Discretion of the administrative body, and the Right of access to the Court

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Abstract

The discretion of the administrative bodies during the stages of the administrative procedure is an issue which has encountered various and debatable problems in the Albanian doctrine, where from practice it has resulted that in many cases it has violated the right of access to court. Our country has faced a series of changes in domestic legislation, where various collegial bodies have exercised their functions with a very important selective and decision-making role in the justice system and beyond. The decision-making of these bodies and the discretion during the stages of the administrative procedure has been different, in terms of the competencies they had and the impact they created in relation to the observance of the principles of the rule of law and the separation and balance of power. The changes that occurred with the adoption of the new Constitution of 2016, provided for the creation of new bodies of the justice system, where we can mention the High Judicial Council, the High Prosecution Council, and the Judicial Appointments Council. The mission of these bodies is the selection according to the criteria of the law of the new judicial body in the justice system in order to realize and reform the justice system. This article will focus on making an in-depth analysis which will highlight the current problems that the new justice bodies have encountered, in the issue of exercising their dissection, during the administrative procedures in order to achieve the mission for which they were created. . In this article, through the cases encountered in the work practice of these bodies, but also in a comparative aspect with the exercise of discretion of other collegial bodies, it is intended to highlight the relationship between the discretion of the bodies, until finalized with a decision of with the aim that the new collegial bodies of justice have, in terms of achieving a universally accepted standard in their decision-making. How is this decision made, and is the right of the interested subject to access the court violated? Have the new bodies really created this standard in their decision-making?

Keywords: discretion, administrative procedures, administrative decision-making, the right of access to court, the principle of legality.

Introduction

The re-establishment of a new democratic system after the fall of the communist regime in Albania required comprehensive arrangements, in order to reform the rule of law. The basis for the creation of the rule of law is realized based on the principle of legality, equality before the law, and legal certainty. The Constitution of the Republic of Albania has undergone successive changes as a result of the observed problems in the reform process of a new state system. *"The system of government in the Republic of Albania is based on the division and balance between the legislative, executive and judicial powers.*[1]*"*

Of course, the reform had its genesis in the first constitutional changes, which

[1] Referring to Article 7 Law no.76 / 2016 "Constitution of the Republic of Albania".

provided for the separation and independence of powers. The Constitutional Court of the Republic of Albania is the body charged with guaranteeing the protection and observance of the constitution. The basic principles that guided these democratic changes were first proclaimed in law "*For the main constitutional provisions"* where we can mention that in article 3, the division of state powers into three powers, legislative, executive, and judicial power was sanctioned.[2]

The Constitutional Court consists of nine members. Referring to the previous law, five members were elected by the President of the Republic, and 4 members were elected by the Assembly. Given the fact that this composition of the court did not guarantee its independent functioning and the influence of the executive on the judiciary was easily evident, it was thought that the appointment of the trial panel would have to be done in a different way.

In the provision of article 7 of the law "On the organization and functioning of the Constitutional Court of the Republic of Albania, it was sanctioned that: *"The Constitutional Court consists of 9 members, who are appointed by the President of the Republic with the consent of the Assembly*[3]. With the adoption of the new Constitution in 1998, changes were made regarding the manner of appointing members of the court, competencies and entities that would set the Court in motion. Regarding the appointment of the trial panel, the most important court in the country, referring to Article 125/1 of the Constitution, it was foreseen that this appointment be made by the President of the Republic, with the consent of the assembly[4].

This was the most efficient method of creating a balance and control between the judiciary and the executive. The existence of this procedure for a very long time had problems due to the lack of institutional cooperation between the institution of the President of the Republic and the Assembly, but there was also a problem regarding the selection of candidates who would have to hold the post of Judge. of the Constitutional Court.[5] The previous legislation did not provide for the criteria and conditions for the appointment of a judge of the Constitutional Court. As a result, the Assembly and the President of the Republic had the highest decision-making freedom regarding the selection and appointment of judges, being satisfied with a very simplified procedure in the selection of candidates. *The Assembly of the Republic of Albania, and the President of the Republic, were satisfied with the fact that the candidates for Judge in the Constitutional Court, had to be part of the ranks of highly qualified lawyers with work experience of not less than 15 years in the profession*[6]. So as can be clearly understood from what was set out above, the executive power, based only on these

[2] Referring to Article 3 of Law no.7491 dated 29.04.1991 "On the main constitutional provisions".

