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APPLICATION OF LAW AND LEGAL CERTAINTY

Zbornik radova 34. Susreta Kopaoničke škole prirodnog prava – Slobodan Perović
Proceedings of the 34th Meeting of Kopaonik School of Natural Law – Slobodan Perović

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ANA PAVLOVSKA DANEVA
KONSTANTIN BITRAKOV

BROAD JUDICIAL CONTROL OVER THE PUBLIC AUTHORITIES: PRIMARY OBJECTIVE OF THE NEW LAW ON ADMINISTRATIVE DISPUTES OF THE REPUBLIC OF NORTH MACEDONIA

An administrative dispute is the legal mechanism of judicial oversight over the public authorities. In that respect, the law(s) which regulate the administrative disputes, in terms of their scope, the procedure, the jurisdiction for resolving administrative disputes, etc., are vital for the protection of the citizens' and legal entities' rights and interests. Therefore, this paper focuses precisely on the Law on Administrative Disputes of the Republic of North Macedonia adopted in 2019 and in force since 2020. The idea is to present the novelties and resolve certain dilemmas which may appear in the everyday application of the legal provisions. Finally, the aim of this paper is to argue that the broadened scope of the administrative-judicial control is more beneficial for citizens.

Key words: *administrative dispute, administrative-judicial control, judicial oversight, administrative acts, decisions*

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INTRODUCTION

Macedonia[1] has been reforming its legal system (and, therefore, certain aspects of its judiciary and administration) for more than two decades now. One of the most vital objectives in that process is the approximation with the *acquis communautaire*. Respectively, in 2019 a new Law on Administrative Disputes[2] was adopted. The idea of this Law was to reform the administrative-judicial control over the public authorities,[3] i.e. to improve the position of individuals and legal entities *vis-à-vis* the institutions. The scope of the administrative dispute i.e. the jurisdiction (*ratione materiae*) of the administrative judiciary was broadened and the procedural rules were made more suitable for the individuals/legal entities whose rights and/or interests have been infringed by a public authority. Having that said, the purpose of this article is to present the novelties in the Macedonian administrative dispute regime.

HISTORICAL BACKGROUND

The administrative-judicial control (over the public authorities) in the Republic of North Macedonia (hereinafter: Macedonia) has a long-lasting tradition, dating back to 1952 when the first Law on Administrative Disputes of the former Federal People's Republic of Yugoslavia was adopted.[4] This Law on Administrative Disputes was replaced with the Law on Administrative Disputes of the Socialist Federal Republic of Yugoslavia from 1977.[5] The latter (federal) law was adopted as a local Macedonian law too, and it was applied even after the country declared independence in 1991 until 2006 when the first Law on Administrative Disputes

[1] In this article we shall use the name "Macedonia" so that we do not have to parallelly use both names "Republic of Macedonia" and "Republic of North Macedonia", depending whether speaking of the period before or after Amendment XXXIII of the Republic of Macedonia (Official Gazette of the Republic of Macedonia 6/2019) came into force.

[2] Official Gazette of the Republic of North Macedonia 96/2019.

[3] In this article we will use the term "public authorities" in parallel with the term "administration". We believe that it is important to use the term "public authorities" more intensively since it indicates the paradigm change: the administrative judiciary controls not only the typical bodies of public administration (the ministries, the bodies within the ministries, etc.) but also all other entities which exercise public powers and decide upon individuals' rights, obligations and legal interests. In that respect, the Law on

[4] Official Paper of the Federal People's Republic of Yugoslavia 23/52 and 15/53.

[5] Official Paper of the Socialist Federal Republic of Yugoslavia 4/1977.

of the Republic of Macedonia (hereinafter: Macedonia) was enacted.[6] Finally, the latest Law on Administrative Disputes in Macedonia was adopted in 2019 and came into force on the 25th of May 2020.

