

TYPE OF GOVERNANCE JUDICIAL CONTROL OF ACTUAL ADMINISTRATIVE ACTS IN THE REPUBLIC OF MACEDONIA

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ABSTRACT

It is a fact that administrative supervision and control of actual administrative acts cannot ensure sufficient extent of abiding the principle of legality by the administration, and even less guarantee the protection of individual rights and freedoms against irregular procedures of the administrative bodies.

Therefore the solution related to evaluation of legality of administrative acts to be entrusted to the courts as autonomous and independent state authorities is unacceptable.

Jurisdictions of a court (administrative or ordinary) in terms of making decision on legality of a particular state act are however different.

Exactly these jurisdictions of administrative judiciary in the Republic of Macedonia are subject to my study and objective therefore will be to assess whether those jurisdictions correspondent to the function of the court in our society in compliance with its set-up with the legal regulations.

In the Republic of Macedonia the administrative disputes are divided as follows: disputes on legality of administrative acts and disputes on complete jurisdiction¹. The division is made by the different extent of jurisdiction possessed by a court when making decision on the legality of administrative acts and decision adopted thereof.

KEYWORDS: administrative act, administrative control, administrative judiciary, administrative disputes.

In adoption of a new Law on Administrative Disputes² (in 2006) in the Republic of Macedonia, dominated the administrative dispute on the legality³ of administrative acts. Such solution has its logic if it is taken into consideration that the ordinary highest court (Supreme Court of RM) had

¹ The court decides on administrative disputes: on legality of acts and the administrative matter (Article 30 of the Law on Administrative Dispute).

² Official Gazette of Republic of Macedonia No 62 / 2006, 150/2010;

³ Official Gazette of SFRY No7/77, Official Gazette of RM Mo 44/02;

jurisdiction over administrative disputes, which lacks large organizational structure for settling such disputes (namely, for deciding on this type of dispute in first instance only two judicial councils comprising three judges were organized), and judges lacking sufficient specialization, due to that the core of the judicial decision was whether the administrative act was legal or not followed by abrogation of the illegal act and its forwarding to the adopting administrative authority, to adopt a new (legal) act in a new procedure, accordingly upon instructions provided by the court.

The new Law on Administrative Disputes, constituted specialized administrative judiciary⁴, modifying to some extent the jurisdiction of the court in terms of administrative disputes. Consequently, by way of the enumeration clause, the Law increased the number of cases in which administrative judiciary shall act in a dispute of complete jurisdiction. Legality in administrative dispute⁵, however, remained dominant. Such concept entailed the dilemma related to protection to be secured to the parties in the one or the other type of administrative dispute and realization of the court function.

Namely, in compliance with the Law on Administrative Disputes of the Republic of Macedonia, a natural or legal person has the right to initiate an administrative dispute if they consider that an administrative act⁶ violates any of their rights or immediate interests based on law⁷ (Article 3 of the Law on Administrative Disputes).

⁴ Administrative disputes in the Republic of Macedonia are resolved by the Administrative Court as first instance court, Higher Administrative Court as second instance court and the Supreme Court of the Republic of Macedonia deciding on extraordinary legal remedies in case where it is regulated by the Law on Administrative Court.

⁵ Article 1 of the Law on Administrative Dispute provides for that due to ensuring judicial protection of the rights and legal interests of natural and legal persons and for the purpose of ensuring legality, the Court decides in administrative disputes on legality of the acts adopted by the state administrative authorities, the Government, other state authorities, municipalities and the City of Skopje, organizations established by law and other legal and other entities in performing their authorities (holders of public office), when deciding on the rights and obligations in individual administrative matters as well as on the acts of those authorities adopted in misdemeanor procedure.

⁶ Administrative act in accordance with Article 7 of the Law on Administrative Dispute is an act by which state administrative authorities, the Government of the Republic of Macedonia, other state authorities, administrative organizations, municipalities and the City of Skopje, public enterprises, trade companies, funds, institutions, organizations and communities, associations and other organizations and communities, when performing their public competences decide in administrative matters relating to certain right or obligation of a natural or legal person, or other person that may be a party in a certain administrative matter as well as the acts of those authorities adopted in misdemeanor procedure. Administrative matter in the Republic of Macedonia covers property-legal area, cadastre, urbanism, construction, water management, agriculture, economy, traffic and communications, games of chance, education, public procurements, voter list, pensions and other rights to pension and disability insurance, the rights based

