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ORIGINAL PAPER

The Institute of Administrative Silence of Kosovo in accordance European Union legislation and comparative aspects with Albania

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Abstract:
Administrative silence is a notion or a law institute known in the theory of administrative right, in the positive right as well as the international right, whereby the administrative law relationship of the concrete nature is created which is based upon general norm (law). In the Republic of Kosovo, by the new law on the general administrative procedure, the administrative silence has taken a positive (approving) character, as compared to the old (abolished) law which foresaw the administrative silence with negative (denying) effect. Unlike the Republic of Albania, the positive administrative silence in Kosovo does not foresee exceptional cases, which means that for all administrative situations or issues, the administrative silence has the character of approving act in silence. The aim of this study is analysing the effects that the positive admnistrative silence has on the parties in Kosovo, as well as the comparative study with the law institute of the administrative silence in the Republic of Albania and directive of Europian Union about administrative silence institute.

Keywords: *Administrative silence; administrative law relationship*; *administrative issue; Republic of Kosovo and Republic of Albania.*

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Methodology

This scientific paper based on international and comparative legal research like a type of legal research. It aims to rectify and clarify the administrative silence institute in Kosovo based in internal norms, also to compare this administrative institute with Albania and International law, exactly with EU's directives that define well the administrative silence institute. Kosovo in 2019 has determined the administrative silence institute with positive effect, but actually in the law on general administrative procedures has collision. Albania has defined the administrative silence institute with expressively positive and negative effect. Europian Union since 2006 has determined the administrative silence institute with positive character.

Introduction

Administrative law relationship is different from other relationships of the right in that it is created in the scope of administrative field. Administrative law relationship regulates the rapport among the bodies that seek rights and the bodies that have obligations (in exercising the administrative power). According to the author Ivo Krbek the administrative law relationships in a more narrow sense are considered as " relations between the state adminstration body in the governing process" as well as in the broader sense as "a relation created based on the administrative law norms". One of the characteristics of the administrative law relationship is the subordination relation , where the party is subject to the state will represented by the administrative organ (Stavileci & Batalli, 2012: 108-109).

The administrative law relationship is conducted with administrative proceeding. By administrative proceeding we understand the commitment for the consequent implementation of law, whereas the consequent implementation of law enables the regular implementation of the law material provisions through which special administrative issues are regulated respectively the administrative law relationship with concrete character which is based on a general norm. Therefore, abiding by the regulations of the administrative proceeding is not only guarantee for the regular implementation of the law material provisions but also a foundation for the principle of democratization in proceeding and a barrier towards arbitrarism and judicial insecurity. (Sadushi, 2008: 246).

Public administration is an organisative structure that represents the foundation for decision-making as well as implementaiton of decisions, rules through which the public services are provided. Administration should serve the citizens as well as be a bond between the official politics and the public (Baliqi, 2017:99). Apart from realisation of the public services, the public administration (the public organ) is an essential entity in the administrative proceeding, respectively in the administrative law relationship which decides upon the right or judicial interest of the party (the citizen) as emphasized earlier herein.

Relationship of the administative right, just like any other judicial relation has three components: a) the entity b) the object and c) the content. Entities of the administrative law relationships are administrative bodies or authorities known by law as well as legal persons who are authorised to exercise administrative activity.The object of judicial relation is what the subjective rights as well as judicial obligations are led upon the administrative right entity. As a rule, objects of the administrative law relationship

may be : a) material possessions and valuables, such as: buildings, cars, money, b) intelectual property as a result of intelectual creativity for instance literary works, paintings, films, etc, c) personal immaterial possessions, for instance: human health, human dignity, etc, d) human behavior, respectively their actions or non-actions. Meanwhile, the content of the administrative legal relationship includes the entirety of the rights and duties of the entities that are a part of the administrative law relationship (Dobrjani, 2007: 34-35).

Not only this much. Within the administrative legal relations, we can also mention Lincences as a very dense administrative activity which are required for a number of different purposes. Therefore, licensing represents one of the most important kinds of administrative activity. Various licensing agencies operate under the discretional power through which it is decided whether they should allow an effective control of the defined activities. For instance, a license issued by the particular licensing agency related to the alcoolic drinks, licensing by the magistrars is one of the well-known examples in the Great Britain. In the Great Britain, one of the most important licensing functions relates to town and country planning where the Town and Country Planning Act 1990 states that the development of land requires planning permission, that is, a 'land use licence'. Local authorities have many other licensing functions in addition, covering activities such as the operation of pleasure boats and lotteries, and the use of firearms (Hawke & Parpworth, 1998: 103-104).

