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Comparative Aspects of Administrative Contracts and Civil-Private Contracts

Abstract

The purpose of this article is to deal with the comparative aspects between administrative contracts and civil-private contracts, analyzing the differences and similarities between them. This analysis in the comparative aspects of these two types of contracts will serve in relation to the definitions and characteristics, the entities that bind these contracts, the legal status of the contracting parties, the legal infrastructure by which these two types of contracts are regulated, the dispute resolution procedure between the contracting parties (in case of any eventual dispute), the way of changing or canceling them, etc. In addition to the differences between administrative contracts and civil-private ones, during the treatment of this paper, the differences between administrative contracts and other forms of administrative activity and the differences between civil-private contracts and contracts of other branches will be elaborated.

KEYWORDS: administrative contract, civil-private contracts, comparative aspects

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1 Introduction

Administrative contracts and civil-private contracts are of particular importance in legal doctrine. In the legal systems of various modern democratic states, administrative contracts are important, because they ensure a balance between the general public interest and the activity that takes place in the private sector. Administrative contracts are a legal basis, which regulate the relations between public – state bodies and private entities, increasing accountability and transparency in the public administration, during the implementation of public projects, with the aim of realizing the general public interest.Although the administrative contract is a bilateral legal act, the public or state administration body as the contracting party has higher power or authority in relation to the other legal entity as the contracting party, which means that the equality of the contracting parties does not exist, which is a principle of civil law and a general condition for concluding civil-private contracts.

Whereas, a civil-private contract is a mutual agreement, which is concluded between two or more natural or legal persons, with the aim of creating, changing or extinguishing a certain legal relationship, depending on what issue the connection is required for that contract.

In general, in order to enter into a civil-private contract, several conditions must be met, such as: the subjects of the law must be able to enter into a contract (ability to act); the object of the contract must be permissible, it means that the legal order allows the conclusion of the contract; contracts of this particular form; the contract resolves the relations allowed on moral and ethical grounds, it means that they should not be contracts contrary to the norms of morality because the same can be declared invalid – null. Regarding the characteristic of capacity to act, the parties must be able to conclude a contract, in order to have knowledge about the rights and obligations defined in the contract. Each object of the contract must be permissible based on the legislation in force, in the case of concluding a contract with an impermissible object, then a contract without legal effects will be concluded. The contract must also have its own form defined by law, in order for that contract to create legal consequences. Also, the contract must be concluded on a moral and ethical basis, otherwise most of the legislations of the contemporary states determine that if a contract is concluded contrary to the norms of morality, that contract is null and never produces legal effects.

Therefore, we, the authors, will try to provide a quality paper by elaborating in detail the differences between Administrative Contracts and Civil-Private Contracts, in order for readers to have basic knowledge about the distinguishing characteristics of these two types of contracts and their importance which they have in legal relations.

2 Comparative aspects on administrative contracts and civil – private contracts

An administrative contract is a mutual agreement between two or more parties or legal subjects, where at least one contracting party is a public body whose purpose is to create, change or end a concrete relationship of administrative law. As a contracting party, the public body has the right to enter into an administrative contract to realize any general public or state interest when such a thing is provided for in a tax manner by law, as well as on the condition that the public body, by concluding the administrative contract, does not violates the legal interests of third parties. So the basic conditions for concluding an administrative contract are at least one contracting party must be a public or state body, not excluding the possibility that two or more contracting parties may be public bodies. The purpose of concluding the administrative contract must be to realize the general social interest, respecting the provisions of the laws that belong to the field of administrative law.[1]

Despite the fact that there is a big difference between the concept of administrative contracts and civil contracts, they also have points in common[2]. The public body, as a contracting party in an administrative contract, is considered the main distinguishing feature from other types of contracts and as such these contracts are defined as agreements where one of the contracting parties is a public body. Considering these characteristics of administrative contracts, it should be noted that these contracts are

1 Ahmet Imami, Mirlinda Batalli, "The Role of Administrative Contracts in the Field of Public Administration" *Access to Justice in Eastern Europe*, No. 3 (2024): 393-409.

2 Marcel Waline, "Administrative Contracts" *AÜHFM*, C. 1 (1944): p. 566.

regulated by the provisions of public law, and on the other hand, disputes arising from these contracts are reviewed by administrative courts.

From this it follows that these contracts, subject to the norms of administrative law, judicial control is a framework of administrative jurisdiction and as such they are considered as one of the most problematic types of contracts in the field of administrative law.[3] But it is important to say that it is difficult to distinguish between civil and administrative contracts, and moreover, the distinguishing criteria are insufficient to distinguish them.[4]

Whenever an administrative body enters into a contract through which it alone manages its property, or through which it creates, changes or terminates a civil legal relationship, it is considered to be bound by a civil contract. In these situations, the contracting parties are equal and the administrative body lacks the authority it has as a state body. So, we have coordination of the will of the contracting parties, which is a principle of civil contract law.

The nature of administrative contracts, in principle, is determined by law, but it is not specified whether it is an administrative contract or not. Therefore, through the two criteria, it could be determined that a contract is either civil or administrative.[5] The first or organic criterion is related to the contracting party. If one of the contracting parties is a public body, then this contract can be an administrative contract. While the second or material criterion has to do with the content of the contract, or the object of the contract. In some cases, if the object of the contract is general public interest, then the nature of the contract can also be determined.[6] These criteria are considered basic in order to distinguish between civil and administrative contracts. Also important is the fact that contracts are concluded between the administrative body and another contracting party, but the material criterion fails, or the purpose of the contract is not the realization of a national interest, these contracts are governed by the

3 Ayhan M. Tekinsoy, "Problems of administrative contract criteria" No. 2 *AÜHFD*, (2006): 183.

4 Vedat Buz, *Creation and validity of public procurement contracts* (Ankara: 2007), 51.

5 Kemal Gözler, *Administrative law*, C. II (Bursa: Ekin Kitabevi, 2003), 18; Łukasz Dubiński, "Kontrakt Socjalny Jako Postać Umowy Administracyjnej", *Prawo i Więź* no. 6 (2024): 1077 – 1104.

