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THE CONTROL OF ADMINISTRATION'S PERFORMANCE AND THE HOLDERS OF STATE ADMINISTRATION

In the contemporary administrative system, the internal administrative control is developed in two forms: institutional control and hierarchical control.

As a rule, the institutional control is done on the basis of the dissatisfaction expressed by the party, i.e. based on the institution of appeal. Hierarchical control is done based on the hierarchical power and thus higher administrative organs have not only the right, but also the obligation to supervise the work of lower organs.

As mechanisms for the internal control of state administration we mention the professional standards, disciplinary commissions, informal mechanisms, self-control of administration, interpersonal control.

As mechanisms for the external control of state administration we mention: parliamentary control, which is known as an external political control upon the work of administration organs, governmental control, public prosecution, courts – administrative courts and constitutional courts, the control performed by the Ombudsman. We can also mention the control of state administration by external formal mechanisms, where in this context we also have to deal with lower state organs, such as: lower organs of state power – citizens – in the delegated power respectively the authorized one from central organs to the local ones. Here we have to deal with the control of state administration organs by municipalities, prefectures, districts etc. This kind of control is realized and depends on state regulation. This kind of state administration control is known as the most accepted control because the request for the control of state administration organs derives from the horizontal position, respectively from the electoral base of choice. This kind of control is one of the most democratic controls in countries with the most advanced democracy.

The relations between central and local organs are regulated by the Constitution and laws. In principle, decentralization means offering larger responsibilities and decision-making competences to local organs with the idea of reforming the processes of local governing. But decentralization, as a concept, represents a form of local governing administration horizontally, while the central organ maintains a vertical administrative structure by maintaining the final authority upon local bodies. Thus decentralization determines the direction of political/juridical relations between state organs and performed within the administration. Decentralization is also reflected by the functions performed by central and local organs and is expressed in proportion with their jurisdiction and responsibilities.

Key words: institutional control, internal and external control, hierarchical control, decentralization, advanced democracy, professional standards, mechanisms, formal mechanisms, the service of control, self-control, interpersonal control, parliamentary control, governmental control, prosecution, Ombudsperson.

1.1. The internal control of administration

By administrative control we understand the impact of the superior administrative organ upon lower organs, regarding the successful performance of their official duties (this is the internal control), or the impact of the specialized administrative organ upon other administrative organs and other holders, with the purpose to ensure their behavior is in accordance with the laws and acts of higher organs (this is the external control).

In the contemporary administrative system, the internal administrative control is developed in two forms:

- a) Institutional control and

b) **Hierarchical control**

As a rule, the institutional control is done on the basis of the dissatisfaction expressed by the party, i.e. based on the institution of appeal. Hierarchical control is done based on the hierarchical power and thus higher administrative organs have not only the right, but also the obligation to supervise the work of lower organs.

1.2. The mechanism of internal control

It is now clear that the police control is one of the key barometers in evaluating the legal state. In those countries where the power of police is less controlled, where while performing their functions the use of force is a common and daily measure, because of the weight it has in establishing legality, the control upon police as one of the important segments of management, is divided in more organs in order for this function not to be accumulated only in one institution. The word itself - mechanisms of internal control of the police, makes it clear that we are talking about services that are positioned inside the police itself or the Ministry of Internal Affairs. Depending from their legal competences, these mechanisms can be of formal or informal character.

1.3. Formal mechanisms of internal control

Part of this group are all the subjects that are positioned inside the police itself (MIA), which according to legal norms have the right and obligation to control the performance of the police. These subjects are divided based on their weight and police violations. In this ranking, the first formal subject that supervises the performance of the police is hierarchical control, then the control which is exercised by a special service known as the service of internal control and professional standards, disciplinary commissions etc.

1.4. Hierarchical control

This mechanism consists of police superiors itself and as we can see it belongs to the first level. This type of control is exercised by the police leading staff based on the vertical principle (from upside down) and the horizontal one, which is also known as hierarchical control. This kind of control is regular and when comparing to other types of control, this one is more voluminous and daily. These kinds of supervisions, exercised by the superiors themselves constitute the usual work of superiors, thus this supervision is not treated as a special activity, but as their usual activity. While performing his duties, the superior, among other things, has the legal obligation to control the performance of the police, who after finishing their job are obliged to write an official statement through which they report for what they did. This is a daily duty of police superiors, because every time they exercise any activity, after finishing, they have to register it by an official statement. Then, the superior evaluates the performance of each policeman regarding the quality. But, aside from this daily form of control, the superiors are also obliged to operatively follow the police's performance. They should not only base in the writings of policemen, but to also directly and closely be informed about how the policemen exercise their duties in practice. If the superior finds that the conducted work did not have the required quality, then he can call the dependent and give him/her a verbal warning and if within a certain period of time the given mistakes are not avoided, then the superior can make a written warning as well. But if even then the policeman continues with the inadequate quality, then he can propose for lowering his wage based on the activity that provides this. This has to do only with violations that are not that serious. If the superior during his evaluation finds out that the policeman during the performance of his duties has made a serious violation or has abused his position, he is obliged to inform the special service that is specialized to control the performance of the police known as the service of internal control and professional standards.¹

