

Control of Legality of Administrative Acts and Protection of Human Rights and Freedoms

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Abstract

Subject matter of this study is control of the administration, its types and meaning as well as the position and role of the court in the Republic of Macedonia, in particular from the aspect of protection of the citizens' rights and freedoms against the actual illegal acts of the administration. The paper consists of an introduction, three discussion parts and a conclusion. In the introduction, the reasons for researching this important topic are given. In the first part the importance of the control of the administration is indicated. In addition, its types in the Macedonians' legal system are described. In the second part of the paper the importance of judicial control of the concrete administrative acts in terms of separation of powers into legislative, executive and judicial is discussed. In the third part the role and the position of the administrative judiciary system in Republic of Macedonia is critically analyzed with respect to the power separation. In addition, the possibilities of disruption of its independence and autonomy by the executive power are implied. Finally, conclusion is provided with guidance for overcoming conferred shortcomings. The purpose of this paper is to highlight the advantages of control of the concrete administrative acts, especially by the judiciary, and to point out the weaknesses of the system that can lead to disruption of the independence of the judiciary by the executive power.

Keywords: Administration, act, control.

1. Introduction

It is more than obvious that administration as necessary instrument for performance of a range of significant issues has widespread authorizations and strong organization. Such a role and setting requires for establishing versatile control, in particular, in terms of its legal and rational setting. In order to ensure legal performance of the administration in the past as well as nowadays, different types and models of control have been practiced to limit exceeding and misuse of the authorizations in its disposal. Most prevailing type of control within the recent period is that of specialized jurisdiction.

2. For Control of Administration and its Types

The oldest historical form of control over state authorities is internal control of the administration. This type of control is the most comprehensive since it evaluates the soundness of the administration actions and it is continuous and competent. This type of control, however, bears by itself elements of partiality and unilateralism since in assessing the appropriateness of its own work the administration is often subjective headed by the service requirements, public interest and defined policy it enforces, whereby the law in the performance of those authorities is more a frame than guiding idea of their performance. Such approach leads mainly to accessorial and subsidiary meaning of enforcement of the objective law and realization of individual interests related to satisfaction of the state needs.

Any constitutional system provides for a form of control over the administration.

The term control itself refers to all possible forms of control, inspections, checks, and supervision in general.

Control refers to activities of secret monitoring of the achievement of the tasks and activities set, and implementation of the results obtained related to the objective set with possibility for corrective impact in the case of its realization (Pusic, 1973). Control is a continuous activity of supervision performed by legally entitled entities over the administration behaviour, the manner of application of its authorizations, acts and measures arising thereof (Borkovic, 1982). The terms control and supervision may be understood as synonyms that indicate same activity comprising monitoring, inspection and assessment of the activity, acts and behaviour, or whether the acts are in compliance with generally adopted rules and regulations related to their enforcement and legality (Gelevski et., 1997). Subject to control of may be the administration behaviour, the manner of applying its authorizations, acts and measures adopted or undertaken by the administration. In theory, and related to the types of control of administration, there are different opinions and positions subordinate to the criteria taken by the authors as a base of division of the control types. Consequently, control primarily may cover legality and rationality (Note 1). The following may be distinguished by the entities for administration control: Bearers of control and authorities to be controlled (Note 2). Control may be political (Note 3) and legal (Lisic, 1995) (Note 4).

Basically, there are three means of ensuring legality and protection of the citizens' rights against the administration operations. First means are specialized, accountant and effective staff that are efficient in their work. Second means are system of procedural protection against the errors and illegalities in administration within the administration itself. Third means is the system of external supervision performed by an entity out of the administration.

The third type of control, external supervision, includes political control, involving control of the parliament, government, ministers and managers of particular departments, then control by courts, regular and special courts, control of the administration by the public and control of the ombudsman.

At the same time indicating to the tendency of approaching, and sometimes to functional connection between the administration and judicial control over the administration. The so-called administrative-legal control, as a rule, in contemporary legislation becomes compulsory and precedes judicial control of administrative acts, or administrative-legal control is to be processing requirement for judicial control of administration. Such solution is a result of a principle presumption of primary administrative competence and principal requirement that the decision is to acquire maturity for assessment by the court.