6 Kemal Gözler, *Administrative law*, C. II, 24.

norms of civil law and disputes are resolved by the civil division courts.[7] Thus, for the protection of the rights of the contracting parties, the law explicitly provides that in disputes concerning the verification of the existence or non-existence of the contract, the fulfillment or termination of the contract, as well as in disputes for damages caused by non-fulfillment of the contract, in addition to the court with general territorial jurisdiction, the territorial jurisdiction also includes the court of the place where, according to the agreement of the contracting parties, the defendant is obligated to fulfill the contract.[8] Protection of the rights of the contracting parties is primarily achieved through the filing of lawsuits, and depending on the goals the plaintiff aims to pursue and what they seek from the court, different types of lawsuits can be distinguished. These can mainly be: a condemnatory lawsuits, an lawsuits for recognition, or an awsuits for modification.[9] According to reports from the Institute for Justice in Kosovo, the Civil Division is one of the most overloaded divisions with civil cases in the courts, primarily dealing with contractual disputes, and during the year 2022 alone, 40,826 new civil cases were received.[10]

However, the resolution of disputes between the contracting parties arising from the administrative contract is competent for the specialized courts for administrative matters, or the regular courts with specialized departments, as is the case in the legal system of the Republic of Kosovo. But since in an administrative contract one of the contracting parties is a public body and through this contract public objectives are aimed to be achieved, the public body has the right to unilaterally terminate an administrative contract only if it is necessary to avoid or eliminate significant harm to the public interest. In this case, the non-public party has the right to compensation for the damages suffered. Meanwhile, the non-public party has the right to file a complaint, which will be reviewed by the Administrative Court.[11] The protection of contractual rights, where on one side we have public authorities, can also be done by the European

7 Sokol Sadushi, *Administrative Law 2* (Tiranë: Grand Prind Publishing House, 2008), 348.

8 Article 53, Law no. 03/L006 on contested procedure, Assembly of the Republic of Kosova.

9 Faik Brestovci, Iset Morina, Rrustem Qehaja, Brestovci Faik, Iset Morina, Rrustem Qehaja, *The right of civil procedure* (Prishtine: University of Prishtina, 2025).

10 *Civil Justice* (Prishtine: Institute for Justice in Kosovo, 2023).

11 Article 66, Law nr, 05/L031 General Administrative procedure.

Court of Human Rights. A typical example of how the European Court of Human Rights protects human rights and the protection of the rights of contracting parties can be seen in the case Zahirović vs. Croatia (2011), Kurban vs. Turkey (2010).[12] Through these cases and many others, it can be demonstrated that the protection of the rights of contracting parties can also be achieved at the international level, ensuring that administrative decisions are made based on legal acts.

In administrative or public contracts, unlike private contracts, there is a general public interest and the contracting parties do not enjoy equal rights and obligations, as they enjoy in private contracts, but the administration body always has unilateral advantages in relation to the other contracting party, such as specific subject (natural or legal person). It means, that with the conclusion of administrative or public contracts, the administration body has an authority in relation to the other contracting party on the basis of which the right is recognized at any moment to unilaterally terminate the contract.

The administrative or public contract is subject to public law and is always related in cases where there is the goal of realizing the general public or state interest. Both administrative and civil-private contracts, for their regulation the contracting parties are obliged to respect the general legal rules, but the difference between them exists in the object of the contract, which means that with the conclusion of the administrative contract legal relations in public law are created, changed or extinguished, while with the conclusion of a private contract, legal relations in private law are created, changed or extinguished[13]. So, even though the general rules apply to the conclusion of two types of contracts, there is a difference in the object and purpose of the contract as well as in the nature of the legal relationship.

Administration contracts and administrative contracts differ between them, since the administration bodies can conclude private contracts for the administration of their private assets, they can also conclude separate contracts for some public services. Therefore, even though all these contracts are administrative contracts, they should not be considered all

12 Judgment of Europe Court of Human Rights, case nr. 5859/11,2013, case, nr.75414/10, 2021. https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Zahirovi%C4%87%22],%22kpthesaurus%22:[%22445%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-118738%22]}.

13 Ibidem.

administrative contracts. The lawyer Sıddık Samo Onar has expressed this situation with these sentences as follows: "neither the contract that binds the administration, nor the object of the contract that is a public service, nor the forms of the contract, are not enough for these contracts to be considered administrative contracts." Administrative contracts are based on the legal power of administrative law, they also contain the elements and characteristics of this power and therefore constitute one of the administrative procedures, but it is not always easy to find the criteria by which administrative contracts are distinguished from civil ones – private.[14] One of the important criteria that helps us distinguish administrative contracts from civil-private ones, is the object of the contract. Administrative contracts have as their object public services, various concessions, public procurements, various state projects, which aim to realize the general state interest. Whereas, civil contracts are about ownership, marital relations, employment, trade, etc.[15]

