administrative conflict would be taken as criteria to determine the system, then we could say that the legislation of countries in the region is closer to the way of judging the cases from administrative courts. All this tells us that administrative judiciary in Albania, Kosovo, Macedonia etc. will not find it difficult to adopt the system of administrative conflict's trial through administrative courts.

2. The Concept of Public Services

It isn't right to say that the concept of public services is utterly a legal concept. Because of its functional character, we can say that this concept has a political meaning as well. A lot of definitions were given about this concept in the nineteenth century. The concept of public services was developed in parallel with the economic, social and cultural conditions, that gave it some kind of meaning through which the public function of the organization has been defined. At the beginning of its development, the public services subject of regulation was the social issue, which was very present at the time. In this period, the public service included mutual aid for poor people, providing their food and placement. But later, social protection was set in the level of health protection.

For this reason, it was considered that the genuine public service is the service of public health. Because of this, there was a conceptual rebirth, meaning the creation of a large number of public services, which have fulfilled the population's needs as well. The state and collectivity have defined the objectives and social interests, but in all cases the services were carried out by social collectivities. Thus a lot of other functions, not only social, were transformed in public rights that were realized through public services. They implicated activities that were necessary to be provided, regulated and controlled, taking into account the general interest of existence and their main objective. Of course, the general interest is legitimate and primary, and that's why it is seen as the most important interest. All general interests are after this interest, when all ask for the fulfillment of their own interests. To answer this question we have to consider the fact that the theory doesn't define the number of persons which interests could be considered as general interest.

This means that the concept of general interest is quite undefined and imprecise. Somehow this is an abstract norm, which is defined and implemented inside the

legal systems of state. This means that the general interest has to do with the human, not exclusively with the individual, but with a certain number of people. Legislature doesn't define the number of individuals which general interest should be considered as general interest, but it is understood that general interest should be defined by the interest that unites all the members of society, or, at least, most of them. Although it is mainly related with public services, the concept of general interest, as intuit personae, presents an expression that is used in internal rights as well as in international rights.

3. The Development of Public Services

Public services have been developed in the period of liberal capitalism. At first, its job had an utterly social character. This is the period where the highest progress was achieved, while in the later period of development high results were achieved as well in the field of education, health, traffic, the use of water and natural resources. The biggest and fastest development of public services was made in France, and then continued in the German science and practice. Leon Digi was the representative of the so-called theory of social functions, and he belonged to the French school of solidarity, which had a big impact in the first half of XX century. This school had the human in the first plan as a subject and as a base of the right in general. According to this school, the human is the head, the leader. Every activity is realized through him, by leading it or by being part of the leaders. This lesson undergoes some changes about the origin of norms and the way they are expressed. Development of public services require also tight system of control to protect the national interest especially when it comes to financial institutions in order to gain public trust and support (Sahiti et al., 2017).

The material source of the rights is the human, the leading functions of which don't have an obligation character, but they constitute order and leading rules in public services. As we mentioned, the main principle is mutual aid, which is put into action through public services, so through public power. The French legal science has mostly taken care of the issues that have to do with public services problems, based in the fact that there are a lot of definitions about the concept of public services. In French language, even the expression itself has some kind of politic meaning, and it is often used in everyday communication, a thing that contributes to the idea of public services anyway. In the preamble of France's 1946

constitution which is also included in the 1958 constitution, they give public services a national (Denkovic, 1970).

But, in the time's ideology, the idea of public services has become a synonym of violence and bureaucracy. This has led to public service becoming a concurrent of private sector, which was also showed in the general interest, in the general interest with the proviso to take particular authorizations and responsibility in order to perform this order. Furthermore, the private sector, respectively the private organization which appears as a public institution that fulfills the general interest of citizens, has to undertake special obligations as well to accomplish this task. After 1986, when the state undertook the privatization of economic and social services, the concept of public services has won its place again, the place it has even nowadays in the system of social need of population. But, even now, because of political impacts, the concept of public service is understood in a wrong way, that's why the administrative body is qualified as public service.