1.5. The service of internal control and professional standards

Even nowadays, the need to control the services that are charged with special competences is never too much. Experience has clearly shown us that every power in certain cases can be despotic and misused if it is not subjected to real control. The service of internal control and professional standards (SICPS), is the organizational unit positioned within the MIA, that has the obligation to control the performance of the ministry. The appearance of these services was undoubtedly determined by the high number of police violations and the development of the human rights and freedoms concept. SICPS is appeared as a strong guarantee for preventing arbitrary behaviors of police. In fact, this control is presented as a control of second level and thus presents a filter where the performance of police and its superiors is filtered,

¹ With the term 'control mechanisms' we understand all subjects that in any manner control the performance of the police.

especially in the cases where force was used. Now the evaluation of legality, rationality and regularity of using violent means would not be exercised by police superiors, but by a service which is not at all depended from the police and which can thus conduct this evaluation in an impartial and independent way. The purpose is for SICPS to develop objective investigations when violence and unprofessional means are used, by making it unable to hide police abuses. From this we can see that with the appearance of this service, the citizens have an additional instrument where they can freely go and present their complaints. Because of the importance of this service in the control of police, we will pay more attention to it. SICPS is an organizational unit positioned within the ministry and performs its duties in accordance with the Constitution, laws and rules of procedure. This service is centralized and is lead by the Assistant Minister which is chosen by the Minister himself, in front of whom he is responsible. The service is based in the principle of hierarchy and devolution. This organ performs its duties in the name of the minister, to whom it immediately reports for any police violations. Seen from this point of view, the service of internal control is one of the strongest instruments in the hands of the minister through which he/she establishes order and discipline within the ministry. The service also has the obligation to help the minister in the successful management of the duty. In this direction, SICPS is presented as the right hand of the minister but also as a protector of law and professionalization of MIA.¹

According to the organization and structure, the service is divided in three smaller units: the service of internal control, the service of professional standards for the city of Skopje and the analytics service as part of it. In the Republic of Macedonia this system was first established in 1998, as a result of the reforms by the ministry. In fact, the establishment of this service was imposed by the European Union which required the ministry to establish the mechanisms of police control, which should effectively protect human rights and freedoms during police procedures. At the beginning the service employed only 3 persons and their leader, later this number increased to 11 and remained the same until 2003. During this whole period the service was known as service of internal control and its duties were mainly based in the orders of the minister. Thus when the minister accepted complaints from citizens, he addressed them to the service which after conducting superficial investigations, informed the minister for the results of the investigation. The minister was not obliged to act according to the conclusions of the service, thus even if the service found that there were legal violations, the minister had the last word. In 2003 the service approved its Rules of Procedure for the first time, and the number increased to 45 inspectors. Until 2009, the service was positioned next to the minister's office which symbolized that the service was a part of its cabinet and functioned for its needs. With the consultation of international experts, it was required for the service to be deployed and instead to establish it outside the ministry, where the citizens could come freely and present their complaints against the police. Now the service is located outside, near the main gate of the Ministry, in Dimçe Mirčev Street. Even though the center of the service is located in Skopje, the inspectors of SICPS are positioned in all departments of the police.² This separation helps the citizens to file their complaints against the policemen in every city of the country, without having to go to the center. But when accepting the complaint and registering it in the analytics services, the Assistant Minister can assign one or more inspectors in the concrete case, which can come from the center of the service. Its advantage is the fact that in the concrete case the policeman against whom the citizen filed the complaint is not aware of this, thus he can't make different pressures. The Rules of Procedure have set deadlines regarding the duration of investigations by the service.

The investigations for small violations have to end within a reasonable period of time, which can't be longer than 30 days. In cases of serious violations, the investigations can last longer, but not longer than 90 days. After the expiry of the 30 days limit, the service has to necessarily inform the citizen by writing, even if the investigations are still in process. After the investigations are finished, the service is obliged to again inform the citizen about the results. If violations have been found, then the ministry takes legal measures against its employee and also informs the citizen. SICPS has the competence to press criminal charges against the employee of the police and propose disciplinary measures. The most important thing in the work of SICPS are cases when force is used by the police, especially when because of its use serious damages are

¹ Miletić, S. (2003). *Policisko Pravo*. Centar za antiratna akcija, Beograd, 371.

² This regulation was helped and financed by the U.S. Embassy in Skopje, and other technical means were given within the ICITAP program. Later, this kind of help in developing service's capacities was also given by the Embassy and experts of the United Kingdom. The author during this time has worked in the service and had the luck to know the experts of European Union, that have worked in such services in their states such as: England, Germany, France, Belgium etc.

caused, such as death or serious injuries. In these cases, SICPS in accordance with the police law (Article 81) undertakes investigations regarding the evaluation of the legality, rationality and regularity of the use of weapons. According to the police law, this organ may use force (fiery tools and weapons) starting from the ranking done by the law itself, from soft measures to the lethal ones. We will briefly take a look on other mechanisms below.

1.6. The disciplinary commission

It is a subject which operates within every police department and presents the third level of control. In fact, disciplinary commissions are presented as a type of court within the police, while SICPS is presented as some type of prosecution. Every proposal against police employees ends in the disciplinary commission. The disciplinary commission develops a procedure for the collected material and in the end takes the decision regarding the responsibility of the employee. The commission can impose some sanctions: the decrease of wage according to relevant regulations for a period of time no longer than 6 months, lowering his/her degree for two levels maximum and the termination of labor relations. The employee who was found guilty has the right to appeal against the commission's decision to the minister and after this he can also file a lawsuit before the court¹.

