



Judicial Control over Public Administration

Fadil ZENDELI¹, Memet MEMETI^{2,3}, Agron RUSTEMI³

Abstract: Judicial control of administration and installation of courts as specialized institutions for resolving administrative disputes (conflicts) strengthened legitimacy, efficiency and accountability of the administrative bodies and this contributed to strengthening the protection of human rights against administrative bodies. The paper attempts to address the administrative disputes (conflict) in general hence giving specific data for some European countries and USA. Access to thesis topic is analytical and contributes to the recognition of administrative disputes as legal and functional mechanism in building the rule of law. The paper will result with appropriate conclusions that reflect the work of institutions and administrative disputes (conflict) itself as a legal instrument and will help the concerned parties, officials, judges, researchers for theoretical and practical importance of administrative disputes (conflict).

Keywords: court; control; accountability; administration

1. Introduction

Judicial control is the last mechanism applied after the developed administrative process and only after we have exhausted internal administrative procedures in a particular case, the parties are entitled to judicial protection. The role of the court in

¹ Professor, Ph.D., Faculty of Public Administration and Political Science, South East European University, Ilindenska nn, Tetovo, Macedonia. Phone: +389 44 356 000; Fax: +389 44 356 000. Corresponding author: f.zendeli@seeu.edu.mk.

² Professor, Ph.D., Faculty of Public Administration and Political Science, South East European University, Ilindenska nn, Tetovo, Macedonia. Phone: +389 44 356 000; Fax: +389 44 356 000. Corresponding author: m.memeti@seeu.edu.mk.

³ Assistant, MA., Faculty of Public Administration and Political Science, South East European University, Ilindenska nn, Tetovo, Macedonia. Phone: +389 44 356 000; Fax: +389 44 356 000. Corresponding author: a.rustemi@seeu.edu.mk.

an administrative dispute is to determine that the administrative authorities have issued a legal administrative decision or the law was violated.

When the competent administrative body completes the administrative process and issues the final administrative act as a product of the administrative process, against which the aggrieved party is unable to use right of complaint as judicial legal tool, then it creates a situation of conflict (dispute) between the party and the administrative body. (Pollozhani & Salihi, 2004, p. 181)

All the activities of state and public administrative bodies are subject to governmental control, internal control of state administrative bodies (internal control) and judicial review. The issue reviewed by the court in administrative dispute is an issue of validity or invalidity of administrative actions since only the court has the right of assessment of the legality of administrative acts, as the case is exhausted in administrative procedure.

Along with administrative disputes, were developed special judicial and legal institutions, before all administrative tribunals and the administrative judiciary. The notion, administrative court (administrative tribunal, verealtungsgericht) shows that it is not about the administrative body that adjudicates, but for a special judicial body that resolves various issues of administrative law. The procedure developed through administrative courts is a branch of judicial activity, unlike judicial administration which is a branch of administration that cares about the inner workings of the courts.

Developing of rule of law imposed as an imperative the installing of a control mechanism that will enable and provide extensive legal protection in the field of administrative activity. Carrier of this control should be the body that would be independent and shall have the proper authority of administration in exercising its activities to work in accordance with eligibility.

Courts are more legal institutions within a state, established by the Constitution and the law that apply and interpret laws and international conventions, protect rights and freedoms of man and citizen, and create and build rights through the rich court practice. The independence of the judiciary and the rule of law are the foundation of a democratic constitutional state.

Although forms of control of administration are important, yet they are insufficient to complete the system of applying the principle of legality. The development of legal science imposed as an imperative setting of a special control that will be able

to provide legal protection in the area of legal activity. The carrier of this control should be a body that would be independent and shall have authority, in order that the administration in exercising its acts to act in terms of legality. (Borkovic, 2002, p. 128)

In developing of modern states, rules the attitude that the judiciary because of the professionalism and independent organization of the administration represents an adequate form of judicial control over administration.

Administrative dispute is construction of a legal theory and practice of the nineteenth century, under the banner of protecting the legality of objective and subjective rights of citizens. Resolving conflicts between administration and citizens, in France, in the early nineteenth century, was given to special councils and the State Council (Conseil d'Etat). These were the first forms of administrative justice and administrative dispute (conflict) (les contentieux administratif). With this, the French legal practice created the first forms of administrative justice, giving the example that would later follow other states in the European continent (Borkovic, 2002, p. 448). Judicial control of administration means the power, which is given to a body independent from political power and administration to resolve conflicts, which are caused in the functioning of the administration. Judicial control should ensure that the administrative authority shall not exceed the powers and exercise control over the administration if exceeding authority and violates the rights of citizens.