[3] Referring to Article 7 of Law no. 8577 dated 10.02.2000 "On the organization and Functioning of the Constitutional Court (K. i. Albania 2000).

[4] Interpretation referring to article 125/1 of law no. 8417 dated 21.10.1998 "Constitution of the Republic of Albania (amended).

[5] History of the Constitutional Court of the Republic of Albania, taken from the Official website of the Constitutional Court of the Republic of Albania, http://www.gjk.gov.al/web/Historiku_97_1.php,

[6] See Article 7/2 of Law no. 8577 dated 10.02.2000 "On the organization and functioning of the Constitutional Court of the Republic of Albania.

two criteria, had a very wide discretion in the selection of candidates. The legislator of the time, with the drafting of the new constitution in 1998, and with the entry into force of the organic law on the organization and functioning of the constitutional court, sought to avoid, as far as possible, the full influence of the executive power in the judiciary, and especially in the appointment of the most important court judges in the country. However, despite the efforts, he did not foresee that in the future there could be a weakening of the institutional cooperation between these two bodies of executive power. Thus, it was deemed necessary to intervene for the adoption of a new constitution, in order to regulate in a more efficient way exactly this issue.

With the adoption of the new Constitution in 2016, a deep institutional reform of the justice system was intended, which would affect not only the Constitutional Court, but also the Supreme Court and the entire justice system as a whole. The new law "On the organization and functioning of the constitutional court of the Republic of Albania, has provided a wider framework of criteria for candidates to be appointed to the Constitutional Court. Also, new legal changes have made it possible for the appointment of the trial panel to the most important court in the country should not depend entirely on the executive, and the legislature. This is clearly stated in the amendments made to Article 7 of the previous law.

"*The Constitutional Court consists of nine members, of which three members are appointed by the President of the Republic, three members are elected by the Assembly of Albania and three members are elected by the Supreme Court. Judges of the Constitutional Court are appointed for 9 years, without the right to reappointment. 2. The composition of the Constitutional Court is renewed every 3 years, with one third of it. The new members are appointed in turn, respectively by the President of the Republic, the Assembly and the Supreme Court. This rule is followed even in cases of termination before the term of office of a member of the Constitutional Court*[7]". The new law has added some provisions on the criteria and conditions for the appointment of a judge of the Constitutional Court, the procedure for the appointment of judges by the President of the Republic, the procedure for the election of the Assembly, the procedure for the election of the Supreme Court, and new rules regarding the election of the President of the Constitutional Court, or the renewal and composition of the Constitutional Court, etc.[8] In the changes and additions of the new legal framework, there is a creation of a new selection body, which should assess the conditions and criteria of the candidates who will run in the vacant positions in the Constitutional Court. This is exactly the Judicial Appointments Council (KED)[9], which we will address below. Referring to law no. 99/2016, the Judicial Appointments Council after evaluating the conditions and criteria for the appointment of candidates,

[7] See Article 7 of Law 8577 dated 10.02.2000 (Law no. 99/2016 "On some additions and amendments to Law no. 8577 dated 10.02.2000 On the organization and functioning of the Constitutional Court of the Republic of Albania" 2016) "On the organization and the functioning of the Constitutional Court of the Republic of Albania.

[8] Article 6 et seq. (Law no. 99/2016 "On some additions and amendments to law no. 8577 dated 10.02.2000 On the organization and functioning of the constitutional court of the Republic of Albania" 2016, GA Tirana, Decision no. 240 / 121 Reg. Founder no.4 date 21.01.2021 2021).

[9] Judicial Appointments Council legal definition referring to law 115/2016 "On the organization and functioning of justice bodies".

listing the candidates, which is accompanied by a written report which analyzes the fulfillment of legal conditions and criteria for each candidate. Based on these lists compiled by the Judicial Appointments Council (KED), the selection of candidates should be carried out, respectively by the Assembly, the President of the Republic and the Supreme Court. The spirit brought by the new constitution which is in force in the Republic of Albania, is that of an anti-corruption constitution. We can say with conviction that it is one of the first constitutions in Europe and beyond, which seeks to solve one of the main problems in the Albanian State, which have to do precisely with the cleaning of the judicial system, from entities that do not exceed the criteria to further their mission of justice.

