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REPORT

"ALTERNATIVES TO LITIGATION BETWWEN ADMINISTRATIVE AUTHORITIES AND CITIZENS: MACEDONIAN EXPERIENCE"

prepared by

Ms Ana PAVLOVSKA-DANEVA
The "Former Yugoslav Republic of Macedonia"

Abstract

The paper refers to the control over the legality of individual administrative acts, which regulate concrete civil rights and duties. It contains the fundamental ideas of this problem area articulated in administrative legal theory.

Focusing on the situation in the Republic of Macedonia, the paper addresses the internal or so-called higher administrative resort supervision over individual administrative decisions prescribed by the General Administrative Procedure Act. In addition, the types of external supervision are presented -- the work of the institution of the Ombudsman in accordance with the Macedonian Law on Public Attorney; and administrative-judicial control over the legality of individual administrative acts (decisions). In the Republic of Macedonia, the Administrative Disputes Act regulates this procedure, yet it requires serious amendments and addenda.

1. Brief Theoretical Presentation of Types of Control over Public Administration

The concept of control refers to conducting a special activity of constantly monitoring the performance of assigned duties and tasks, and comparing the results achieved with the set goal, with the possibility of having a corrective influence in the event of digression.[i]

With regard to the types of control over the administration, in theory, there are a variety of views and opinions. The classification depends on the criteria that the authors take as a basis for distinguishing between the types of control.

There is political control of the administration, which is conducted by political players (for example, parliament, government, political parties, and public opinion) and legal control of the administration, which can be[ii]:

- Administrative control exercised by the administration itself, which can be 1) internal administrative and 2) external administrative;

- Judicial control of the administration, as control of the administration performed by the courts, which can be 1) general judicial control of the legality of administration actions and decisions, carried out by regular courts; 2) judicial control of the legality of administrative acts carried out by (administrative) courts in administrative-judicial procedure (administrative and administrative-accounting disputes). 3) so-called special court protection of constitutionally guaranteed freedoms and rights and 4) protection by the Constitutional court ;

- Special control of the administration, as a type of control conducted by special institutions, such as 1) the public prosecutor's office based on the procedural powers to initiate adequate procedures and 2) the ombudsman, who controls the administration as a protector of civil rights.

Thus, there are three instruments for ensuring legality and protection of civic rights against the actions of the executive. The first instrument is competent, skilled, efficient, and conscientious personnel, who know their jobs well. The second instrument is the system for procedural protection against work errors and illegalities, some of which include the possibility for higher

administrative bodies to remedy the mistakes and illegalities, meaning within the executive itself. Finally, the third instrument is the system of external supervision, which is done by somebody from the outside, someone who is not part of the administrative bodies or part of the executive branch in general.[iii]

The third or external control integrates the following types of control of the executive:

- control by the Parliament, where the government, that is, ministers are concerned, as heads of certain departments; control that leads to political liability;

- judicial control, which can be carried out by regular courts or special administrative courts, or as the third option, by regular courts authorized to rule on administrative disputes;

- control of the administration by the public opinion, which can vary depending on its role in a given society;

- control by the Ombudsman, as a special means for ensuring legality and protection of civic rights.

2. Internal Supervision under the General Administrative Procedure Act

The overall administrative procedure in the Republic of Macedonia is regulated by the General Administrative Procedure Act (GAPA), which represents a complete federal law of the former SFRY[iv]. Thirteen years have gone by since the adoption of the Constitution of the Republic of Macedonia in 1991, which established a new legal and political system of independent Macedonia, and still the Macedonian Parliament has not yet adopted a new GAPA.

The internal supervision procedure denotes control over the legality of decisions made by an administrative body or organization with public authorities, which are enforced by a directly higher body. This procedure is initiated when a dissatisfied complainant files an appeal, or (which is rarely done) ex officio. Apart from the complaint as a standard legal remedy, the GAPA prescribes as many as seven so-called special (extraordinary) legal remedies that, in the event of serious material or formal illegality, can be brought to bear against the decision reached.

The Act's major flaw is the existence of a large number of special (extraordinary) legal remedies, which enable final decision that had gone into effect to be contested, thus allowing endless procedure protraction. This occurrence even obstructs the implementation of the most vital procedural principles in law: res judicata and non bis in idem.