When comparing all these laws, the most crucial difference is the one related to the model of administrative-judicial control. Namely, in the period before 2006, Macedonia had a mixed model of judicial control over the administration. On the one hand, there was a special law regulating the administrative disputes which is a characteristic of the Continental model of administrative-judicial control. On the other hand, the administrative disputes were resolved before the Supreme Court – the highest court in the country with general jurisdiction (*ratione materiae*) – which is a characteristic of the Anglo-Saxon model of judicial control over the administration. This changed with the adoption of the Law on Administrative Disputes from 2006, i.e. in 2007, when the specialized Administrative Court was founded. Another important moment was the foundation of the Higher Administrative Court in 2010 (under the amendments of the Law on Administrative Disputes from 2006). That way, Macedonia fully adopted the Continental model of administrative-judicial control of the public authorities.

This approach was accepted in the country due to the finding that the specialized administrative courts are more versed in the work of the administration, given its specifics and the multitude of areas it covers such as taxes, customs, police activity, the civil status, inspections, constructions, health and social protection, pension insurance, administrative agreements, etc. In such circumstances, the administrative judiciary achieves much stronger and stricter oversight of the legality of the public authorities' work than the regular judiciary. The administrative courts are (and should be) much more knowledgeable of the public authorities' competencies and thus examine the merits of the administrative acts much more thoroughly, not focusing only on their formal content. In fact, the administrative judges – focused only on resolving administrative disputes and not on any other (civil or criminal) cases – are quite well acquainted with the problems of the public authorities, their case-law and track-record, as well as the viewpoints of their employees. They can understand why these public authorities interpret a legal provision in a certain way and enter into an assessment of whether such interpretations will circumvent the purpose of the law itself. In recent decades, specialization in resolving administrative disputes has emerged as a European[7]

[6] Official Gazette of the Republic of Macedonia 62/06 and 150/10.

[7] The list of member-states of the European Union which have specialized administrative courts is available here: *https://e-justice.europa.eu/19/EN/national_specialised_courts,* September 2021.

and global trend. Hence, the current existence of a specialized administrative judiciary in Macedonia should be considered as an advantage over the former system and it needs to be nurtured and constantly upgraded.

PURPOSE OF THE ADMINISTRATIVE DISPUTES AS PER THE LAW ON ADMINISTRATIVE DISPUTES OF MACEDONIA

Nowadays, there is no dilemma that an administrative dispute is the legal mechanism of judicial oversight over the administration.[8] In other words, an administrative dispute is a dispute which is resolved in a special administrative-judicial procedure,[9] a form of providing judicial control over the legality of the decisions of public authorities. However, in recent years it has become more and more widely accepted that the administrative disputes can be initiated not only over decisions of the public authorities, but also in respect to their actions (real acts or other administrative actions) as well. Having said that, it may be concluded that the purpose of the administrative disputes is twofold: to ensure the legality of the functioning of the legal system as a whole and to ensure judicial protection over the rights and legal interests of the parties.

Therefore, in the legal doctrine, administrative disputes are divided in two categories: objective administrative disputes – the purpose of the administrative dispute is protection of an objective legal situation, i.e. protection of legality and public interests and subjective administrative disputes – the purpose of the administrative dispute is to protect the specific right and/or legal interest of the individual.

However, the Macedonian Law on Administrative Disputes from 2019 clearly emphasizes that the purpose of the administrative dispute is to protect the specific rights and legal interests of the individual, and not the public interest.

Namely, Article 2 of the Law on Administrative Disputes – which is entitled "Purpose of the Law" – reads: "[a]n administrative dispute provides judicial protection of the rights and legal interests of natural and legal persons against individual administrative acts and actions of public bodies in accordance with this Law." So, the protection of the principle of legality or the public interest is, in fact, not mentioned. Thus, it can be concluded that the Macedonian legislation accepted the concept of a subjective administrative dispute. This is even more vivid when comparing

[8] Zoran Tomić, *Opšte upravno pravo* (13 izdanje), Pravni fakultet Univerziteta u Beogradu, Beograd, 2020, 144.

[9] Борче Давитовски, Ана Павловска-Данева, *Административно право – книга втора (процесно право)*, Правен факултет "Јустинијан Први", Универзитет "Св. Кирил и Методиј" во Скопје, Скопје, 2020, 76

the cited Article 2 of the current Law on Administrative Disputes with Article 1 of the former Law on Administrative Disputes from 2006 which read "[i]n order to ensure judicial protection of the rights and legal interests of individuals and legal entities and to ensure legality, the Administrative Court (hereinafter: the court) in administrative disputes decides on the legality of acts of the state administration, the Government, other state bodies, municipalities and organizations determined by law and of legal and other persons in exercising public authorizations (holders of public authorizations), when deciding on the rights and obligations in individual administrative matters, as well as on the acts adopted in misdemeanor procedure".