Decision-making independence during the administrative procedures of the Judicial Appointments Council

Unlike previous legal provisions, the justice reform package, in order to achieve the goal for which it entered into force, created new justice bodies. The Judicial Appointments Council was one of the newly created bodies. The Judicial Appointments Council KED is a constitutional body provided and regulated in the constitution, in its article 149 [10] The Constitution has also regulated not only the function of this collegial body but also the manner of its organization, the selection of its members and the number of members. Regarding the issues of organization and functioning of this body were foreseen to be regulated by a special law[11]. This administrative body organized in the form of a collegial body, independent, and consisting of nine members with conditional duties for a period of 1 year[12]. The Council of Judicial Appointments has as its object of activity the obligation to verify the fulfillment of legal conditions and evaluates the professional and moral criteria of the candidates for members of the constitutional court and the candidates for High Inspector of Justice[13]. Specifically, this body was established in order to review the candidacies and to carry out the verifications of the legal conditions and the evaluation of the professional and moral criteria of the candidates for some institutions. The new law adopted in the framework of justice reform defines the principles, rules and procedures for its organization and functioning. KED, after considering the candidacies, ranks them and sends the candidacies for the final recruitment to the nominating body. In order to ensure that the procedure for selecting candidates will be transparent based on merit and fully public, this body adopts detailed rules for the selection of candidates, their scoring, rules for the procedure of verification of assets and integrity and the past professional and personal of all candidates interested in these vacant positions. The law has given the Judicial Appointments Council the independence to determine for itself the rules, methodology, and procedure for the performance of the tasks for which this body was established. The issue that is raised for discussion taking into account the decision-making of KED, has to do with the standard of decision-making of this body. The

[10] Article 149 / d of law no. 76/2016 "Constitution of the Republic of Albania".
[11] See law no. 115/2016 "On the governing bodies of the justice system".
[12] See Article 221 of Law no. 115/2016 "On the governing bodies of the justice system".
[13] See Article 218 of Law no. 115/2016 "On the governing bodies of the justice system.

biggest problem that the new judiciary can face is precisely the maintenance of a universally accepted standard of decision-making. This article aims to deal with the legal analysis, in terms of exercising the discretion and decision-making independence of the judiciary and in this case the KED. How far does this discretion go? To what extent does the decision-making of the administrative body, during the development of the administrative procedure, pass the test of proportionality, and does not violate or limit the right of the interested subject?

Discretion is the result of the exercise of a free choice of decision-making body. Discretion or independence of decision-making of the administrative body, is a feature not only in making reasonable and appropriate decisions but also for decisions on matters of fact and law. For issues that result more as a reasonable solution it is up to the administrative authority to decide. Discretion has a significant impact on the decision itself made by the administrative authority during the decision-making process. Discretion is a choice that the administrative body makes in order to provide solutions [14]. Is the discretion of the administrative body in decision-making an unlimited right? Discretion may be limited in function of the purpose and objective that the decision-making body will have. In analyzing the defense of the thesis that discretion can be limited, many authors have argued that discretion (freedom of choice, or decision-making independence) is not arbitrariness.

The discretion of the administrative body requires that the exercise of power be carried out prudently. The rule of law requires the administration to intervene in the rights of an individual only with the authority of law, which must be clearly limited in its content, subject matter, purpose and scope, in order for the intervention to be determinable and in a way to be predictable and accountable by the citizen. This is how the German Federal Constitutional Court expresses itself. In principle, the discretionary right of the public body must be exercised in the spirit of the legislation in force and in accordance with the Constitution of the Republic of Albania, this is also the spirit in which the Code of Administrative Procedures provides regarding the lawful exercise of discretion by the body administrative (see Article 11 of the Code of Administrative Procedures)[15]. Discretion which is legally exercised when it is in accordance with legal provisions and is not beyond the bounds of the law. The election of a public body, in the function of exercising its duties, is not an election that exceeds the limits of the law, or makes an unjustified deviation from previous decisions taken by the same body in cases or similar. In the administrative doctrine, but also in the domestic and foreign judicial jurisprudence, the concept is known that in case a discretionary administrative act is abrogated by the court due to the illegality that this act may have, the court can not take the place of administration, can not issue an administrative act itself. Such a choice may not be made by the court, but may be exercised again by the administrative body[16]. The exercise of this administrative

[14] See Sadushi Sokol, "Procedural Administrative Law" Toena Publishing 2017, (Sadushi 2017) pp.373- 374.

[15] See Article 11 of Law no. 44/2015 "Code of Administrative Procedures of the Republic of Albania" (Law no. 44/2015 "Code of Administrative Procedures of the Republic of Albania" 2015).

