A philosophical approach on administrative procedure

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Abstract

Protection of the rights of parties by public administrative bodies which supervise the legislation enforcement and which issue decisions on this ground is enabled only through solid and concise structuring of administrative procedure and respecting of this procedure by all persons involved in a certain administrative procedure. Therefore, the state which is the only institution to have the competence for issuing and enacting laws, always keeping in mind the fact that different parties will, in one way or another, be affected by the decision of public administration bodies, are entitled to protect their lawful interests, should enact adequate laws which regulate the whole procedure to be carried out in order to make a public administration act binding on parties and so be respected. This type of governance of procedure development will be a very efficient and effective mechanism to prevent state authorities to use their powers for authoritarianism and arbitrariness, and create one of the manners for functionalising the rule of law.

Keywords: Law, justice, procedure, human rights.

Introduction

The overall discourse on the manner of functioning the society and maintaining the social cohesion is mainly developed in two basic antagonist lines, whose benchmark is the need for existence or inexistence of the state as institution. On the one hand, there is a theoretical community which affirms the anarchist theory, whereby the existence of a constitutional institution, as it is the state, which would organize and enable the life of people without society, is not necessary. Even though there is an antagonism even within this group as a result of individual positioning with the society and the state, however, their convergence point is the exclusion of the need for existence of a state. These two anarchist groups are: Communitarian anarchists confirm the idea that the minimalistic and narrow societies, which in fact due to their narrowness enable a totally normal functioning of the relevant society and respect of relevant agreements because even in such societies there is total mutual pam-individual recognition. *"Communitarian anarchists argue that, in a society made up of communities like this, cooperation will be possible on a much larger scale. Essentially communities will agree to exchange services with one another – they may specialize in producing different kinds of goods for instance – and they will collaborate on projects that need to be carried out on a larger scale, for instance, creating a transport system or a postal service. It is in each community's interest to make these agreements, and the penalty for breaking them is that no one will be willing to cooperate with your community in the future if it proves to be untrustworthy. So once again there is no need for a central authority to tell people what to do, and no need to use coercive force to compel communities to cooperate – the system will effectively be self-policing."*[1]
Second group of anarchists are libertarians, who consider that all eventual services of the state in relation to individual and protection of their rights, freedoms and interests may be performed by different private economic entities, which have to be

[1] David Miller, Political Philosophy: A Very Short Introduction, Oxford University Press, pg. 25-26.

compensated as the state is compensated multiple times more expensive. "*Market anarchists – sometimes called libertarians – claim that we could contract and pay individually for the services that the state now provides, including crucially for personal protection. In the absence of the state, firms would offer to protect clients and their property, and this would include retrieving property that had been stolen, enforcing contracts, and obtaining compensation for personal injury. So if my neighbour steals something that is mine, instead of calling the (public) police, I would call my protective agency, and they would take action on my behalf against the troublesome neighbour.*''[2] Whereas on the other hand, there is a group of etatist theorists who argument that there is need that for the existence of the individual and maintaining the social cohesion to exist the state institutions which take care and protect human rights and freedoms. Even among this etatist theoretical community exist differences in relation to their theories; however, in general, there is a mutual agreement to enable the maintenance of social cohesion and protection of human rights and freedoms thought the positive legal mechanism. In fact, not only theorists of positive law theory, but also theorists of the theory on natural human rights, which rights belong to the people due to its human being and not because of being member of a certain state, agree at the last instance with the necessity for the existence of a state for the recognition of these natural human rights and guaranteeing through legal mechanism that these rights will be respected because as such will be positive. Protection and guaranteeing the respect of human rights and freedoms is enabled only when there are positive legal provisions with legal effect, where the state is subject to, and which is also the object of these provisions and supervision of their implementation. The role of the state is remarkable and necessary for protecting human rights and freedoms, as well as maintaining the social cohesion, whether by being subject of the right, its object or having the competence (the right and obligation) for supervising the implementation of positive legal provisions. In the framework of competencies for drafting and enacting legal acts, supervising their implementation by different persons, but also implementing by the state. Consequently, the state is the crucial determiner of the freedom and the freedom is realizable by persons only when these persons are an integral part of the state as constitutional and legal institution and in which people have agreed to link their interests with each other because in this way these interest would be protected and not by being egoist and dissocialised beings. Building multilateral inter-human relations is enabled by the positive legal system of the country, where the greatest number of citizens of that country voluntarily obey, and the other part are afraid from the eventual punishment in case of failure to respect. On this ground, the man voluntarily and reasonably becomes subject of the law reasonably created by this man, because the whole corpus of positive legal provisions and is generally product of activity of the reason. In analogy with the nature governance enabled as a consequence of the impact of physical laws of causality, Kant explained even the human governance from laws of reason, which then become positive laws. "Hence, just as the laws of causality govern our systematic ordering of events in nature, so the laws of reason, in their practical capacity, regulate human subjects freely determined actions."[3] In fact, the idea for enabling a normal social order and conform the reason through legal acts is found at old Romans, according to which citizens should necessarily be active in policy and assuming public responsibilities and this in essence is a request of stoic philosophers. "This is the purpose of the Roman law: create an order compliant to