An administrative dispute is initiated by filing a complaint⁸ (Article 19 of the Law on Administrative Disputes). The Law on Administrative Disputes provides for filing one type of complaint only, or a complaint on initiating administrative dispute⁹.

on social security, unemployment, health insurance, the rights to health-sanitary supervision and control, supervisory measures of the labor inspectorate, public charges, taxes, contributions, duties, fees, commissions, statutory issues, travel documents, vehicles, weapon, industrial property rights, copyrights, banking, concessions, defense, labor relations, excise taxes, dismissals from office and etc. Pursuant to Article 8 of the Law on Administrative Disputes, an administrative dispute may be administered against final administrative act adopted in second instance (final administrative act, against administrative act in first instance where legal protection has not been anticipated in administrative procedure in second instance, when the competent authority, upon a request, or appeal of a party has not adopted appropriate administrative act, under the terms and conditions provided for in the Law on Administrative Dispute as well as when the provisions of administrative agreements have been violated, in accordance with the provisions of the Law on Administrative Dispute.

⁷ A state authority, subsidiary or other business unit of a trade company, settlement and etc. or a group of persons, although lacking capacity of legal entity, may initiate administrative dispute if they can be bearers of the rights and obligations resolved in the administrative proceedings. When an authority of municipalities and City of Skopje, or organizations decide in administrative matter of authentic or delegated competence in first instance, and a competent authority determined by law has made decision upon an appeal against such act, an administrative dispute against the second instance act may be also initiated by the municipality and City of Skopje, or the organization authority of which has decided in first instance, if they consider that the second instance act violates the right of the local self-government, or the right to governance. Administrative dispute may be initiated by the state ombudsman of the Republic of Macedonia in the case where the Law or public interest has been violated by an administrative act or administrative agreement, or the representing authority under a law. A plaintiff in administrative dispute may also be a trade union if they assess that the right or direct interest determined under law has been violated to its member by the administrative act. When an individual, a member of an association which according to its regulations is obliged to protect certain rights and interests of its members, and an administrative act has violated any of its rights or interests, the association may, in agreement with that member and on its behalf, file proceedings and conduct administrative dispute against such administrative act. The association may, at any stage in the proceeding, under the right of third involved party, to act and make use of any legal remedies if that is not in opposition with the statements and procedures of the party itself.

⁸ It is filed mainly within 30 days as of the date of submission of the administrative act by the party. This term is also valid for the authority competent to file a proceeding, if the administrative act has been submitted. If the act has not been submitted, they may file a proceeding within 60 days as of the date of submission of the administrative act to the party that benefitted thereof (Article 20 of the Law). In the case where the act has not been submitted, a suit may be filed within 30 days as of the date of publishing of the act, or the Decision of the Administrative Court in the Official Gazette of the Republic of Macedonia, while due to failure to meet the obligations provided for in administrative agreements, a proceeding may be filed within 30 days as of the date of establishing the failure.

The essence of the issue below is the difference between the legality in administrative dispute and administrative dispute on complete jurisdiction.

LEGALITY IN ADMINISTRATIVE DISPUTE

Macedonian legal theory fails to adequately focus on the issue related to the legal nature of an administrative dispute. It is a fact that this issue has largely theoretic dimension as well as certain practical consequences which mainly refer to the role and function of the court when making decision on administrative disputes as well as the position of the party therewith.

Therefore my attempt in the Study is to present some attitudes on this plan. To be precise, the name of this administrative dispute itself – legality in administrative dispute opens the dilemma related to the object of protection. What is exactly subject to protection when this type of administrative dispute is in question? The general or public interest, observance of legality or subjective interests of the persons concerned by this acts.

If we take into consideration the subject of the administrative dispute only in the dispute on legality, in which only individual administrative acts are opposed, it appears that the dispute protects mainly individual interests, and if the objective of the administrative dispute is taken into consideration, dilemmas arise on what is the subject to protection of the dispute on legality¹⁰.

It is a fact that abrogation of an illegal act fails to enable to exist actual administrative acts in the legal system of a country, which are not in compliance with the law (material and procedural law), also a manner of protection of the legality in the country, but it is also a fact that when an illegal act is eliminated from the legal system (in this case individual administrative act) the rights and legal interest of a party are also protected.

⁹ French theory and practice attributed to the distinction between administrative dispute of complete jurisdiction and legality in administrative dispute thus to the distinction of two administrative-judicial suits: suit against abuse of office subject to a dispute against illegality of an administrative act and subject to complete jurisdiction subject to a dispute of complete jurisdiction. The suit against exceed of competences is a suit initiated by individuals and mainly due to protection of general interest rather than individual interest. A law is abrogated in the interest of good governance, protection of general interest, proper functioning of public services rather than for protection of subjective interest. A suit of complete jurisdiction is aimed at settlement of a dispute between two parties, the essence of which is resolution of subjective dispute. On the other hand, to initiate a suit against exceed of competences in France, a suit of complete jurisdiction must be previously submitted.