An example of an administrative contract between private persons can be in cases where the inhabitants of a village enter into a contract with a private company for the construction of a public school, which was demolished long ago. In this situation, all contracting parties are private, but the construction and operation of the public school is in the general interest of the state. In principle, whenever a contract is concluded and at least one of the contracting parties is a state body, it is considered an administrative contract. However, it does not mean that this should be understood in an absolute way, since there are various exceptions that we talked about above. The administrative contract is concluded based on the provisions that regulate administrative law relations, unlike the private contract, which is concluded based on the laws that belong to the field of civil-private law. However, the similarity between them exists in cases where disputes arise between the contracting parties in an administrative contract, then the laws from the field of civil law come into play. For example: When situations arise where the damage caused to one of the contracting parties must be compensated. The administrative contract

14 Sıddık Sami Onar, *General Principles of Administrative Law*, C. III (İstanbul: Akgün Matbaası, 1967), 1594–1595.

15 According to Article 1 of the Code of Administrative Procedures of the Republic of Albania, where it is stated that: the general principles of this code can by law be made mandatory even for private entities, an administrative or public contract can also be concluded between private persons, when such a thing is fiscally foreseen by law.

is imposed in administrative law, with its distinguishing characteristics which are related to the limited implementation of the autonomy of the will of one contracting party (private party) and to the variety of sources of administrative contracts. Both administrative contracts and civil contracts create legal effects and consequences, as well as realize agreements between two or more contracting parties who have different wills. However, in administrative contracts, there is the application of the principle of autonomy of will in full only by the public authority (the state), while on the other side (private party) contracting, the autonomy of will is very limited, which unlike the public body is never allowed to unilaterally withdraw, cancel, change or modify the administrative contract.

In administrative contracts, the full application of the principle of private autonomy is not possible. Namely, the contracting parties are not completely independent and equal in the contractual relationship. The private law party in this relationship is the weaker subject because the public law entity, due to the public interest as the primary goal of the administrative contract, determines the conditions. However, private autonomy as a principle is present through the free will of the private law party to conclude a contract with the public authority, even though the contracting parties in this contractual relationship are not entirely equal in some aspects, as the private law party voluntarily accepts such a relationship.[16]

In the case of concluding an administrative contract, based on the object with which the activity of a public service is specified, the way in which the public interest is realized, according to the type of contracting parties, as well as based on the participants who execute the contract, may we distinguish the administrative contract from private – civil contracts,[17] since civil contracts have the purpose of creating, changing or extinguishing legal relations in the field of civil-private law, with different purposes, except for the realization of the general public interest, which is related to the purpose of concluding the administrative contract. The administrative contract is a legal act of public management, while the private-civil contract is a legal act of private management. Public management is done by public bodies providing public services, while private management is done by private entities to realize their mutual interests. To distinguish

16 Zoran Filipović, "General principles of contract law and administrative contracts" *STED Journal*, No. 1 (2021): 174-189.

17 Sokol Sadushi, *Procedural Administrative Law* (Tiranë: Toena Publishing, 2017), 353.

an administrative contract from a private or civil contract, the manner of the contracting party's participation must also be considered, as this determines the nature of the contract. This means that permanent or continuous participation of the contracting parties is required to execute the specified service. Permanent participation means that one of the contracting parties is dependent or subservient to the other party.[18] The permanent participation is usually of the public body, which has the high authority to supervise the activity of the private contracting party to realize the public service. The permanent participation of the public body is one of the elements that distinguishes the administrative contract from civil-private contracts. Whereas, if the participation of the contracting parties is reciprocally equal and there is no dependence on one contracting party, then we are dealing with civil-private contracts. So, as mentioned above, when conflicts are presented in administrative contracts by the contracting parties, the provisions of administrative law are first applied, which fall into a separate field, unlike the provisions of civil law. However, in some cases where it is not possible to resolve the conflict with the provisions of administrative law, then there is no obstacle for the conflict of the contracting parties to be resolved with the provisions of civil law.[19]

The other difference between administrative contracts and private ones also exists in the creation of their legal effects, which means that if the administrative contract is declared invalid, as we pointed out above, its invalidity is like the absolute invalidity of an administrative act and in this case, administrative contracts, since their conclusion, never produce legal effects, while in civil contracts there are cases when their cancellation can be requested and declared invalid, but it depends on what invalidity is involved. If we have an absolutely invalid private contract, then like an administrative contract, it never produces legal effects from its conclusion, but if we have a relatively invalid contract, then unlike an administrative contract, that contract can be validated over time and create legal effects in the future, even though at the time of its connection it was invalid.

In private-civil contracts, the parties who enjoy rights to determine the content of the contract within the legal framework, are not the same rights as in the case of concluding administrative contracts. As mentioned above, administrative contracts are a matter of administrative law and

18 Ibidem, 354.

19 İsmet Giritli, Bilgen Pertev, Akgüner Tayfun, *Administrative law* (İstanbul: Der Yayınları, 2001), 829-830.

the administrative authority in administrative contracts according to the status is not the same as the other contracting party. The public administration does not negotiate and does not have contractual freedom, as the parties have in the case of concluding private-civil contracts. If the public body would not have more rights in these contracts by severing or breaking the contract at any moment, then there would be no need for administrative contracts at all, since private-civil contracts exist for the equality between the contracting parties.[20] The great differences regarding the freedoms of the contracting parties in administrative contracts in relation to civil-private contracts do not diminish the importance of administrative contracts, since they are very important acts used by the public administration for the provision of public services. The regime of administrative contracts differs from civil-private contracts.

