

# THE BURDEN OF PROOF IN THE ADMINISTRATIVE PROCESS IN ALBANIA

*Dr. Entela Hoxhaj*

University “Luigj Gurakuqi”, Shkoder, Albania

*Dr. Irma Baraku*

Comissionner for Protection from Discrimination, Albania

---

## Abstract

The role of the administrative authority is different in the administrative process in the administrative proceedings and in administrative adjudication. This difference is seen in its possibility to impose rules to the private parties in the administrative proceeding and in its being equal part in the administrative conflict in court.

With the enactment of the law on administrative courts in Albania there are new rules of administrative judging. These rules are related also with the burden of proof which is different from the classic rule for the burden of proof in the civil processes in court. This is the main object of treatment of the following paper. The burden of proof in the administrative adjudication belong to the public authority and this is one of the main principles of administrative judging.

---

**Keywords:** Administrative dispute, administrative court, burden of proof

## Introduction

The administrative process involves the manner of proceeding (action) of the public administration bodies in the case of direct application of material legal norms in specific cases of their activity, and the procedure of the parties involved in the administrative trial. This is the reason why the rules of administrative procedure intended to act alike and equally to all, in order to avoid any influence of the officials in issuing the administrative act. Through the control of this procedure can come out even the responsibility of an officer for the possible illegality (B. Pollozhani, E. Dobjani, E. Stavileci, L. Saleh, 2010: p. 323).

Based on the above adductions, the following analysis will examine the burden of proof in the administrative process in Albania respectively during:

- i. the administrative proceeding, as a procedure applied in the framework of the activities of public administration bodies;

- ii. the administrative conflict (decision-making by the administrative courts).

### **1. The burden of proof in the administrative proceeding**

The provisions that regulate the administrative procedure include rules which concern:

- the competence of the public administration body to decide on the administrative issue;
- the actions or operations to be followed in order to have a fair decision on the administrative issue;
- the sort of formal actions and the order of actions that must perform the administrative body for the implementation of the material legal norm in a certain case;
- the rights and obligations of the parties and other participants in the administrative proceedings (A. Sokoli, 2005: p. 8).

These rules include also the administrative norms contained in the Code of Administrative Procedure, as well as those contained in the laws on the organization and functioning of the various bodies of public administration, as for example: the law no. 9000, dated 30.01.2003 “On the organization and functioning of the Council of Ministers”, the law no. 8652, dated 31.07.2000 “On the organization and functioning of local government”, the law no. 8480, dated 27.05.1999 "On the functioning of the collegial bodies of state administration and public entities", etc. [As for the provisions that regulate the administrative conflict in the respective courts, please see the following issue in this paper].

The public administration bodies, on the occasion of developing the relevant procedure and the decision-making process (in order to have a fair implementation of the certain legal issue and because of the variety of regulation areas and the characteristics of different public administration bodies) should act in conformity with the general principles set in the Code of Administrative Procedures, as well as the laws and bylaws of the respective organ of public administration.

The administrative investigation procedure is very similar to the judiciary procedure in many aspects. However, they differ on a substantial element: the court operates on the principle of availability court, according to which *the court should be expressed on everything that is required and only what is required*; meanwhile in the administrative investigative procedure it is operated on *inquisitorial investigation basis* (Instituti i Studimeve Publike dhe Ligjore, 2004: 180). According to the *explicit* prevision of article 81 paragraph 1 of the Albanian Code of Administrative Procedure “*The competent organ requires and takes acquaintances with all the facts that are necessary for making the final decision, by using for this purpose all the*

*methods of proof permitted by law*”. This paragraph requires that the administrative authority should act as protector of the public interest *by using all the means and methods of proof* in its disposal and it should verify all the facts in order to take a fair decision. It should not be limited solely in the data presented by the parties in the process, but, if it will come necessary, the administrative authority may ask and see by its initiative any information or document that may serve for the right solution of the administrative case (Instituti i Studimeve Publike dhe Ligjore, 2004: 181), such as:

- the questioning or confrontation of witnesses,
- the authentication of the document’s certifying power,
- expert’s opinion,
- checks in place,
- secure evidence, etc.

The “burden of proof” classic rule in the administrative procedure is similar to that in the civil procedure process in court: the party that claims a right has in the mean time the obligation to prove, in accordance with the law, the facts on which it bases the proper claims.