[16] See Decision no. 26 dated 02.08.2013 of the Court of Appeals Tirana Electoral College (G. e. Tirana 2013).

discretion has certainly had its problems in the new bodies of justice. If we refer to the law governing the verification of legal conditions for competing candidates, the Judicial Appointments Council is charged with carrying out the procedure to carry out the control of candidates 'integrity, the control of candidates' property, and other legal declarations and conditions. Upon completion of the procedure of declaration and control of assets, verification of the control of the integrity of the candidates, the Advisory communicates to them individually the result of the verifications that the council has performed[17]. For the candidates that the Judicial Appointments Council has banned from running, the law has recognized the right to appeal to the Administrative Court of Appeals only for serious procedural violations. *no later than 5 days from the day of notification of the impugned decision*[18]. If we carefully analyze the new law on the organization and functioning of the justice system, it is noticed that against the decisions of the general meeting of the new justice bodies, they can appeal to the Administrative Court of Appeals within a certain deadline but only for reasons that relate to the violation of the procedure by the body itself. The law did not allow the appeal against the decisions of the KED or the HJC to be made also for reasons related to the violation of the substantive law, but only for the violation of the procedure. Rightly, the question arises why the legislator has made such a decision ?. In the following we will address some cases of case law, including cases that have gone to trial in the ECtHR, where the issue of discretion of the public body in its decision-making is addressed.

Problems of practicing the discretion of the administrative authority in development of administrative procedures

The issues of independence in the decision- making of the collegial body during the development of the administrative procedure is an issue which have existed before, in various collegial authorities, during their decision- making. These issues, of course, have been addressed for resolution before the domestic courts, and have also been tried before the ECHR. We bring to attention the case of Dauti v. Albania, where the applicant had made a request to the Medical Commission for determining the Ability to Work, requesting that the degree of disability must be determined in order to receive compensation as a result of an accident at work. The Commission recognized the complainant's incapacity for work by awarding him category 4 of the incapacity statute on the grounds that he was considered to have had an accident outside work. The complainant, disagreeing with the decision of the KMCAP medical commission, partially challenged the decision of the district commission, arguing that the district commission had erroneously assessed the circumstances of the case, and sought to qualify in another category (category 2), but the Commission of the Complaints completely canceled the decision of the district commission considering the complainant as a suitable subject for work. Complainant Dauti addresses the court to oppose the decision of KMCAP after proving that the complainant had an accident at work and not outside working hours. The case went to trial in the Tirana District

[17] See Articles 235, 236, 237 of Law no. 115/2016 "On the governing bodies of the justice system".
[18] See Article 238 of Law no. 115/2016 "On the governing bodies of the justice system".

Court. After considering the case on 9 June 2003, the court rejected the complainant's claim on the grounds that, in accordance with Article *35 of the Law on Social Security, the decisions of the Appeals Commission could not be subject to judicial review on the grounds that Complaints are final*[19]. So, the Albanian law on social security had given discretion to an administrative authority to adjudicate with final decisions, which could not be subject to a judicial review. So the Appeals Commission for Assignment of Ability to Work judged as if it were a quasi-court. The complainant, after consuming the system of internal judicial control, failed to find the right, despite his claims, for lack of judicial control of the decision of the Appeals Commission[20]. Referring to the provisions of the Code of Administrative Procedures, it is sanctioned that "*Decisions to review the objection are taken and notified to the party within 30 days from the date of its submission"*. The decision can be sued directly in the court competent for administrative matters[21]. So from this we understand that any administrative act regardless of the decision-making exercised by the administrative body, at its discretion, may have certain problems, for which the interested party may not always agree with the decision-making of these administrative bodies. The European Court of Human Rights notes that it is necessary that at least to some extent, the domestic courts review the decision of the appeals commission, so the decision of an administrative body, which the law has charged with the obligation to take decisions in its discretion and in its evaluation. In the present case, the court found that none of the interested parties in the process challenged the court's jurisdiction, and did not reject his claims on the grounds that the commission's decision was final and not subject to judicial review[22]. Of course, in the concrete, the Appeals Commission, where the appellant is directed to oppose the decision given by the administrative body, KMCAP[23] does not have in its composition qualified legal or judicial members, and according to the jurisprudence of the Strasbourg Court, the lack of such a composition of the appellate administrative body results in the trial in the administrative body meeting the criteria for reviewing the case as a court designated by law could do[24]. *Requirements for flexibility and efficiency fully in compliance with the protection of human rights may justify the prior intervention of administrative or professional bodies and even more so of judicial bodies that do not in all meet the requirements of Article 6 of the ECHR*[25]. Consequently, the European Court of Human Rights confirms through its jurisprudence and orders that decisions taken by administrative authorities be subject to further scrutiny "of a

[19] See decision Dauti vs Albania Complaint no.19206 / 05 dated 03 February 2009.