So, administrative law relationship is a result of an administrative activity, respectively administrative work. Because administrative works have legal character, the administrative law relationship takes administrative character as a result of this in its content. Thus, even if a social relationship existed before, or it was founded through administrative work, it is granted the character of administrative law relationship. The administrattive law relationship can be created in three ways: a) through administrative act; b) through administrative silence and c) ipso lege - automatically according to the law, where administrative act is not required (Dobrjani, 2007: 110-111).

The institute of administrative silence!

As we mentioned earlier herein, likewise it can be said that, one of the ways of establishing administrative law relationship is also by administrative silence. Doctrinal approaches to administrative silence will often be underpinned by assumptions about wether the wider public interest is better served by prioritising the interests of the administration or those of the individual (Gordon, 2008: 2). In administrative law, the administrative silence is a special institution, in which, with the request of a party to the administrative matter, a competent body has not issued its decision and does not hand over the decision to the party within a legal timeframe during which a party has the right of appeal if the request is rejected. But the silence is final and the party may seek judicial protection from a competent court if the body of the first instance remains silent and where the party has no right of appeal. Administrative silence is not a form of ruling on a case but a legal invention under which it is clear that the competent administrative body has denied the claim of the citizen, without resolving it within the time provided by the law (Batalli, 2017: 140). Administrative silence is, in fact, a legal fiction of administrative law, a situation caused legally. According to it, application filed with public administration bodies, outstanding in a certain period of time, **is** considered as 'denied' or 'accepted'. There is an adminstrative silence when the public adminstration organ is silent de facto, i.e. does not adopt relevant decision within legal time that has

been set, while it is expected to do so, and the law has anitcipated that such a de facto silence means a positive or negative response, equating it with a positive or negative decision, as per the approved regulation (Çani, 2014: 2). So, the administrative silence implies creation of the administrative relationship without issuing the administrative act, due to expiration of the time limit for issuing the administrative act wished for the party in the administrative proceeding which is counted from the initiation date of the proceeding by one of the participants in establishing the administrative legal relationship (Stavileci, 1997: 33).

Administrative silence in the past and present, in accordance European Union legistlation

Historically, in the past the administrative silence was considered a refusal. However, on the 12th of December 2006, the Parliament and the Council of Europe brought about the directive 2006/123/EC in which, in the declaration of the reasons of this directive, it is explained that one underlying difficulty for a party dealing with public adminisrtation "... is complexity, length and legal insecurity of the administrative proceeding". For this reason, by following the example of particular modernism and the initiatives of the good administrative practice undertaken by the Committee and the national level, it is necessary that the principles of administrative simplifications are defined, among others (…) introduction of the authorisation principle implied by the competent authorities after a certain period of time has passed" (SIGMA, 2012:21). For these reasons, for a modern administration and a more simplified procedure to the party, the European Parliament and the Council with their directive are determined for the positive character of the administrative silence. Therefore, the text of the Article 13 paragraphs 3 and 4 of the Directive says as follows: " *3. The authorisation procedures and formalities will assure applicants that their application will be processed as soon as possible and, in any case, within a reasonable time frame which was set and published in advance. The time period will commence only when the whole documentation has been submitted. When this is justified by the complexity of the issue, the time period may be extended only once by the competent authority for a limited time frame. Its extension and duration will be justified accordingly and the applicant will be notified before the deadline of the original period. 4. Failure to respond within the fixed time or extended time frame in accordance with the paragraph 3, the authorisation will be considered as given. However, there may be other modalities, where justified by the reasons of touching the public interest including the legitimate interest of the third parties"* (SIGMA, 2012a: 21).