In view of the legal nature of an legality in administrative dispute, the positions of French theoretician may be mainly divided into three. The first group encompasses theoreticians who advocate the position that legality in administrative dispute is a dispute against violation of law, the second group of theoreticians argue that legality in administrative dispute is objective and interim subjective administrative dispute, i.e. the legality in administrative dispute and administrative dispute of complete jurisdiction are increasingly approaching, while according to the third group it is considered that administrative dispute of complete jurisdiction is a subjective dispute.

The possibility for initiating an legality in administrative dispute by state authorities for the purpose of legality protection as well as the possibility for its initiation for the purpose of protection of a law-based interest of natural and legal persons necessitates a conclusion that the nature of the administrative legal dispute is concerned, which is not a real judicial dispute but a type of control of legality made by the court.

The contents of the dispute of legality of administrative act consists of establishing whether the authority or organization having adopted that administrative act has properly applied or not the concrete regulation. Consequently, in this type of dispute, the court only establishes whether in the concrete case (individual administrative act) the law is properly applied or not. The point of the assessment is legality of the individual administrative act, not the protection of rights and interests, which will be protected after all if illegality of the act has been established. Sanction for illegality of an individual administrative act is its abrogation, whereby the court controlling the illegality of the act provides legal instructions to the authority act of which has been abrogated for illegality.

ADMINISTRATIVE DISPUTE OF COMPLETE JURISDICTION

In the Republic of Macedonia the Administrative Court has jurisdiction over dispute of complete jurisdiction. Characteristic of complete jurisdiction dispute in the Republic of Macedonia is the Courts competence to provide evaluation on the legality of an administrative act and resolve the administrative case itself, or decide on the rights, obligations and interests in individual cases, if it has established that the administrative act is illegal. Namely, the Court may determine, establish, modify or abolish a legal situation such as civil cases, or to substitute the administrative act by its own decision. In this type of disputes, the Administrative Court has a wide field of action, i.e. it establishes or founds a legal situation, engages into assessment of the discretion evaluation of the administrative authorities exactly by rules valid for a discretion assessment of ordinary courts it establishes the point of facts in the concrete case. The court decision in this case entirely replaces the abrogated act, whereby the creator of such administrative act is obliged to only enforce the court decision. Administrative dispute of complete jurisdiction is an administrative dispute in which the Court, acting upon a suit, has jurisdiction to resolve legal and factual issues of the suit and amend acts of administrative authorities.

In compliance with the former Law on Administrative Disputes, the Court of complete jurisdiction was entitled to decide on few cases. if it has established that the administrative act is to be abrogated, allowed by the nature of the matter and the data in the proceedings provided sound basis for making decision on its merit; decided on requests related to restitution of cases, or damage indemnification, if the data in the proceedings provide real basis therefore; if the competent authority, after the abrogation of the administrative act adopted in opposition to the legal opinion of the court or in opposition to its notes related to the procedure, the plaintiff filed new action; the authority failed to act or it failed to exercise the valid court decision.

It is a fact that the previous law predicted the suits of complete jurisdiction as exclusion. Suits over legality of particular administrative acts prevailed.

On this plan, the 2006 Law on Administrative Disputes with its amendments brought essential modifications extending the capacities of the Court to decide on complete jurisdiction. As a result, the Administrative Court of the Republic of Macedonia in compliance with the Law on Administrative Disputes, decides on administrative dispute of complete jurisdiction¹¹ over:

- legality of particular acts adopted in the election procedure and over particular acts related to election, appointment and dismissal of public official, if determined by law, as well as over the acts nomination, appointment, and dismissal of senior civil servants, unless otherwise provided for in the Law;
- dispute arising from the implementation and enforcement of the procedures provided for in concession agreements, public procurement agreements and any agreement in which either of the parties is a state authority, organization with public competence, public enterprise, municipalities and the City of Skopje, concluded for public interest or performing public office;
- particular acts adopted by administrative authorities, the Government, other state authorities, municipalities the City of Skopje, organizations established by law, legal and other entities in performing public competences, in cases where other legal protection in second instance is not ensured against such act;
- conflicts of competence among the state and municipal and City of Skopje authorities, between municipalities and City of Skopje and upon disputes related to conflicts of competence between the municipalities and City of Skopje and holders of public office, if provided for in law, and the Constitution and laws fail to anticipate other judicial protection.