In the Republic of Macedonia legality control of particular administrative acts is realized within the administration itself (by way of instance control, or control by the right of supervision) as well as by courts.

Administrative-legal protection of the citizens of the Republic of Macedonia is secured by the Law on General Administrative Procedure. (Note 5) It is realized in first and second instance administrative procedures characterized by various guarantees for protection of the parties in the procedure for the purpose of adoption of concrete legal acts by the administration. Pursuant to the provisions, competent first instance authorities are the following: ministries, other state administrative authorities, organizations established by law and other state administrative bodies, legal and other entities performing public authorizations entrusted by law, municipal, Skopje City authorities and authorities in Skopje City municipalities deciding in first instance on the rights, obligations or legal interests of natural and legal persons or of other parties (Note 6).

The State Second Instance Commission for Decision-making in Administrative Procedures and Labour Relations Procedures is competent for second instance decisions upon appeals filed against decisions adopted in first instance administrative procedures (Note 7).

The State Commission is a novelty in the legal system of the Republic of Macedonia having several implications as follows: systematic regulation of actions upon appeals against acts adopted in first instance administrative procedures, increment of efficiency in exercising the right to appeal against administrative procedure, independent and professional decision-making in first instance administrative procedure.

The State Commission is a state authority autonomous in its operation with a capacity of legal entity, and it is independent administrative body which is to act professionally without any external pressure. They are directly accountable before the legislative authorities.

2.1 For Control of Administration and its Acts

It is a fact that administrative supervision and control 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 by the administrative bodies. Administrative control merely within the framework of administrative organization not only lacks to provide secure guarantees for ensuring the principle of legality of administrative acts but also it is not sufficient and unreliable in providing full and real protection to the individuals.

Therefore the control of administrative acts legality should be entrusted to other independent authorities. But the question arises which authorities are most appropriate for this type of control. If this control is entrusted to legislative authorities, it is a fact that they like the administrative authorities will build their assessment of soundness of administrative acts on advisability, or political grounds. Consequently, in a system with tripartite division of power the only solution for control of soundness of actual acts of the administration are courts.

Despite numerous remarks that entrusting the control of legality of administrative acts to courts undermines the principle of power division and involves the administration into subordinate position not only to legislative but also to judicial authority; nevertheless this solution entails most acceptable, in particular from the aspect of declared position and role of courts in the society as independent and autonomous authorities as well as qualified and competent to assess legal side of administrative action, or soundness of administrative acts.

The possibility of conducting administrative dispute is typical for countries for which legality and rule of law principles are valid, or where the matters between administration and citizens are regulated by law. Relating to this matter, administration and citizens have particular mutual rights and obligations arising from law, so that any right empowered to the administration counterbalances the citizen's obligation to the administration and reverse, any citizen's right counterbalances the obligation of administration to the citizen.

Why is judicial control of concrete acts of administration important? Because unless administration action is strictly statutory tied and controlled, wide prospects for mass violation of statutory principle open.

Grounding the state on the principle of rule of law (Note 8), means a concept in which judiciary is independently and autonomously positioned in the legal system (Note 9). In fact, it is not accidentally that Montesquieu in his book “The Spirit of the Laws” points out the need for division of power in judicial and executive noting that any merge would lead to tyranny and violence.

Separation of power should hamper violation of one authority over another and citizens, deconcentration of power, precise allocation of the administration functions, impossibility of entailing, instrumentalization and supremacy of one authority over another. In fact the problem of the relations between different types of authority should solve the dilemma related to allocation of the centres of power and the methods for exercise of power.

3. Position of the Administrative Jurisdiction in the Republic of Macedonia

Namely, the Constitution of the Republic of Macedonia (Note 10) and the Law on Courts (Note 11) 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 (Note 12) within which competence is also administrative jurisdiction (Note 13) 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 types, 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 MPs (Note 14).

The courts’ decisions are pronounced in the name of citizens – Article 13 of the Law on Courts. The control enforced thereof should be focused on the control over power holders, authorities and governance. It is separated from the executive and administrative units. Courts are special type of state authorities, differing by their organization from the other state authorities, for which special regulations of organization are valid. Courts should make their decisions within applicable law, and not based on the reasons of political opportunity or equity. Courts have twofold task: with their decisions they protect the fundamental rights and interest of the citizens, institutions, organizations and legal entities (Article 5 of the Law on Courts), and as authority to protect the social and legal order in the country.