The differences between Article 2 of the current Law on Administrative Disputes and Article 1 of the former Law on Administrative Disputes are vivid. Firstly, ensuring legality is no longer the primary purpose of the administrative disputes and is implied instead. Secondly, the administrative dispute is not limited to the assessment of the legality of individual legal acts, meaning that other actions of the public authorities are now subject to judicial oversight. We shall focus on the second difference further on in the text, elaborating that an administrative dispute can now be initiated against actions as well.

However, at this point it is important to note that the shift towards the subjective concept of administrative dispute was made, inter alia, under the influence of the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly referred to as the European Convention on Human Rights or with the abbreviation ECHR), the legal systems and the case law of member-states of the European Union and the theoretical deliberations in Macedonia. The new concept definitely puts the individual and his/her rights and legal interests at the center of the dispute. Thus, those rights and legal interests are offered with better protection than in the objective concept of administrative dispute. Namely, the administrative judges must change their perspective of decision-making and interpretation of norms in a subjective administrative dispute. They should no longer pay attention to sanctioning illegality but to administering justice, i.e. to "correcting the injustice done to the individual" with the individual legal acts or actions of the public authorities.

Up to this point, it may seem that the distinction between an objective and a subjective administrative dispute is merely a theoretical one, without any practical implications. Nevertheless, Article 2 of the Law on Administrative Disputes from 2019 has practical significance as well. Expressing the purpose of the Law on Administrative Disputes in this way means that in case of a dilemma the legal provisions should be interpreted in such way as to primarily ensure protection of the rights and of the legal interests of the individual. The entire regulation of the administrative dispute is subordinated to the prescribed goal, from the active

identification for initiating the dispute, the position of the plaintiff and the interested persons, the course of the procedure, and especially the provision of an oral hearing, through the court's authority to determine the factual situation in the case and to decide on the merits, i.e. in full jurisdiction and finally until the execution of the court decisions from the administrative dispute is ensured.

SUBJECT-MATTER OF THE ADMINISTRATIVE DISPUTE PER THE LAW ON ADMINISTRATIVE DISPUTES OF MACEDONIA

The subject-matter of the administrative dispute is prescribed in Article 3 of the Law on Administrative Disputes. The Law on Administrative Disputes has accepted the principle of enumeration, meaning that there are 10 points in which it is determined what the administrative dispute may be initiated for. Each of these 10 points shall be presented in the following text.

Legality of the final individual administrative acts that directly affect the legal status of the plaintiff, i.e. with which it is decided on the rights, obligations and legal interests of the plaintiffs

On this occasion, it is necessary to clarify the term "final individual administrative acts". According to the Law on General Administrative Procedure,[10] a final administrative act is one against which an administrative dispute can be initiated. The final administrative act can be annulled, repealed or amended only in cases determined by law. Such an act is enforced, unless otherwise provided by law. It is necessary to distinguish the validity from the finality of the administrative act. Thus, the decision against which an appeal is not allowed or the appeal in the administrative procedure has already been declared, and by which the party has acquired a right, i.e. by which an obligation has been imposed on the party, is final in the administrative procedure. So, against the final decision the party has no right to appeal, but it has the right to initiate an administrative dispute with a lawsuit. On the other hand, once the individual administrative act becomes valid the party can neither file an appeal nor initiate an administrative dispute with a lawsuit.

Another important element of this provision is the precondition that the final individual legal act must refer to the rights, obligations and legal interests of the party – the plaintiff. Otherwise, he/she would not be able to initiate a lawsuit or, to be more precise, the lawsuit shall be dismissed.

[10] Official Gazette of the Republic of Macedonia 124/2015.