1.7. Informal mechanisms

Above we mentioned that the mechanisms of internal control depending on their obligations and legal competences could be formal and informal. Parts of the informal mechanisms are the subjects that have no legal obligation, but exercise this duty based on their job.

1.8. Self-control

Self-control presents an internal court or an internal moral mechanism of every person which is firstly related with his or her consciousness and character. This allows us to built principled attitudes regarding some actions, which can be acceptable or unacceptable in a society. This is a very important virtue of every person, and especially of police employees, for them to limit their power themselves, especially in cases when force is used. Obviously this kind of control depends on the attributes of character and its sustainability, so that even in critical cases they are able to control themselves and not excess their competences. It is known that the duties of police are often exercised away from public, and we know cases of corruption, cases of raids or other situations where police employees face different challenges (discovery of gold, huge amounts of money) where their sustainability is required. Thus, during the education of policemen it is required to develop control attributes, especially in cases of using firearms.

1.9. Interpersonal control

This kind of control means the mutual supervision of police employees themselves. It is known that every duty exercised by the police or in each of their activities, at least two policemen participate. In cases when various interventions have to be taken, then the number of employees increases in proportion with the danger which is faced. However, one person of the group is always the leader and he bears the burden of responsibility, for illegal or non-professional actions. But if meanwhile the police employees receive illegal orders from their superiors, then they are obliged not to follow this order, and to attract the attention for this.

This organization is mostly related to the protection of the rights of police employees. This function is performed by the syndicalist organization when approving legal norms, collective agreement, where police employees interests have to be protected in general and in many segments of performance, that can be violated by the employer during this period. In the Republic of Macedonia, even nowadays there is no special professional association for the protection of policemen that would protect police employees especially when their rights are violated by the commanding staff².

2. The external control of administration

2.1. The parliamentary control

The parliamentary control presents one of the most important forms of political control known by the countries with parliamentary system. This control especially claims:

- a) Ensuring the regular functioning of administration
- b) Guaranteeing legality and protecting citizens rights, and
- c) Performing the general supervision of administrative activity.

¹ Qebri AVZIU, PhD, Scientific and Professional Magazine for Law Ulpianus, 118.

² This kind of control is very developed in Germany. If one of the policemen misuses his function, of course that his colleagues would charge him. As a result, this state has no special services for internal control.

This control belongs to people representatives which have the authorization to continuously prove that the administration doesn't avoid directive lines, set by the Parliament. We will present examples of parliamentary control mechanisms in France, United Kingdom and United States of America. Seen comparatively, the organs of external control in most contemporary states, exercise not only the function of legality, but also the function of opportunity in certain fields. Parliamentary control in countries with developed democracy and in the countries with parliamentary systems presents one of the most important forms of external control. Traditionally, as Great Britain is known as the cradle of parliamentarianism. The Chamber of Parliament exercises its control upon administration, using the traditional technique, which is in the disposal of every parliamentary regime. However, parliamentary control in Great Britain is mostly realized through specialized committees and polling committees, which are established *ad hoc*, when this is required by a special occasion. The sanctions for the application of parliamentary control in the work of administration are: revocation of the Head of the Department (Minister), because of the political responsibility which he has before the Parliament. In France, parliamentary control upon administration's performance is done with the interference of a Member of Parliament, but also with the impact of the electorate through the Members of Parliament. Similar to Great Britain, the members of the Parliament present their questions to the Government and Ministers, those questions are announced in the Official Gazette and they must be necessarily answered. However, the most important form of parliamentary control for the Government and other organs of central administration is the impact of the Parliament in approving (voting) the budget. Also, there exists the institution of verbally presenting questions to ministers, which are obliged to answer the presented question. In U.S.A., even though the system of separation of powers exists formally, respectively the presidential system in which the control of administration's performance is very successful, the impact of the Congress in the performance of administration has been broadly put in the meaning of exercising control. The truth be told, the Congress disposes many constitutional or legislative measures for the successful exercise of administration control.

Here it is firstly referred to budgeting rights through which the Congress can refuse certain budget means of administration organs which can impact the successful exercise of its functions¹.

2.2. The mechanisms of external control

It can be said that the subjects of external control appeared as a result of the fact that society did not trust police enough to let it take care of its own performance, without the presence of external subjects. Seen from this point of view, distrust is the main cause for establishing external mechanisms for police control. Even if the police wouldn't misuse their power, citizens would still have their doubts regarding the performance of this organ. The reasons of why should there be an external control are indefinite, but the most important is that in countries where the police had no external control was prone to excess its competences, which automatically violated human's rights and freedoms. The lack of external control provides this organ with space for transforming in a scary organ, which can be a powerful instrument of the dominant class, to overthrow their opponents etc². With one word, the existence of external control mechanisms make this organ more responsible and more careful towards the citizens. Thus, because of the dangerousness that the police holds, the external subjects that control its performance, are large in number. Thus, we can divide them in formal and informal subjects in this part as well. First we will mention the formal subjects³.

