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HISTORICAL AND CONTEMPORARY DEVELOPMENT OF JUDICIAL CONTROL OF ADMINISTRATION IN SERBIA

The article gives an overview of the historical development of Serbian administrative justice, description and analysis of the current regulation thereof and the reform of administrative judiciary envisaged by Serbian National Judicial Reform Strategy.

Key words: *Administrative judiciary. – Judicial control of the administration. – Administrative Law. – Judicial Reform. – Serbia.*

1.INTRODUCTION

When one speaks about administrative judiciary or better yet judicial control of administration in a country, one does not refer only to the organization and procedural aspects of a certain type of courts in a country. One, actually, addresses the core legal issue of democracy in it. For functioning of judicial control of administration in a country is a flawless litmus paper of the rule of law in that country. Any state that indeed restrained its powers and submitted it to legal control is the one in which the administrative judiciary has the necessary legal and extralegal capacities to perform such a task.

This article mainly addresses the issue of administrative judiciary in Serbia, its organizational and procedural features. However, in order to enable complete understanding of the role and functioning of administrative judiciary, it also tackles the matters of administrative procedure, pre-judicial, administrative control of administrative acts and the other types of judicial control of the work of administration. The paper provides first an overview of historical development of administra-

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tive dispute in Serbia, proceeds with detailed outline of its current regulation and finishes with the explanation of the envisaged reform thereof.

2. HISTORICAL DEVELOPMENT OF SERBIAN ADMINISTRATIVE JUDICIARY

The Serbian administrative legal system evolved through two distinct, yet connected paths, the process of codification of the rules of the administrative proceeding, on the one hand, and the development of judicial control of administrative acts, on the other. Although, chronologically speaking, the codification of the rules of the administrative proceeding occurred later, this process shall be described first given that it had a more straightforward development.

The Kingdom of Yugoslavia (including Serbia as a part thereof) was among the first countries in the world to codify the rules of the administrative proceeding by adopting the General Administrative Proceeding Act in 1930 (entered into force in 1931). Before Yugoslavia, this was done by Spain in 1889,[1] Austria in 1925 and Czechoslovakia and Poland in 1928.[2] Yugoslavian law was mainly based on its Austrian role-model, but was almost two times bigger, because the legislator included numerous provisions of civil proceeding in it.[3]

The political changes after the World War II led to a discontinuity with the previous legal system. All the laws and regulations enacted before the war were not in force any more, but could still be applied under two conditions: if there was no new law regulating pertinent matter and if the provisions of previous law were not in a contradiction with the new constitutional and political order. Therefore, although not in force, certain provisions of the General Administrative Proceeding Act of 1930 were applied by the administrative authorities until the new law was enacted. The General Administrative Proceeding Act of 1956 took over many provisions of its predecessor and reflected changes in the political system. It also encompassed new chapters on general principles of the administrative proceeding, competence of administrative authorities, powers of authorized persons and enforcement of administrative acts.[4] This law was amended four times, in 1965, 1976, 1978 and 1986.[5]

After the Federal Republic of Yugoslavia (the third Yugoslavia) was created in 1992, the 1956 Law with its changes was still in force. In 1997 a new law was passed. The law had minor amendments in 2001 and 2010. The amendments mainly concerned the change of terminology resulting from the change in the organization of

1 Rusch, Wolfgang, *Administrative Procedures in EU Member States*, Conference on Public Administration Reform and European Integration, Budva, Montenegro, 2009.

2 Томић, Зоран, *Опште управно право*, Правни факултет Универзитета у Београду, Београд, 2011, 248.

3 Милков, Драган, *Управно право II, Управна делатност*, Правни факултет Универзитета у Новом Саду, Нови Сад, 2003, 67.

4 *Ibid*., 68.

5 Томић, 249.

the country – from federal (Yugoslavia) to unitary state (Serbia). The 1997 Law did not significantly depart from its predecessor.

Finally, after a seven years drafting period (2009–2016), the currently in force General Administrative Procedure Act[6] (hereinafter: GAPA) has been enacted in 2016. Its implementation started on June 1, 2017.

The first traces of administrative judiciary in Serbia are linked to the establishment of the Council of State (*Državni savet*). This authority was formed in 1839.[7] Serbian legal doctrine, however, considers that administrative dispute, as the most significant form of judicial control of administration, was created by the 1869 Constitution.[8] This Constitution gave the Council of State the competence to "consider and decide upon appeals against decision of ministers in contentious administrative matters."[9] The constitutional provisions were followed by the two laws on the Council of State of 1870. Until the end of the World War I, the Council of State was the only administrative court in the country.

After the World War I, Serbia (Yugoslavia) introduced two-instance administrative judiciary. This was done by the 1921 Constitution and the Administrative Courts Act of 1922. There were six first-instance administrative courts and the Council of State became the supreme administrative court. It decided upon appeals against the decisions of the first-instance administrative courts and as the court of the first and the last instance when the legality of the decisions of ministers was challenged. The Council of State and the administrative courts were, as well as their French role-model, considered to be part of the administration, i.e. executive power, not judiciary.[10] This structure of administrative judiciary lasted until the beginning of the World War II.

After the World War II, the Council of State and the administrative courts were abolished. Until 1952, judicial control of administration did not exist in Serbia.[11] In accordance with Soviet legal doctrine, dominant in Yugoslavia at the time, legal control of the work of administration was conducted exclusively within the administration, i.e. by higher, appellate administrative authorities.[12]

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6 Official Gazette of the Republic of Serbia, no. 18/2016.

7 The contours of this authority could be observed at an earlier stage, at the very beginning of creation of Serbian modern state, during the First Serbian Appraisal against the Ottoman Empire (1804–1813), Сагадин, Стеван, *Управно судство*, Државна штампарија, Београд, 1940, 155.

8 Томић, Зоран, *Коментар Закона о управним споровима*, Правни факултет Универзитета у Београду, *Службени гласник РС*, Београд, 2010, 78; Милков, Драган, *Управно право III, Контрола управе*, Правни факултет Универзитета у Новом Саду, Нови Сад, 2011, 56; Јеринић, Јелена, *Судска контрола управе у нашем и упоредном* праву, doctoral dissertation defended at the University of Union from Belgrade, Faculty of Law (not published), 2011, 46, са даљим with further citations in footnote 117.