The legality of the failure of the public bodies to decide within the legal deadline on the rights, obligations and legal interests of the plaintiff (administrative dispute for silence of the administration)

This point determines the possibility for the parties to initiate an administrative dispute for assessment of the legality of the failure of the public bodies to decide within the legally determined deadline, i.e. the possibility to initiate an administrative dispute due to silence of the administration. The subject of an administrative dispute in such a situation is not an administrative act because the act does not exist. Instead, the administrative dispute is initiated and takes place in order for the administrative inactivity to be remedied, i.e. for the required individual act to be adopted. This type of administrative dispute, in legal theory is called a dispute due to the silence of the administration.[11] Silence of the administration occurs when the public body does not act upon the request of the party in the first instance procedure when the appeal is not allowed, or when the second instance body has not decided on the submitted appeal within the legally determined deadline. In such situations, the legal presumption is that the (first-instance) request or the appeal (to the second-instance authority) of the party is, respectively, rejected. In order to initiate an administrative dispute for the silence of the administration, several procedural conditions need to be met: the party at whose request/appeal the procedure has been initiated must wait for the legal deadline for deciding to expire; after the expiration of that deadline, the party has to once more address the public authority which should have decided upon the request/appeal in order to ask for the delivery of the respective individual legal act. Only when these two legal assumptions have been fulfilled and the silence still exists, the party is allowed to initiate an administrative dispute for silence of the administration before the Administrative Court.

Legality of the acts of the public authorities adopted in a misdemeanor procedure

The misdemeanor procedure is a set of procedural actions for detecting and punishing a perpetrator of a misdemeanor, undertaken by the competent authorities. As per the Macedonian legislation the misdemeanor procedures can take place before two types of authorities: courts and other public authority.

[11] These types of administrative disputes, historically speaking, have been accepted even in the earliest laws regulating administrative disputes in the countries of Southeastern Europe. For more information see, Dobrosav Milovanović, "Predmet upravnog spora", *Zbornik radova 150 godina upravnog spora u Srbiji 1869-2019*, Upravni sud Republike Srbije, Pravni fakultet Univerziteta u Beogradu, Beograd, 2020, 81.

Article 49, para. 1 of the Law on Misdemeanors from 2019[12] prescribes that "[a] misdemeanor procedure can be carried out, and a misdemeanor sanction can be imposed only by a competent court". In this case, competent courts are the first-instance (basic) courts. However, Article 49, para. 2 provides that "[f]or certain misdemeanors for which the fine is set up to a maximum of 250 euros in denar counter value for a natural person, 500 euros in denar counter value for a responsible person in a legal entity and an official and 1,000 euros in denar counter value for legal entities, a misdemeanor sanction may be imposed by a misdemeanor body […]. Article 49, para. 3, further on, provides that a misdemeanor body can also decide on misdemeanors for which higher fines are prescribed, if this is in line with the legislation of the European Union. These so-called misdemeanor bodies are, in fact, the administrative and other public authorities which have been granted the right to conduct misdemeanor procedures and impose misdemeanor sanctions with a certain substantive law (*lex specialis*).

Respectively, the second instance misdemeanor procedure against judgments rendered by the basic court is conducted by the appellate court. The procedure on the appeal against the first instance decision for misdemeanors adopted by a public authority (the so-called misdemeanor body) is conducted before the Administrative Court. In this case, the Administrative Court appears as a second instance in relation to the misdemeanor decisions adopted in out-of-court procedure. When deciding in such cases, the Administrative Court should decide in full-jurisdiction. This means that its judgment should either confirm the legality of the decision reached in the first-instance misdemeanor procedure (by the public authority/misdemeanor body) or completely replace it. The administrative dispute over the legality of acts adopted in a misdemeanor procedure is initiated with a lawsuit that contains the same elements as any lawsuit for initiating an administrative dispute. The difference in relation to the general principles for initiating an administrative dispute consists in the deadlines for filing a lawsuit. Namely, according to the Law on Administrative Disputes, the general deadline for initiating an administrative dispute is 30 days from the delivery of the decision to a party. However, exceptions to this deadline are possible, and must be determined by law. Exactly such an exception is made by the Law on Misdemeanors, which reduces the deadline for filing a lawsuit against a decision of the misdemeanor body to 8 days from the delivery of the decision made by the misdemeanor body. This is done in order to provide fast and efficient judicial protection in the area of the so-called administrative offenses/misdemeanors. Finally, the administrative-judicial protection provided for misdemeanor cases has another point of difference in relation to other administrative disputes. That difference is reflected in the different effects of the lawsuit. Namely, in the case of