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 promotion of human rights and fundamental freedoms, ensuring equity, equality, non-discrimination at any grounds and ensuring legal security based on the rule of law (Article 3 of the Law on Courts).

The Administrative Court, Higher 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 (Note 15).

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 themselves (Note 16).

The Judicial Council is competent for election and dismissal of judges and defining and cancellation of judge function; election and dismissal of the court presidents; monitoring and evaluation of the judge work; deciding on immunity from seizure, and etc (Note 17).

It shall be, however, admitted that the Constitution and legislation of the Republic of Macedonia, judiciary and even administrative judiciary cannot in practice prevent the domination and power of executive authority in relation to the legislative and judicial authorities.

Hence, with regard to judiciary independence, there are some assertions for selective justice, indirect political pressure, court decisions which are extraordinarily accelerated related to result and pace as well as the content of court decisions which sometimes have direct consequences on the career of the judges concerned, in particular in significant or political sensitive cases. Taking into consideration that justice should not only be enforced but also it is to be perceived to be enforced, the fact that such justice-related suspicions exist is a problem for judiciary independence and public trust (Note 18).

Consequently, reforms are required in terms of independence and impartiality of a court related to parties in a concrete case only, but also in terms of governing political structure (which is characteristic of a democratic legal state, where a court role is determined by the idea for justice and protection of the human rights and freedoms, property and other interests of legal entities in exercising the function of administration of justice).

A court should have independent position not only related to executive authority and parties in proceedings but also institutional independence from political impacts. Certainly that formal and legal numerous

rules exist in the Republic of Macedonia which are to ensure independent position of the courts (judges are elected by independent judicial body – Judicial Council of RM – Article 42 of the Law on Courts; the judges' term is unlimited – Article 38 of the Law on Courts; judges are guaranteed immobility in their judicial function – Article 39 of the Law on Courts; prohibition exists for any impact on their jurisdictional function on any grounds and from any subject – Article 11 of the Law on Courts; performing their jurisdictional function, judges enjoy immunity – Article 65 of the Law on Courts; special judicial budget exists (Note 19); and etc.

Practice however indicates that the courts independent and impartiality in the Republic of Macedonia currently is disputable, and the political elite influence emphasized.

Therefore, improvements in the organization of the judicial system and structure for judge career (Note 20) will be required, which will not only lead to formalistic decision-making for achieving short-term productive targets but also to dispute settlement, building stable judicial practice, making clear and well founded judicial decisions and ensuring long-term legal reliability in the interest of citizens. Justice quality which depends on the judges' competence and training entails a need to fully implement the merit-based election principle for election of judges in the Republic of Macedonia (Note 21).

In addition, independence of judges is to be ensured, particularly in terms of security of their term. For that purpose, legislations governing judges' dismissal is to be amended for precision and prudence (Note 22).

The current assessment and promotion system of judges mainly emphasizes their productivity and achievement of targets instead of quality and problem solution, which may induce formalistic instead of independent decision-making (Note 23).

Such situation in the Republic of Macedonia contributes to occurrence of opinion in theory for redefining the judge function as *public service of justice* (Note 24), with a role of independent arbiter between authority and individual; thus releasing from the policy influence when enforcing law and pronouncing sentences (Kambovski, 2010). We will also mention the stands on the judicial function as social, and the Court as surety of legality, freedoms, rights and tackling autocracy of authority (Popovska, 1996).

4. Conclusions

The need for the control of the concrete administrative acts is evident. The organization of this kind of control in the Republic of Macedonia is constantly changing and upgrading with declarative tendency to be placed in the hands of specialized and expert bodies. However, in reality the problem with the independence of these institutions is still present. Namely, there are obvious attempts by the executive power in Macedonia to deteriorate the position of the judiciary and to overpower it. Therefore in the future the attention will have to focus on several issues: building higher democratic consciousness and relations in the system as a precondition for adequate realization of the separation of powers principle; building the notion that the separation of powers into legislative, executive and judiciary, practically should be the separation of responsibilities and functions in the state organization; state authorities should be bound by the request to limit the power in favour of individual freedoms and rights; review of all legal provisions that allow even minimum opportunity to executive power to interfere and to influence in the work of the judiciary.