2.3. The mechanisms of formal external control

In formal subjects of mechanisms we mention: the Parliament, Government, Public Prosecutor, Courts, Ombudsperson etc. i.e. depending on the state regulation where this mechanism is regulated with relevant constitutions of national states.

¹ Qebri AVZIU, PhD Scientific and Professional Magazine for Law Ulpianus, 123.

² This commission is formed by 9 members (deputies), where 6 come from the position and 3 from the opposition, but the head of the commission as usually is chosen from the opposition. The commission has two important functions: one is related the protection of human rights and freedoms and if any violation happens, they start an initiative for political responsibility against the official person. The commission can't undertake investigatory activities that are in the competence of the court. The commission also accepts complaints from citizens regarding police's performance. It's disadvantage is that it accepts and addresses to SICPS to undertake investigations regarding the circumstances, that were presented in the lawsuit and there are no mechanisms that can independently investigate the case for which the citizen complaints.

³ Interpellations according to Article 72 of the Constitution of the Republic of Macedonia can be initiated by 5 deputies.

3. The Parliament – external political control of the performance of competent state organs

3.1. Parliamentary control

The Parliament is the highest legal organ of a state, which among other functions also conducts the political control of the performance of competent state organs. This is truly the only organ that can control the activities of the government and to react against the non-principled activities that have clearly political motives. The detection of such actions of the government that exceeds its powers is something we have to be thankful for because it limits the ongoing misuses which if not detected and stopped can lead to numerous consequences for the society. The parliament can control the police by approving laws that regulate its organization, structure, competences etc.; by regulating the policy of national security, polemics and discussions regarding security issues, approval of budget for the police, choosing and revoking the minister and assistant minister etc. Further, the Parliament has the competence to form special *ad hoc* commissions in special cases regarding police violations, thus within the parliament today there functions the permanent polling commission¹, interpellations², deputies questions etc.

3.2. The government

From all the subjects that exercise their control upon the police, the government is an incomparable institution because of the competences it has upon this organ. The government has this position especially in those countries where its organization and functioning is based on the strong principles of centralization, where the local power has little or even not a bit jurisdiction upon this organ. According to the constitution, the government is an executive organ who bears the competence to directly control the state administration, including the Ministry of Internal Affairs. The government exercises this control in this manner: by proposing minister or assistant ministers, who politically and professionally are responsible before the government for their work, by naming high police functionaries (the director of P.S.B. and D.S.C.)³, approves regulations, controls the police budget, decides in second level regarding citizens complaints for administrative issues etc. As we can see, the government, based on its competences, objectively is capable of controlling the performance of the police in details, by also being able to manipulate in certain cases for its own interests. Practice has proved that the government often has misused police power or has required the minister to undertake certain actions that were not in the spirit of law⁴. Thus we raise the question, how will the minister behave in these cases? He has to first warn the Head of the Government that the order cannot be implemented.

This commission is formed by 9 members (deputies), where 6 come from the position and 3 from the opposition, but the head of the commission as usually is chosen from the opposition. The commission has two important functions: one is related to the protection of human rights and freedoms and if any violation happens, they start an initiative for political responsibility against the official person. The commission can't undertake investigatory activities that are in the competence of the court. The commission also accepts complaints from citizens regarding police's performance. Its disadvantage is that after accepting and addressing to SICPS to undertake investigations regarding the circumstances, that were presented in the lawsuit and there are no mechanisms that can independently investigate the case for which the citizen complaints. Interpellations according to Article 72 of the Constitution of the Republic of Macedonia can be

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³ Public Safety Bureau and Directorate of Security and Counterintelligence.

⁴ During human history there are a number of cases when the police, with the request of the government was very brutal and violated seriously human rights and freedoms. The government had requested it to cause suffering to the population, by thinking that violent measures will help for it to strengthen its position. This was the case with France during the governance of Lui XIV, Stalin, Hitler, Enver Hoxha, Pol Pot in Cambodia etc.

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If the Prime minister insists in taking these actions, then the minister is left with no choice but to resign or take legal measures against the prime minister. But, the problem complicates in cases when the minister doesn't want to lose his position as a member of the government, then in democratic states, the conflict is settled by the parliament or in court where the prosecutor under the pressure of citizens takes legal measures.

3.3. Public Prosecutor

Certainly, the progress regarding the mechanisms of internal control upon the police is huge, but yet the main role upon the control of police in the aspect of misuses and violations of the disposition of the Criminal Code is carried by the Public Prosecutor. This is the competent organ for pressing criminal charges even in cases when the authors of criminal offenses are law's employees themselves. It is true that the prosecutor and the police have the same function and their work is much intertwined, thus we can say that they always fight the crime together, thus the prosecutor in cases when policemen are involved in a crime, hardly decides to initiate a criminal procedure, so today it is required for the policemen to stop being the group of unconvicted¹. With the new competences of L.P.P., the Public Prosecutor, will carry the criminal and investigatory procedure and will have the position to daily control its performance, even though not in the operational aspect².