[12] Official Gazette 96/2019.

misdemeanors, the lawsuit for initiating an administrative dispute postpones the execution of the decision for payment of a fine. In this way, for the sake of economy and efficiency, it is envisaged to wait for the end of the administrative dispute, and if the decision of the misdemeanor body is confirmed, then to carry out its execution. The second reason for determining the suspensive effect of these lawsuits arises from the fact that judicial protection in this case is a second instance, and not a third instance that is common for administrative-judicial control. Hence, the lawsuit is in fact a substitute for an appeal, so it takes on the basic properties of an appeal as a remedy, among which, in the first place, is suspension.

Legality of the final individual acts adopted in an election procedure

The Electoral Code[13] contains numerous provisions that refer to deadlines for decision-making and the possibility to initiate administrative disputes against individual legal acts which are being adopted in an election procedure. It is our opinion, however, that the disputes over the legality of acts/decisions adopted in an election procedure should not be reviewed by the Administrative Court but rather by the Supreme Court of Macedonia as the highest judicial instance in the country. This solution would be more adequate given the political significance and the effect of judgments related to elections.

Legality of the final individual acts on the elections, appointment and dismissal of holders of public office adopted by the highest political authorities

At first, it might seem that this is a complete novelty in the Macedonian administrative dispute regime. In that sense, it may cause different interpretations and dilemmas in the proceedings of the administrative judiciary. In order to better understand the issue with this novelty, it is necessary to consider the traditional definition of the administrative dispute [prescribed in the previous Law(s) on Administrative Dispute], the current case-law of the Administrative Court (as well as the practice of the Macedonian Supreme Court beforehand, when the administrative disputes were resolved there), as well as the theoretical considerations in respect to the subject-matter of the administrative disputes. Only after a comprehensive analysis of all these aspects together, will it be possible to conclude that the new provision of the Law on Administrative Disputes contained in Article 3, para. 1, sub-para. 5 is not a drastic novelty that can bring about tectonic changes in the subject-matter jurisdiction of the administrative judiciary.

[13] Official Gazette of the Republic of Macedonia no. 40/2006 ... 215/2021.

Namely, it is clear from the cited provision from Article 3, para. 1, sub-para. 5 of the Law on Administrative Disputes that the administrative judiciary is – just as in the past – quite limited when reviewing the acts of the highest political authorities. Firstly, the administrative judiciary can only review these acts in terms of their legality, not their political prudency. Secondly, the provision covers only the individual acts of these authorities, i.e. their decisions on election, appointment, and dismissal of holders of public office. In that respect, the contemporary provision is essentially identical to the provision in Article 9, para. 1, sub-para. 2 of the Law on Administrative Disputes from 2006 which read: "[a]dministrative dispute cannot be initiated for matters that in line with their constitutional powers are directly decided by the Assembly and the President of the Republic of Macedonia except for decisions on appointment and dismissal". Thus, even though the formulation was different, Article 3, para. 1, sub-para 5 of the current Law on Administrative Disputes and Article 9, para. 1, sub-para 2 of the Law on Administrative Disputes from 2006 are not that different. The only difference is, in fact, in the legal technique – in the first law the Parliament used the negative enumeration (what is not a subject-matter of the administrative dispute) while in the latter the positive enumeration (what is a subject-matter of the administrative dispute). In other words, the current legal provisions explicitly prescribe that the respective acts are a subject of administrative-judicial revision so that no authority in the country can interpret that the election/appointment/dismissal of holders of public office is a "matter that in line with the constitutional power is directly decided" and is, therefore, no subject of any judicial oversight.

It is clear that according to the existing legal system the mentioned authorities – in addition to adopting general acts (regulations) that create policies at the central and local level – also adopt individual legal acts by which they decide on the rights, obligations and legal interests of specific persons. Such are the individual legal acts for appointment or dismissal of certain person to a specific public office. Thus, only those individual legal acts are a subject of the administrative-judicial control. The general legal acts remain within the jurisdiction of the Constitutional Court

This is also determined in a decision of the Constitutional Court adopted in 2008: "[t]herefore, according to the Court, the Administrative Court cannot be competent to assess the legality of the general legal acts which regulate certain social interactions, which is the competence of the Constitutional Court of the Republic of Macedonia, but competent to decide on the rights and obligations of natural and legal persons violated by the acts of the holders of public powers in individual administrative matters".[14]

[14] Decision of the Constitutional Court, 75 / 2007-0-0 of 13 February 2008.