During the administrative proceeding, *the burden of proof on the pretended facts falls on the interested parties despite the obligation of the administrative authority previewed in the paragraph 1 of article 81 of the Albanian Administrative Procedure Code. The interested parties can attach documents or opinions or require the administration to take measures to secure evidence needed for the final decision* (Albanian Administrative Procedure Code, article 82). The right of the administrative authority to use all the methods of poof must not be confused with the burden of proof that belongs to the parties for the facts that they claim during the proceedings. The burden of proof is connected with the right of the claiming party to use all the rules ensured by law to require the takings of evidences such as: questioning of witnesses, hearing, submission of documents, request of experts, secure evidence, etc (Instituti i Studimeve Publike dhe Ligjore, 2004: 181). It is important to stress that during all the procedure pursued within the administrative structures, the administrative authority is set on a priority position and imposition in relation to private parties; meanwhile, the administrative conflict in court provides the participation of opposing equal parties (the administrative body and the private party) that develop the activity that should be reviewed by the judges.

## **2. The burden of proof in the administrative courts**

The administrative process in courts, just like the administrative activity, is regulated by provisions of public law; however it should be noted that the judicial function differs from the administrative one by its main purpose, which is not any more to protect the interest of one of the parties in

the process, but the simple application of the law to restore the violated right by respecting some basic guarantees for each of the parties (the administrative authority and the private party) (E.Cassetta, 2012: 800). In a general overview, the judicial process provides for the participation of opposing parties that develop an activity or activities to be reviewed by judges.

The administrative conflict, which is the continuing of the administrative process in the competent courts, is regulated by rules/provisions within laws that concern:

- the principles and procedures of administrative adjudication, the rights and duties of the parties involved in this process;
- the organization and functioning of administrative courts, along with the respective powers and jurisdiction;
- the administrative judicial decisions and their execution.

Part of this group are the administrative provisions included in the law “On the organization and functioning of administrative courts and the adjudication of administrative disputes” (the Albanian law no. 49 / 2012), and even within the Code of Civil Procedure for the procedures and cases non-mentioned in the law on administrative courts. The reference to the Code of Civil Procedure is direct by the article 1 paragraph 2 of the law no. 49 / 2012 when explicitly stating that *the dispositions of this law are fulfilled with the provisions of the Code of Civil Procedure, unless and to the extent that this law provides otherwise.*

The independence of the judiciary is one of the constitutional guarantees of the exercise of this power, to which is also referred in the article 145 of the Albanian Constitution. This article expressly provides that judges are independent and subject only to the Constitution and laws. The principles of administrative adjudication are numbered in article 3 of the Albanian law on Administrative Courts (law no. 49 / 2012). Among the principles enumerated in article 3 is also the principle concerning the burden of proof in administrative adjudication.

In the administrative conflict in court, the burden of proof falls on the public administration authority. This procedural principle is defined in the 3<sup>rd</sup> paragraph of article 3 of the Albanian Law on Administrative Courts: *“The public administration, as a rule has the obligation to prove the merits in law and in fact of the activities committed by its bodies”.*

We should distinguish here the respective legal regulation of the burden of proof in the civil process, referred to in article 12 of the (Albanian) Code of Civil Procedure, according to which *“The party claiming a right, has the obligation, in accordance with the law, to prove facts on which bases its claim”.* Regarding this principle in the civil trial, there is a rich jurisprudence of the Supreme Court decisions, such as the decisions to Civil College of the

Albanian Supreme Court: no. 153 dated 01.04.2010, no. 157 dated 22.02.2007 and some other decision (Y.Pjeternikaj, I.Haxhiu, T.Punmira, 2011: 22-23).

With the Decision no. 153 dated 01.04.2010, the Civil College of the Albanian Supreme Court has stated that "*...The Panel finds that during the process of proof, it is important the right definition by the court on the burden of proof and its distribution on the participants in the trial according to article 12 of the Code of Civil Procedure Code... So, it is clear that whoever has claimed a right and obligation, in accordance with the law, must prove the facts on which he bases his claim. In the meantime, who makes rejections in court that the facts alleged by the plaintiff did not bring the required legal consequences, must also prove his rebuttals judicially...*" (Y.Pjeternikaj, I.Haxhiu, T.Punmira, 2011: 23). With the Decision no. 157 dated 22.02.2007 the Supreme Court estimated fair the conclusion reached by the lower courts based on the following reasoning "...

*If the respondent would have disputes about the number of pages translated, was it that, in terms of article 12 of the Code of Civil Procedure, had the burden to prove that there were not so many pages as claimed the plaintiff and the courts agreed, but that it was a smaller number a smaller number...*" (Y.Pjeternikaj, I.Haxhiu, T.Punmira, 2011: 24).