[2] Ibid, pg. 27.
[3] Katrin Flikschuh, Kant And Modern Political Philosophy, Cambridge University Press, p. 75

the idea of the order, and the reason too."[4] In fact, with regards to the law, where the state has the exclusivity for preserving it, there are many opinions dedicated to the numerous directions of the law, whether in terms of nature they govern, manner of their drafting, its relation to other social values, etc. Opinions have been articulated by the philosophic community for all these issues. What is more evident is the fact that the philosophical community did not reveal any significant interest in relation to the procedural law.

Notion and intention of administrative procedure

Liberal democracy installed in the governance system of all states oriented to the west is identified with an axiological system that affirms and glorifies the rule of law, protection of human rights and freedoms, but also building a social system in order to take care for those who cannot care for themselves. Rule of law is the mechanism of institutions which within its mandate rights includes guaranteeing the rule of law. As such, this state has been established based on a supreme legal, political, social, etc., act called constitution. Consequently, it is pointed out an imminent and inalienable correlation between the law and the state, which, in one way or another, condition their stabile and factual existence. Both the state and the law will lose the sense of their existence if their intention would not be, and they would not enable the protection of human rights and freedoms, and the legal system cannot be perceived without the state that is its subject, but also monitors the enforcement of legal – positive provisions. *"On the one hand, the state is presented as embodiment of the idea of law, as a factor necessary to give the right efficiency to the legal norm. On the other hand, the state cannot act without the law, and its power is expressed in the legal norm."*[5]As such, liberal democracies are essentially consolidated on the principle of mutual division and control of state governments. This is a real chance to minimise, but also in the best case preclude from the state the excess of public competencies and authorizations that it have pursuant to legal acts and constitution. These features have been articulated by John Locke, where, according to him, the state should have differentiated state governments which have and exercise relevant competencies. According to Locke, the state should have the legislative power that empowers laws, the executive power that judges based on the laws and conducts other political and strategic plans related to the maintenance of social cohesion and protection of human rights. When exercising their competencies, these powers, except enjoying independence, they also control each other in fair and lawful exercise of their mandate. However, according to Locke, the legislative is the supreme power in the state and has the competence for drafting and enacting laws. "*Whenever the government exists, the legislature is the supreme power. Whoever makes laws for others, must necessarily be higher than them*"[6]. However, the legislative power cannot take care for all issues; therefore, for daily works is the executive power, whose primary duty is to implement laws which derive from the legislative activity. "*It isn't necessary—it isn't even advisable—that the legislature should be in existence all the time; but it's absolutely necessary that the executive power be. There isn't always a need for new laws to be made, but there is always a need for laws that have been made to be enforced."*[7]Despite the division of powers into two by Locke, Montesquieu