9 *Ibid*., 78–79.

10 Томић, *Коментар Закона о управним споровима*, 79.

11 Поповић, Славољуб, *Управни спор у теорији и пракси*, Завод за издавање уџбеника Социјалистичке Републике Србије, Београд, 1968, 9–12.

12 Certain special laws prescribed the competence of ordinary courts to decide on the legality of particular types of administrative acts, Драгојловић, Лука, *Спор пуне јурисдикције у праву СФРЈ*, doctoral dissertation defended at the University of Sarajevo, Faculty of Law (not published), 1978, 18.

In 1952, the Administrative Disputes Act was enacted. It regulated the procedure of judicial control of administrative acts. In accordance with the federal organization of Yugoslavia, the competence of courts was determined by the laws of federal units.[13] In Serbia, the competence to resolve administrative disputes in the first instance was divided between the Supreme court (for administrative acts of the central state authorities) and county courts (for the administrative acts of local government authorities). The Supreme Court decided on appeals and other recourses against the decisions of the county courts.[14] This was also the case when the Federal Republic of Yugoslavia (the third Yugoslavia) enacted the Administrative Disputes Act of 1996, predecessor of the law currently in force.[15]

It remained so until 2010, when Serbia introduced the Administrative Court. There is only one Administrative Court for the entire territory of Serbia and it is part of judiciary, not the executive power (Arts. 11 and 29 of the Organization of Courts Act[16]). Its seat is in Belgrade and it has three departments, in Novi Sad, Niš and Kragujevac. It decides in all administrative disputes in the first instance. Its decisions are final, there is no appeal, i.e. ordinary legal remedy against them. There is, nevertheless, one extraordinary legal remedy that can be filed with the Supreme Court of Cassation, but only in a very limited number of situations (Art. 49 of the Administrative Disputes Act[17]). The administrative dispute procedure is regulated by the 2009 Administrative Disputes Act (hereinafter: ADA).

To summarize, these two pathways of evolution of the administrative law in Serbia can be compared. The codification of the rules of the administrative proceeding was linear, keeping its original essence with necessary adjustments and modernization. These codified rules were applied even during the period of political and legal discontinuity immediately after the World War II. On the other hand, after the turbulent period of its genuine establishment, from the creation of the Council of State until the recognition of mandatory nature of its decisions (1839–1869), the judicial control of administrative acts took the form of all comparatively known major organizational models. To be precise, it went from the French model of administrative courts that are part of the executive (before the World War II), to the period of Soviet absence of judicial control (from the end of World War II until 1952), and through the Anglo-Saxon system of resolution of administrative disputes by ordinary courts (1952–2010), to the German/Austrian model of existence of a special administrative court that is a part of the judiciary (since 2010).[18]

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13 Стјепановић, Никола, *Управно право СФРЈ, Општи део, Књига II,* Завод за издавање уџбеника СР Србије, Београд, 1964, 801.

14 *Ibid.*

15 For details on 1996 law see Vučetić, Dejan, "Serbian Judicial Review of Administrative Acts and European Standards for Administrative Disputes", *Facta universitatis*, Faculty of Law, University of Nis, Series: Law and Politics Vol. 3, No. 1, 2005, 73–80.

16 Official Gazette of the Republic of Serbia, no. 116/2008, 104/2009, 101/2010, 31/2011, 78/2011, 101/2011 and 101/2013.

17 Official Gazette of the Republic of Serbia, no. 111/2009.

18 For detailed overview of the historical development of the administrative dispute and administrative judiciary in Serbia, see Цуцић, Вук, *Управни спор пуне јурисдикције – Модели*

3. FORMS OF JUDICIAL CONTROL OF THE ADMINISTRATION

The judicial control of the administration in Serbia is divided between the Administrative Court (hereinafter: AC), the Constitutional Court and the ordinary (civil) courts.

The most important type of judicial control of the administration is the control in administrative dispute (administrative court proceeding), before AC, as well as, in a limited number of situations, before the Supreme Court of Cassation.

Primarily, the job of AC is to control the legality of non-appealable administrative acts [*konačan upravni akt*] (Art. 3, par. 1 ADA). An administrative act, pursuant to the Serbian legislation (Art. 4 ADA and Art. 16 GAPA) and legal doctrine is an individual, unilateral, binding, legal act of the administration.[19] Serbia has a mandatory system of administrative appeal. This means that in order for an administrative act to be challenged before AC, first an administrative appeal to a higher administrative authority has to be filed against that act. Only once the act has been confirmed by the higher administrative authority and, thus, became non-appealable, a lawsuit can be submitted to AC. The only exception is the situation in which the administrative appeal has been excluded by a law. This is usually the case when the highest administrative authorities, particularly ministries, decide a case in the first instance.[20]

There is an exception to previously mentioned rule. Namely, the non-appealable administrative acts cannot be challenged in administrative dispute if other type of judicial protection has been provided (Art. 3, par. 1 ADA). An example of such exception is a decision of employer to dismiss its employee, in which case the employee can file a lawsuit with the ordinary court in labor dispute (special type of civil litigation). This does not apply to civil servants.

In addition to non-appealable administrative acts, the silence of the administration (Art. 15 ADA), i.e. the omission of the administration to issue an administrative act upon party's request within the time period prescribed by the law, can be challenged before AC. The silence also has to be non-appealable, i.e. the administrative authority that omitted to issue an act has to be the authority whose administrative act, had it issued it, could not have been contested by an administrative appeal. These are either the appellate authorities or the authorities (usually the highest ones), against whose first-instance decisions the administrative appeal is excluded by a law.

Besides these two, the subject-matters of the administrative dispute can also be other legal acts and claims.

и врсте, Правни факултет Универзитета у Београду, Београд, 2016, 253–261.