Administrative or public contracts and private ones also differ in terms of the procedure for concluding them, since the conclusion of administrative contracts requires a more complicated and special procedure, such as: the announcement of a tender by a public body for any issue certain, the recruitment of applicants, the announcement of the winner of the tender, and many other conditions. Whereas, for private contracts, an easier procedure is required because the purpose of concluding the contract is not the general public or state interest, but the private interest between the contracting parties. Of course, even with the conclusion of private contracts, the contracting parties are obliged to adhere to the general legal rules, but not in a complicated procedure, as is the case with the conclusion of administrative contracts.[21]

Therefore, in the end, we can say that administrative contracts belong to public law, while civil contracts belong to private law, with the exception of some cases which we elaborated above. Based on the content of the contract, in the conclusion of private contracts the contracting parties are freer than in the case of the conclusion of administrative contracts. The limitation of the contracting parties in the case of concluding an administrative contract

20 Sadushi, *Procedural Administrative Law*, 362.

21 According to the lawyer Singh, if with the conclusion of administrative contracts, the contracting parties have the same freedom as the parties have with the conclusion of private-civil contracts, the commercialization of public activities may spontaneously result. This may result in the misuse of public interests by the contracting parties, in order to realize their private interests, and for this reason it is important to preserve the special nature of administrative contracts, where the public body has full authority in relation to the private party.

is related to the fact that there is a risk of misuse by administrative bodies, if the parties have freedom as in the case of concluding private contracts.[22]

The unilateral dissolution, change, modification or unilateral withdrawal of the public body as a contracting party ensures stability in the exercise of administrative activity and the provision of public services through administrative contracts. Taking into account that the main instrument of administrative activity is the administrative act and the contract is the main institution by which the subjects of law regulate their private relations, then the use of the administrative contract by public administration bodies can give the idea that public administration related to contracts administrative, agrees to be subject to the legal regime of private law, outside of any influence from public law. The administrative contract, which is used by public administration bodies, can be interpreted as a manifestation of its will to submit to the rules of private law. This is one of the main reasons why most European and Anglo-Saxon countries consider administrative contracts concluded by public administration bodies the same as private law contracts, as well as the competence to resolve conflicts arising from administrative contracts. regular courts that judge civil cases.[23] The treatment of administrative contracts differs from state to state, depending on how administrative contracts are regulated by their positive laws. As we mentioned above, that in some countries the competent courts for resolving administrative contracting parties' disputes are the regular courts, while in some other countries the competent courts may be the specialized courts, i.e. the administrative courts.

When there are one or more clauses in a contract that, by their content, indicate the intention of the contracting parties to subject themselves to the rules of public law, that contract is considered an administrative contract. While in private contracts these clauses would be considered either unusual or illegal, to be freely provided by private law persons and as a result, the existence of these clauses is considered to manifest the will of the contracting parties to submit to the legal regime of public law and in this way the contract related to its clauses is defined as an administrative contract.[24] The very existence of such clauses is an important factor for qualifying a contract as an administrative contract. Based on these clauses,

22 Aurela Anastasi, Eralda Çani, *Basic knowledge of Constitutional and Administrative law* (Tiranë: Adel Publishing House, 2011), 253.

23 Erajd Dobjani, *Administrative Contracts* (Tiranë: Emal, 2017), 29-30.

24 Philippe Yolka, *Droit de contracts administratif* (Paris: LGDJ, 2013), 56.

the contracting parties have the right to express their will to regulate their relations with the norms of public law based on which they realize the interests of the public administration.

Also, there are contracts when they are concluded between two or more legal entities of public law, but in case the substantial criterion is missing, i.e. the absence of legal relations in the field of public law, then there cannot be an administrative contract concluded between public administration bodies.[25] So, if the said criterion is missing, then that contract should be considered as a private law contract. In these cases, even though there is an organic criterion, that at least one party must be a public administration body, and this criterion is met in a double manner, the contract concluded is not considered an administrative contract, but the same applies to contracts that are part of the regime legal of civil – private law.[26] In order to consider that a contract is administrative, in addition to the organic criterion, the contract must be concluded in legal relations in the field of public law, fulfill specific rights and obligations, realize the general state interest, as well as fulfill and other conditions which are determined by the laws of public law.

While in the case of concluding contracts between persons under private law, in principle such contracts are considered as part of private law, since the body criterion that at least one of the contracting parties must be a public administration body is not fulfilled. Likewise, the Codes of Administrative Procedures of the Republic of Albania of 1999 and 2015,[27] taxatively define that for a contract to be qualified as an administrative contract, at least one party must be a public body and according to this notion, in case a contract is concluded between two persons of private law, then that contract became part of private law. However, a deep analysis of the jurisprudence of the Republic of Albania suggests that this principle should not be considered in an absolute manner since there are certain circumstances when contracts are concluded between subjects of private law, but who exercise and fulfill administrative functions- public and these

25 Frank Moderne, "Les conventions entre personnes publiques" *RFDA*, May-June (1984): p. 1.

26 Francois Colly, "Un contrat conclu centre personnes publiques mais ne faisant naitre que des raports de droit prive releve de la competence du juge judiciare" *AJDA* (1990): p. 614.