Despite the civil procedural law was enforced by the administrative sections of the civil courts till 2012, when it was adopted the Law on Administrative Courts in Albania, in some sort of issues, such as disputes with the object of discrimination in labor relations, the Albanian Constitutional Court with its practice has decided to reverse the burden of proof.

In its Decision 33 /2007 the Albanian Constitutional Court made an interesting interpretation in a case with object repeal as unconstitutional for the articles 141, 143, 144, 146 /1 of the Labour Code and argued "the reversal of the burden of proof in issues of discrimination". In its reasoning the Court stated that: "*In conceptual terms 'discrimination based on social status' means that individuals can be differentiated and treated unequally based on social composition , which is unrelated to their merits ... The obligation of the employer to prove the claim (burden of proof) would be discriminatory, as forecasted in article 146 /2 of the Labor Code, if proved that the employee is excluded on the basis of gender, race, religion, ethnicity, language, persuasion, political, economic condition, educational, social or parental affiliation (if the legislator would make sharing a social group from others, unfavorable treating one group from another, but within the category of employees). The aim of the legislator in this case is not associated with any desire or willingness to unfavorably treat certain categories, but enables*

*the employee to the article 146 /2 of the Labor Code to prove – to the court – the discriminatory elements on the basis of which may benefit even compensation for dissolution of the contract without reasonable cause”.*

This Decision of the Albanian Constitutional Court served later as a basis for the primary courts to reverse the burden of proof in cases of discrimination related to labour relations and in other cases of discrimination object. However, with the enforcement of the law on administrative courts the question related to the burden of proof was further solved in the dispositions regarding the principles of administrative adjudication.

Differently from the civil process in court, in the administrative adjudication under the principle provided for in article 3, 3<sup>rd</sup> paragraph of the Law on Administrative Courts, for the activity of public administration, the burden of proof belongs to the latter. This burden is widened in proving the facts on which is based the activity conducted by its organs, and in proving the law that has served as the legal basis for the administrative act issued under its activity.

Concerning the facts claimed by the party of private law and that are not related with the administrative action / activity, it is this party of the administrative process the (party of private law) that has the obligation to bring the proofs on which bases its requests (E. Dobjani, E. Toska, E. Puto, E. Dobjani, 2013: 74). However, the reversed burden of proof in the administrative conflict in court belongs to the public authority to the extent that it creates the reasonable doubt for the judge.

## **Conclusion**

- The “burden of proof” classic rule in the administrative procedure is similar to that in the civil procedure process in court: the party that claims a right has in the mean time the obligation to prove, in accordance with the law, the facts on which it bases the proper claims.
- In the administrative adjudication under the principle provided for in article 3, 3<sup>rd</sup> paragraph of the Law on Administrative Courts, for the activity of public administration, the burden of proof belongs to the latter.

## References:

- A. Sokoli, 2005, E drejta procedurale administrative, (Eng: *Administrative procedure law*), Prishtine.
- B. Pollozhani, E. Dobjani, E. Stavileci, L. Saleh, 2010, *Administrative law – comaprative aspects*, Shkup.
- E. Casetta, 2012, *Manuale di diritto amministrativo*, 14<sup>sima</sup> Edizione completamente riveduta, aggiornata e corredata di schemi grafici sul processo, Giuffrè Editore, Milano.
- E. Dobjani, E.Toska, E.Puto, E.Dobjani, 2013, *E drejta administrative – kontrolli mbi administratën publike*, (Eng: *Administrative law – the control on public administration*), SHB EMAL, Tirane.
- Instituti i Studimeve Publike dhe Ligjore, 2004, *Komentar – Kodi i Procedurave Administrative* (Eng: *Commentary – Code of Administrative Procedure*), Tirane.
- Y.Pjetermikaj, I.Haxhiu, T.Punmira, 2011, *Jurisprudenca e Gjykates se Larte dhe e Gjykates Kushtetuese mbi Kodin e Procedures Civile*, (Eng: *The jurisprudence of the Supreme Court and the Constitutional Court on the Code of Civil Procedure*) SHB Fan Noli, Tiranë.
- The Albanian Constitution (1998, revised).
- The (Albanian) Code of Administrative Procedure.
- The (Albanian) Code of Civil Procedure.
- The (Albanian) law no.49 / 2012 “On the organization and functioning of administrative courts and the adjudication of administrative disputes”.