19 Krbek, Ivo, *Upravni* akt, Zagreb: Jugoslavenska akademija znanosti i umetnosti, 1957, 16; Милков, Драган, *Појам управног акта*, doctoral dissertation defended at the University of Novi Sad, Faculty of Law (not published) 1983, 349.

20 Cucić, Vuk, "Administrative Appeal in Serbian Law", *Transylvanian Review of Administrative Sciences*, no. 32/2011, 52–53.

Art. 3, par. 2 ADA prescribes that in administrative dispute, a party can also challenge legality of non-appealable acts, by which it has been decided upon someone's right, duties or legal interest, provided other form of judicial protection has not been provided. The administrative dispute has, hence, been set as a residual form of judicial protection against individual, unilateral legal acts in Serbian legal system. This is also prescribed by the Constitution of the Republic of Serbia[21] – the legality of non-appealable acts deciding on rights, duties and legal interests is subject to examination in administrative dispute, unless a law prescribes other type of judicial protection (Art. 198, par 2). Art. 3, par. 2 ADA provides that the administrative dispute can also be initiated against other non-appealable individual acts, when this is stipulated in a law. The explanation for introduction of this provision in ADA, given that its predecessor did not have it, was to leave a possibility to provide legal protection in the administrative dispute against administrative contracts, which did not exist in Serbian law in 2009, when ADA was enacted. In the meantime, GAPA, enacted in 2016, introduced administrative contracts in Serbian legal system, but envisaged a different solution for legal protection (see below). Despite legislator's intent to widen the scope of the administrative dispute with these two provisions, they were never applied in practice.

The main claim a party can make in the administrative dispute is to request annulment (quashing) [*poništavanje*] of the challenged act. This means that the act is going to be removed *ex tunc*, i.e. as of the date of its issuance. Except for the request to annul the challenged act, a party can make accessorial request for damages or return of an object that was taken away (Art 16 ADA). A special attention has to be paid here to the fact that these two requests are of auxiliary nature. Namely, a party can make these two claims only in addition to the request for annulment of the challenged act, i.e. a party can ask only for the compensation of the damage that was caused and/or the object that was taken away by the annulled act (Art. 45 ADA). AC, however, has a discretion here to decide whether it will award damages or return the object by its own judgment or only annul the challenged act and direct the party to claim damages or return of an object in the civil litigation. Unfortunately, due to the lack of the capacities of AC (see below), it has never happened in practice AC awarded one of these two accessorial claims. It always directed the parties to the civil litigation.

If a party wants to get damages for the damage that was caused by the administration, but not by an administrative act, e.g. when the damage was caused by a factual act of the administration, it has to initiate a civil litigation proceeding before the ordinary courts. Therefore, if the damages claim is the main claim, it belongs to the civil litigation proceeding.

ADA had another novelty with respect to its predecessor. It set down two additional claims a party may submit. A lawsuit can be filed with AC with the request for declaration that the defendant (administrative authority) repeated the act that was previously annulled by AC (Art. 24, par. 2). This is the situation in which submitted a lawsuit against an administrative act to AC, AC annulled it and sent the case back

21 Official Gazette of the Republic of Serbia, no. 98/2006.

to the administration with the instruction to issue a new, different administrative act, but the defendant – administrative authority issued an administrative act with the same content as the one that was annulled for illegality. The same provision allows the party to request AC to declare illegality of 'an act without legal effect'.

Both of these claims have not appeared in the practice of AC since ADA was adopted, eight years ago. The probable reason is that in both cases there are no logical reason for the party to request only declaratory judgment, when it can ask the contested act to be annulled. Moreover, in the first case, it is even questionable whether it would suffice if the party would only ask for the determination that an act was repeated. This due to the fact that, in spite of its previous annulment, AC would still have to determine that the defendant actually repeated its act and even then, the act would still be in force and oblige the party (if it stipulated duties for the party). Furthermore, the second type of claim – declaration of illegality of challenged act, again, without the request for it to be annulled, would make sense in legal systems where there is a strict division between ordinary and administrative judiciary and prohibition for the ordinary courts to examine legality of administrative acts, as was the case in France in the end of 18th century.[22] In Serbian system, as in virtually every modern legal system, parties are allowed to request damages in the civil litigation, where the ordinary court would be competent to determine whether certain act of administration was illegal and caused damage to the party. The ordinary court is not authorized to annul that act of the administration, but it has the jurisdiction to examine its illegality as the preliminary issue that appeared in its proceeding. Obviously, these two requests are useless in comparison to other options standing before the parties in Serbian judicial system.

The new GAPA introduced the possibility to contest other acts and actions of the administration in the administrative dispute. It enabled indirect challenge of legality of factual acts of the administration [*upravne radnje*], administrative contracts[23] and provision of public services[24] (Arts. 147–150 GAPA). It was not pos-

22 Two laws were issued by the French Revolutionary Parliament (Constituante) in 1790 that strictly prohibited any control of ordinary courts over the acts of administration, Waline, Marcel, *Droit administratif*, 8ème édition, Sirey, Paris, 1959, 25; Brown, Lionel Neville, Bell, John S, *French Administrative Law*, Clarendon Press, Oxford, 1998, 46; Boisdeffre, Martine de, "L'organisation de la justice administrative en France", *La revue administrative*, Paris, no. 52/6, 1999, 32.

23 Administrative contracts still do not exist in Serbian legal system because GAPA envisaged that in order for a certain type of contract to become administrative contract, i.e. to has this special legal regime, including legal protection in the administrative proceeding and the administrative dispute, this has to be prescribed by a law. The reason for this legislative solution lies with the fact that, comparatively and theoretically speaking, the most important types of administrative contracts – public procurement contracts, public-private partnerships and concession contracts were already regulated in a different manner by special laws. Hence, in order not to create conflict of laws, the legislator opted for this approach. In order for these contracts to become administrative contracts, the laws regulating them have to be changed. Then they can be lined up with the legal solutions contained in GAPA.