27 The Code of Administrative Procedures of the Republic of Albania, dated May 12, 1999 and code of Administrative Procedures of the Republic of Albania, dated May 22, 2015.

contracts have an administrative character and in a word, can be considered as administrative contracts.[28] In cases where the private person exercising administrative-public functions is a contracting party, then, this is an exception that is necessarily made to the criterion of the body of the administrative contract. The person who exercises administrative-public functions is considered that person when the public body has delegated certain powers to him, in order to perform administrative activity in the field of public law.[29] In this case, based on the jurisprudence of Albania, the criterion of the body of the administrative contract has exceptions, since even though none of the contracting parties are bodies of the public administration, but their activity is related to public law, then, freely we can say that we are dealing with an administrative contract.

The person who has been delegated the powers to exercise public administration functions, when concluding the contract does not sign in his name and private account, but signs in the name and on the account of the public body that has delegated the powers and in this case, we consider that the contract concluded by the entity in question should be considered as a typical administrative contract.

The main comparisons between administrative contracts and civil-private contracts concern the definition, purpose, contracting parties, legal basis, the legal status of the contracting parties, the protection of public or private interest, dispute resolution between the contracting parties, termination or modification of the contract, legal control, effects of breaching the contract terms, etc.

The comparison of these two types of contracts shows that they have different structures and objectives, differing purposes of interest realization, which may be public or private; unequal positions between the contracting parties; different legal bases and different ways of resolving disputes between the contracting parties, etc.

There are also distinctions between administrative contracts and civil-private contracts regarding the legal foundations that regulate these types of contracts. Administrative contracts are governed by norms belonging to the field of public law, specifically by laws and bylaws that regulate the organization and functioning between public bodies, and between public bodies and private entities. The regulation of administrative contracts is

28 Dobjani, *Administrative Contracts*, 206-207.

29 Yves Brard, "Le mandat comme fondement des contracts administratifs entre persones privees" *JCP*, (1981): 3032.

also based on public law principles, such as: the realization of the public interest; the superiority of the public authority in relation to the other contracting party; specific norms related to administrative law; as well as the resolution of disputes between contracting parties by specialized courts or departments.

In contrast, civil-private contracts are regulated by norms belonging to private law, specifically by different civil codes or laws that regulate contractual relationships between private entities. The purpose of private law legislation is to ensure that the parties are equal and protected according to the applicable legislation. Civil-private contracts are also based on fundamental principles, such as: the freedom to express will regarding the conclusion and terms of the contract; the equality of contracting parties, where neither party has unilateral superiority over the other; general norms regulating the fulfillment of contractual obligations; contract resolution, compensations, ways of terminating and modifying the contract (based on the agreement of the contracting parties); as well as the resolution of disputes between contracting parties by regular courts that handle civil matters.

This substantial distinction in legal norms forms the basis for the proper functioning and implementation of each type of contract, especially administrative and civil-private contracts. It should also be noted that in some situations civil contracts are forbidden to be applied, as is the case with inheritance, where the heir cannot make a contract or any agreement for an inheritance that has not yet been opened.[30]

To gain a deeper insight into perceptions of the differences between administrative and civil contracts, the authors conducted interviews with about 80 participants, 20 of whom are professors, 30 students, 20 lawyers, and others. When asked how much information they have about administrative contracts, only 30 of them responded positively, while the others stated that they only have information about contracts in general. When asked what the difference is between administrative and civil contracts, 17 of them answered that the difference lies in the contracting parties, 10 of them answered that the difference lies in the object of the contract, 7 of them answered that the difference lies in both the contracting parties and the object of the contract, while the rest did not give a specific

30 Detrina Alishani Sopi, "Renunciation of Inheritance by Kosovar Women: Desire or Injustice? A Case Law Perspective" *Access to Justice in Eastern Europe*, No. 3 (2024): 325-44.

answer. When asked how important administrative contracts are in the realization of the public interest, 53 of the participants stated that administrative contracts are very important for the realization of the public interest, 23 of them answered that they are not very important. While when asked whether there is a limitation in the conclusion of an administrative contract as opposed to the conclusion of a positive contract, 47 of them stated Yes, while 33 of them stated No. When asked how the process of concluding administrative contracts can be improved in terms of strengthening transparency, 59 of them stated that procurement procedures should be improved, 10 of them stated that this is achieved through internal and external audits, while 11 of them stated that through the improvement of legal policies. While on the question of whether it is necessary to strengthen the justice system to provide judicial protection for the protection of contracting parties in civil and administrative contracts, 35 of them stated that it is very necessary to strengthen the justice system, 15 of them stated that it is necessary, 10 of them stated that the protection of the rights of contracting parties is at a sufficient level, while the others have no information on this issue.[31]

Legal theorists, when comparing administrative and civil law, particularly emphasize the difference in their "subject of study" when it comes to scientific discipline, as well as in the method of regulation when it comes to positive law provisions. They highlight that these are entirely different branches of law, but that a certain connection can nevertheless be established between them.[32] According to German legal theory, which takes a somewhat different approach to administrative contracting, an administrative contract always creates, modifies, or terminates a legal relationship "in the realm of public law," while other contracts have the same effects but in the sphere of private law. Therefore, if the legal relationship that the contract creates, modifies, or terminates is within the realm of public law, the contract, by its legal nature, will be an administrative contract.[33] This is, for example, the case when we talk about a concession contract as a legal relationship established between the state (the grantor) and a legal

31 Interview conducted by the authors of the manuscript, 2025.

32 Davitkovski Borče, Elena Davitkovska, Dragan Gocevski, "The Relationship between Administrative (Public) Law and Civil (Private) Law," [in:] *Harmonisation of Civil Law in the Region* (Sarajevo: Faculty of Law, 2013), p. 169.