3.4. The Court

The courts are one of the very important subjects in controlling the performance of the police. This control is especially expressed in cases when the police request the Court to grant a warrant for arresting suspected persons, applying technical surveillance tools, raids etc. Afterwards the court can control police's performance, when talking with the suspected person before the court. In this case, the judge can also be informed by the citizen about whether the police violated his rights and freedoms during the previous procedures. Then the citizen, whom is not satisfied with the government's decision in second level, can file a lawsuit before the court. In general, the court is the most competent organ for the protection of human rights and freedoms.

The functioning of the administration in the Courts of the Republic of Kosovo

The functioning of administration in the courts of the Republic of Kosovo is one of the interesting topics and in the same time it is a challenge for the judicial system of a country, especially for the proper functioning of courts. This becomes more interesting because of the fact that judiciary in Kosovo is going through an essential reformation of its organization. Having this in mind, and the fact that besides the need, there was no action regarding this issue, we decided to write a paper regarding the functioning of administration in the courts of the Republic of Kosovo, where we will try to describe the main notions and the organization of administration in details in all levels of the courts in Kosovo, based on the old and new law, then the duties of those organs and we have also taken the opinions of court administrators of every level, and we will present them here. As we said, administrative activity and thus, administrative acts are very diverse regarding their form and content. They can create various rights and obligations for the subjects that take part in this activity. But, if until the beginning of the 90's the theory of administrative law and legislation was not fully accepted, today we undoubtedly accept the thesis that no important administrative sanction can be executed without the possibility to appeal it in court and without the judicial review of the act or the sanction. By courts in implementing this principle we will consider regular courts, Supreme Court and Constitutional Court. For the conditions and cases of judicial reviews conducted by these courts we will talk later in the relevant chapter.

¹ Themes, N. (2000). *Debates in Public Security Reform, External Controls*. Washington, DC; WOLA, 6.

² We can talk a lot about the control of Public Prosecutor upon police, but in this place we are limited to pay more attention to it. About the control of the Court and Ombudsperson upon police we will talk in another paper.

1. The constitutional control in Kosovo

Kosovo doesn't have a long tradition of constitutional control¹. The first foundation of constitutional justice in Kosovo appeared after the constitutional reforms of 1971 that advanced Kosovo's constitutional position within the former Yugoslav Federation. This situation helped Kosovo as a constitutive element in former Yugoslavia Federation to make its own reorganization in certain political-legal fields, including the field of constitutional and legal protection. In 1972 the 10-th amendment was approved in Kosovo's Constitutional Law which founded Kosovo's Constitutional Court. This step made it possible for the Constitutional Judicial Branch (which until then was part of the Supreme Court) to transform in a Constitutional Court. The institution of the Constitutional Court was also provided within the new constitutional architecture of 1974. The Constitutional Court of Kosovo as a mechanism for the protection of constitutionality and legality was functional until 1990 when with the use of anti-constitutional means, the removal of Kosovo's constitutional autonomy followed.

Therefore in 1999, the Interim Agreement for Peace and Self-Government in Kosovo ("The Agreement of Rambouillet") had designated the establishment of a 9 member constitutional court with an international presence of five international judges to ensure the constitutional conformity of laws in relation with the constitution and to protect constitutional rights and freedoms². Since this Agreement was not implemented, the institutional frame set by it never came to life. The need to establish a system of constitutional control (the establishment of Kosovo's Constitutional Court) was articulated by national representatives during the drafting of the Constitutional Framework for Provisional Self-Government in Kosovo. In April 2001 international and national experts under the leadership of United Nations Mission in Kosovo (UNMIK) were mandated to draft a constitutional document which would enable the building of the institutions of provisional self-government and the gradual transfer of authorizations from the United Nations Mission in the institutions of provisional self-government. However, the proposal for the establishment of the Constitutional Court for the protection of constitutionality was refused by UNMIK with the justification that a step like this overcomes the spirit and limits set by the United Nations Security Council Resolution nr. 1244³. According to UNMIK, the Constitutional Court reflects an attribute of statehood thus prejudged the final status of Kosovo⁴. All that was defined by the Constitutional Framework in this direction was the establishment of a Special College near Kosovo's Supreme Court to treat, *inter alia*, whether the laws adopted by the Parliament were in accordance with the Constitutional Court, by including international legal documents. But this Special College was never functionalized therefore it has no practical constitutional importance. Finally, the concept of establishing a Constitutional Court as a fundamental part of Kosovo's constitutional architecture triumphed in the "Vienna negotiations" for

¹ Regarding constitutional control in Kosovo, see Visar, Morina (2010). The Newly Established Constitutional Court in Post-Status Kosovo: Selected Institutional and Procedural Concerns. *Review of Central and East European Law, Volume 35, Number 2*; Dren, Doli, Fisnik, Korenica (2010). Kosovar Constitutional Court's Jurisdiction: Searching for Strengths and Weaknesses. *German Law Journal*.

² See Article 6 of the interim Agreement for Peace and Self-Government in Kosovo. The full text of the Agreement in English can be found in http://www.state.gov/www/regions/eur/ksvo_ambouillet_text.html.