When the Court deciding on a dispute of complete jurisdiction has established that the disputed act is to be abrogated, allowed by the nature of the matter, and the data in the procedure provide sound basis therefore. The Court shall mandatory act, provided that:

false application of law is in question (faulty determined legal matter);

administrative agreement disputes are concerned;

acts adopted in misdemeanour procedure are in question by the authorities referred to in Article 1 of the Law on Administrative Disputes;

- the procedure has been cancelled, and related to a case which facts of state are established in administrative-judicial proceedings;

the administrative act was previously abrogated, and the authority failed to act upon the instructions and positions of the Court provided in the judgement;

upon abrogation of the act, the competent authority adopts administrative act in opposition to the legal opinion of the Court, or in opposition to the notes provided by the Court and related to the procedure, and the plaintiff files a new action;

- restitution of forfeit objects as well as compensation to damage inflicted to the plaintiff by enforcement of the disputed act;

- if the competent authority upon abrogation of the administrative act fails to, immediately or within the term and procedure provided for in the Law, adopt a new administrative act,

¹¹ Article 2 of the Law on Administrative Dispute.

and upon the party's request the Court shall made a decision that will replace in complete the act of the competent authority, if allowed by the nature of the matter¹².

Such judgment shall fully replace the act of the competent authority.

Why should a dispute of complete jurisdiction be dominant dispute in the Republic of Macedonia? Since the Macedonian legislation provides for certain guarantees that the Court only may protect the citizens' rights and freedoms violated by concrete administrative acts and in a dispute of complete jurisdiction.

Namely, the Constitution of the Republic of Macedonia¹³ and the Law on Courts¹⁴ define the position of the Court as a state authority or as a judiciary authority function of which is to apply laws. The courts in the Republic of Macedonia within which competence is also administrative jurisdiction in the system of division to legislative, executive and judicial powers have autonomous and independent position (Article 1 of the Law on Courts) and they adjudge in compliance with the Constitution, laws and international agreements ratified in accordance with the Constitution (Article 2(1) of the Law on Courts). The judges, in the application of the right to protect the human rights and freedoms.

Objectives and functions of the judicial authority covers: impartial application of the right insubordinate to the position and capacity of the parties, protection, observance and advancement of human rights and fundamental freedoms, ensuring, equity, equality, non-discrimination at any base and ensuring legal security based on the rule of law (Article 3 of the Law on Courts).

The Administrative Court, Higher Administrative Court and Supreme Court, which have jurisdictions related to the assessment of legality of particular acts adopted by the state administrative authorities or organizations and other authorities with public competences of the Republic of Macedonia, are part of the single judicial authority of the Republic of Macedonia.

¹² Unlike in national legislation, in France an administrative dispute of complete jurisdiction may be also initiated against an action taken by a state authority. Administrative dispute of complete jurisdiction may emerge as additional as well as previous administrative dispute. The terms for initiating administrative dispute of complete jurisdiction are diverse and may extend to 30 days.

¹³ The Constitution of the Republic of Macedonia was adopted and passed in the Assembly of the Republic of Macedonia on 17 November 1991 in Skopje. It was published in the Official Gazette of the Republic of Macedonia No 52 of 22 November 1991.

Integral part of the Constitution are Amendments I and II, published in the Official Gazette of the Republic of Macedonia No 1 of 10 January 1992, Amendment III, published in the Official Gazette of the Republic of Macedonia No 31 of 02.07.1998, Amendments IV-XIII, published in the Official Gazette of the Republic of Macedonia No 91 of 20.11.2001, Amendment XIX published in the Official Gazette of the Republic of Macedonia No 84 of 30.12.2003 as well as Amendments XX-XXX published in the Official Gazette of the Republic of Macedonia No 107 of 09.12.2005.

¹⁴ The Law was published in the Official Gazette of the Republic of Macedonia No 582 of **11.05.2006**.

The Amendments to the Law were published in the Official Gazette of the Republic of Macedonia No **35/2008 and 150/10**.

The Administrative Court was established and performs judicial power throughout the territory of the Republic of Macedonia (Article 25 of the Law on Courts) like the Higher Court (Article 25 of the Law on Court).

The type, jurisdiction, establishment, abolition, organization and composition of the courts as well as the proceedings therein are regulated by law adopted by two third of majority votes of the total number of MPs¹⁵.