[20] In the interpretation of the Decision Dauti vs. Albania Complaint no.19206 / 05 dated 03 February 2009.

[21] See Article 143 of the Code of Administrative Procedures of the Republic of Albania.

[22] See paragraph 48 of the decision Decision Dauti vs. Albania Complaint no.19206 / 05 dated 03 February 2009 and paragraph 48 of the decision Decision Dauti vs. Albania Complaint no.19206 / 05 dated 03 February 2009.

[23] KMCAP Ability Assignment Commission.

[24] In the Interpretation of the Decision Le Compte, Van Leuven and De Meyere against Belgium referred to the decision Dauti against Albania.

[25] See Po there , Decision Le Compte, Van Leuven and De Meyere v Belgium complaint nr.6878 / 75 dated 23 June 1981, paragraph 51.

judicial body with full jurisdiction" (see Ortenberg v. Austria, p. 31).
Taking into consideration the fact that the Appeals Commission is not an "independent and impartial" court as required by the terms of Article 6 of the ECHR[26], creates the conviction of the court that we are dealing with a violation of human rights, and the right of access to court has been denied to the appellant. So from the analysis we make of the concrete case it results that the discretion of the administrative body is known by the doctrine of administrative law, regarding the freedom and independence of its decision-making. This discretion must be conditional and limited, and may go as far as it does not infringe the rights of the entity concerned to oppose an administrative decision, in court. Recognition of the rights of an administrative body, of its decisions being final, and denial of the interested party to exercise the right of judicial control of a decision taken by the administrative body, violates the right of the party to access the court. This fact directly affects the distortion of the due process of law, sanctioned by the constitution in its Article 42.[27]
Can we say that the same problem is observed in the decision-making of new justice bodies? To analyze this, we will have to address the decision-making of these bodies and specifically for the purpose of the study we will address the decision-making process of the Judicial Appointments Council.
The challenges faced by the new authorities of justice, and in particular the authority of the Council of Nominations in Justice, have to do precisely with independence in exercising decision-making in an administrative procedure. In this article we will bring to attention exactly this issue focusing on the specific case which we have taken in the analysis. With the opening of vacancies by the Institution of the President of the Republic for members of the Constitutional Court in the Republic of Albania, Ms. Peto like many other candidates have expressed interest in running for the position of member of the Constitutional Court. After the completion of the administrative procedure conducted by the Judicial Nomination Council, the procedure for the interested subject has ended by not giving the right to the subject to compete in this position with the argument that the interested subject has resigned from the competition for this position. The interested subject, not agreeing with the decision of the administrative body, in the concrete case of decision no. 61 dated 23.12.2021 of KED, addressed the Administrative Court of Appeal in Tirana with a lawsuit request to oppose the decision of the authority mentioned above. We bring to your attention that the administrative body KED in its claims, states that against the decision to complete the procedure of verification, evaluation, scoring and ranking of its candidacy, it is concluded that the law does not provide for appeal.[28]. Referring to the court decision, it turns out that the interested subject addressed the court opposing the decision taken by KED, which has completed the procedure of the candidate for the vacant position in the Constitutional Court, with a decision stating that the procedure has ended due to the resignation of the subject interested.
The provision of Article 238 of the Law "On the governing bodies of the justice

[26] See Article 6 (European Convention on Human Rights 1950).
[27] See Article 42 of Law no. 76/2016 Constitution of the Republic of Albania.
[28] See Decision no.4 dated 21.02.2021 of the Administrative Court of Appeal of Tirana p.18 (GA Tirana, Decision no.4 dated 21.01.2021 of the Administrative Court of Appeal of Tirana 2021).

system" states that: "*Against the decision of the KED to ban candidacy only for serious procedural steps are made in the Administrative Court of Appeal*. The Administrative Body, the Judicial Appointments Council, claims that the candidate Mrs. Peto has resigned, and as a result her procedure has ended because according to KED the candidate has expressed the will to withdraw, therefore this decision can not be the subject of judicial review[29]. After the analysis, taking into account the circumstances of the case reflected in the court decision, it is noticed that the administrative body is contradictory in its claims because on the one hand it claims that the interested party lacks the legitimacy to address you. the court, and on the other hand, communicates to the interested subject, and recognizes the right to challenge this decision in the competent court.[30].