³ United Nations Security Council Resolution 1244 was adopted in June 10th 1999, which enabled the establishment of United Nations Mission in Kosovo. This UN Mission in Kosovo was divided in four pillars and was responsible for the restoration of health, education and public services, the exercise of police functions for a short term and the development of Kosovo's Police Service in a long term, and the restoration of the judicial system. On the other side, OSBE took the duty of promoting the democratization and human rights, and the establishment of capacities in these fields. UNHCR took the responsibility of coordinating the humanitarian help for many displaced kosovars while the European Union took the responsibility for rebuilding the economy, including the coordination of international financial help and the reorganization of trade, coins and banking issues.

⁴ For more regarding international administration in Kosovo see Ford, Christian E., Oppenheim, Ben A. (2008). Neotrusteeship or Mistrusteeship? the "Authority Creep" Dilemma in United Nations Transitional Administration". *Vanderbilt Journal of Transnational Law*, 55-105; Yannis, Alexandros (2004). The UN as Government in Kosovo. *Global Governance*, 67-81; Stahn, Carsten (2001). Constitution without a State? Kosovo under the United Nations Constitutional Framework for Self-Government. *Leiden Journal of International Law*, 531-561; Stahn, Carsten (2001). The United Nations Transitional Administrations in Kosovo and East Timor: A first Analysis. *Max Planck Yearbook of United Nations Law*, 105-183; Marshall, David, Inglis, Shelley (2003). The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo. *Harvard Human Rights Journal*, 96-145.

Kosovo's political status under the leadership of the United Nations Special Envoy Mr. Martti Ahtisaari, who in the Comprehensive Proposal for the Settlement of Kosovo's Status of 27th March 2007, had settled the establishment of a nine-member constitutional court to ensure the protection of constitutionality¹.

In 9 April 2008, Kosovo's Parliament adopted the Constitution of the Republic of Kosovo, where the Constitutional Court had an important institutional position.² In the 8th chapter, the Constitution has defined the Constitutional Court as the final authority for the interpretation of the Constitution by giving it a broad volume of constitutional jurisdiction. By clearly specifying the circle of authorized subjects to put in motion a process of constitutional control, the Constitution has explicitly defined the categories of issues which can be subjected to a constitutional control before the Constitutional Court. The definition of the institution of individual constitutional complaints is considered as an important mechanism for citizens, juridical persons and Kosovo's constitutional democracy itself. Juridical persons can also benefit from the constitutional protection of human rights and freedoms. This constitutional recourse can be used only after the exhaustion of regular legal remedies and only regarding to concrete and direct violations of the rights and freedoms set by the Constitution.

Chapter eight of the Constitution was implemented with the adoption of Law nr. 03/l-121 for the Constitutional Court of the Republic of Kosovo, of 16th December 2008 which further regulates the organization and function of the Constitutional Court, the procedures for presenting and reviewing constitutional requests, the conditions and procedures for naming and revoking constitutional judges and fundamental procedural principles regarding the proceeding of a constitutional request. The process for drafting the bill for the Constitutional Court was initiated when in May 2008 the Working Group for the establishment of the Constitutional Court was formed. The drafting of the bill for the Constitutional Court was done by representatives of Kosovo's institutions and international organizations, national and international legal experts to ensure that the content of the bill is compatible with the legal infrastructure of European Union. Taken in general, the control exercised by the Constitutional Court upon the actions of the Government, is related to the general limitation which the Government faces while exercising this function that has to do with following the Constitution and laws. The mechanisms of exercising the control also control the political function, but the governmental one as well. These mechanisms are political as well, similar to the ones exercised by the Parliament through questions, interpellations or commissions, or the judicial ones. With other words, the Constitutional Court enjoys the competence of controlling the legality of the acts of Ministers Council.³ Usually, the objects of control are bylaws: decree, decisions, orders, instructions, regulations etc.

2. The control of administration conducted by the Ombudsperson

Ombudsperson presents one of the control types upon the performance of administration. The term 'ombudsman' is borrowed from the Swedish language which means 'mediator or representative'. This notion was first encountered in Sweden in 1809. The Ombudsman presents an organ, which has the obligation to protect the citizens. This organ has the prerogative of controlling administration's performance. The control of administration conducted by the Ombudsperson is the type of control which is lately being applied in countries going through transition. Based on the sample of developed democratic

¹ The Comprehensive Proposal for the Settlement of Kosovo's Status of 27th March 2007 addresses: 1) the need for the functioning of a multi-ethnic democracy, 2) the issuance of Kosovo's Constitution, 3) Kosovo's status in international relations, 4) the rights of minorities and the mechanisms for their protection, 5) decentralization, 6) judicial system, 7) cultural and religious heritage, 8) return of refugees, 9) economic development and 10) security. The full text of the Comprehensive Proposal for the Settlement of Kosovo's Status is available at www.unosek.org/.../statusproposal.html.

² The project of drafting Kosovo's Constitution was very specific and strongly followed the basis set in Ahtisaari's Plan, which had set the main lines of the constitutional document. In this direction, the Working Group of 21 members was formed, whom consisted the political representative with competence in the legal field to work in the draft of the constitution's text and the preamble, fundamental principles, Kosovo's institutions, fundamental rights and freedoms, security and order, communities rights, judicial power, economic relations, local self-governance, independent agencies and Ombudsperson. In 2 April 2008 the draft-constitution of the Republic of Kosovo was certified by the International Civil Representative while it was finally approved by the Parliament of Kosovo in 9 April. For more information regarding the process of constitution's draft see shih Marko, Joseph (2008). *The New Kosovo Constitution in a Regional Comparative Perspective. Review of Central and East European Law*, 33, 437-450; Tunheim, John (2008). Shih poashtu Rule of Law Symposium Rule of Law and the Kosovo Constitution. *Minnesota Journal of International Law*.