References

- Borkovic, Ivo, (1987), *Upravno pravo*, Zagreb, 33-38.
- Vincent, Jean/Guinchard, Serge/Montagnier, Gabriel/Varinard, Andre, (2003), *Institutions judiciaries*, 7e edition, Paris.
- Gelevski, Simeon, et al., (1997), *Upravno pravo*, Skopje, 155-160.
- Gelevski, Simeon, (1997), *Sudska kontrola i zakonitost na administrativnite akti (Judicial Control and Legality of Administrative Acts)*, Collection of the Faculty of Law in Skopje, Skopje, 41-51.
- Grizo Naum, et al. (2008), *Administrativno pravo (Administrative Law)*, Skopje, 332-340.
- Lilic, S, (1995), *Upravno pravo*, Beograd, 55-58.
- Kambovski Vlado, (2010), *Sudsko pravo (Judicial Law)*, Skopje, 103
- Poposka, Biljana, (1996), *Za prirodata na pravosudnata funkcija (For the Nature of Judiciary Function)*, Collection in honor of Ivo Puhan, Faculty of Law, 270.
- Pusic, E, (1961) *Uprava, knjiga I*, Zagreb, 151-160.
- Pusic, E., (1973), *Nauka o upravi*, Zagreb, 61-73.
- Constitution of RM, Official Gazette of RM No 52/91, 1/92, 31/98, 91/01, 84/03, 107/05.
- Law on General Administrative Procedure, Official Gazette of RM No 38/05;
- Law on Administrative Disputes, Official Gazette of Republic of Macedonia No 6p.62/06, 150/10;
- Law on Courts, Official Gazette of the Republic of Macedonia No 58/06, 35/08, 150/10;
- Law on Judicial Council of the Republic of Macedonia, Official Gazette of RM No 60/06, 150/10, 100/11;
- Law on Court Budget, Official Gazette of RM No 60/2003, 37/06 and 103/08;

Law on Establishing State Second Instance Commission for Decision-making in Administrative Procedures and Labour Relations Procedures

Progress Report of the European Parliament and the Council on the Republic of Macedonia 2013, <http://sep.gov.mk/>

Notes

Note 1. Legality control covers supervision assessing the harmonization of administrative acts and measures with legislation, governing the cases in which such acts may be adopted, or measures taken as well as the adoption procedure thereof. Advisability control means a form of supervision, under which administrative acts and measures are compared to the purpose to be achieved.

Note 2. Control holders are subjects, which by way of legal norms, are authorized to perform particular form of supervision over administration, applying control authorizations (the Parliament, Government, administrative authorities themselves, courts, Public Prosecutors Office). Authorities controlled are different administrative organizations – passive controlled entities (state and local administration, their organizational units).

Note 3. Control is political when it is enforced by political entities such as the Parliament, Government, political parties and public opinion. The purpose of political control does not mean control of actual administrative acts, but taking legal-political measures. These measures make either direct intervention thereof in a manner that they cease to apply or their matter is otherwise governed by law, or indirectly by way of political impact on the administration, it is forced to amend or cease to apply its own general act.

Note 4. Legal control may be: administrative control – made by the administration itself, and which may be external or internal administrative control; judicial control – as control over administration, and which may be general judicial control on legality of administration operation and decisions, made by regular courts; judicial control over legality of administrative acts made by administrative courts in administrative-judicial proceedings; special judicial protection of the rights and freedoms guaranteed by the Constitution and constitutional-judicial protection; special control of administration, as a control realized by special institutions such as Public Prosecutors Office (based on procedural authorizations to initiate particular procedures) and Ombudsman (who controls administration protecting the citizens' rights).

Note 5. Official Gazette of the Republic of Macedonia No 38 of 26.05.2005.

Note 6. Article 1 of the Law on General Administrative Procedure.

Note 7. Law Establishing State Second Instance Commission for Decision-making in Administrative Procedures and Labour Relations Procedures, Official Gazette of the Republic of Macedonia No 51 of 13.04.2011.