24 Public services are services of general interests provided by the state owned public enterprises and public institutions (such as schools, libraries, museums, etc.) or through public-private partnerships. The services of general interest can be of economic (e.g. electricity, water, heating,

sible, nor is it possible now, to contest these acts and actions before AC directly. When an administrative authority illegally undertakes or fails to undertake a factual act or when it fails to fulfill its obligations from an administrative contract or when an organization providing public services fails to deliver these services in accordance with the prescribed standards (timely, with good quality and non-discriminatory), then a party has an option to contest legality or quality thereof by a new legal remedy in Serbian law – objection [*prigovor*]. This legal remedy is remonstrative, i.e. it is submitted to the authority or the organization whose act, action or omission is challenged. The authority or the organization, provided they find the objection to be well-founded, shall redress the consequences of its illegal work. If not, they will issue an administrative act rejecting the objection. This administrative act can than be contested before a higher administrative authority and then AC. Given that the application of the new GAPA started just three months ago, there is no case-law in this field yet.

Finally, the judicial control of the administration is also done by the Constitutional Court. The Constitutional Court has two different proceedings in which it controls the acts and actions of the administration – the proceeding upon constitutional appeal and the proceeding for control of constitutionality and legality of general legal acts.

Art. 170 of the Constitution stipulates that a constitutional appeal can be submitted to the Constitutional Court against individual legal and factual acts of public authorities (this includes administrative acts, factual acts of administration and court judgments), if they breached party's constitutionally guaranteed human or minority rights or freedoms and provided all other legal remedies against such acts have been exhausted or do not exist. This type of legal protection is available only once the administrative legal remedies (administrative appeal and objection) and the administrative judicial remedies (lawsuit to AC and, if allowed in particular case – extraordinary legal remedy to the Supreme Court of Cassation) have been exhausted.

The other type of judicial control of the administration is the control of its general legal act, i.e. control of the by-laws it issues. Serbian legal doctrine refers to these acts as the administrative regulations [*upravni propisi*]. Constitutionality and legality of these acts can be challenged exclusively before the Constitutional Court (Art. 167 of the Constitution). The Serbian law prohibits the control of general legal acts by any other court (including AC), even by way of exception (exception of unconstitutionality). Art. 63 of the Constitutional Court Act[25] states that if a court, in a particular case, encounters an issue whether certain general legal act is in accordance with the Constitution, ratified international agreement or a law, it has to temporarily stop its proceeding and initiate the proceeding for control before the Constitutional Court.

public transport) or non-economic nature (e.g. education, culture, health services, information services).

25 Official Gazette of the Republic of Serbia, no. 109/2007, 99/2011, 18/2013, 103/2015 and 40/2015.

To sum up, despite various legal possibilities, the administrative dispute in Serbia, in practice, remains reserved for the control of the legality of administrative acts (individual, unilateral, binding, legal acts of the administration) and the silence of the administration, against which the administrative appeal has been previously exhausted or excluded.

4. ORGANIZATION AND STRUCTURE OF THE COURTS RESOLVING ADMINISTRATIVE DISPUTES

None of the procedural solutions and envisaged reforms of administrative judiciary in Serbia can be fully comprehended without an overview of the number of judges and cases received per year and the organization and structure of the courts resolving administrative disputes.

As was mentioned, there is only one Administrative Court in Serbia. It has 40 judges and 35 judicial associates that help judges in their work.[26] On May 24, 2017, the High Judicial Council of Serbia increased the number of judges in AC to 50.[27] They are still to be engaged. AC received 21.548 cases in 2016[28] and 11.134 cases for the first half of 2017.[29] The overall number of cases dropped from 47.450 in 2016[30] to 39.320 in June 2017.[31] Average number of cases received per judge, per month is 46,39 and the average number of resolved cases per judge, per month is 41,12. Average number of cases before a judge at the end of June 2017 was 736,28.[32]

To make the aforementioned worse, AC is competent to here all lawsuit concerning elections on all levels of government (parliamentary, presidential, provincial and local elections). AC in its annual report explicitly mentions this as one of the most difficult obstacles for efficiency of its work. Not only that the deadlines for resolution of election disputes range from few hours to two days, but they also necessitate that judges leave all the other cases aside, work overtime, in shifts, including nights and be on constant stand-by. Even the judges from the detached departments were called to come and spend days in the seat of the court in Belgrade, to work on these cases.[33]

The judges of AC are elected and appointed in the same procedure and in the same way as all the other judges in Serbia. The judges are elected for the first time, for a three-year period, by the National Parliament, on proposal of the High Judicial Council, while election of the judge for permanent position, after these three years,

26 Annual Report on the Activities of AC for 2016, available at *http://www.up.sud.rs/cirilica/izvestaji-o-radu*, last accessed on September 26, 2017, 4–5, 11.

27 Report on the Activities of AC for period January – June 2017, available at *http://www.up.sud.rs/cirilica/izvestaji-o-radu*, last accessed on September 26, 5.

28 2016 Report, 1.

29 2017 Report, 1.

30 2016 Report, 1.

31 2017 Report, 1.

32 *Ibid.*

33 *Ibid.*, 26.

and their promotion to higher courts within judiciary is done only by the High Judicial Council (Arts. 51 and 52 of the Judges' Act[34]). Given the fact that AC is the court of state rank, i.e. the only one for the entire territory, in order for a person to be elected for a judge, in addition to general conditions – citizenship, degree in law, bar exam – they must have at least 10 years of legal practice (not necessarily in judiciary) after they passed their bar exam (Arts. 43 and 44 of the Judges' Act). There is no special training that a person has to take to be elected for a judge of AC.

AC tries cases in its seat in Belgrade, as well as in its three detached departments in Novi Sad, Niš and Kragujevac. The sole purpose of these detached departments is to bring the justice closer to citizens, given that the criteria for determination of the territorial competence within AC, i.e. between the seat and detached departments, is the place of residence (for natural persons) and seat (for legal persons) of the plaintiff. This is important for a country like Serbia, which has highly concentrated administration. Namely, most of the administrative authorities whose decisions could be contested before AC (second-instance authorities and highest authorities, which decide the case in the first and last instance in the administrative proceeding) are concentrated in Belgrade. Therefore, the cases of parties living outside Belgrade would be almost always tried in Belgrade. This would increase their costs and the time they would have to spend to attain justice.