[4] Zhan Hershe, Habia filozofike – Një histori e filozofisë, Translated by: Artan Fuga, Publishing House Dituria, p.57.
[5] Luan Omari, Shteti i së drejtës, second edition, Publishing House ''Elena Gjika'' Tirana, 2012, p.2-3.
[6] John Lockes, Second Treatise of Government.
[7] Locke, op. cit., p.177.

thought this division into three state powers, dividing from the executive power of Locke even the judicial power. "*In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law... the latter we shall call the judiciary power...*"[8]. The USA constitution was articulated based on this. The rule of law is such, which in essence is a social liberal state that harmonizes collective and individual interests, and whose basic intention is the protection of human rights and freedoms. As such, this state does not exclude the collective interest by protecting only the individual one, in terms of an extreme individualism affirmed by the libertarians and for which is much criticised by communitarians and extreme left because the apology from liberalism toward individual interests and individualism does not mean suspension of collective interest because rule of laws with liberal nature have interest on the social welfare. Only this state and this system enable the realization of the true freedom which is the foundation of the state itself. "As suggested by his name, liberalism is a doctrine that advocates the freedom and a type of state that enables freedom."[9] All this functionality is enabled only because of the existence of a legal system governing the rights and obligations of persons within the state. However, it is not sufficient only the existence of legal system composed of acts which determine rights and obligations and which sanction in case of eventual violations. It is not sufficient the group of legal acts dedicated for drafting and enacting legal acts that determine rights and obligations, which Herbert Hart called as second norms. It is necessary to have whole set of legal procedural acts, which in essence would govern many crucial issues of rule of law. As an effect of the importance of procedural law, it is often said that the democracy or the rule of law is a procedure and is identified as such. Consequently, legal aspect is not sufficiently governed in the legal aspect only with legal acts called substantive – legal acts, which determine rights and obligations of natural and legal persons, but it is crucial their implementation in practice. After all, a legal provision which is not implemented is not important at all, and its importance depends on the level of its implementation. There is no sense of drafting and enacting the law and then not implementing. Moreover, seen from perspective of legal positivism, it may not be called law at all. Also, the procedure is a mechanism for ensuring that legal positive provisions will be fairly and lawfully implemented. Consequently, the legal provisions governing and determining the procedure in fact are the best roadmap on how to implement a provision determining rights and obligations. The procedural law determines steps to be taken by the public administration body when issuing an administrative act, as well as the path to be followed by parties affected by the issuance or non-issuance of an administrative act by the public administration body. In principle, *prima facie* is observed an essential difference between the law determining rights and obligations, composed of legal – substantive provisions and the law determining procedures and orientation path in relation to a relevant administrative act. "Procedural justice is in contrast with the essential justice. Most of people have e common understanding of difference. The procedure is related to the process or steps taken to issue a decision; the essence relates to the content of the decision."[10] In fact, one of the theorists dealing with philosophical treatment of the procedural law, Michael D. Bayles considers that there

[8] Montesquieu, The the Spirit of the Laws.

[9] Anthony M. Ludovici, The Specious Origins of Liberalism The Genesis of a Delusion, Britons Publishing Company London 1967, p.38

[10] Michael D. Bayles, Procedural Justice - Allocating to Individuals, Kluwer Academic Publishers, Dordrecht / Boston / London, p. 3.