The Administrative Court of Appeal, based on the legal provisions of Law 49/2012, is functionally competent, to adjudicate cases that arise as a result of an administrative dispute. Disputes arising from individual administrative acts, normative by laws and administrative contracts by the public body[31]*(see Article 7 of Law 49/2012)*.

The question for discussion is whether the administrative body, in this case the Judicial Appointments Council, meets the requirements of Article 6 of the European Convention on Human Rights?

Does KED play the role of a quasi-court designated by law. Is it a violation of Articles 6 and 13 of the Convention[32] if its decision is unfounded in considering the merits of the case? To answer these questions, it is necessary to consider the position of the European Court of Human Rights. The Law "*On the Organization and Functioning of the Justice System*", in some of its provisions has provided that against the decisions of the Judicial Appointments Council, the High Prosecution Council, and the High Judicial Council may object within a period of time, assigned to the Administrative Court of Appeal, only **for serious procedural violations**.[33] **.** This fact leads us to the conclusion that the court has no right to adjudicate a decision of the new judiciary. Therefore, the Court has no right to analyze the merits of the case, examining the merits on the merits. Decisions of the new judiciary can only be subject to judicial review if we are dealing with procedural violations.

Based on these legal provisions, at first glance it turns out that the legislator has given these bodies a very high discretion of action.

We come to this conclusion when we take into consideration the decision of the Administrative Court of Appeal in Tirana, where the interested party opposes a decision of the KED, which has banned the plaintiff from running for the vacant position of judge in the constitutional court. We bring to your attention that by decision *no. 94 dated 10.11.2020 and decision no. 100 dated 07.12.2020 The Administrative Court of*

[29] See Decision No. 61 dated 23.12.2020 of the Council of Appointment to Justice ".

[30] See if there , the facts of the decision of which are reflected in decision No. 4 dated 21.02.2021 the Court Administrative Appeals Tirana.

[31] Article 7 of Law no. 49/2012 "On administrative courts and adjudication of administrative disputes.

[32] Article 6 and 13 of the Convention European of the Rights of Man,

[33] Taken in analyse provisions of Articles 235, 236, 237 and 238 of Law no. 115/2016 "On the organs of government that the system of justice ".

Appeal has abrogated the decision of the KED[34] (Administrative Court of Appeal, Decision no.94 dated 10.11.2020 of the Administrative Court of Appeal 2020) (Administrative Court of Appeal, Decision no.100 dated 07.12.2020 of Administrative Court of Appeal 2020). Despite these decisions, which has fundamentally discussed the issue of candidacy of the plaintiff, revoking the decision of the administrative body, again the administrative body, has rejected the candidacy of the plaintiff [35](Justice, Decision No. 37 dated 23.11.2020 of the Appointments Council in Justice 2020)

As a result of this trial we are of the opinion that it is likely that through these decisions of the Administrative Body, which have repeatedly decided not to allow the plaintiff to run without considering court decisions, creates the belief that we are dealing with a case unprecedented, and very dangerous, affirming, once again, the abuse of the discretionary right that the administrative body has in finalizing the administrative procedure with a decision-making, although the latter may be abusive. This discretionary freedom of the administrative body can not legitimize arbitrariness, as in this way the public loses trust, in terms of the role that the new justice bodies must play in order to carry out their mission. This fact affects the above in violation of some other basic constitutional principles, such as the right to a fair legal process, legal certainty, the principle of non-discrimination or even the principle of equality before the law. These decisions can also irreversibly violate the right of access to court, which we will analyze below.

The relationship between the decision-making discretion of the administrative body and the right of access to court

The right of access to a court is a constitutional and fundamental human right enshrined in the constitution of the Republic of Albania, but also in the European Convention of Human Rights, specifically in Articles 6 and 13 of the convention. The European Court of Human Rights, but also the Constitutional Court, has emphasized that with regard to the right of access to court should not be understood as a right which is recognized to the individual only for the proceedings followed by the court, but also for the proceedings located by other state bodies, when dealing with an administrative complaint.[36].