It is interesting the report of the judiciary to the executive (government), because the government often (in history), but even today, meddle with the courts, undermining judicial independence, as an organ of state power, which will not be able to function as a corrector of the legitimacy of legal acts, which approves the administration during its activity.

In order to clarify the different forms of accountability of the administration we will examine judicial control over administration. The purpose of judicial control is to protect the rights of citizens or public officials in relation to the administration. For this reason it is established an independent body that will resolve administrative disputes. The manner of exercise of judicial control is distinguished by the way that there is a specialized administrative tribunal or exercise control over the administration of regular courts. The volume of judicial control over administration differs from state to state. In some countries, before courts may be

submitted only the issue of responsibility of the administration, while in others, the judge has the right to cancel any unlawful act.

In the group of countries where the courts of general jurisdiction, exercising control over administration is England (Common law). Boundaries of administrative power in England are stipulated by law and the basis of judicial control over administration relies on the doctrine of *ultra vires*, i.e. the jurisdiction of the courts is limited in terms of assessing administrative act only in terms of legality.

For judicial control over administration, (Borkovic, 2002, p. 128) Montesquieu considers that the judicial authorities should not meddle in the affairs of government. Independent judiciary means that the courts are composed of special people and special organization that are not in the system of legislative and administrative organization (Lowenstein, p. 239). However, over time it became clear that the independence of the judiciary represents a sound basis for the institutionalization of control over the administration in accordance with legal regulations.

Authority that courts enjoy in Anglo-Saxon countries derives from the fact that they are the oldest makers of law, both in England and in the United States and other countries that are under the influence of common law. The basic right, of the common law still prevails in the legal doctrine of these countries. Courts in Anglo-Saxon countries as the creators of law recognize the notion of analogy and interpretation more freely and widely.

Thus, the law is limited by the constitution; power is limited by law, politicians from all judges. Control of constitutionality is softened and each jurisdiction can and must exercise it. (Duhamel, 1993, p. 132)

Considering the courts' control activity in relation to the administration, we must distinguish two ways of control. The first form is the direct control exercised by the courts through lawsuits and second form, indirect control over the administration, by treatment of the legality of laws, exercised by the Supreme Court.

In the United States, the judicial authority was recognized only by the regular courts. In the U.S. there are a number of regulatory bodies, independent commissions, tips arbitration, even courts or legal bodies, such as tax courts, as the Americans call, legislative court.

Thus, Americans have trusted their courts an enormous political power: but forcing them to deal only with judicial laws, they have reduced the many dangers of this power. If the judge would be able to deal with laws in a theoretical and general way, if he could take the initiative and censored the lawmakers, then he would enter politics in splendid: becoming a champion or opponent party, he would have aroused all the passions that divide the country to take part in this war.

In the European continent the situation differs from the United States of America. Administrative courts in Europe possess the same authority as the regular courts. Administrative judiciary was born in Central Europe as a result of the struggle of peoples against despotic government and turned into one of the main symbols of the victory of law against despotism. The classic studier of Anglo-Saxon law, Albert Dejsi, believes that the right of citizens attacking administrative acts before regular courts is one of the essential elements of the rule of law, rule of law, representing the Anglo-Saxon law as an ideal of legality. Dejsi, considering that the system that is built in compliance with the rule of law, the regular courts to resolve matters of administrative law and principles that apply, should be developed, in analogy with private law.

French lawyers are associated with their system, where control over the administrative power has been entrusted with the administrative courts and not the regular courts. For Professor Rollan, “For France, this system is fully satisfying.” It is wisdom that administrative acts are not subject to regular courts, which requires knowledge of administrative law and administrative activity. This knowledge does not possess the regular courts; they will either increase the prerogatives of administrative or ignore the wrong approach or ignorance. It is a known rule in the French law where the administrative judge recognizes the administrative law.

The French State is a classic country that has specialized administrative judiciary and the development of specialized administrative judiciary in France is a result of specific historical context, developing the French society after the revolution. The Declaration of Rights of 1789, for the first time sets out the idea that the administration is subject to the principle of legality. On the other hand there is a lack of trust in the regular courts as successors to the so-called “Parliament” of the old regime, therefore is the separation of judicial and administrative functions. However, this system gives greater rights to administrators who should decide the legality of its decisions, which gives the possibility to be tendentious.

In the Republic of Bulgaria, the courts as entities are exercising control over the legality of acts and actions of the administration bodies¹. Physical and legal persons can appeal against all administrative acts belonging to them, except those assigned by law.

Supreme Administrative Court performs higher judicial control for the correct and equal implementation of laws in administrative disputes². "The court may decide on the legality of acts of Council of Ministers and ministers, and other acts defined by law.