³ See: *Decisions of Constitutional Court 2010* (2011). ILAR Publisher, Tirana.

states of west, especially in the states with an emphasized social role, such as Sweden, the Ombudsperson in countries of former Yugoslavia was found in the legal system in order to contribute in strengthening human rights and freedoms. The Ombudsperson is an institution which has the right to explore various illegal and irregular actions of power organs and individuals in the exercise of all kinds of activities, from the organs of executive power, to courts and others¹. The Ombudsperson takes certain measures and actions after accepting the news by the administration of the Commission, or based on self-initiative for the violation of human rights, which are proclaimed in the European Convention for the Protection of Human Rights and Fundamental Freedoms or discrimination of any type. For its investigation results, the Ombudsperson declares its results and conclusions.

Special units can present it to a government official or organ. If the subject towards whom the special unit is directed to is not taken care carefully, the Ombudsperson will present the unit and will instruct it to international bodies for the implementation of law and other dispositions, depending on who decides about certain questions from his competences. The same unit is also directed to the political-executive organ of that level of power in which the organ or official did not follow Ombudsperson's conclusions and recommendations. Simultaneously, the Ombudsperson can start the procedure before the competent bodies and institutions. He has the right to access and review all official documents, including the confidential ones. It is especially foreseen that the Ombudsperson has the right to be present in all administrative hearings and procedures of administrative organs. The Ombudsperson at any given time can control places where persons are deprived of liberty or places where they work. These authorizations have to be more précised in laws regarding the procedure of administration.

3. The mechanisms of informal external control

The mechanisms of the external control of police that have informal character are: media, non-governmental organizations and political parties. Because of the short time, we will not further go into analyzing these institutions. With the hope that in another paper we will dedicate a higher importance to these institutions, especially analyze the work of the prosecutor, courts, ombudsperson, media, non-governmental organizations and political parties. We will also talk about the new model that is foreseen to be upon the external control of police in the future.

Today, in every democratic state, the idea for the police to control is unacceptable. The mechanisms of internal control have disadvantages regarding the fact that they are formed by the police employees themselves, whom for various collegial or emotional reasons will not undertake the necessary means against the police who violates the rules. Even in cases where violations would be found, these mechanisms would cover these cases or would sentence symbolic sanctions. Also, the lack of external mechanisms allows the internal ones to be arbitrary. Further, the functioning of external mechanisms disables the government to misuse the power of the police. External mechanisms are even more efficient in accepting complaints from citizens and create the conditions for the investigations regarding the use of force, especially firearms, to be conducted based on the principles of legality, objectivity, neutrality, impartiality etc. But even today, in the Republic of Macedonia there are still no formal mechanisms of external control part of which would be the citizens themselves. It is though that taxpayers have the right to directly take part in investigations, especially when firearms are used, and learn closely for the legality, rationality and regularity of the use of arms.

The forms of state administration control by the lower organs of state power – citizens

Decentralization is a process spread throughout the entire Europe. The main purpose of decentralization has derived by the need and interest to have a better more functional government. In order to achieve this, a number of procedures and principles have been created to make the process of decentralization easily implemented. Decentralization entails the transfer of responsibilities from a higher level of central government, to more localized structures. Being such, decentralization includes a broad spectrum of activities and impacts in a number of important fields of citizens' daily life. Decentralization presents a form and effort of the government to make the state central institutions more democratic. The purpose of the new level of the decentralization of power is to create a tool with which the relations between central and local powers can be regulated. Regardless of the regime type and existing structures of the energy before decentralization, decentralization was used as an effort to reform and improve the government. However, in states where a national objective and the purpose for decentralization were not set, decentralization was used or resulted in serving only the interests of the national elite of energy.

¹ About the Ombudsman in different countries see: Prof. Dr. S. Popovic, page 407-410.

In this text I will present the information, principled and methodology for the implementation of decentralization and I will highlight the positive and negative effects. Aside from this, I will compare initiatives and highlight the requests and standards that will help in the successful implementation of a decentralization initiative. The focus of this document is in the implementation of a decentralization program in Kosovo mostly inspired by the actual international administration of Kosovo.