are at least three issues from which derive issues of procedural justice. According to Bayles, these issues are related to collegial or group decisions, settlement of disputes between parties and decisions for determining obligations or allocation of individual benefits.[11] It is very important to state that legal provisions determining and governing the path to be followed by public administration body for issuing an administrative act, considering here the opportunities given to the party in administrative procedure or third parties, whose interests, in one way or another, are affected by administrative act, are the basic features of the rule of law, which has not tolerance in relation to state authoritarianism and totalitarianism. Parties in administrative procedure have a remarkable role and central and dominant position in decision-making. This in fact is the position of individual in society and state, and this positions is at a level equivalent to the state when it comes to the equality before the law and the right for equal treatment. In the rule of law, all persons are equal before the law, meaning that bodies with the competence for supervising the implementation of legal acts and decision-making based on the law in relation to the eventual violations of legal acts which are in force and have legal effect, should treat all equally and without any privilege or discrimination. Moreover, these bodies should equally treat all individuals with each other, as well as with the state. When the individual and state administration bodi are in a disputing legal procedure, then the state body which carries out the procedure is obliged to have similar and equal access for all parties in procedure. In fact, roots of this type of individualism in political relations between individual and the state are found at Hugo Grotius, who bases the foundations of individualism and its non-inclusive relations with the society and then we go on with many other theorists. During theoretical claims to convincingly argue that, despite the typical political and juridical constellations of the state, however, there are certain rights pertaining to the individual because of his being and as such the state must respect. These rights have the primate in relation to state policies; therefore, it is considered that Grotius establishes a subordination of policy against the judiciary by shifting the policy in the so-called political right. "With Grotius and his definition of the subject begins the inclusion of the right to state power, the influence of the legal field in the political field ... We can say that with the treaty of 'The Right of war and peace', the political thought is transformed by moving from a political theory to a theory of political law." Another positive element of protection of human rights and freedoms in the rule of law and which results from the procedural right is the sense of security created by the party included in procedure for a certain legal issue, that its rights will be respected and that the state administration body will issue a meritorious decision based on legal acts. Among others, this security the party will create even because he will have optimal time and content opportunities to be informed for procedure development, provision of relevant evidences in favour of his allegations, sufficient time to prepare and provide these evidences to the public administration body, and then appealing any relevant division that may be considered as not fair, whether due to erroneous determination of factual situation, or erroneous interpretation of applicable positive law. Security provided to individuals by the state or other individuals is one of the basic premises which serve as the basis for establishment of such a state. In hypothetical theoretical situation[12] of the lack of an institution which would supervise the respect

[11] See: Bayles, op. cit., p. 2.

[12] Hobbes does not present the situation prior the state and lack of state in historical and true aspect, in terms of a time when there was no state but a certain natural state of functioning of society, but all this discourse presented to the "Leviathan" is a philosophical reflection. This finding is also one of the most striking philosophers of contemporary political philosophy John Rawls. See: The Philosophy of Law – An Encyclopedia, Volume I-II

of human rights and freedoms as it is the state, the individual would face difficulties and unsurpassed challenges. Thomas Hobbes, one of the theorists of the contract theory considers that in such a situation of the lack of state, people would have real predispositions of mutual hostility, which in the last stage of development would end up with an inclusive fight where potentially all would be against all. All this is a consequence of the equality of individuals, as well as predisposed skills and potentials for negative activities. Based on the fact that Hobs considered that people have wishes and covet, while being equal beings in terms of power and potential, they have systematic attempts of increasing and advancing their potentials and powers because they are egoist beings. *"Creating superiority over the other, having power over it, is the basic freedom of every being"*[13]. Systematic allegations of everyone to preserve its existence due to equality, advancing itself and shifting to a superiority level towards all others results with a serious threat for each other individually and for all too. *"... we are essentially equal, mentally and physically: even the weakest – suitably armed – has the strength to kill the strongest. This equality, he suggests, generates discord*."[14] It is justifiable the conclusion that this manner of functioning of a human society would be impossible due to the serious threats from everyone towards everyone and not ensuring that their rights and freedoms will be respected; therefore, the only opportunity that enables a normal human living would be the establishment of a state with monstrous characteristics as of leviathan based on a contract between individuals. This state, because of monstrous characteristics, terrifies peoples with negative predispositions and provides security for all from all. Continuers of the Hobbes philosophy, as Locke, Montesquie, etc., all show the issue of respecting the rights and ensuring people that their rights will be guaranteed by the state as such and *raison d'être* of the state in essence is the provision of security for people. However, only the existence of the state does not mean any assurance *a priori* that human rights and freedoms will be respected. Hobbes in this case may be considered as an example on how human security has a remarkable role in the reasonability of state is not the best example for state-building, where everything is preceded based on fair and equal procedure. After all, the state as such is abstract, but it is revealed through its mechanisms, among which even authorized persons that have specific rights and obligations in public works. Activity of these persons should be totally legal and be carried out based on legal procedures. The increase of the level of individual assurance that his rights and freedoms will be respected because the state takes care of these, while the state itself is obliged to respect these rights and freedoms in fact increases the trust and convince towards the state. The trust on the state and obey in a rational manner that the state has to be respected is the basic paradigm of state functionality and the main premise of social cohesion. The state cannot be considered without the massive obey of citizens towards the state, while the sanctioning of those who do not respect the state as subject of the right and state right should be minimum. Totalitarian states are identified with the lack of security by individuals as the state accountability for authorities' actions totally lacks. The whole activity of the state power may be carried out without any legal procedure and decision is taken *ad hoc* and all this is channelled in a systematic anxiety and collective depression. The rule of law functioning based on the legal procedures and which has legal acts conform to the justice is an antipode of this non-procedural activities of totalitarian states. When carrying out the