Judicial control over administrative acts is performed by the courts and administrative bodies established by special laws. Decisions of administrative bodies, previously, were controlled by the Supreme Court, now this control refers to the Supreme Administrative Court.

In the new structure of the judicial power was formed Supreme Administrative Court in accordance with the Law on judicial power, which exercises supreme supervision for precise and equal application of administrative law. Administrative Court decisions are binding on public authorities to the executive and the judiciary. (Galligan & Smilov, 1996-1998, p. 19)

Judicial reviews of administrative acts are affecting only their legitimacy and are transmitted under the initiative of concerned citizens and organizations (via appeal) and the prosecutor. Opportunity for review of an administrative act may be used; when the administrative competent authority has declared its decision or exceeded deadlines to make it. Complaints are addressed to the bodies that have approved the act, while they are obliged to send them to the competent courts.

Judicial control over administrative bodies in the Republic of Croatia does not differ much from other countries in the region. The administrative court in the Republic of Croatia has the position of highest instance in the administrative decision. It decides on individual administrative matters, as well as specific administrative acts.

In the Czech Republic since 1990, the judicial system after 40 years was restored judicial review of administrative acts, where administrative matters are settled by the courts of general jurisdiction and partly by the Constitutional Court.

¹ Constitution of Republic of Bulgaria, article 120, paragraph 1.

² Constitution of Republic of Bulgaria, article 125.

Constitution of 1993, envisioned the creation of the Supreme Administrative Court. (Bicovski, 1996, pp. 156-163)

Even the courts of general jurisdiction, have certain powers to review administrative acts. The right to seek judicial review of administrative action, is determined with the Charter of Fundamental Rights, Article 36, paragraph 2, of the Charter provides “to everyone, whose rights were violated by the decision of the public administration may ask the Court to review the legality of the decision, even though the law may determine otherwise.

The functional role of the court in the administrative dispute relates to the review of the legality of an administrative act, violation of legitimate interests of citizens and regulation of these effects. The court may repeal as illegal an act or a part of it but not change the act because it would result that the court makes the rules.

When the court decides the repeal of an administrative act which is contrary to law or only a portion of it, is the state administration body whose act is repealed, he who in accordance with all legal requirements, as well as on the interpretation of the law that is made by the court to regulate the situation after the repeal of the act.

From what was said above that the court does not appear to be expressed on the modification of an administrative act, but only to declare invalid an act when he is against the law. In the world today there are two administrative justice systems that are responsible for the control of administrative acts-French and Anglo-Saxon model.

According to the French model, administrative disputes are resolved by specialized courts in special procedures. In France's the highest administrative court - The State Council (Conseil D'ETA), is a very important organ in the French legal system, which is also the creator of French administrative law. However, one should bear in mind the fact that today in France certain administrative disputes are solved by ordinary courts (e.g. for compensation of damage in the exercise of administrative activity), while on the other hand in England increases the number of administrative courts.

Special administrative courts operate in Italy, Austria and Germany. In Anglo-Saxon system, administrative disputes are solved by regular courts, in regular procedures and rules of procedure and due process. In the United States of America operate some specialized federal courts in different fields, such as: customs, licenses etc.. Do specialized courts function is a direct reflection of traditional

doctrine that there is no distinction between public and private law and administrative law as part of constitutional law doctrine that is gradually released under the influence in England and in the U.S. (in the first sub impact of European Union law).

Using the doctrine of judicial control (judicial review), and great authority this court has enjoyed, this Court has given itself the right to be issued in assessing the suitability of the amendments, or amendments of the Constitution of the United States America. This power of judicial oversight is not sanctioned by the constitution, but it is a doctrine which the Supreme Court has adopted in the case of *Marber v. Madison* of 1803. Through this power of the Supreme Court allowed the control of both branches of government, under the principle of checks and balances as stipulated by the Constitution of the United States of America (Halili, 2006, p. 117). In fact there is no other court in the world that somehow can get closer to the extraordinary power that the Supreme Court enjoys to adjudicate disputes, to interpret the national constitution and to make public policy.

Although the Supreme Court can block legislative and executive branches through judicial review, it often doesn't use this power. Furthermore, the number of state laws that have been declared unconstitutional is extremely small if one considers the number of laws that go every year. Whenever the president or Congress enact a law, it is assumed that the bodies that have endorsed the constitutionality know well and that everything is in accordance with law. But if the Supreme Court disagrees, saying it violates the limits of governing powers determined by the constitution, the law is repealed.

Between these two models there is a third model, where there are no specialized administrative courts, but administrative disputes are usually resolved by the highest court of the power of hearing, as was the case with the former Yugoslavia and currently with the Republic of Macedonia, but that is in a process of installing specialized administrative Court for the election of administrative disputes.