This is not a very big problem, because through the administrative body certain activities are conducted; with which public services animate their job with the intention to fulfill their main job, having to do with the fulfillment of general social interests. For this reason, in the French legal science public service is defined as an activity with general interest, owned by collective bodies (public communities). To be considered as public service, it is necessary for every activity to be oriented in at least two elements – in the objective and means, and both of these elements should be fulfilled cumulatively. The objective presents the main obligation that has to be fulfilled. This obligation includes providing general interests. But, the objective doesn't spontaneously provide the general interest. General interest can be realized, when these means are public power of state as collectivity and public institution, as an organization of public service (Borkovic, 1997). Except this, the continuity in action is also required, meaning that general interest should always be protected with public service activities.

Only in this way public services justify their purpose for which they were established in the first place. In this context we understand that public services should be functional and appropriate for all citizens with equal terms. As we can see, the entirety of all the elements of which public services are depended, are done for general interest. We can phrase a synthetic definition associated with this: we talk about public services when the activity with general interest is done by a legal person, in the public right, but this activity is also entrusted to the legal person of private right, and because of this reason he has special authorizations and

obligations. With other words when an activity is done by a public legal person, it is enough for it to be an activity of general interest, but when it is done by a private person, it is necessary for this task to be with general interest and for this person to be in a certain legal system (Kujundzic, 2005).

4. Types of Public Services

As we mentioned, the concept of public service fits politically to the needs of legal (administrative) services and public services with industrial and commercial character. Unlike administrative public services, which are hard to be defined positively, public services with industrial and commercial character are often public institutions that are characterized with their activity. Most often they are economic and have to do with production, sale, distribution, transport, credit etc. Public services with industrial and commercial character have evidently higher autonomy than administrative public services.

In these services legal rules of public and private right are applied, by enabling these services to carry out their activities that based on their nature, are inside the same public legal person, as state, territorial, institutional collectivity. Legal (administrative) public services perform activities that are easier manifested in the negative way than in the positive one. In fact, their definition proves that all the things that are not part of public services with industrial and commercial character belong to them, they are non-profitable and their activity is not depended from the revenues. Governmental institutions are part of these services, which perform their activities in accordance with the character of their existence. So, the legal public service is performed by courts, administrative bodies and organizations to which public services are entrusted, through public authorizations. It is very challenging e to supervise the informal systems for the state intuitions especially financial institutions (Aliu et al., 2017) in the Balkans. The existence of public services conditions with the necessity of general interest's fulfillment. This doesn't mean that general interest is always enough to define them, especially when it comes to some public services that aren't defined precisely. In this case, their definition is combined organically or institutionally with the features of the legal person, depending on whether it is about public services or private services. In this case, we have to know whether the question is about the material or functional concept of the service. In public services with industrial or commercial character, which are directed from legal persons of public right, there are divisions between the

administrative right and private right, while the implementation is basically equal. Public services that are directed from private legal person, despite of their nature, are mostly regulated with the private right (Stavileci, 1997).

5. Administrative Judiciary

Administrative judiciary presents some type of control upon administration, respectively upon the administrative act, in first place the particular and individual administrative act. This kind of control is realized in the field of administrative activity through which it's most important form of function is developed. It is displayed as "construction of theory and legal practice" from the beginning of nineteenth century, built under the banner of the need to protect objective legitimacy and especially the subjective rights of citizens, France is considered as 'cradle' of administrative judiciary. Speaking the truth, French legal practice has created the first forms of public services, respectively of delegated – authorized power, of administrative judiciary and administrative conflict (le contentieux administrarif). In the beginning of nineteenth century, the solution of administrative conflicts between public administration and citizens was in the hands of special councils and State Council. (Conseil d'Etat) In this way, France served as a "model" and "example" for administrative judiciary, which was later followed by other Europe countries as well (Dimitrijeviq, 1986). It is worth mentioning that State Council in France was transformed from an "administrative body" to "special administrative court", with the authority to resolve administrative conflicts.