A-Z, Editor Christopher Berry Gray, Routledge Taylor & Francis Group, p. 30

[13] Zherard Mere, Kryeveprat e Mendimit Politik- Hyrje në Teorinë e Politikës, Translated by: Edit Dibra, Botimet DITA 2000, Tirana, 2007, p.103.

[14] Raymond Wacks, Philosophy of law, A very short introduction, Oxford University press, p. 6.

administrative procedure, the public administration bodies will be obliged to fully act in compliance with the substantive legal provisions which determine rights and obligations. As such, the procedural law, even though it is governed with legal provisions of the same level with the law determining meritorious issues, however, it is obliged to proceed legal issues according to these provisions and enable their right and lawful implementation. Consequently, the procedural law is not deontological, but it is articulated and enacted with theological approaches exterminated by itself; however, this entails the aspect of value for what it has been created. As such, the procedural law enables conforming the factual situation with legal one; therefore, the procedure is revealed as potential, but also as observer of normal implementation of legal provisions. Thus, the procedure does not mean only paving a safe path for normal implementation of legal – substantial procedures, but also means the central pillar that hold the building called the rule of law. The whole this procedure of remarkable importance for functioning of rule of law is established based on several principles which accompany the whole procedure development in different administrative issues. Moreover, these principles determine the content of procedural provisions, but also ideals aspired to achieve from the law in general and specifically procedural law. The idea of legal principles has been built since the right has been created, and as such these principles have been transferred over generations, even preserved with some scientific fanaticism. They are extended to different dimensions of law, starting with law drafting, implementation, interpretation, procedures, etc. On this ground, it is concluded all these legal process cannot be done *ad hoc* but requires a crystallised structure of principles with totally rational character. Lon Fuller specifies in "The morality of Law" eight basic principles to be respected during the drafting of legislation by relevant bodies so these laws are good and implementable. It was already highlighted that the implementation of legal acts is imperative because an non-implementable legal act has not its value due to non-achievement of purpose for what it has been issued. Hence, the implementation of legal acts requires adapted socio-economic, political, legal, etc., circumstances. In order for legal acts be implementable, different aspects of joint life, starting from physical and geographical aspect to that cultural and economic. As Montesquieu mentions in "The Spirit of the Laws" drafters of laws should consider a variety of factors, including the climate factors, than laws publicity, simplicity and their understandability, etc. However, the condition necessary for implementation of positive legal acts is the compliance of state authorities with the law, namely legal procedures, starting with the respect of legal procedures for issuance of legal acts, decision-making, and opportunity for challenging administrative decisions through legal procedure, and interpretation. Principles have an important role in interpreting legal acts, especially when it comes to that called as legal gap, on which occasion a principled and logic interpretation is needed. In this regard, the roots of this proposition on principles are found in the theories of natural law or the law as it should be. In this case, the interpreter or the decision-making body shall apply the law by reference to any relevant principle, which always goes in favour of the party's interest, especially when the party is a complainant or has initiated an administrative procedure. Depending on the above, two kinds of principles are established and are related to the legal - substantive law and procedural law. In the first case, the principles generally apply also in other areas of law, whereas in the second case there are elements to be respected when issuing an administrative act or even refusal to issue an act. In general, the legal opinion identifies 4 general principles related to the normal and correct position of the state