Note 8. Fundamental values of constitutional order of the Republic of Macedonia are fundamental human rights and freedoms recognized in the international law and defined in the Constitution; rule of law; division of state authority in legislative, executive and judicial power – Article 8 of the Constitution of RM.

Note 9. The Constitution of RM, amendment XXV (Official Gazette of the Republic of Macedonia No 107 of 09.12.2005) declares independent and autonomous judiciary.

Note 10. 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.

Note 11. The Law was published in the Official Gazette of the Republic of Macedonia No 582 of 11.05.2006. Amendments to the Law were published in the Official Gazette of the Republic of Macedonia No 35/2008 and 150/10.

Note 12. Reform in judiciary of the Republic of Macedonia was implemented from 2004 to 2010, whereby significant amendments to the Constitution, Law on Courts and Judicial Council were made, Academy for Judges and Public Prosecutors was established to add to the realization of professional and competent judiciary and introduction of much stricter professional requirements, Administrative and Higher Administrative Courts were organized, court decisions are enforced by professionals, the number of unsolved cases were reduced, legal assistance and mediation have been introduced, automated system for court cases and e-justice was set up, the legislation related to criminal procedure and police reform were fully reorganized. Consequently, key long-term reforms in this field have been already completed in accordance with the European standards. However, there is concern related the function of courts in practice. This refers to independence of courts (and law enforcement in general) as well as to the general quality of justice – Progress Report of the Republic of Macedonia 2013, p. 13.

Note 13. In the Republic of Macedonia, judicial system for control of administration performance through administrative dispute dated as of 1952. Almost for half a century, exactly until 2006, this type of courts control was enforced within the regular judiciary; namely, it was the Supreme Court jurisdiction for first instance

enforcement (in two councils, each of three judges). The Supreme Court made second instance decision upon appeal, if permitted as remedy in a council consisting of five judges. However, the practice of delayed and slow resolution of administrative-legal cases in the Supreme Court was the reason to adopt a new Law on Administrative Dispute in the Republic of Macedonia in 2006 modifying the organizational model of administrative-judicial control in the Republic of Macedonia. Nowadays, the Administrative Court, Higher Administrative Court and Supreme Court have jurisdiction over administrative-judicial control of legality of particular administrative acts in the Republic of Macedonia in accordance with the Law on Administrative Dispute and Law on Courts.

Note 14. Amendment XXV to the Constitution of the Republic of Macedonia published in the Official Gazette of RM No 107/05.

Note 15. Law on Courts, Article 22.

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

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

Note 18. Progress Report of the Republic of Macedonia 2013, p. 13.

Note 19. Law on Court Budget, Official Gazette of RM No 60/2003, 37/06 and 103/08.

Note 20. In practice, the Judicial Council when electing judges ignored the Law requirements for a long period to prefer the staff from the Academy of Judges and Public Prosecutors. Hence, in 2012 in the first instance 39 judges were appointed, and 4 of them only graduated from the Academy, and 13 in the first half of 2013, and 1 of them only graduated from the Academy. Interim 13 of 80 candidates for judges and prosecutors graduated in 2009 are still awaiting their first employment. This prejudices the efficiency of the new legislation and commitment to the merit-based principle of employment in judiciary.

Note 21. Progress Report of the Republic of Macedonia 2013, p. 13.

Note 22. Protective measures are required to guarantee the application of proportional disciplinary measures by the Judicial Council. The tendency to pronounce dismissal instead of indulgent disciplinary sanction is continuing as well as the application of comprehensive grounds for dismissal based on “unprofessional and unaccountable judicial practice” in almost all cases – Progress Report of the Republic of Macedonia 2013, p. 52.

Note 23. Direct relation between assessment and dismissal that is to be applied as punishment for serious disciplinary infringements only is to be eliminated – Progress Report of the Republic of Macedonia 2013, p. 52.

Note 24. The idea of the Court as public service in the interest of all citizens was developed by the French theoretician Duguit in his Social solidarity theory, see Vincent, Jean/Guinchard, Serge/Montagnier, Gabriel/Varinard, Andre, 2003, Institutions judiciaries, 7e edition, Paris, 160.

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