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ADMINISTRATIVE PROCEDURES IN ALBANIA: MAIN FEATURES AND DRAWBACKS

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The Historical Context against which the Albanian Administrative Procedures Code (APC) Evolved

The recent political changes in Albania gave renewed vigour to the public policy debate about the perceived need to reduce the role of the government in socio-economic affairs. Over the last decade, Albania has been quick to embrace the reforms that ultimately transformed the old paternalistic state into a regulator. However, the *statist* tradition of the past lingers on. The recent public policy debate shed light on the fact that despite the profound transformations the role of the government in the life of our society is still far too big. Old habits die hard. Albania's tradition of *statism*, by definition, means that the scope of administrative regulation in the past was such that it amounted to outright intrusion. This *statist* approach has had consequences on the build-up of administrative law in present day Albania and its distinguishing features.

When considering administrative law in the Albanian setting before the '90s, it is important to understand its scope of application both in terms of state entities and activities that were subjected to its norms as well as its overall objectives.

In terms of entities, administrative law under communism was applied to those state organs commonly categorised as "administrative" rather than the so-called "organs of state power" such as the Council of Ministers, Albania's collective presidency called "the Presidium", the Parliament and, of course, the Communist Party. In other words, *administrative law was conceived and devised to apply to those entities that carried out rather than formulated policy*. Needless to say, there existed no such things as independent agencies in the sense we are used to refer to today. Nor would administrative law apply to the procurator and the courts, although they were not considered organs of state power in the sense referred to above.

In terms of activities, under the *ancien regime*, administrative law would concern itself with four main categories of administrative action:

Administrative Acts: Maybe the only way to grasp the real meaning of administrative acts as we in Albania used to understand them is to juxtapose them with other administrative activities such as the so-called administrative operations and contracts. Another important distinction to be drawn here is the one between administrative acts and those political acts which are often known in Europe as "acts of government" and which tended to be considered not subject to judicial control. In other words, acts of administration were considered those normative or individual decrees, decisions and orders which set forth rights and duties and which emanated from the administrative agencies below the so-called institutions of power (Council of Ministers, Parliament etc).

Administrative Operations: The notion of administrative operations would refer to those line functions of administrative entities which did not give rise to rights or duties but were intended to implement administrative acts.

Administrative Contracts: These were agreements between administrative agencies and enterprises and subject more to the norms of civil law and arbitral tribunals than to administrative law.

Jurisdictional Administrative Acts: These were a special category of administrative acts comparable to the concept of quasi-judicial function that emanated exclusively from the work of the "*Arbitrazh*", the arbitral tribunal that settled disputes between state agencies and state owned enterprises.

The above-referenced scope of administrative law in Albania before 1992 and its main technical features have inevitably determined its main objective: *The legal achievement of state goals rather than the effective addressing of individual grievances*.

This legacy has left its imprint on the present-day scope of administrative procedures law which was adopted by the Assembly¹ on 12 May 1999.

The Doctrine Underpinning the Albanian APC

So what is the doctrine underpinning the Albanian Code of Administrative Procedures? Another way in which I would like to phrase this question is, simply, where did the APC come from and what does it stand to achieve? I am delighted to inform you that our fascination with the idea of codified administrative procedures is not to be ascribed to benevolent pressure from the international community as it is increasingly the case with other pieces of legislation. Instead, Albania did have an internal political and intellectual process to that effect which I'll try to summarise in the following paragraphs.

¹ The Albanian Parliament.

Going as far back in constitutional theory as this forum allows me to do, I would say that the idea of codified administrative procedures rests on the constitutional hypothesis that modern states are the produce of representative government. That being said, it logically follows that administrative services are but the end product of a long process of legitimization. The quality of such services on the other hand is the confirmation of a functioning representative scheme to be contrasted with a mere fiction of it. So, in order to have our system of government deliver the kind of governance it was engineered for, we have to pose ourselves a question: “How do we make sure the public administration performs well?” Of course political control and judicial control hastily make their way into our minds in an attempt to answer that question. After all, we tend to trust our politicians, whom we vote into office, more than those “sinister” bureaucrats who, in the best case, get their positions under considerations of meritocracy. The same goes as far as the judiciary is concerned given the adversary nature of the judicial process and its meticulous procedural detail.

However, it is the bureaucrats we have to deal with most of the time. It seems as if everybody else has abdicated so that they can run our lives. Increasingly governance is the subject matter of bureaucrats. But we do not trust them. Do we?

If this were not enough, legislative reforms in most polities have shielded bureaucrats from political pressure through the introduction of relatively stable career systems. So we are left with the bad taste of a constitutional usurpation and longing for democratic control over the administration.