Finally, in relation to this provision of the Law on Administrative Disputes, it is up to the Administrative Court to interpret, in each individual case, whether the plaintiff has submitted a lawsuit against a general or an individual legal act (for appointment/dismissal) adopted by the Assembly, President and the Government. In addition, the Administrative Court shall also, on a case-to-case basis, determine whether a certain legal act has a general effect (*erga omnes*) or not (*inter partes*). In other words, the Administrative Court shall be able to dismiss all lawsuits which are filed against the general legal acts, i.e. the legal acts with general (*erga omnes*) effect. In other words, the Administrative Court should only adjudicate on the legality of individual legal acts on the election/appointment/dismissal of holders of public office.

Legality of the individual acts against which a regular remedy is not allowed and legal protection is not provided in another court

The Law on Administrative Disputes provides that if an individual legal act breaches the individual's rights and/or legal interests, and if there is no other legal remedy that person can use, he/she can initiate an administrative dispute. This provision is, in a way, an addition to the previous one. Even if the previous provision did not exist at all, the individual legal acts of the highest political institutions (President, Assembly, Government) on the election, appointment and dismissal of holders of public office would have been a subject to administrative-judicial oversight in the case of absence of any other judicial instance which would offer legal protection. The *ratio* behind this interpretation is simple. The Assembly, the President and the Government fall under the broad definition of a public authority which is used in the Law on Administrative Disputes (see: footnote 3). Secondly, the Assembly, the President and the Government have to follow certain rules and procedures when electing/appointing/dismissing holders of public office. Respectively, if they fail to follow the rules and procedures, they shall violate the person's rights and legal interests. Thirdly, in such cases of violation, the basic courts which decide on employment disputes have no jurisdiction, since this is not an employment but a specific type of a professional relationship between the appointee/elected office holder and a public authority. Therefore, Article 3, para. 1, sub-para. 6 indirectly determines the jurisdiction of the Administrative Court.

In practice, for these cases there is rarely a negative, even less often a positive conflict of jurisdiction between the administrative and the regular judiciary. And, if a conflict of jurisdiction appears, the Supreme Court is obliged to resolve it by determining which court should decide in the specific case. The more challenging problem would be if the conflict appeared between the Administrative Court and the Constitutional Court. This could arise bearing in mind the cited Article 3,

para. 1, sub-para 6 of the Law on Administrative Disputes and Article 110, para. 1, sub-para. 3 of the Macedonian Constitution which provides that the Constitutional Court protects the individuals' and citizens' freedoms and rights which relate to the freedom of belief, conscience, thought and public expression of thought, political association and the right to non-discrimination on the grounds of sex, race, religion, nationality, social and political affiliation.

So, for the purpose of illustration, let us assume that a holder of public office has been dismissed, and he/she believes that the dismissal was due to his/her nationality or political affiliation. Which court would be competent to decide in such case? We would have to accept the standpoint that the individual should file either legal remedy, however, one has to bear in mind that throughout the ages the Constitutional Court of Macedonia has only decided in such cases for infringement of individuals' rights and liberties in rare cases.

Conflicts of competencies between different public authorities

The administrative judiciary is competent for resolving the conflict of competencies between the public authorities of the central government and the bodies of the municipalities and the city of Skopje as units of local self-government, as well as for the conflict of competencies between the units of local self-government, unless otherwise provided by the Constitution or laws.