administration body in relation to the party and where the right would be implied as impartiality as would be stated by John Rowls, and then party be genuinely party to the proceedings and not only nominally, and as such can be considered all that can be provided as evidence that may have any impact on the issuance of a meritorious decision, have sufficient and supporting arguments that would result in the issuance of a meritorious and lawful decision as well as in terms of the right to be lawful and in accordance with the legal provisions in force. "There are four general principles-impartiality, opportunity to be heard, grounds for decisions, and formal justice."[15] In the totality of the issue, we can specify that principles in the administrative procedure are: 1. Principle of lawfulness, 2. Principle of proportionality, 3. Principle of equality and non-discrimination, 4. Principle of objectivity and impartiality, 5. Principle of legitimate and reasonable expectations, 6. Principle of open administration, 7. Principle of non-formality and efficiency of the administrative proceeding, 8. Principle of information and active assistance, 9. Principle of gratuity of the proceeding, 10. The principle of the right to legal remedies.[16] The procedure should take place based on these principles and conform to their logic. These have recommending and orienting characteristics and essentially contain a norm to be respected during the procedure. Such principles in liberal democracies are necessary to be included and respected in the positive legislation. Knowing their importance, the European Union has governed in its legislation principles to be respected by member states, but also states in contractual processes with EU. Michael D. Bayles considers, categorizes and gives importance due to the fact that: "*Economic costs*, *Moral costs*, *Process benefits*.[17] Hence, these principles are not fragile and totally differentiated in relation to each other, but are closely linked to each other. Although somehow these are aspiration norms and seem prima facie to relate to the law as it should be or so-called natural human laws, they are actually incorporated and included in the law and have been positivized as legal provisions because only so they will enable the parties to have an active approach and with the possibility that through its contribution to render a more meritorious and fair decision, from which the party would benefit from the realization of its legal rights on the one hand the other side would benefit the state itself as being a state of the law where the parties realize their rights and fulfil their obligations towards the state will have a higher level of functionality and more powerful social cohesion. The whole process of decision-making related to human rights and freedoms by the public administration body proceeded in accordance with the administrative procedure, defined and sanctioned in a clear and strict manner, either in the determination of the time limits but also the principles to be respected ends by issuing a final decision that can no longer be challenged in an administrative proceeding. Within this period, since the initiation of the procedure, the determination of the substantive and territorial competences and other matters relating to the rights and obligations to act, the form and nature of the decision-making body, the adequate administration official, the content of the act, the appeals procedure in issuing the decision, do not end definitively. Despite the fact that a decision may be enforceable and final, again the party unsatisfied with this decision may continue the proceeding at the competent court. Thus, the completion of the procedure within the public administration does not mean that the unsatisfied party must agree with a certain

[15] Bayles, op. cit., p. 115.

[16] See: Law No. 05/L-031 On General Administrative Procedure, Chapter II General Principles, Article 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13, published; Official Gazette of the Republic of Kosova / No. 20 / 21 June 2016, Pristina.

[17] Michael D. Bayles, Principles of Law - A Normative Analysis, Published by D. Reidel Publishing Company, p. 20-28.

decision and not follow his / her beliefs differently regarding the legal issue. Within a certain legal deadline, which is mainly 30 days from the day of receipt of the decision, unless otherwise provided by the law, the party may file a lawsuit with the competent court and follow the path of realizing the alleged rights through the court. Consequently, court decisions prevail and have supremacy in relation to the decisions of the state administration.

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