33 Damir Aviani, "Specificities of Administrative Contracts and Their Judicial Control in Croatian Law" *Collection of Papers. Faculty of Law in Split*, No. 2 (2013): 351-370.

or natural person (the concessionaire), in which the state grants the legal or natural person the right to exploit a natural resource or perform a public service.[34] French authors cite one of the specific features of administrative contracts as being that they are contracts between unequal parties, because the public authority exercises a stronger legal will and, in the execution of the contract, holds certain public powers.[35]

The international element of administrative contracts is significant not only in terms of which legislation governs them but also in determining the competent authority for resolving disputes between the contracting parties in the event of a potential conflict. For any disagreement arising from international administrative contracts, the competent body for dispute resolution is international arbitration, which conducts its proceedings based on international norms.

Within European legal systems, despite differences in their respective legal concepts, there are also common features and shared interests regarding administrative contracts. In principle, legislation must always seek to maintain a proper balance between the public interest and the private interest, particularly in situations where the application of private law might undermine the general public interest.[36]

In the absence of specific legislation prioritizing the public interest, discretion must be afforded to judges, who, when adjudicating such disputes, should give precedence to the public interest while being mindful of the need to maintain a balance so as not to infringe upon the rights and freedoms of the other contracting party.

It is essential to establish legal systems with appropriate legislation to ensure legal certainty for administrative contracts, with the aim of protecting the public interest and guaranteeing the realization of the legal rights and interests of the parties involved in the contract.

The French legal system has significantly contributed to the regulation of administrative contracts and the identification of their distinctive characteristics, which differentiate them from civil-private contracts. According to French legal doctrine, which is based on the laws of the French state and further consolidated through the resolutions of the Council of State, two

34 Marko Šikić, Frane Staničić, "The Legal Nature of the Concession Contract" *Collection of Papers, Faculty of Law in Split*, (2011): 419-441.

35 Solene Rowan, "The new french law of contract" *International and Comparative Law Quarterly*, No. 4 (2017): 805-831.

36 Márta Várhomoki-Molnár, *Public Administration Contracts and Concessions in Europe* (Budapest, 2020), 5.

conditions must be met for an agreement to be classified as an administrative contract: the conditions set out in the tender specifications must be fulfilled, and one of the contracting parties must fall within the category of public authorities.[37]

According to the first condition, public authorities are obligated to announce a public tender, conduct the tendering procedures, and subsequently select the private contracting party for the conclusion of the administrative contract. The second condition relates to the organic criterion, which is recognized by nearly all contemporary legal systems that acknowledge the institution of administrative contracts.

In the French legal system, if these two conditions are met, the concluded agreement is treated as an administrative contract, and specific provisions of public law are applied. France, as the cradle of administrative law, also recognizes the theory of administrative contracts, having established a special legal framework that governs such contracts. Under French law, the rules governing administrative contracts must respect the general public interest, ensuring the proper organization and functioning of public services.

Nevertheless, in the French legal system, for a contract to be considered administrative, it must fulfill the following conditions: One of the parties must be a public authority; the administrative courts must have jurisdiction to review the contract; the contract must relate to a public service or be classified by law as an administrative contract; and the contract must contain a clause or condition of a "significant" nature derived from public law.[38]

In the English legal system, specifically within common law, regardless of the matter being regulated, the law is applied equally to public authorities and private parties in economic relations. This approach has had significant consequences for the development and recognition of administrative law in England. As a result, administrative law was acknowledged much later in England compared to countries like France and Germany.

The characteristics of administrative contracts in England are reflected in the principles developed by the courts and various statutes. However, there is no general legal theory in England regarding how the general public interest is taken into account when administrative contracts are

37 Georges Pequignot, *Théorie générale du contrat administrative* (Montpellier: University of Montpellier, 1945), 169-175.

38 Gérard Cornu, *Vocabulaire juridique. Association Henri Capitant* (Paris: Presses Universitaires de France, 2011).

concluded by the contracting parties. Instead, the protection of the public interest in administrative contracts is ensured through judicial practices established by English courts.

The role of the courts in England is vital in interpreting legal provisions and general principles that govern administrative contracts. Despite the lack of comprehensive legislation specifically designed to protect the public interest, the English legal system has developed consolidated practices within the field of public law.

The German legal system has traditionally been based on a strict distinction between branches of law, namely private law and public law. The primary approach to contracts involving public authorities – specifically administrative contracts – is that public administration bodies are also subject to the rules of private law when they engage in economic relationships. Nevertheless, German legislation also acknowledges certain specific features of administrative contracts related to public authorities and the overarching state interest.

In addition to the application of private law provisions in the formation of economic relationships, German legislation includes specific features of administrative law. The substance of these public law elements depends on the positive law within the German legal system.

Moreover, in the Federal Republic of Germany, the key distinguishing element between administrative and private contracts lies in the object of the contract itself. According to German legal theory, an administrative contract always creates, modifies, or terminates a legal relationship within the field of public law, whereas other contracts do so within the realm of private law.[39]

This distinction is based on the fact that administrative contracts regulate legal relationships that govern the functioning of public administration and the realization of the general public interest. In contrast, civil-private contracts aim to regulate civil legal relations of a proprietary nature. This differentiation enables legislators to draft specific legal norms that govern administrative contracts in detail within the German legal system.

In the following sections, we will discuss administrative contracts in the Republic of France, the Republic of Croatia, and the Republic of North Macedonia, making comparisons with the Republic of Kosovo.

39 Klaus Lange, "The Distinction Between Public Law Contracts and Private Law Contracts" *Neue Zeitschrift für Verwaltungsrecht*, (1983): p. 313.