The old law of the administrative procedure of Kosovo 2007 (abolished in 2016) foresaw the administrative silence in the article 130, paragraph 2 " In the case of non-action by the administration (non issuance of the act and the complete silence), the administrative appeal is made within 60 days from the day of submission of the request for initiation of administrative proceeding". Administrative appeal against the administrative silence within the time limit is made as a result of the impact of the judicial security principle which aims at the defence of the legal relations created and their complete non-enchroachement (Baraliu & Stavileci, 2014: 326). According to the old Law on administrative procedure 2007, the parties have been granted the right to file complaint in the court against the administrative silence in accordance with the law on civil procedure in power (Law on administrative procedure, article 131, paragraph 2, 2007).

In the old law on the administrative general procedure of Kosovo, adinisrtative silence had negative (denying) character, whereas by the new law, Law Nr. 05/L -031 on the General Administrative Procedure approved on the 21st of June 2016 and entered into force one year later, in 2017, the administrative silence institute took on positive (approving) character as precised by the article 100, paragraph 1 of Kosovo APL Nr.05/L-031 *" If the party has requested for the issuance of written administrative act and the public organ does not inform the party on the administrative act within the initial time, it does not inform the party on the extension of deadline or on the act within the extended deadline, pursuant to the article 98 respectively 99 of this Law, the request made by the party will be considered as accepted entirely and the administrative act requested by the party will be approved".*

On the other hand, there is an ambiguity in the article 133, paragraphs 1-4, as contradictory to the article 100, paragraph 1 (contradictory to the article 100) which puts forward that *"The complaint against the administrative silence is processed directly by the supreme organ. The supreme organ immediately asks the competent organ to present, without any delay, the whole case file and a written report on the reasons of the administrative silence. Initially, the supreme organ will review if the complaint is valid and, only if the complaint is acceptible, it will review the request of the party, as it has been submitted to the competent organ. The supreme organ will decide on the request based on the case file or if it is necessary to conduct additional administrative review or it will order the competent organ to conduct administrative reviews and notify it on the results of the review. Unless otherwise set forth by law, the supreme organ will resolve the issue by one of its final acts"* Law on the general administrative procedure, article 100 and 133, 2016).

Republic of Kosovo has delayed the adoption of the aforesaid EU directive related to the administrative silence in its internal administrative legislation. After the approval of the new law on the aforesaid general administrative procedure , the new commentary of law as an obligatory part of the law draft has not yet been realised, consequently, the law maker is obliged to clarify the controversy between the article 100 and 133 through authentic interpretation. It is thought that the article 133 shall specify the exemplary cases (it must have exclusive character) on which administrative acts or circumstances the supreme organ will decide on by its final act regarding the complaint against the administrative silence, so that this controversy of the legal provisions or the colesion on the new law on the general administrative procedure of Kosovo (Law on the general administrative procedure, article 100 and 133, 2016a) is solved.

By having a comparative viewpoint on the study, particularly, the positive administrative silence (approval in silence) in the Republic of Albania, explicitly, it is defined in which cases the administrative organ will issue approval/ authorization, despite other cases which are approved in silence without the approval/ authorization. Pursuant to the article 76, paragraphs 1 and 3 of the administrative procedure code of the Republic of Albania the acceptance of petition in silence occurs when execution of an adminisrtative act or exercising the right by an individual is conditioned by approval or authorization of administration, excluding the cases when it is otherwise put forth by law, it can be processed by execution of the act or by exercising the right, if the respective decision is not given within the time limit set by the law. In the cases when law does not forsee any time limit, the time limit for acceptance in silence due failure to act upon it is 90 days from the day the petition was presented. The cases that need an approval/ authorisation of the administrative organs are: licenses for contstruction

works, license for changing the land destination for construction, work permits for foreigners, licenses for foreign investments, 24 hour work permits, authorisations for shift work as well as gathering of the public and private functions (Administrative procedure code, article 76, paragraphs 1, 2 and 3, 2003).

Conclusion

Based on this study, we conclude that despite the discrepancies of the law on general administrative procedure of Kosovo related to administrative silence, the new law in question has brought about changes to the benefit of citizens, as unlike the old law of the administrative procedure, it has sanctioned the administrative silence as an approval in silence for the party's request, so by the new law, the administrative silence has taken a positive character. We consider that this change is to the benefit of the parties (citizens) because the administration bodies of the first instance, or the same bodies which make the decision, will be more active because they should not neglect important requests (for example; construction permissions for big buildings, permission in exercising high-risk activities, etc) where, as a result of eventual neglection, for the party, the silence would be converted to an act approved in silence. This happens due to the fact that the new law in question has not specified exceptional character to the administrative silence, as in which cases is the approval or authorisation of the public organ necessary, therefore, in principle, the administrative silence in Kosovo has a positive character for any request made by the parties.