Finally, it has been said that the Supreme Court of Cassation decides in a limited number of situations on an extraordinary legal remedy against AC's decision. The numbers display the best the severity of legal and extralegal limitations (see below in section on legal remedies) for access to the Supreme Court of Cassation. Namely, there have been 666 cases in the administrative dispute matter received in 2016.[35] This accounts for only 3,45% of the cases resolved by AC at the same period of time (19.274). Furthermore, there is only one bench of three judges in the Supreme Court of Cassation specialized for resolution of administrative disputes.

These numbers present the grim picture of the administrative judiciary in Serbia and probably provide the best explanation for the necessity of envisaged reform (see below).

5. PROCEDURE BEFORE AC

There are three parties in the administrative dispute, the plaintiff, the defendant and the interested person [*zainteresovano lice*] (Art. 10 ADA).

Plaintiffs can be natural or legal persons who claim that the challenged act breached their rights or legal interests. Plaintiffs can also be the state, provincial or local government authorities, organization or groups of persons who do not possess the status of a legal person, provided they were able under the law to be the parties in the administrative proceeding. ADA also stipulates that two public authorities

34 Official Gazette of the Republic of Serbia, no. 116/2008, 58/2009, 104/2009, 101/2010, 8/2012, 121/2012, 124/2012, 101/2013, 111/2014, 117/2014, 40/2015, 63/2015, 106/2015, 63/2016 and 47/2017.

35 Annual Report on the Activities of the Supreme Court of Cassation for 2016, available at *http://www.vk.sud.rs/sr/годишњи-извештај-о-раду-судова*, last accessed on September 26, 2017.

can be parties on special grounds. These are competent public prosecutors and public attorneys. The first can file a lawsuit if they find that a law has been breached by the challenge decision to the expense of the public interest, while the latter can be parties in administrative dispute in order to defend economic interest of the public entity they belong to (the state, province or local government unit). (Art. 11 ADA).

Defendant is, obviously, always the administrative authority whose act or silence is challenged (Art. 12 ADA).

The interested person is the person to whose interests it would be detrimental if the the challenged act would be annulled (Art. 13 ADA). This is, actually, the successful party from the administrative proceeding that preceded the proceeding before AC, e.g. the person who was employed as a public servant in an open contest, whose legality is then challenged before AC. Thus, the interested person always has the same interest as the defendant – to defend the contested act.

Parties do not have to be represented by a lawyer (attorney at law) before AC. This only the case in the proceeding before the Supreme Court of Cassation (Art. 50 ADA).

The plaintiff initiates the administrative dispute by submitting a lawsuit to AC within 30 days as of the day of delivery of the contested administrative act or 60 days as of the day of delivery of the contested act to the parties, if the plaintiff is a person or an authority to whom the contested act was not delivered (Art. 18 ADA). In case of administrative silence, there are two time periods, which must lapse before a lawsuit can be submitted. The first is the time period of 60 days as of submission of an administrative appeal to a higher administrative authority or the time period prescribed by GAPA or special law for issuance of a non-appealable first-instance administrative act, provided a shorter time period was not prescribed by a law. After that, the party must once again ask the competent authority in written form to issue the requested act. If the administrative authority does not do so in the following seven days, the party can submit a lawsuit to AC (Art. 19 ADA).

Pursuant to Art. 21 ADA, a lawsuit can be submitted either in written or electronic form, in accordance with the laws regulating electronic documents. AC can send its decisions to the parties in electronic form only with their prior consent. Despite the fact that ADA foresees the possibility of electronic communication between AC and the parties, such communication does not exist in practice. Nevertheless, certain improvements have been made. Namely, AC is currently part of the project of the Ministry of Justice – e-Court. The purpose of this project is to enable electronic communication between AC and the parties, including submission of appeals, delivery of court decisions and other judicial documents in electronic form, as well as the possibility of insight of parties into the course of their proceeding before AC.[36]

The grounds for initiating the administrative dispute are the following: 1) misapplication of law, by-law or other regulation; 2) lack of competence of the defendant to issue challenged act; 3) breach of of the rules of procedure; 4) incomplete or inaccurate determination of the facts of the case; 5) if an authority rendered a

36 2017 Report of AC, 14.

discretionary administrative act, but exceeded its powers or abused or misused the legal purpose of the discretion (Art. 24 ADA). Discretionary administrative acts can be challenged before AC, but only with respect to their legality, not their opportunity (appropriateness) [*celishodnost*]. A party contested a discretionary administrative act can be successful only if it proves that the act was issued by an incompetent authority, that the facts of the case were not determined completely and accurately, that the procedure for the issuance of the act was defective, that the authority, when exercising its discretion did not opt for one of the possibilities prescribed by the law (excess of powers) or did not use the discretion conferred to it by the law to achieve the purpose legislator had in mind when giving the discretionary powers (abuse or misuse of of the legal purpose). This purpose is either realization or protection of a certain public interest.

6. PROVISIONAL COURTS PROTECTION

The lawsuit to AC has no suspensory effect (Art. 23, par. 1 ADA). However, ADA allows the parties to ask AC to delay the enforcement of the challenged act, until the judicial proceeding ends, provided this enforcement would cause the plaintiff damage that would be difficult to repair and provided such delay is not contrary to the public interest nor would it cause greater or irreparable damage to the opposite party (meaning here the opposite party from the administrative proceeding, which gained something by the challenged act) or to an interested person (Art. 23, par. 2 ADA). ADA prescribes further that a party from the administrative proceeding can ask AC to delay the enforcement of an administrative act even before the initiation of the administrative dispute: 1) in case of urgency; 2) if an administrative appeal that has been submitted against an administrative act has no suspensory effect, and the proceeding upon the appeal is ongoing (Art. 23, par. 3). AC has to decide on the request for delay of enforcement in all these cases within five days as of its submission (Art. 23, par 4 ADA).