Autonomy and independence of administrative jurisdiction is guaranteed by the Judicial Council of the Republic of Macedonia which is autonomous and independent authority comprising 15 members, 8 (eight) of which, or majority are elected by the judges among themselves¹⁶.

The Judicial Court is competent for election and dissolution of judges and lay judges, defining and cancellation of judge function; election and dissolution of the court presidents; monitoring and evaluation of the judge work; deciding on immunity from judicial revocation, and etc¹⁷.

In fact, legality in administrative dispute fails to provide opportunity for the Court to define the state of fact, prove facts, maintain open hearing in the concrete case, and resolve the case legally on its merit. In this dispute the Court is competent to only assess whether an act is legal or not and abrogate it and provide legal instructions for its legal resolution. The Court in the dispute on legality is forced to decide on the basis of the state of fact determined by the authority act of which is under scrutiny of legality, and a space is left for the authority that has already adopted illegal act to decide for the second time on the same matter, which provides opportunity for that authority to delay the matter or adopt another illegal act. In fact, in this dispute the Court role is mainly to perform a kind of control of the illegality of acts, where the role of the Court to resolve a dispute between the parties is not evident.

For the purpose of comprehension of the administrative dispute of complete jurisdiction as a dominant type of administrative dispute it will be also necessary to make certain amendments related to prescribing compulsory determination of the state of fact by the Administrative Court in first instance and presenting evidence in the concrete case, introducing mandatory direct public hearing in administrative disputes of first instance. Namely, in administrative disputes on legality, the Court makes decision on the state of fact and evidence basis established by the administration act of which has been disputed, whereby the Court has no jurisdiction to establish the state of fact and present evidence. Furthermore, a practice has to be introduced for the Court to make decisions based on open public hearing¹⁸ in order to perceive the facts and present evidence. The existing legal solution as provided for in Article 30 of the Law on Administrative

¹⁵ Amendment XXV to the Constitution of the Republic of Macedonia, published in the Official Gazette of RM No.107/05;

¹⁶ Amendment XXVIII to the Constitution of the Republic of Macedonia, published in the Official Gazette of RM No.107/05;

¹⁷ Amendment XXIX to the Constitution of the Republic of Macedonia, published in the Official Gazette of RM No. 107/05.

¹⁸ **The Court will hold a public hearing and adopt a judgment to decide on the administrative matter itself, if:**

complexity of the matter in the administrative dispute requires so,

it is necessary for better clarification of the administrative matter and establishing the state of fact,

the Court presents proves, and

in the cases provided for in Articles 22, 36(3) and 40 of the Law on Administrative Dispute (Article 30-a).

Disputes provides for that the Administrative Court by rule decide on administrative disputes in its closed session.

It, however, has to be admitted that the Constitution of the Republic of Macedonia, fails to provide to the judiciary yet essential autonomy guarantees, since the constitutional solutions enable power and domination of the executive authority in relation to legislation and judicial power.

Therefore, in the Republic of Macedonia, which is declared as democratic legal state, the considerations for a different function of the Court are increasing, which has to focus on protection of both natural individual rights and freedoms and exercise of the rights. There comes the opinion that the Court should be perceived as public service of justice¹⁹, not as an authority in narrower sense, since the term “public service” is a widespread term connecting the elements of application of the Law and protection of human rights and freedoms²⁰. Redefinition of the position of the Court as a public service of justice would affect the Court to position itself as independent arbiter between the government and individual, and to release from the application of law and passing judgments under the influence of politics. In fact, defining the Court as public service implies to a requirement that the laws applied by the Court are subordinate to the idea for justice and human rights and freedoms. It is also worth to mention the increasing stands on the judiciary function as social, and the Court as ensurer of legality, freedoms, rights and tackling autocracy of the authority²¹. Such redefining of judiciary function in the Republic of Macedonia and within that frame the administrative judiciary as a whole will justify the solutions of the dispute of complete jurisdiction as a dominant type of administrative dispute.

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¹⁹ The idea on the Court as public service in the interest of all citizens was developed by the French theoretician Duguit within the frame of his Social solidarity theory, see Vincent, Jean/Guinchard, Serge/Montagnier, Gabriel/Varinard, Andre, 2003, Institutions judiciaries, 7e edition, Paris, 160.

²⁰ Kambovski V. Judicial Law, Skopje, 2010, pg. 103.

²¹ Poposka Biljana, Za prirodata na pravosudnata funkcija (For the Nature of Judiciary Function), Collection in honor of Ivo Puhan, Faculty of Law, 1996, pg. 270.

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