The discussion in this document will be focused in the most debated example in Kosovo, but will also include decentralization examples in sovereign states and is based on the view that the process of decentralization being developed in Kosovo is far from being a normal process or a process in the interests of the population living in Kosovo. Thus it has to be focused on the complexity of the process, positive and negative aspects of decentralization and the possible consequences for the population of Kosovo. While decentralization has been defined by different authors as an intellectual construction, political and legal definitions may have very different connotations and meaning in the everyday life. However, decentralization is an administrative process to divide the competences and functions of a central organ (in this case the Government of Kosovo), with lower organs (in this case, municipal governments). Decentralization presents a very complex but systematic process, regarding the organization and functioning of a state where the democratic process is based in a plural system of respecting human rights, rule of law and citizen activism. For this I will paraphrase the words of Professor Kominski of the University of Indiana in the United States of America: centralization and/or government are two factors that can discourage or limit people's ability to take citizen actions. The internal regulations of state are defined by the relation between central and local organs. The relations can be close or not. The decentralization has been normally implemented based on the constitution or the laws of central power which then delegate their competences to central non-governmental organs. In a centralized system central organs have all the powers and other organs have little or no autonomy at all. A centralized system is seen to present a simple, efficient system of governing, where the central organ takes all the decisions. Decentralization is a process that results after the clear definition of centralization. This is the main topic in this study. Thus, in order to analyze decentralization, it is necessary to understand centralization. Decentralization is a product of centralization. They are closely connected and depended on each-other. They support and contemplate one another, and there can't exist a conflict between them. It is logical for the decentralized power to have organic and functional relations with the central power. Regardless of the level of a state's decentralization, the lower organs will be responsible before the higher ones. The relations between local and central organs are regulated with the Constitution and laws. In principle, decentralization means offering larger responsibilities and decision-making competences for the local organs with the idea of reforming the processes of local governing. But decentralization, as a concept, presents a form of local governing administration horizontally, while the central organ maintains a vertical administrative structure by also maintaining the final authority upon local bodies. Thus decentralization defines the direction of political/legal relations between state organs and the ones exercised within the administration. Decentralization has been also reflected by the functions exercised within the central and local organs and is expressed in proportion with their jurisdiction and responsibilities. SELF-ADMINISTRATION as a form of decentralized power and the governance of lower state organs. In Kosovo, the creation of municipalities based on ethnicity, with the purpose of creating pure ethnical enclaves is and must be unacceptable because it can threat the unique municipal structure and Kosovo's constitutional order. Local governing has to be conceived based on equal individual and collective rights of citizens and communities in Kosovo.

Decentralization, in a political/legal context means the transfer of authority from the central organs of state governing structures. In a decentralized state, where the principle of two governing levels has been respected, local government exercises political functions and offers special services. The structure of the main government exercises functions and special services for the entire state. The respect and maintenance of the division of competences and responsibilities of different government levels is a main principle of decentralization. The principle of two governing levels doesn't violate the principles of decentralization for as long as it is based on law. Decentralization as a legal/political instrument can have different characteristics such as the ability of central governance to name civil employees of lower levels, the allocation of funds to support specific autonomic structures of lower organs, the control of the transfer of responsibilities in lower levels is exercised by the central organ and can be defined with constitution (Prof. Dr Riza Smaka, Prishtinë, 2003/05/14). Also, when a central organ creates the bodies of lower levels, then the public functions of that organ are implemented in accordance with a "horizontal political system, respectively decentralized power", as functions of services and always based on law. In this context, we

deal with sub-municipal units. Kosovo in under a civil and political international administration with a temporary administration that follows the transfer of competences from the central level in municipal organs, and creation of new organs in a sub-municipal level. This is happening although the existing central and municipal structures of governance are not strong. However, the adopted governance structures in defining the final status of Kosovo will define the model of local governance in Kosovo.

Does decentralization has to be implemented in the central level? The answer to this question requires empirical research to build a new model of decentralization which is politically acceptable, suitable for the horizontal and open functioning and available to fulfill people's needs. In principle, this treatment favors decentralization, but one in accordance with the acceptable models based on the political will of Kosovars, not based on ethnicity, which is believed to be against the interests of the major population of Kosovo.

References

1. *Decisions of Constitutional Court 2010* (2011). ILAR Publisher, Tirana.
2. Dren, Doli, Fisnik, Korenica (2010). Kosovar Constitutional Court's Jurisdiction: Searching for Strengths and Weaknesses. *German Law Journal*.
3. Ford, Christian E., Oppenheim, Ben A. (2008). Neotrusteeship or Mistrusteeship? the "Authority Creep" Dilemma in United Nations Transitional Administration". *Vanderbilt Journal of Transnational Law*, 55-105.
4. Marko, Joseph (2008). The New Kosovo Constitution in a Regional Comparative Perspective. *Review of Central and East European Law*, 33, 437-450.
5. Marshall, David, Inglis, Shelley (2003). The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo. *Harvard Human Rights Journal*, 96-145.
6. Miletic, S. (2003). *Policisko Pravo. Centar za antiratna akcija*. Beograd.
7. Stahn, Carsten (2001). Constitution without a State? Kosovo under the United Nations Constitutional Framework for Self-Government. *Leiden Journal of International Law*, 531-561.
8. Stahn, Carsten (2001). The United Nations Transitional Administrations in Kosovo and East Timor: A first Analysis. *Max Planck Yearbook of United Nations Law*, 105-183.
9. Themes, N. (2000). *Debates in Public Security Reform, External Controls*. Washington, DC; WOLA.
10. Tunheim, John (2008). Shih poashtu Rule of Law Symposium Rule of Law and the Kosovo Constitution. *Minnesota Journal of International Law*.
11. Visar, Morina (2010). The Newly Established Constitutional Court in Post-Status Kosovo: Selected Institutional and Procedural Concerns. *Review of Central and East European Law*, Volume 35, Number 2.
12. Yannis, Alexandros (2004). The UN as Government in Kosovo. *Global Governance*, 67-81.