Over the last decade under democratic government, we have learned to understand the mechanics and the limits of both political and judicial control over the bureaucracy. Political control for one can take place in two main forms. In the first place, it can be exerted *ex ante* through law making. Clearly, a parliamentary statute is able to determine to a considerable degree the functions of public administration and the way they are performed. Secondly, political control can be imposed *ex post facto* through parliamentary hearings and investigations, the reconfiguration of agencies and budgetary reductions etc. Judicial control which is performed following the submission of individual complaints against administrative action or inaction is also *ex post factum* in nature. Moreover, judicial control has a somewhat narrow scope of intervention as it concentrates on the legality of administrative action alone.

Whereas the regime of controls over the bureaucracy depicted above is certainly time-tested and potentially able to reinvent the way the administrative machinery performs its tasks, it tends to be rather cumbersome. The *ex post* types of controls in particular reveal the following difficulties:

In the first place, parliamentary controls, at the end of the day, boil down to little more than a political exercise. The necessary votes may simply not be there, the political climate may not be propitious for reform, competing social and economic interests may hijack the attention of the political class etc.

Secondly, as far as the courts are concerned, it must be noted that the inevitable *ad hoc* approach the courts take to administrative litigation undermines the ability of judicial review to bring about systemic improvements in the way public power is exerted, at least in the short run.

All of these considerations, and indeed much more, led us in Albania in the second half of the ‘90s to believe that the only viable form of control over the bureaucracy is the *ex ante* control in the form of codified administrative procedures. The advent of codified administrative procedures does not, of course, render political and judicial controls obsolete. On the contrary, it makes them more effective because such procedures make up the very basis of administrative behaviour against which politicians and judges will then be able to match the performance of the administration. To take the case of the Albanian Code of Administrative Procedures, I should perhaps point out that it makes reviewing the performance of the administration by our public, as well as by politicians and judges easier in the following three ways:

- In the first place, the Code’s requirements for the administration to observe a certain sequence in enacting an administrative procedure (I am thinking of the obligation of the administration to notify the parties to a proceeding, the obligation to award the parties a hearing, the obligation for expeditious decision-making, the obligation to communicate the decisions to the parties etc), in fact enable politicians and judges to follow the administrative process more closely;
- Secondly, the Code’s requirements for increased access of the interested parties to the administrative procedure tend to rightfully concentrate the process on legitimate individual rights of the parties giving them an increased opportunity to influence the process;

- Finally, the set-up by the Code of an effective regime of internal control exposes the individual administrator to closer scrutiny by higher echelons of the hierarchy and, eventually, to sanctions for failure to observe the Code's procedures.

The result of all this should be the demystification of the administrative process thanks to an injection of transparency and predictability provided by codified procedures.

The surge in the number of independent agencies supervised by the assembly alone has been yet another reason to set up an APC. After the adoption of their constituting legislation, the Parliament, for all practical purposes, is cut out of the management of the newly created agencies. A basic law aimed at providing a lowest common denominator (standard) of administrative practices was clearly needed. The advent of independent agencies prompted yet another legal debate concerning their ability to regulate their specific spheres of jurisdiction in a normative fashion. In other words, their rule-making power was questioned.

The issue was tackled within the framework for the legislative process that led to the adoption of Albania's Assets Declaration Law envisaging the establishment of a High Inspectorate. Whereas the Inspector General (the figurehead of the agency) as conceived by the law featured all major characteristics of an independent institution (the modalities for the election of the Inspector General were such that they effectively shielded the agency from improper influence on the process of exercising its duties, the agency was also recognized as having full managerial autonomy), it lacked any ability to adopt general rules aimed at regulating its specific area of jurisdiction. The solution envisaged in the draft empowered the Inspector General to merely conceive normative acts and then refer them to the Council of Ministers (COM) for formal adoption. This solution was opted for by the drafting committee following their interpretation of article 118 of the Constitution of Albania, which seems to restrict regulatory capacity to those Government bodies alone that are provided in the Constitution².

On the other hand, article 116 of the Constitution leaves room for a less rigid interpretation as it stipulates that directors of other central institutions (the proposed Inspector General clearly falling under this category) may also issue normative acts³.

Whereas most of the solutions incorporated in the draft suggested the intention of the drafting committee to set up an independent agency (the modalities for the election of the Inspector General, the ambition to entrench him/her in the position etc), the drafters hesitated to vest the Inspector General with regulatory powers. On the other hand, it was legitimately feared that reducing the regulatory capacity of the inspector general to a mere power to refer proposed regulations to COM, may in turn diminish the stature of the agency and its ability to address the issue of declaration of assets with regard to the members of COM who may effectively sabotage the work of the inspector by declining to adopt (or by making undue changes to) regulations proposed by the latter.