In 2016, parties asked AC to delay the enforcement in 931 cases.[37] However, given that the case-law on this matter was not made public, we cannot make any comments as to how AC interprets the criteria for delay and in which types of cases it finds this legal institute particularly suitable. The author came across the information that at least in two types of situations this provisional protection is as a rule granted – in case of acts ordering an illegally erected building to be demolished or in case the party manages to prove that payment of certain amount due on the basis of the challenged act, e.g. taxes or customs, it would go bankrupt.

In spite of lack of empirical data, the regulation of the provisional protection in ADA can be critiqued on several accounts. The first, this is the only type of provisional court protection envisaged by ADA. AC, consequently, cannot provisionally, temporarily regulate the subject-matter of the dispute. The second, the provision of Art. 23 ADA omitted one important criterion for granting provisional protection mentioned in Council of Europe's Recommendation No. R (89) 8 of the Committee

37 2016 Report of AC, 9.

of Ministers to Member States on Provisional Court Protection in Administrative Matters.[38] This criterion is absence of *prima facie* unfoundedness of the lawsuit submitted against an administrative act.[39] Introduction of this criterion would disable abuse of provisional protection. The third, ADA should have prescribed the time period in which AC would be obliged to resolve the administrative dispute in which the enforcement of the contested decision was delayed. We consider this to be useful, if not necessary, taking into account the fact that the delay of enforcement impacts the public interest and/or the interests of interested persons and third parties.

7. PRELIMINARY PROCEEDING

The administrative dispute proceeding has two parts, the preliminary and the regular proceeding.

The preliminary proceeding is conducted by a single judge. A judge can render procedural and the decisions on the merits of the case.

A judge conducting preliminary proceeding shall dismiss [*odbaciti*] a lawsuit for formal deficiencies – if it was filed untimely (too late or too early) or by an unauthorized person, if it challenges an act that cannot be contested in the administrative dispute, if the mandatory administrative appeal was not submitted beforehand, if the case was already resolved or if the lawsuit was incomplete and it was not completed by the plaintiff upon request of AC (Arts. 25 and 26 ADA).

The other type of procedural decisions that a single judge can take in the preliminary proceeding is the decision on termination of the proceeding [*obustavljanje postupka*]. This shall be done if a plaintiff withdraws its lawsuit (Art. 32 ADA) or if the defendant annuls or alters its challenged act or, in case of administrative silence, issues an act, in order to satisfy the requests made by the plaintiff and the plaintiff subsequently accepts this before a judge (Art. 29 ADA).

There are special provisions of the Civil Procedure Act[40] (Arts. 336–341), whose subsidiary application in the administrative dispute is allowed by Art. 74 ADA, and the Mediation Act,[41] which allow the parties to conclude a reconciliation. The obstacle for their use in the administrative dispute proceeding is the fact that they prescribe that parties can conclude a reconciliation provided they are empowered to freely dispose with their claims. While this is almost always the case in a civil litiga-

38 Adopted on September 13, 1989, available at *https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2011090&SecMode=1&DocId=702300&Usage=2*, last accessed on September 26, 2017.

39 There is a difference in the wording of this criteria between Principle II of the Recommendation and its Explanatory Memorandum, paragraph 14. The first one mentions *'prima facia* case against the validity of the act', while the later mentions the lack of *prima facie* unfoundedness of the lawsuit. We are of the opinion that the latter is more appropriate and that the prior has been a mistake, given that this is not in accordance with the request that the provisional measures cannot prejudice the outcome of the dispute before the court (Principle III.3), more on that see Вук Цуцић, „Стразбуршки стандарди у домаћем управном спору", *Анали Правног факултета у Београду*, бр. 2/2009, 257–261.

40 Official Gazette of the Republic of Serbia, no. 72/2011, 49/2013, 74/2013 and 55/2014.

41 Official Gazette of the Republic of Serbia, no. 18/2005.

tion between two private persons, it is almost never, if ever, compatible with the position of the defendant in the administrative dispute. It is a state authority bound by the law, which cannot dispose freely with the legality of its act. That is why a special legal mechanism has been prescribed by GAPA (Art. 175) to allow the defendant, if its act was contested before AC and if it finds the lawsuit well-grounded, to annul or alter its challenged act on the basis on which AC would be allowed to do so.[42] Hence, this legal mechanism serves as a vehicle for reconciliation of the parties in the administrative dispute.

There are two instances in which a single judge can render a judgment on the merits of the case. The first is the case in which the contested act contains such flaws in its form or content (e.g. an act without a decision [*dispozitiv, izreka*] or motivation), that make it *prima facie*, obviously illegal (Art. 28 ADA). In such a case a judge will annul it by a judgment. The second, if the contested act is flawed with a reason of illegality that makes it null and void [*ništav*] (reason of nullity) (Art. 42, par. 3 ADA), judge shall issue a judgment proclaiming it null and void. An act shall be null and void if it contains the most severe types of illegalities (for instance, if an administrative authority resolved a case that had to be resolved by a court, if its enforcement would be impossible or if its enforcement would lead to a commitment of crime – Art. 183 GAPA).[43] The court, including single judges in preliminary proceedings, is obliged to *ex officio* check whether contested acts contain deficiencies that make them null and void (Art. 41, par. 2 ADA).

Judgments and decisions rendered by a single judge in a preliminary proceeding can be challenged by the objection. This legal remedy is submitted to a special panel of three judges of AC. If the panel finds the objection to be well-founded, it shall annul the judgment or decision of the single judge, continue with the proceeding and decide on the submitted lawsuit as well (Art. 27 ADA).

8. REGULAR PROCEEDING

The regular proceeding is conducted by a three-judge panel. It consists of determination of the facts of the case and issuance of the judgment.

If a single judge conducting preliminary proceeding fails to render any of the decision mentioned in the previous section, even though conditions for its issuance existed, the panel shall do so. The panel shall do the same if the conditions for issuance of these decisions appear after the end of preliminary proceeding, i.e. if a plaintiff withdraws its lawsuit or if a defendant annuls or alters its contested act or issues omitted act so as to satisfy plaintiff's requests made in the lawsuit.