A fact like this had great influence in the attitude of French theory, according to which special administrative courts were considered as "part of administrative power", and not "part of judicial power". In fact, the French doctrine always refused to treat State Council and other administrative courts as part of 'the unique judicial – legal system', but only presented them as "special organizations", born in the flank of administration (Elster & Slagstad, 1988). Administrative judiciary is computed as one of the "perfect forms" of control upon the legitimacy of administration bodies acts. In reality, this kind of control was almost prohibited in a lot of Europe countries for a long time. Those countries supported the idea that judges shouldn't interfere in the so-called "executive duties". The reason was supported in the principle of "power's separation". There was also another reason mentioned. It was thought that judges are not prepared to interfere effectively in

administrative issues (Sadushi, 2005). The largest stocks appeared in the East countries, where Albania belonged. Not establishing administrative courts in East countries, as well as in Albania, in the formal meaning was seen as a result of a special viewpoint of the doctrine at the time, either legal or political, in those countries, about state's role in general and the position of administration. In fact, according to this doctrine, the institution of administrative conflict was considered as an "institution of bourgeois right". Being so, that institution didn't match with state's role and the administration's position (Karlovčan, 2008).

5.1. The Report between Administrative Judiciary and Constitutional Judiciary

The control used by constitutional courts and the control used by administrative courts differs in form and content. However, in some countries, constitutional courts are also allowed judging the legitimacy of administrative power acts, and like this they somehow become part of administrative judiciary. For example, in Spain, Italy, France and Estonia, constitutional courts have "additional authorizations" in the field of administrative judiciary (Pero & Zigic, 2006). Related to this category, it is enough to mention constitutional provisions that clearly define that "the Constitutional Court guarantees the respect of Constitution and carries out its final interpretation", that Constitutional Court's decisions have binding power for state's administration bodies, and that Constitutional Court's decisions are mandatory for all the other relevant bodies.

5.2. Administrative Judiciary's Organization and Europeanization

The increased spreading of administrative judiciary in the countries of Europe has been a push to talk about the so-called "Europeanization" of administrative judiciary in scientific conferences. (Androjna, 1977) Administrative judiciary's 'Europeanization' is an identification sign with standards that have been embraced from a large number of European Union countries and that now have already taken place in their legislation. However, administrative judiciary's "Europeanization" doesn't mean that at the same time administrative courts in those countries are "dressed with the same clothes", and it also doesn't mean the identification of administrative judiciary with any of its mentioned organizational regulations. In this context, Albania will be able to also adjust her administrative judiciary to her specific conditions, without needing to blindly refrain to a model.

5.3. Administrative Judiciary's Reforms

States that have embraced administrative judiciary's standards are riding a wave of reforms. They have planned and are taking determined steps towards administrative judiciary's reformation in their countries. On what direction can the administrative judiciary develop? This is the question standing in front of them. First, in most of the countries there's a need to do analysis about the past path and the experiences in administrative judiciary's field. Second, the legislation which refers to administrative procedures in those countries is being revised. Third, the possibility to change and complete the legislation about administrative procedures is being reviewed while some countries even consider drafting a new legislation. Fourth, they're checking the innovations in this field in some of the European Union countries and 'mutual denominators' are required. The European Convention for Human's Rights contains some requests that should be in the minds of countries applying reforms in the administrative judiciary.

5.4. Administrative Judiciary's Importance and Priorities

First, the increasing impact of judicial control of public bodies that is seen with a lot of interest in administrative judiciary. Their second importance is the construction of a new special model of judicial control in general, deliberately expanding and strengthening it. The third one has to do with increasing the impact of power's separation in judicial control that is seen with a lot of interest in society's democratization processes in general. Fourth, there's guaranteeing the independence and impartiality of the judges, to ensure the principle of legitimacy in administrative judiciary. From the large number of administrative judiciary's priorities, we will mention only some of them. Primarily and above all, I would emphasize administrative judiciary's priority in the 'democratization of judicial system'. Another priority of administrative judiciary is its functional separation from the system of courts under the general competence. A detached priority of administrative judiciary is increasing citizen's and public opinion's belief in the legal work of the administration. And last, the protection of citizens from "administration's arbitrariness" is another priority of administrative judiciary. Of course we could also talk about other favors of administrative judiciary (Materials of Science Conference, 2009). Without listing them by the importance they have or could have, these favors of administrative judiciary should be seen as more opportunities to: a) Specialize, b) Resolve conflicts, c) The creative role of administrative judiciary in the development of administrative right. Administrative judiciary through administrative courts has another special priority. It is expressed

in the competences of administrative courts. Speaking the truth, administrative courts have full competences, not only in law's implementation, but also in the authentication of facts