Disputes arising from the procedure for concluding administrative agreements

The Law on Administrative Disputes defines the administrative agreement in Article 4, para. 1, sub-para. 8 as a "bilateral legal act concluded between a public authority and a national or legal person with the subject of performing public service or providing public services…". Administrative agreements are the concession agreements, the public procurement agreements which are of public interest, the contracts for performing public services or public works which are a competence of the pubic authority, as well as other agreements which the administrative judiciary shall deem as such bearing in mind their content. The definition of an administrative agreement is also contained in the Law on General Administrative Procedure: "An administrative agreement is an agreement that the public authority concludes with the party for the purpose of performing public powers within the competence of the public authority, when it is determined by a special law". Thus, there are several preconditions for an agreement to be considered an administrative one: one of the parties has to be a public authority; the subject of the contract is the

performance of (a) public service(s) by a private contracting party (those public services are, regularly, a competence of the contracting public authority), and such a contractual transfer of competence is allowed by law.

However, the Law on General Administrative Procedure contains additional provisions for the administrative agreements, directly affecting each individual conclusion as to whether an agreement is to be deemed administrative or not. Article 99, para. 2 of the Law on General Administrative Procedure reads: "the annulment of the administrative contract upon a lawsuit of the party, i.e. the public body, is decided in an administrative dispute". The Law on General Administrative Procedure also regulates the unilateral termination of the administrative agreement, stating that it can only be done by a decision of the public authority if one of the two preconditions from Article 101 is met. Those conditions are failure of the private contractor to fulfill the obligations, and necessity to terminate the agreement so that imminent danger to the life and health of people or property is eliminated (and it cannot be done otherwise).

In these cases, the administrative agreement is terminated by an administrative act/decision in which the reasons for termination must be stated and explained. Against this administrative act, the party can initiate an administrative dispute as per Article 101, para. 4 of the Law on General Administrative Procedure.

The provisions of the Law on General Administrative Procedure in this situation are a *lex specialis* in relation to the Law on Administrative Disputes. Hence, it undoubtedly follows that in addition to the explicitly stated "disputes arising from the procedure for concluding administrative agreement", the acts of the public authorities for annulment of an administrative contract shall be considered as a subject of the administrative dispute, as well as the administrative acts by which the public authorities perform unilateral termination of the administrative agreements. In fact, there is nothing disputable in this interpretation of the competence of the administrative judiciary in assessing the legality of administrative acts (decisions) of public authorities, even without the cited Article 101 from the Law on General Administrative Procedure. This is because the decisions of public authorities arising from the procedure for concluding administrative agreements, as well as their decisions for early termination or annulment of administrative agreements, without any doubt, are classic administrative acts that directly affect the legal status of the plaintiff, i.e. acts with which the public authority decides on an individual's/legal entity's rights, obligations and legal interests.

Therefore, the Administrative Court should implement a broad interpretation according to which it is competent to review all decisions of the public authorities which are adopted in the procedure for concluding administrative agreements/ for termination or annulment of an administrative agreement. In other terms, even though the Law on Administrative Disputes refers only to the procedure for

concluding administrative agreements, the Administrative Court can decide on the decisions for their termination or annulment as well.

Legality of the decisions which are reached upon a free assessment of the public authority – discretionary acts

The Law on Administrative Disputes sets out precise limits of the judicial oversight over the discretionary acts of the public authorities. In light of the Law on Administrative Disputes, an administrative dispute cannot be initiated in order for the Administrative Court to review the substantive aspects of the discretionary act. On the contrary, the Administrative Court can only review whether the procedure in which the discretionary act was adopted has been carried out in line with the law and whether the public authority adhered to the limits of its (legally set out) discretionary competencies. To further elaborate on the latter, every discretionary competence is given, by law, with a certain goal. When examining discretionary acts, the administrative judiciary can only inspect whether the goal for which the discretionary competence was given is met with the individual act at hand. Hence, when the subject of administrative-judicial control is the legality of an act adopted at its own discretion, then the possibility of conducting an administrative dispute in full jurisdiction is excluded. The Administrative Court is competent, if it finds the discretionary act illegal, only to annul it.