3. The Ombudsman Institution - A Citizen's Rights Defender

The Ombudsman is parliamentary representative authorized to process the citizens' petitions and also to begin a procedure on his own initiative whenever he notice illegal or inappropriate activities of the public administration which are causing violation of human basic rights and freedoms.[v]

Regarding the role of the Ombudsman, the conclusion would be that it is double-folded: on the one hand, it works on solving the complaints of the citizens, and on the other hand, it works towards the improvement of the public administration.

3.1. The Public Attorney as a Macedonian Ombudsman

The 1991 Constitution of the Republic of Macedonia introduced the institution of the Public Attorney, which is parallel to the Scandinavian Ombudsman.[vi] Lamentably, that created only the Constitutional basis for the establishment of the institution, while in 1997 belatedly the Law on the Public Attorney was adopted, which regulates the issues of appointment, organization, competencies and the methods of operation of the Public Attorney.[vii] Thus, after almost six years, the institution of the Public Attorney was finally made operational in the Republic of Macedonia.

In Macedonian legal system, the Public Attorney is projected as a body that operates independently and autonomously, which does not mean a substitute for the regular legal instruments.

The Public Attorney of the Republic of Macedonia, as the other Ombudsmen in the world, is not competent to adopt decision, for instance, similar to the sentences and rulings of the Courts, or to the decisions of the administrative bodies, which are backed by instruments of legal force. Instead, the Ombudsman simply intervenes. His/her interventions take the form of suggestions, opinions, recommendations, proposals, etc. That does not mean that they are less important than the decisions we mentioned above. To the contrary, the reason why such interventions should be even stronger is that they are made by and independent body, which is professional, expert, impartial and objective. Furthermore, there is no appellate procedure foreseen for the interventions of the Ombudsman. Finally, the failure to act on those interventions brings in the pressure of the public opinion and the media as its ultimate and strongest instrument. Namely, the public is informed through the annual report on the activities of the Ombudsman submitted to the Parliament, as well as the special reports, press conferences, bulletins, publications, etc.

4. In General about Judicial Control Over the Administration

The objective of judicial control is to protect the rights of the citizens or the civil servants with regard to the administration[viii]. Therefore, an independent body is formed to regulate administrative conflicts. The modalities for conducting judicial control differ based on whether there is specialized administrative judiciary in a certain country (France, for instance) or control over the administration is entrusted to regular courts (in England, for example). There are opinions that the second solution is more democratic, however, there are others who reckon that the administrative judiciary allows judges who exclusively treat administrative problems to become better specialized.

5. Theories on Administrative-Judicial Control over Specific Administrative Act

Developed democratic countries have recognized the indubitable need for judicial control over administrative acts, as a type of external legal control over the administration.

Speaking from a strictly normative aspect, this type of legal control over the administration runs counter to the widely accepted concept of the division of state powers. However, the administrative dispute, as the fundamental form of judicial control over the administration, comes as a consequence of the numerous essential deficiencies of the internal administrative control and is, simultaneously, a result of the constant aspirations for and concepts for the greater protection of human rights and freedoms. It can be freely said that the administrative

dispute, that is to say, its very advent and development, represents the strongest proof of the victory of life over law.

5.1. Continental-European System

The Continental-European system provides for the formation of special administrative courts for resolving administrative disputes. The cradle of the formation of the special administrative judiciary is France, in which special administrative tribunals exist. The State Council -- Conseil d-Etat -- was established in 1801. In fact, the administrative judiciary was created in the second half of the 19th century, because of liberal-individualistic ideas about protecting the rights of the individuals from the state. The administrative courts, magistrates, or administrative tribunals, as they are called in different countries, have no other function apart from the administrative-judicial and they are organizationally incorporated within the administration, but their work is completely independent from the latter. With legal control over administrative acts being their main and only task, they dedicate themselves entirely to this issue, exerting a genuine influence on the respect for law within the administration.

The most representative countries of this Continental-European system are: France, Germany, Austria, as well as Italy and Belgium, which used to belong to, but abandoned the Anglo-Saxon system. We would also add to this group of countries the countries from our neighborhood, as well as those from the former SFRY regions: the Republic of Bulgaria, Republic of Croatia, Republic of Slovenia, and the Bosnia-Herzegovina Federation.