42 For details on this extraordinary legal remedy, see Cucić, Vuk, "Extraordinary Administrative Legal Remedies in Serbian Law", *8th Biennial International Conference*, Universul Juridic, Bucharest, 2011, 74 – 84.

43 For details on this extraordinary legal remedy, see *Ibid*; Томић, Зоран, Миловановић, Добросав, Цуцић, Вук, *Практикум за примену Закона о општем управном поступку*, Министарство државне управе и локалне самоуправе Србије, Београд, 2017, 197–201; Томић, Зоран, *Коментар Закона о општем управном поступку*, Службени гласник, Београд, 2017, 666–683.

The determination of the facts of the case in an oral hearing is the rule (Art. 33, par. 1 ADA). The oral hearing can be dispensed with only if 1) the subject-matter of the dispute 'obviously does not necessitate personal hearing of the parties and particular determination of the facts of the case'; or 2) if the parties agree so (Art. 33, par. 2 ADA). In order to further emphasize the need for oral hearings, Art 34 ADA prescribes special situations in which the court is obliged to conduct an oral hearing: 1) if this is necessitated by the complexity of the case; 2) if the defendant has not provided AC with the records of the case; 3) if in the administrative proceeding that preceded the proceeding before AC there where parties with opposite interests; 4) or if the court wants to decide on the merits of the case.

Obvious legislator's intent was to increase the number of oral hearings before AC, probably so as to avoid possible breaches of the right to a fair trial (Art. 32 of the Constitution and Art. 6 of the European Convention on Human Rights). Additionally, the strict wording of pertinent provisions is likely the consequence of the fact that ADA's predecessor (1996 law) prescribed the oral hearing as an exception to the rule and the fact that oral hearings ever since 1952 were almost never held. Nonetheless, the legislator did not manage to change the situation tremendously. Namely, in 2016, AC scheduled 1.558 oral hearings.[44] This accounts for 7.2% of all cases received in 2016 (21.548). In practice, AC holds oral hearings only in cases in which there where parties with opposite interests in the administrative proceeding that preceded the administrative dispute. AC indicated that even this, given its overall workload and lack of capacities, represented significant burden.[45]

Hence, in practice, in most of the instances, AC decides the case on the basis of the facts determined in the administrative proceeding.

Once the facts of the case are established, the panel shall decide on the case. The legality of contested acts is assessed within the boundaries set by the plaintiff's request (usually partial or complete annulment of an act), but AC is not bound by the reasons set forth in the lawsuit. This means that AC can annul challenged act for the form of illegality not mentioned in the lawsuit. However, this is only an option for AC, not its obligation. The only matter AC has to *ex officio* examine is whether there are illegalities making an act null and void (Art. 41, par 2 ADA and Art. 183 GAPA).

If the lawsuit is well-grounded, the most common decisions rendered by AC are the judgments that only annul contested acts (or pronounce it null and void if there are grounds of nullity) and send cases back to defendants, which then have to, if this is necessary, decide on the case again (Art. 42 ADA). Mentioned judgments are, however, *ex lege*, accompanied with 'channeling',[46] i.e. with the legal opinion

44 2016 Report of AC, 9.

45 The relevant wording of the 2016 Report says that AC had good results in reduction of the number of old cases and increase of efficiency 'in spite of the fact that in large number of cases it was necessary to hold public oral hearings (in 1.558 cases) where the preparation of the case, judging and writing decision takes more time', 2016 Report of AC, 28.

46 Willemsen, Paulien *et al.*, "Final Dispute Settlement in Numbers: Report of an Examination of Final Dispute Settlement in the Utrecht District Court", *Transylvanian Review of Administrative Sciences*, no. 28/2009, 131.

and procedural remarks of AC, which oblige the defendant (Art. 69, par. 2 ADA). Put differently, the defendant has to render a new act in accordance with the judgment of AC, which is by law obligatory for it. Other most common decisions in case of a well-founded lawsuit are judgments ordering a defendant to issue an omitted act. This is, obviously, done in the case of the lawsuit against the silence of the administration (Art. 44 ADA).[47]

Finally, ADA prescribes that, under certain conditions, AC can, after annulment of the contested act, decide also on the merits of the case, i.e. substitute the challenged act with its own decision. In Serbian legal theory and legislation this is called 'administrative dispute of full jurisdiction', which is a literal translation of French terminology – *le contentieux de pleine jurisdiction*. This has been set as a general clause, i.e. it is allowed with respect to all acts that can be challenged in the administrative dispute (Art. 43, par. 1). ADA stipulated only two exceptions. AC cannot decide on the merits when it annuls a discretionary administrative act (otherwise, AC would indirectly exercise administrative discretion) or if this is explicitly prohibited by a special law[48] (Art. 43, par. 2 and 3 ADA). In addition to this wide possibility for deciding on the merits of the case and, thus, speeding-up the entire process of the realization and protection of parties' rights and interests, ADA prescribed several instances in which AC *is obliged* to decide on the merits of the case. For instance (for other examples see below), this is the case when AC determined the facts of the case itself and annulment of challenged act and return of the case to the defendant would cause the plaintiff damage that would be difficult to repair (Art. 43, par. 5 ADA).

Nevertheless, despite legislator's obvious intent to increase the number of cases that are finally dealt with by AC, deciding in full jurisdiction happens almost never in Serbia.[49] From a legal point of view, this was enabled by abusive interpretation of one of the conditions for deciding in full jurisdiction – that deciding on he merits is 'enabled by the nature of the matter'. This completely vague notion was never given any substance in case-law and it has, in our opinion, lost any meaning when ADA, departing from its predecessor (1996 law), explicitly prohibited full jurisdiction in cases when a discretionary administrative act was challenged.[50] From a non-legal point of view, this has been a direct consequence of the neglect that the state, purposefully or not, displays towards its administrative judiciary, which can be clearly

47 Additionally, it has been mentioned that it is possible to render accessorial decisions on damages caused or return of an object taken away on the basis annulled administrative act (Art. 45 ADA) or declaratory judgments (Art. 42, par. 2 ADA), but that they never appeared in practice.