Administrative contracts are also recognized by the legal system of the Republic of Croatia, through its new Law on General Administrative Procedure. Since 2010, Article 3, paragraph 2 of this law has stipulated that: "The provisions of this law shall apply accordingly to the conclusion of administrative contracts and to any other actions of public law bodies within the field of administrative law, when such actions directly affect the rights, obligations, or legal interests of the parties, unless otherwise provided by law."[40]

Thus, the Law on General Administrative Procedure in Croatia applies to all types of administrative contracts and to actions by state bodies that directly affect the rights, obligations, and legal interests of specific parties. Based on this Croatian legal framework, administrative contracts, actions of state authorities, and other administrative matters are grounded in a clear and stable legal basis, thereby providing legal certainty to the parties involved.

However, it is important to emphasize that the Croatian state has recognized administrative contracts since 1991, although under various designations, such as: Concession contractsPublic procurement contracts, Public-private partnership contracts, Healthcare contracts, through which private healthcare institutions were integrated into the public sector, Education contracts, whereby private colleges were transformed into public educational institutions. These examples illustrate Croatia's longstanding practice of applying administrative contracts, even before their formal classification under the newer administrative law framework.[41]

As part of this scientific research, we deemed it reasonable to conduct scientific-empirical research aimed at addressing the hypotheses set out in relation to administrative contracts and civil-private contracts. This empirical research included a survey questionnaire administered to sixty (60) respondents of varying age, educational background, profession, and other demographics. The completion of this research has made it possible to obtain a realistic overview of the importance and interconnection between administrative contracts and civil-private contracts.

Fourteen respondents (23%) answered that they were university lecturers; eleven (18%) answered that they were judges; seven (12%) answered

40 General Administrative Procedure of Croatia, article 3, paragraph 2, No. 71-05/1-09-2.

41 Aviani, "The Specific Features of Administrative Contracts and Their Courts – Controls in Croatian Law", 352.

that they were prosecutors; thirteen (22%) answered that they were lawyers; and fifteen (25%) answered that they were public administration officials. Given these results, we conclude that respondents to the survey on administrative contracts in the Republic of Kosovo are professionals, since the majority of them are qualified jurists.

The absolute majority, consisting of 48 respondents, or 81% of them, decisively answered that they perceive a connection between administrative contracts and civil-private contracts. Only 2 respondents (4%) answered that there is no connection between these contracts, while 9 respondents (15%) were unaware of the connection between them. As recognized by legal doctrine and the legislation of democratic countries, and based on the majority of the respondents' answers, we consider that administrative contracts have a close connection with most of the other contracts in legal doctrine.

3 Fundamental knowledge of resolving administrative and civil-private contracts

According to the French legal system, administrative contracts are part of public law and are regulated by specific administrative law provisions. Legal protection and the resolution of disputes arising from administrative contracts are handled by specialized courts, specifically administrative courts. In other countries, such as the Republic of Kosovo, Albania, Croatia, and North Macedonia, there is a combination of public and private law for regulating administrative contracts.[42]

The conclusion, implementation, and execution of these contracts can be governed by public law, while compensation for damages caused to the contracting parties is regulated by civil-private law. It is also worth noting that in cases where there is a lack of public law norms to fully regulate an administrative contract, the norms of civil-private law apply.

Legal protection of administrative contracts and the contracting parties in most democratic states is provided by specialized courts, except for some countries (such as Kosovo) where this protection is provided by

42 Bajram Pollozhani, Ermir Dobjani, Esat Stavileci, Lazim Salihu, *Administrative Law – comparative aspects* (Skopje: ASDRENI, 2010), 77.

their regular courts, and other countries (such as the USA) that entrust this authority to special quasi-judicial bodies. Thus, after the conclusion of administrative contracts, in the case of non-fulfillment of the obligations created by the contract, the competent authority for resolving disputes regarding administrative contracts may be: Administrative Courts (France, Croatia, Albania, Germany, Spain, etc.) as specialized courts; regular courts (Kosovo); and special quasi-judicial bodies (USA),[43] depending on the legal system of each country.

In the case of civil-private contracts, certain circumstances may arise where some provisions of the contract have two interpretations regarding obligations. In such cases, the principle *in dubio pro reo* or the principle in favor of the obliged party will apply.[44] However, in administrative contracts, when such circumstances arise, the obligations are always interpreted in favor of the general public interest,[45] which is also the purpose of the administrative contract. This interpretation is made due to the specific characteristics of administrative contracts, which are concluded between public authorities on one side and private entities on the other.

An administrative contract must be interpreted when: there is a mismatch between the will of the parties and the purpose of the contract; when the contract terms are unclear, confusing, or contradictory; and when the contract is incomplete due to the provisions it contains,[46] causing difficulties in interpreting the contract. In such cases, the interpretation must always be in line with achieving the general state interest.

The public authority has full authority to terminate or modify the administrative contract, but only in cases where the termination or modification aims to achieve the general public interest. Any decision by the public authority to terminate or modify the administrative contract can be appealed to the competent court, depending on the legal system in which the contract was concluded.

The legal protection of the contracting parties during the execution of civil-private contracts is provided by regular courts or arbitration (if such

43 Pollozhani, Dobjani, Stavileci, Salihu, "Administrative Law – Comparative Aspects", 77.

44 *Noul Cod civil. Comentariu pe articole*, ed. Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Macovei Ioan (Bucharest: C.H. Beck, 2012), 1333.