Administrative Court of Appeal Tirana in *decision no.04. dated 21.01.2021* has dismissed the case subject to main trial.[37] This decision as a result has not provided a final solution to the case, without making any kind of analysis on the merits of the case. Referring to the aforementioned decision, the court states that the case should be dismissed because as a result of the circumstances of the fact, *the vacancy for the constitutional court has been filled and the claim of the plaintiff can not find a solution in court*.

[34] See Decision et no. 94 dated 10.11.2020 of the Administrative Court of Appeal ; decisions no. 100 dated 07.12.2020 of the Administrative Court of Appeal , taken from decision no.04 date 21.01.2021 of the Administrative Court of Appeal p.33 (Administrative Court of Appeal, Decision no.94 dated 10.11.2020 of the Administrative Court of Appeal 2020).

[35] See Decision No.37 dated 23.11.2020 of the Council of the appointment in Justice " On prohibition of candidacy ... ".

[36] See decision no. 53 dated 01.12.2014 of the Constitutional Court of the Republic of Albania.

[37] See decision no. 4 dated 21.01.2021 of the Administrative Court of Appeal in Tirana.

In relation to this case we are of the opinion that the right of the plaintiff to have access to court has been violated. Every party to the trial has the right to seek protection of his procedural and substantive rights if they have been violated by violations of these natures. The Administrative Court of Appeal in Tirana should have considered the case by analyzing in detail whether or not there are procedural violations in this process by the Judicial Appointments Council, regarding its decision to allow or prohibit candidacy. During the trial of the case was treated the fact that the candidate had resigned from the candidacy procedure. The Code of Administrative Procedures has sanctioned that, "*1. As a rule, in the administrative procedure initiated with the request, the public body declares that its conclusion without a final decision on the case, if the party that has submitted the request withdraws it ». 2. The public body may declare the termination of the procedure initiated by the request, without a final decision even if it results clearly from the circumstances that the party that has submitted the request withdraws it.*[38].

Completion of proceedings due to resignation is a decision which does not find support in law no. 115/2016 *"On the organization and functioning of the judiciary"*». What is the procedure that should be followed by KED in case the candidate would resign from the competition for the vacant position? Should the legislature have provided for such a procedure? Bearing in mind the legal provision sanctioned in the code of administrative procedures, and the circumstances of the fact reflected in the court decision, it is not clear that the resignation was granted. The only fact that has been taken into consideration for the consideration of the concrete case is the correspondence via e-mail sent by the plaintiff in the direction of KED. Is the existence of a certain form necessary for resigning from candidacy? Regarding the above, we create the conviction that the decision is unfair in two aspects. First, in the interpretation of the correspondence of the plaintiff with the administrative body KED, we notice that the plaintiff, expresses reservations, and has claims regarding the procedure followed by the naming body, and states sexually that he has lost confidence in the council as the procedure followed by the council for evaluating its candidacy presents many shortcomings. Second, suppose if you want to give up, even if you communicate via email, should a road procedure be publicly organized if another procedure? The Administrative Court had a better case for consolidating its jurisprudence and making decisions of new justice bodies, which could be made at the advent of judicial facilities.

Consolidation of the judicial jurisdiction of the Administrative Court of Appeal as the only judicial body which has the direction of the army and judicial control over the decision-making of the new judiciary, will create a uniform of choosing by choosing once better, a better issue the way the new judiciary, exercise discretion and rubber in administrative decision-making. *This will use both a universally accepted precedent, and a model to be kept in mind in the problem of its problem. The fact that the court has refused to rule on the merits of such a castle is a decision that runs counter to due process*[39]. We manage to convince the minority of the position regarding the fundamental solution of the case, and about the premise that it should create in terms of the rights

[38] See Article 94 paragraph 1 and 2 of Law no. 44/2015 " Code of Administrative Procedure " Stay in Italy I judge the minority in the decision (GA Tirana, No. 4 dated 01/21/2021.