On the other hand, the article 133 of law on general administrative procedure of Kosovo, which, among others, says that the supreme organ will directly process the complaint against the administrative silence by its administrative act, and this provision contradicts the article 100 of the same law which has classified the administrative silence of the organ of the administration as approval in silence for the request of the party in administrative proceeding. In this way, the cases in practice can cause confusion in decision making of the public organs in relation to the principle of judicial security, where in the respective case there is unclarity in the norm, ambiguity and confusion as to when the administrative act is to be considered as approved in silence or when it should not be considered as approved in silence but it is the supreme organ (body) that brings the decision by its final act.

Meanwhile, at the body of this scientific paper we saw (realised) that the law maker in the Republic of Albania had foreseen the administrative silence with positive character (the approval of the petition in silence), but even with this exceptional character, despite the fact that the petition may be approved in silence pursuant to the article 76, paragraph 1 and 2 of the administrative procedure code, paragraph 3 of this article foresees that for the cases that have been explicitly foreseen, the administrative organ will issue approval or authorisation, for instance: approval of constrution permissions, 24 hours work permits, approval for foreign invenstments..., etc.

It is clear that there is discrepancy between provisions in the Law on the general administrative procedure of the Republic of Kosovo, respectively the article 100 and the article 133 by which the principle of judicial security is violated the reason being that this causes that the parties practically feel unsecure and confused on whether the administrative organ should consider their requests in the case of silence as approved acts or when any public organ does not issue a written document to the party on the act approved in silence by the organ of the first instance, but this organ tends to consider the

administrative silence as a complaint by its merited act, if the latter action is legal or in contradiction to the positive administrative silence itself.

In such a judicial situation, the doctrinary interpretation of the new law on the administrative procedure is missing because it has not been commented about by the academic circles in order to interpret the discrepancy between the aforesaid legal provisions related to the administrative silence in the Republic of Kosovo.

Also a challenge of the state administration, its organization and functioning remains the professionalization of administration officials, the surveyed citizens estimate that the state administration is largely unprofessional, therefore the recruitment of administration officials should be done in accordance with professional criteria. and on the basis of merit for each official. Continuous professional training and development of state administration staff is crucial in individual performance, personal but also professional development, also guarantees the success of state administration in general.

Recommendations

Within the scope of the qualitative study of this topic, after the theoritical and comparative treatment of the notion administrative silence and analysis of the judicial norms with regards to the administrative silence, as a result of the research work, we present these recommendations:

a) The article 100 of Law on Kosovo general procedure shall be amended, so as to give an exceptional character to the positive administrative silence, despite the silence having a positive character, it should be specified in which cases is the approval or authorisation of the public organ in administrative proceeding required. Detailed correction for the positive effect of the administrative silence would be in conformity with the principles of the directive of the European Parliament and Council regarding the administrative silence of 2006 year, like the implied authorisation principle by the competent authorities after a certain time period has passed.
b) Reviewing the complaint against the administrative silence of the first instance organ directly by the supreme organ pursuant to the article 133 should not have existed as a legal possibility as it is in contradiction with the positive administrative silence itself pursuant to the article 100 of the Law on the general administrative procedure of the Republic of Kosovo, therefore such a part should be left out from the law with the proposal of the relevant project amendment and its approval by the decision making organ, respectively the Assembly of the Republic of Kosovo.
c) Simplification of the administrative procedure in general in a timely as well as procedural aspect as well as the full harmonization (apo compliance) of the Europian directive of 2006 year for the administrative silence institute by the new Law on the general administrative procedure in power of the Republic of Kosovo.
d) Sensibilisation of the citizens through a promoting (mediatic) campaign by the State on their rights in the public authorities in administrative proceeding pursuant to the law in power, especially, on the administrative silence institute on how the citizens can exercise their judicial rights and interrests in administrative proceeding through the administrative silence institute.
e) Digitalization or computerization of the administration in administrative services would be a great help in relation to parties in simplifying the administrative procedure in relation to the parties, in a timely manner of processing the procedure in the entirety of the procedural actions that would be undertaken in the

administative proceeding according to the law in power on the general administrative procedure of the Republic of Kosovo, as well as in the economical, administrative. techincal aspect, etc. Therefore, Republic of Kosovo shoud be more expeditive in the field of digitalizatoin or computerization of the administriation at the national level.