45 Gaston Jèze, *Les contrats administratifs de l'Etat, des departements, des communes et des etablissementes publics*. vol. I (Paris: M. Girard, 1927), 16.

46 Catalin Silviu Sararu, "The interpretation of Administrative Contracts" *Juridical Tribune*, No. 1 (2014): p. 152.

a clause is provided in the contract). During the resolution of disputes between the parties in civil contracts, courts rely on civil-private law, based on the equality of the parties and the interpretation of the contract's purpose and terms.

Regarding the termination or modification of civil-private contracts, in cases where the contract terms are not respected, the contracting parties may request a review of the contract. It is important to note that the termination or modification (depending on the presented circumstances) can be done by mutual agreement of the contracting parties or by court intervention.

For administrative contracts concerning legal protection of the contracting parties, a more complex but legally regulated procedure is followed. The public authority always aims to protect the general public interest, having a privileged legal status compared to the other contracting party. In contrast, in civil-private contracts, the contracting parties have greater freedom in negotiating the termination or modification of the contract, and regular courts typically interpret the contract's terms and rely on the general principles of civil-private law for legal protection.

The freedom of the contracting parties in administrative contracts is limited, and a special procedure is required for resolving disputes between them, whereas in civil-private contracts, the parties have more autonomy, and legal protection is provided in a simpler procedure conducted by regular courts.

The formation, implementation, and enforcement of administrative contracts may be regulated by public law, while compensation for damages caused to the contracting parties is governed by civil-private law. It is also worth emphasizing that, in cases where there is a lack of public law provisions to comprehensively regulate an administrative contract, the norms of civil-private law are applied.

Legal protection of administrative contracts and the contracting parties, in most democratic countries, is provided by specialized courts – except in some states (such as Kosovo), where this protection is provided by regular courts, and other countries (such as the United States), where the competence lies with specific quasi-judicial bodies. Therefore, in cases of non-fulfillment of obligations arising from administrative contracts, the competent bodies for resolving related disputes may include: Administrative Courts (e.g., in France, Croatia, Albania, Germany, Spain), as specialized tribunals, Ordinary Courts (e.g., in Kosovo), or Specialized

quasi-judicial bodies (e.g., tin he United States),[47] depending on the structure of the country's legal system.

In civil-private contracts, when contractual provisions present ambiguities regarding obligations, the *in dubio pro reo* principle is applied—in other words, interpretation favors the obligated party.[48] By contrast, in administrative contracts, any such ambiguities are interpreted in favor of the public interest,[49] thereby fulfilling the purpose of the administrative contract itself. This interpretation arises from the unique nature of administrative contracts, which are concluded between public authorities on one side and private entities on the other.

The system for resolving administrative disputes varies depending on the country and its legal framework. The Anglo-Saxon model is primarily applied in English-speaking countries, while the Continental European model is used in most EU member states. Disputes between parties to administrative contracts are resolved through administrative dispute procedures, which also involve an external (judicial) review of all administrative legal acts.

An *administrative dispute* refers to a conflict that arises between a subject of law (natural or legal person) and a state authority. The administrative dispute procedure is a distinct legal process, designed to assess the legality of administrative acts[50] and to ensure protection of administrative contracts and the rights of the contracting parties involved.

Legal scholarship and the practical experiences of various countries, within the context of conducting administrative activity – particularly regarding the formation and implementation of administrative contracts – face a considerable number of challenges that often hinder the proper and effective functioning of such contracts. These challenges include: Lack of a consolidated legal infrastructure; Transparency and accountability; Effective enforcement and implementation of administrative contracts; Compatibility between national and international legislation; Difficulties faced by competent authorities in resolving contractual disputes; Advancements in technology; Inter-institutional cooperation; Enforceability

47 Pollozhani, Dobjani, Stavileci, Salihu, "Administrative Law – Comparative Aspects", 77.

48 *Noul Cod civil. Comentariu pe articole*, 1333.

49 Jèze, *Les contrats administratifs de l'Etat, des départements, des communes et des établissements publics*, 16.

50 Agur Sokoli, *Administrative Procedural Law* (Pristina: University of Prishtina, 2015), 215.

of legislation related to administrative contracts; Bureaucratic procedures; Lack of professional qualifications among public officials; Conflicts of interest, and Freedom of contract.

These issues pose significant concerns regarding the contractual freedom and intent of a party entering into a contract with a public authority.

4 Conclusion

At the end of this scientific work, dealing in detail with the comparative aspects of administrative and civil-private contracts, we consider that these two types of contracts have substantial differences but also connections between them. Civil-private contracts are aimed at fulfilling private needs, with equal legal status of the parties. Whereas administrative contracts aim to realize the general public interest. So, the specifics that distinguish administrative contracts from other contracts are related to: subjects where at least one contracting party must be a public body, the purpose of concluding the contract which is always the realization of the general state interest, the special conditions for their connection, which differ from the conditions for the conclusion of ordinary contracts, the inequality of the contracting parties, etc.

The binding nature of the administrative contract and the private one exists in the case of the conclusion of the administrative contract, where, in addition to the special conditions that belong to the administrative contract taxatively, the general conditions that are expressly determined by the laws of the field of of civil law, for the conclusion of private contracts.

This scientific work also aims to improve legal practice and dispute resolution in administrative and civil law. This paper will also serve as a platform to encourage debate on the role and importance of these two legal doctrines. We hope that professionals dealing with legal issues and anyone interested in understanding the differences and similarities of these two types of contracts will find this paper, titled “Comparative Aspects of Administrative Contracts and Civil-Private Contracts”, useful.

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