5.2. Anglo-Saxon System

Under the Anglo-Saxon system, judicial control over the administration and administrative acts is conducted by the courts of general jurisdiction. This system has been accepted, above all, in England, the United States, and other countries in which solely the common law applies. Under this law, the state, its bodies and public institutions, are subjected to the same legal rules as the individuals. For these reasons, these countries have no separate administrative law as a branch of the legal system, which represents an aggregate of legal norms and which regulates the work of the administration. Therefore, the right to rule in administrative disputes is not entrusted to special administrative bodies, but rather to the regular courts of general jurisdiction.

Judicial control over administrative acts in the countries of the Anglo-Saxon system is not conducted as part of a special procedure, as is the case in the countries of the Continental-European system, but rather the same procedure is applied as in civil matters -- common law.

6. Administrative-Judicial Control in the Republic of Macedonia de lege lata

When it comes to the powers to conducting administrative-judicial control, the Macedonian Administrative Disputes Act does not opt for either of the above -- the Continental or Anglo-Saxon model -- creating a combined version of the two systems.

In Macedonian administrative-legal theory, there have been varying opinions on the justifiability of this solution in terms of the efficiency that it offers in attending to the administrative-judicial protection of individual administrative acts. Opinions making a case for maintaining the existing model see it as representing a successful combination of the English and French system, as being rational and economic, while retaining all their advantages (specialization, autonomy, special procedure, authority of the Supreme Court of the Republic of Macedonia, and so forth).

For these reasons, we feel that there is need to amend the Macedonian system of judicial control over the concrete acts of public administration with a view to ensuring its adaptation to solutions accepted in most European-Continental countries.

7 Macedonian Administrative Judiciary de lege ferenda -- utopia or reality?

The realistic situation in terms of judicial protection of human rights against potential violations in the adoption and execution of administrative acts, legal practice, and the statistical data in connection with this issue indicate the indisputable need for reforms in the system of judicial control over legal acts in the Republic of Macedonia.

Above all, the very fact that, in our country, the jurisdiction, means, and procedure for resolving administrative disputes is regulated by a regulation from 1977 speaks of the need to take urgent measures to introduce new legislation that will provide for new solutions to these issues, which would correspond with the provisions of the Constitution of the Republic of Macedonia.

Moreover, there is no denying the fact that the Supreme Court of the Republic of Macedonia is snowed under a huge number of cases of an administrative nature. This, hinders prospects for efficient work, because of which citizens of the Republic are faced with the problem of delays in resolving their administrative cases in exhaustingly slow and expensive administrative-judicial proceedings.

Ultimately, the dynamics of social processes relating to the work of the administration lead to the establishment of new legal institutes in the area of administrative law. That situation, requires narrow specialization, profound expertise, and knowledge of the administrative subject matter (which has been undergoing worldwide expansion over the last few decades), of the people (judges) authorized to resolve disputes in this area.

All this leads to a general conclusion about the inefficiency of the relevant bodies for resolving administrative disputes in the Republic of Macedonia. Thus, we are presenting our position on the existence not of a need -- but rather of a necessity -- to pass a new Administrative Disputes Act that, among other things, would also contain an entirely new legal solution, which is -- establishing a separate Administrative Court of the Republic of Macedonia. In this way, Macedonia will be counting itself among the countries that keep abreast of democratic trends and abandon the system of general judicial control over the administration by forming a special administrative judiciary. It has to be, naturally, adapted to social conditions in our Republic, all with a view to ensuring the more efficient judicial protection of human rights and liberties against the actions and acts of the public administration. This is not in the least an easy task, but the current state of the Republic of Macedonia judiciary unambiguously points to the need to identify new modalities to improve the efficiency of the judicial system.

Ana Pavlovska-Daneva
Assistant Professor
Borce Davitkovski
Professor
Faculty of Law
University of “Sts Ciryl and Methoudius”, Skopje
Republic of Macedonia

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[iii] M. Jovičić, *Ombudsman - čuvar zakonitosti i prava građana* (Ombudsman – guardian of legality and citizens' rights), Beograd, 1969, pp.5-6

[iv] The last settled text of the GAPA is published in 1986, Official Gazette of SFRY, No 47/86

[v] А. Павловска-Данева, *Омбудсман* (Ombudsman), Ми-Ан, Скопје, 2000

[vi] Art.77 of The Macedonian Constitution

[vii] Law on Public Attorney, Official Gazette of the republic of Macedonia, No.7/97

[viii] С. Гелевски, Н. Гризо, Б. Давитковски, *Управно право* (Administrative Law), Скопје, 1993, p.162