Finally, the opinion that prevailed was that interpreting the collision between articles 116 and 118 of the Constitution in a way that would permanently compromise the ability of the Parliament to make broad delegations of powers (especially regulatory powers) to agencies operating in various areas, would significantly abridge the flexibility of our system and would *de facto* run against what seems to be a major trend in modern constitutional theory.

Structure of the Albanian APC and its Main Features

The basic notion underlying Albanian administrative procedure legislation is that administrators find it more difficult to operate and deliver the services expected from them in the absence of codified procedures, able to be applied throughout the wide spectrum of administrative activity. Before the advent of the Administrative Procedures Act (APC), the procedures for the implementation of legal tasks were scattered across a range of laws and regulations. As a result Albanian administrators found it increasingly difficult due to the increasing volume and complexity of the legislation to locate the applicable procedures, let alone to observe them.

The Albanian Administrative Procedures Code is very clear in its scope as it seeks to unify the procedures of administrative behaviour. The procedures enshrined in the Code are only applicable to a relationship that emerges between the administration and an individual private person (or a group of private persons) for the purpose of enabling the latter to either avail of a legally recognised right or obtain a privilege. The

² Sub-statutory acts are issued on the basis and for the implementation of the laws by the organs provided in the Constitution.

³ Normative acts of ministers and directors of other central institutions are effective within the sphere of their jurisdiction on the entire territory of the Republic of Albania".

Albanian APC does not concern itself directly with administrative rule making. Of course, part of the code (such as the rules concerning impartiality or the rules regulating administrative jurisdiction) is as much relevant to sound rule-making as it is to the observance of the rights of the individual concerned. Nevertheless, the aim of the legislator has clearly been to improve the situation of citizens vis-à-vis the administration rather than to smooth the operation of the latter, which comes as a much welcome side effect.

The APC is divided into five parts. The first part is subdivided into two chapters dealing with the scope of the regulation and the general principles, respectively.

The second part is subdivided into three chapters. The first chapter provides for the general rules applicable to issues of jurisdiction. The second chapter outlines rules and procedures to be followed for the delegation of administrative powers and the third chapter seeks to introduce procedures aimed at solving conflicts over administrative jurisdiction.

The third part deals with issues of impartiality in the work of public administration.

The fourth part stipulates the rights and duties of the parties to an administrative proceeding.

The fifth part is subdivided into four chapters dealing with principles of the administrative proceeding, the right to be informed, notifications and the actual rules for the proceeding proper, respectively.

The sixth part is entitled "Administrative Activity". Its four chapters deal with administrative acts, the so-called real acts, discretionary administrative acts, as well as administrative contracts.

Drawbacks/Issues for Reform

The last five and a half years since the adoption of Albania's Administrative Procedures Code have revealed many problems. However, lack of implementation has been so gross that we have been unable to judge the wisdom of the substance of the regulation. As a quick observation, it is worth to note that there exists a huge discrepancy between the elevated standards introduced by the APC and actual levels of implementation on the ground. The following findings are therefore more the result of theoretical speculation rather than lessons learned from implementation or *dicta* coming from the courts of law.

This being said, I'll take the liberty to point out two main drawbacks with the understanding that the implementation of the Code by the administration, as well as long-expected court jurisprudence may well channel future revisions and amendments in different directions.

The main drawback of the Albanian APC is its absence of regulation on rule-making. Clearly, rule-making is typical of independent agencies. The Code was adopted at a time when there was little understanding in Albania regarding independent agencies (the fourth branch of government). Those independent agencies in existence before 1998 were either practically subordinate to the government as a matter of political tradition or were legally not independent. It was not until 1998 that a boom of independent institutions took place in Albania (the Ombudsman, the National Council on Radio and Television, the Telecoms Regulatory Authority, the Central Bank of Albania, the High Chamber of State Audit, the High Inspectorate for the Declaration of Assets, the Competition Authority etc all coming into existence). Sooner or later, these agencies will engage in that sort of regulation that resembles law-making. We have no guarantees that the process will be transparent and participatory for the stakeholders.

Finally, the Code fails to sufficiently emphasise the need for interest group input to decision making. Although the Code is concerned with individual decision-making, third party participation in the administrative process may be necessary. The Code fails to award third parties any right to participate and make submissions to the process.