In the context of control of the acts and work of the Administration is the European Court of Justice which has developed most of the principles of administrative law, it might be called the common European administrative law. National courts of justice are required to ensure implementation of the EU Treaties and secondary legislation to the Commission.

In the Republic of Macedonia the legal system recognizes the instrument of judicial control over the concrete acts (individual) of administration. Constitution of the

Republic of Macedonia guarantees the legitimacy of judicial protection of individual acts of state administration bodies and other institutions exercising public authority.

Control of administration by the higher administration bodies has not given guarantees and security for implementation of the principle of legality in the work of administrative bodies, and therefore the legitimacy should be sought out of administrative organization. Republican Assembly in order of reforming the judicial system and proper settlement of administrative disputes has approved a Law on administrative disputes, where the resolution of administrative disputes is exercised by the Administrative Court, which court should be competent for resolving administrative disputes of first instance body.

With later legislative changes in the legal system of the country was also installed the high administrative Court as a body that decides on the grounds of appeal against decisions of the administrative court. While the Supreme Court will decide by extraordinary legal remedies. With the approval of the Law on administrative disputes, the Republic of Macedonia is approaching closer to the European model of administrative dispute resolution.

Administrative disputes in the Republic of Macedonia resolve: The administrative courts as courts of first instance, Supreme Administrative Court as court of second instance, Supreme Court as a court that decides on the basis of extraordinary.

The most important form of judicial control of administration is anyway the administrative dispute. The Constitution of the Republic of Macedonia guarantees judicial control of legality of individual acts of administrative bodies, while the Law on Administrative Disputes provided that the court in an administrative dispute decides on the legality of acts of state administration, government and other administrative bodies, municipalities and the city of Skopje, as well as administrative organizations which have public authority when deciding on the rights and obligations in concrete administrative issues.

2. Conclusion

Administrative disputes, is actually a continuation of the administrative process by other means and before other bodies of power, i.e. the competent courts. When the competent administrative body completes the administrative process and issues the final administrative act as the product of administrative processes, against which

the aggrieved party is unable to use an appeal as a complaint, then it creates a situation of conflict (dispute) between the party and administrative body.

Judicial control over the legality of administrative acts plays an important role in strengthening the principle of legality and protection of citizens' rights. In administrative disputes the court is in charge for the protection of the legality of administrative acts of state bodies and organizations with public authorization, all this in order to protect the rights and legal interests, but at the same time protect the legality as an important principle of the rule of law.

Installation of administrative courts as specialized institutions for resolving administrative disputes, increased legitimacy, effectiveness and accountability of the Administration (administrative bodies) and this contributed to strengthening the protection of human rights opposite the Administration (administrative bodies).

3. References

Breban, Gi (2002). *Administrativno Pravo Francuske /French Administrative Law*. Beograd: CID Podgorica. (tekst i përkthyer në gjuhën Franceze).

Borkoviç, Ivo (2002). *Upravno Pravo /Administrative Law*. Zagreb: Narodne novine d.d.

Dalligan, J. Denis & Smilov, Daniel M. (1999). *Administrative Law in Central and Eastern Europe 1996-1998*. Budapest: CEU Press.

Duhamel, Oliver (1993). *Droit Constitutionnel / Constitutional Law*. Paris: L.G.D.J., 23e édition. (tekst i përkthyer në gjuhën shqipe).

Halili, Zenun (2006). *Politika dhe Qeverisja e Shteteve të Bashkuara të Amerikë / Politics and Governence in USA*. Prishtinë: ADEA.

Pollozhani, Bajram & Salih, Lazim (2004). *Procedura administrative dhe konflikti administrativ, /Administrative Procedure and Judicial Controle*. Skopje: LOGOS-A.

Pusiq, Eugen (2002). *Nauka o Upravi / Administrative Law*. Zagreb: ŠKOLSKA KNJIGA.

Rousset, Olivier & Rousset, Michel (2004). *Droit Administratif /Administrative Law*. PRESSES UNIVERSTARES DE GRENOBLE (tekst i përkthyer në gjuhën shqipe, Shkup, 2006).

*** *Europiane Administrative Principale*, document SIGMA nr. 26.

*** *Constitutions (1995): Bullgari, France, Greece, Germani, Hungari, Itali, Kanada, Rumania, USA, (Kushtetuta te perkthyer ne gjuhen shqipe)*, Albin, Tirana.

*** *Constitution of Republic of Macedonia*, 1991.

*** *Law of Judicial Review*. Officiale Gazete of Republic of Macedonia, nr. 62/06.