The legality of the administrative act (decision) of a public authority reached upon an objection against a real act or its omission

This provision is stipulated so that the Law on Administrative Disputes may be in line with the Law on General Administrative Procedure from 2015. The latter introduced the so-called real acts as one of the types of administrative actions. Namely, the real acts are defined in Article 4, para. 1, sub-para 12 as acts or actions of a public authority – other than the administrative acts and the administrative agreements – which have legal effects on the rights, obligations or legal interests of a person. Respectively, real act may be record keeping, issuing of a certificate, undertaking actions to enforce a decision, etc. Real acts are factual actions which are not decisions in light of the individual's rights/obligations/legal interests, but do affect them (for instance, a company is not granted with the right to build new headquarters when the certificate for land ownership is issued, however the respective certificate does affect the company's rights given that it shall be used in the procedure for building permits). A regular remedy against the real acts or their omission is the objection. According to Article 118, para. 1 of the Law on General Administrative Procedure: "against a real act or its omission, the party may file an administrative objection to the public authority that

has undertaken or not undertaken the real act, if the party claims that his/her rights or legal interests have been violated by the real act or the non-performance of the act". In addition, Article 119, para. 3 and 4 of the Law on General Administrative Procedure determines that the public authority decides on the objection against a real act or its omission with an administrative act (decision) that should be adopted without any delay, no later than 15 days after receiving the objection. The decision with which the public authority decides on the objection against the real act is just as any other decision – and it can be a subject of an administrative-judicial control.

CONCLUSION

The Law on Administrative Disputes adopted in 2019 amended the entire purpose and scope of the administrative-judicial control in Macedonia. In fact, the administrative dispute is now set out in such way that its primary purpose is protecting the rights and interests of the individuals and legal entities (meaning that the subjective concept of administrative dispute is accepted), while the subject-matter jurisdiction of the administrative judiciary is much broader than in the past. Thus, the administrative dispute regime in Macedonia is finally (at least from a normative point of view) in line with the European standards, while the presented legal provisions put the citizens and the legal persons in a much more favorable position. Since the law has been applied just over a year now, further researches shall illuminate whether better protection against the illegal acts and actions of the public authorities is provided on its basis, especially in terms of the areas causing dilemmas such as the decisions for election/appointment/dismissal of office holders and/or the administrative agreements.

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ŠIROKA SUDSKA KONTROLA NAD JAVNIM ORGANIMA: PRIMARNI CILJ NOVOG ZAKONA O UPRAVNIM SPOROVIMA REPUBLIKE SEVERNE MAKEDONIJE

Rezime

Upravni spor je pravni mehanizam sudskog nadzora nad javnim organima. U tom pogledu, zakon(i) koji uređuju upravne sporove, u smislu njihovog opsega, postupka, nadležnosti za rešavanje upravnih sporova itd, od vitalnog su značaja za zaštitu prava i interesa građana i pravnih lica.

Stoga se ovaj rad upravo fokusira na Zakon o upravnim sporovima Republike Severne Makedonije usvojen 2019. godine koji je na snazi od 2020. godine. Ideja je predstaviti novine i rešiti određene dileme koje se mogu javiti u svakodnevnoj primeni zakonskih odredaba. Konačno, cilj ovog rada ogleda se u argumentaciji stava da je prošireni opseg administrativno-sudske kontrole korisniji za građane.

Ključne reči: upravni spor, upravno-sudska kontrola, sudski nadzor, upravni akti, odluke

Bibliography

Borković I. *Upravno pravo*, Narodne novine, 2002.

Давитковски Б., Павловска-Данева, А., *Административно право – книга втора: процесно право,* Правен факултет "Јустинијан Први", Универзитет "Св. Кирил и Методиј" во Скопје, Скопје, 2020.

Dimitrijević P., *Upravno pravo*, peto izdanje, Medivest, 2019.

Jansen O., "Silence of the administration" (ed. Jean-Bernard Auby), *Droit comparé de la procédure administrative*, Bruylant, 2016.

Milovanović D., "Predmet upravnog spora", *Zbornik radova 150 godina upravnog spora u Srbiji 1869-2019*, Upravni sud Republike Srbije, Pravni fakultet Univerziteta u Beogradu, Beograd, 2020

Ofak L. "Administrative Disputes in Civil Law Jurisdictions", Max Planck Encyclopedia of Comparative Constitutional Law, 2017.

Tomić Z., *Opšte upravno pravo* (13 izdanje), Pravni fakultet Univerziteta u Beogradu, Beograd, 2020.

The Sound of Silence in European Administrative Law (eds. Dragos D., Kovač P., Tolsma H.), Palgrave Macmillan, 2020.

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