f) Until a legal improvement on the institute of administrative silence in Kosovo, it is necessary to make the temporary settlement of the institute of administrative silence through a sub-legal act, respectively with an administrative instruction.
g) To harmonize the organization, structure and operations of the administration with EU standards and the social and economic changes that are taking place in Kosovo. It is necessary to continue the efforts to approximate the legislation of Kosovo in the framework of the EU legislation of which Kosovo intends to be a part. However, in addition, in parallel with this type of harmonization, it is important that these standards are approximated in the organizational, structural and operational form of the functioning of the administration. It is worth mentioning that during this process special attention should be paid to the context of Kosovo, and the specific needs related to the peculiarities of the administration in Kosovo, and not necessarily to adapt identical measures as in other countries, without sufficiently adapting to the circumstances. and the context in which Kosovo finds itself as a new State.
h) Create platforms to enable more efficient communication between public administration and citizens in order to create a clearer picture of the needs of the public in terms of administrative services. It is recommended that this platform be created through a civil society network which can create space for citizens to express their views on the functioning of the administration, to express dissatisfaction with certain services, their expectation for the improvement of these problems, as well as suggestions for concrete actions that can be taken to make this improvement workable.
i) To make a comprehensive assessment of the state administration in the form of SWOT analysis, accurately harmonizing the legal framework governing the field of administration, because there is a noticeable change and frequent completion of laws, which can lead to opposition or collision between them, and especially the disharmony between bylaws and laws.
j) To make a full coordination between the bodies regarding the exercise of competencies and in particular their delegation because such a situation often brings confusion to the parties precisely because of the lack of coordination of the administrative bodies regarding the competencies. And this situation directly affects the parties in terms of time and costs.

References:

Baliqi, B. (2017). Politikat publike dhe qeverisja, published by Konrad Adenauer Fondation in Kosovo, pp. 99. Retrieved from: http: //www.kas.de/Kosovo.

Batalli, M. (2017). Consequences of administrative silence in public administration, *SEER Journal for Labour and Social Affairs in Eastern Europe*, pp. 140, Retrieved from: https://doi.org/10.5771/1435-2869-2017-1-139.

Baraliu, M. & Stavileci, E. (2014) Komentar i Ligjit për procedurën administrative i Republikës së Kosovës, 1th edition, published by GIZ, pp.326.

Çani, E (2014) Administrative silence: omission of public administration to react as an administrative decision-taking. *Juridical Scientific Journal*, School of Magistrate, Tirana, Albania, No.4, pp. 151-173.

Dobrjani, E. (2007). E drejta administrative I, published by Perlat Vushtina, pp. 34-35.

Gordon, A. (2008) Administrative silence and UK public law, Curentul Juridic, The Juridical Current, Le Courant Juridique, Petru Maior University, Faculty of Economics Law and Administrative Sciences and Pro Iure Foundation, vol. 34, pages 39-59, December. Classification: K23.

Hawke, N. & Parpworth, N. (1998). Introduction to Administrative Law, published by Cavendish in The Great Britain, pp.103-104.

Stavileci, E. (1997). Hyrje në shkencat administrative, published by Universitety of Pristina, pp.33.

Stavileci, E. & Batalli, M. (2012). E drejta administrative (organizimi dhe veprimtaria administrative), published by Universitety of Pristina, pp. 108-109.

Sadushi, S. (2008) E drejta administrative II, 4th edition, published by Grand Print in Tirana, pp.246.

Sigma (2012). Administrata e Mirë përmes një sistemi më të mirë të procedurave administrative, published by SIGMA in The Republic of Kosovo, pp. 21.

Kodi i procedurave administrative i Republikës së Shqipërisë (2003), neni 76, paragrafi 1-3.

Ligji mbi procedurën administrative i Kosovës (2007), neni 131, paragrafi 2.

Ligji mbi procedurën e përgjithshme administrative i Kosovës (2019), neni 100 dhe 133.

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