6. The Connection of Administrative Judiciary and Administrative

Procedure

There are two viewpoints shown about this rapport. According to one viewpoint, the judicial procedure is considered as an extension of administrative procedure. According to another point of view, there are two different procedures - one that is held in administration and ends there, with the extraction of the administrative act, and the other one held in courts, contesting the legitimacy of the administration act extracted from the administration. Even though there is a close connection between the rules that define the administrative procedure and judicial control, it can hardly be accepted that judicial control is a "higher degree" of administrative procedure, knowing that administrative procedure, in reality, is developed and ends inside the administration itself. It is not at all disputed that judicial control presents a higher institution in solving administrative cases. In administrative judiciary there is a number of "sensitive cases" that are or can be presented. Those sensitive cases pop out, regarding to the volume or mode of control (Sadushi, 2005).

A question about "sensitive cases" that requires a direct response is: how is it possible that on one side there is an effective judicial – legal protection provided, and on the other hand at the same time they "respect" the need of an efficient extraction of the decisions in administrative procedures? There exist a number of instruments that can help in this point of view, for which the administrative judiciary theory talks about. First, it is requested to give the administration courts as clear competences as possible and this fact is seen with a lot of interest, for both courts and the application of power's separation principle. The theory also talks about another instrument: about the possibility to apply consultative procedures in the rapport between courts and administration. In reality, it is seen as a possibility for public bodies to ask administrative courts for law's interpretation by avoiding illegal decisions. However, this possibility may be associated with two warnings. First, we should be careful because the council that the court gives to public bodies can be somehow considered as "preliminary judgment", and secondly, it can be considered as a "privilege" for public bodies. Among these instruments, in literature they talk about the delay of judgment's effect, for the delay of judiciary

practice's effect etc. How should the instruments be understood? They should be seen as nothing more than a "common purpose" of public bodies and administrative courts in making the best legal decision. Related to this, administrative judiciary should be understood as a phase in the process of decision-making and as an instrument to justify administration's activities. Therefore, the conclusion is clear: the separated activities shouldn't be seen as opposites, but as additional (complementary). Court's control should be understood as a device to improve the rationality and quality of administrative decisions.

6.1. Administrative Judiciary's Purposes

Among the important functions of administrative judiciary, two are essential: the preventive function and the repressive function. Administrative courts protect preventively the individual's rights. This kind of protection prevents the excess of executive and administrative power's authorizations to the detriment of citizens. This function of administrative judiciary simultaneously is expressed with the impact in administrative procedure. The repressive function of administrative judiciary is expressed in applying sanctions when there's concrete violation of legal order. There is a number of problems that can pop out in administrative courts practice. Among the most highlighted problems we can mention the protection one, not in time, judicial and legal. A number of cases awaiting trial, the procedures procrastinate and citizens lose their faith in courts.

Another problem is related to the inability to complain about administrative courts decisions. We should review the cases when the complaint about administrative courts decisions is excluded, even though the last practices are favorable and, in principle, provide the appeal against administrative courts decisions. As a third problem we mention the one that expresses itself in some countries efforts to harmonize their legislation with the dispositions of the Convention of Human's Fundamental Rights and Freedom Protection. In this struggling they face an insufficient degree of harmonizing administrative conflicts with this general document. Regarding to the administrative conflict itself, certain problems may appear. If there would be an effort to sum them up, these three problems would be coming up: one, the institutions wouldn't patch up the administrative conflict; two, the half-defining of administrative conflict and three, the insufficient expansion of legitimacy's supervision in all individual acts of state and public power. It is in our interest to review the experiences in the region, especially the administrative courts in Croatia and Slovenia.

7. Conclusion

The functioning of administration in region court's and in the countries that have passed or are in the final phase of transition is one of the most interesting issues nowadays and simultaneously it is a challenge for the entire judiciary system of a country, especially for the genuine operation of courts. Therefore the administration can feel kind of bad against judicial control. The first thing we can say is that it can "feel kind of bad", away with the fact that it is placed "under a judicial control". Second, the possibility that the procedure that was developed in administrative act's issuance will lead to court creates some kind of "legal uncertainty", until the end of the process, regarding to the regularity of the contested administrative act.

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