[39] Decision of the Administrative Court of Appeal Tirana 2021)

of individuals in administrative proceedings, the relationship that is created between it and the right to guarantee access to court , in order to administer justice, referring to the principles sanctioned in the Constitution and the Code of Civil Procedure. I also consider it reasonable to add that this issue, by its very nature, carries a problem which apparently is not evident at the moment, but has to do exactly with the principle of the court established by law. The Constitution of the Republic of Albania has sanctioned the right of individuals to be tried by a court designated by law. The emerging question is whether the vague procedures followed by the selective administrative bodies of the members of the constitutional court, and the uncontrolled discretion of the new judiciary, can call into question future trials, which as a rule should to be tried by a court appointed by law? *In order to determine whether a court is considered independent, attention must be paid to the manner in which its members are appointed and their mandate, the exercise of guarantees against external pressures, and the question of whether the body has the expression of independence.*[40] *(See decision Morris vs United Kingdom).* This is the position held by the jurisprudence of the Strasbourg Court regarding this very essential constitutional principle. The existence of such problems during the exercise of the discretion of the administrative bodies, in view of the establishment and formation of the Constitutional Court, directly affects the regular legal process.

Conclusions and Recommendations

In this article we addressed some of the most pressing issues regarding the independence of decision-making by administrative bodies during the development of an administrative procedure. Referring to the cases taken for review, it is important to note that in some cases, especially in cases in which the new justice bodies have the obligation to exercise their discretion regarding the resolution of concrete cases, there is a negligent attitude of the administrative body, in reporting on the position of the court. Also, in a detailed analysis of concrete cases, many questions were raised regarding the discretionary position of administrative bodies. At the end of the analysis we notice a reluctance of the court to provide solutions to concrete cases by not treating the case on the merits.

The court is satisfied with the fact that there is a legal provision that prevents the party from challenging the decision of the administrative body, without dwelling on the fundamental rights of the requesting party. The existence of this legal provision does not allow the court to go beyond this textual position of the legislator. In response to the issues raised for discussion in this paper, we consider that despite the fact that the law prohibits the court from reviewing the basis of an administrative decision (especially the new judiciary), failure to exercise such judicial control, results in not only violation of the right of the interested subject, but also puts at the crossroads the effective mechanisms of the court for the restoration of rights.

This may result in the new judiciary, charged by the Constitution and the law

[40] See Decision Morris against the Kingdom of United nr.38784 / 97 paragraph 58 year (Morris v the United Kingdom to the European Court of Human Rights, Application nr.38784 / 97 2002, paragraph 58)

establishing and rebuilding the new justice system, proceeding with appointments to vacant positions in the justice system without worrying about whether or not the Court will rule in regarding the review of appeals against decisions of administrative bodies.

Seen in this light, when it comes to appointing members of the constitutional court who will become part of the justice system, the Appointments (President of the Republic), the Assembly, or even the Supreme Court itself can not appoint members of the court Constitutional, without first completing the judicial control of the administrative decision-making of KED. Seen from this point of view, occurring in the conditions when the nominating bodies follow the selection procedure without waiting for a final and final decision of the court, then it is likely that the court will not invest to give a decision in defense of the interests of the party. request, when in the end the decision of the Court will be considered ineffective.

Thus, at the end of the conducted legal analysis, we assess that the decision of the Administrative Court of Appeal has lost its effectiveness, as it can not legally judge regarding the decision-making discretion of the Judicial Appointments Council, regarding the merits of the case.

We consider that although the law recognizes the right of the court to adjudicate the decision of the administrative body only for serious procedural violations, if the nominating body nominates the candidate without waiting for the competent judicial body to express itself, we consider that this activity violates the rights of the interested party. due process of law.

We also emphasize that any interested subject who would be in this case would face the same precedent. In order to achieve the goal of the justice reform package, in our opinion, it is necessary to intervene in regarding the appeal against the administrative decisions of the new bodies of justice.

These changes should be made by providing for the right of the court to consider the decision-making of new bodies of justice, not only for serious procedural violations, but also the exercise of judicial control, based on merit.

Violation of the right to challenge decisions in material terms not only violates the right of access to court, transforming the court into an ineffective means of appeal but also violates the principle of effective protection, encouraging arbitrary actions of bodies state administrative. These arbitrary actions, in addition to obstructing the right of access to court, also violate the principles and fundamental human rights enshrined in the constitution, such as the right to a fair legal process, the principle of equality before the law, non-discrimination, etc.

As a result of these actions and the precedent created in the treated cases, are indicators of an obvious risk and with a very high expectation of its recurrence in the future. Even if the decision-making of administrative bodies is legal in the future, a double standard in decision-making will be created, which directly affects the principle of the court established by law. Will the new judiciary manage to maintain a universally accepted standard? This is an issue that remains to be seen in the future.

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