48 Only few laws, such as Banks Act, actually made such prohibition.

49 From 2010 to 2014, AC decided a total of 86,488 cases. Only 26 of these cases were decided in full jurisdiction. Hence, less than one in every 3.000 cases is decided on the merits, Цуцић, Вук, *Управни спор пуне јурисдикције – Модели и врсте*, 261–262.

50 For detailed analyses and critique of the practice and theory on this issue, see *ibid*., 260–286. See also: Драгојловић, Лука, *Спор пуне јурисдикције у праву СФРЈ*, 93–95; Мајсторовић, Богдан, *Коментар Закона о управним споровима*, Службени лист, Београд, 1967, 150; Пљакић, Љубодраг, *Практикум за управни спор*, Intermex, Београд, 2011, 328; Ивановић, Јелена, „Спор пуне јурисдикције у управно-судској пракси Републике Србије", Фондација Центар за јавно право, Сарајево, 2013, 64.

seen in the enormous disproportion between the number of judges and the number of disputes they have to resolve (see above).

9. ENFORCEMENT OF AC'S JUDGMENTS

Given that there is no appeal (see below) against AC's judgments, they become final and enforceable immediately upon their delivery to the parties (Art. 68 ADA).

As it was mentioned, ADA contains 'channeling' mechanism (comparatively also know as injunctions[51]). This means that the defendant administrative authorities are obliged by AC's judgments. If the case is sent back to the defendant with the instruction to render new act, it has to render it, within 30 days as of receipt of the judgment and in accordance with 'the legal opinion of the court' and its 'remarks concerning procedure' (Art. 69, par. 2 ADA). 'The legal opinion of the court' actually refers to different interpretation of relevant laws by AC, which has to be applied when new act is issued. In case of procedural remarks, the administrative authority has to rectify the procedural errors it made. Theoretically, in such a case it would be possible for the defendant to reach the same decision as was in the annulled act and to abide by the judgment at the same time. For instance, the defendant omitted to hear a party or to take certain evidence, so it rectifies that mistake, but comes to the same factual and legal conclusion. In the first case ('legal opinion') this would not be possible. The decision has to be different because AC found that the legal interpretation of pertinent regulations was not correct and that a different decision had to be reached.

It occurs in practice that defendants do not enforce the judgment of AC. How often, unfortunately, we cannot tell, given that such statistics (despite being necessary) is not kept. There are two ways defendants can fail to execute AC' judgments and they are both regulated by ADA. The first is the situation in which a defendant rendered a new act, but not in accordance with the judgment. The law refers to this as 'active non-enforcement of a judgment' (Art. 70 ADA). The second possibility is the failure of a defendant to render a new act within 30 days as of the day of receipt of the judgment – called 'passive non-enforcement of a judgment' (Art. 71 ADA). In both instances, ADA prescribes that plaintiffs can submit new lawsuit to AC and that in such situation AC is obliged to decide on the merits of the case. Evidently, the intention of the legislator was to avoid further 'Ping-Pong effect'. However, unfortunately, the legislator prescribed that in these situations the full jurisdiction is obligatory 'unless it is not possible due to the *nature of the matter* or excluded by a law' (Art. 70, par 1 ADA) or that it is obligatory 'if the *nature of the matter* allows it' (Art. 71, par. 3 ADA). In practice, as we said, this enabled AC never to decide on the merits of the case, even in such cases, where the administration is not enforcing its own judgments.

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51 Compare with the French law – see Gourdou, Jean, "Les nouveaux pouvoirs du juge administratif en matière d'injonction et d'astreinte", *Revue française de droit administratif*, Dalloz, Paris, no. 12, 1996, 334; Waline, Jean, *Droit administratif*, Dalloz, Paris, 2010, 637; Denoix de Saint Marc, Renaud, Presentation dans "La loi de 8 fevrie et la réforme du contentieux administratif", *Revue française de droit administratif*, Dalloz, Paris, 1996, 4.

Lastly, in order to enhance enforcement of judgments, ADA introduced two novelties. It set that a plaintiff can request damages for non-enforcement or untimely enforcement of AC's judgments in civil litigation (Art. 72). This would have been possible and was possible even before this provision was sanctioned, but it seems that the legislator wanted to send a message therewith. ADA also authorized AC to fine the head of the administrative authority that failed to execute its judgment (Art. 75, par. 2). There are, however, no records on how often did this occur and whether it gave any result.

10. LEGAL REMEDIES

There are two extraordinary legal remedies in Serbian administrative dispute proceeding – the request for reexamination of judicial decision (hereinafter: reexamination) and the lawsuit for reopening of the procedure (hereinafter: reopening).

Reexamination is filed against a decision of AC to the Supreme Court of Cassation, within the same time limit as for the lawsuit to AC (30 or 60 days) (Art. 51 ADA). Reexamination can be initiated by a party in the administrative dispute or competent public prosecutor (Art. 49, par. 1 ADA). Natural persons must be represented by an attorney at law (Art. 50 ADA). The Supreme Court of Cassation decides on reexamination only within the boundaries of party's request and without oral hearing (Art. 54 ADA). If it finds the reexamination request to be well-founded, the Supreme Court of Cassation can either alter (thus ending the dispute itself) or annul contested judicial decision and refer the case back to AC (Art. 55 ADA).

This legal remedy is extraordinary on two accounts. The first, it can be submitted only on two grounds: 1) breach of law; or 2) breach of the rules of procedure, which could have affected the resolution of the case (Art. 49, par. 3 ADA). The second, and more important, it can be submitted in only limited number of situations: 1) when this is prescribed by a law; 2) when AC decided in full jurisdiction; 3) in cases in which the administrative appeal was excluded by a law (Art. 49, par. 2 ADA). The numbers exhibit the best how strict these limitations are. Reexamination is requested in a bit more than 3% of all cases (see above). The explanation for this is as follows. The are only a few laws that explicitly allow reexamination (situation 1). It has been shown that AC almost never decides on the merits of the case (situation 2). The only situation in which reexamination is actually sought are matters in which the administration decides in only one instance (situation 3), but even these represent exception to the rule that the administrative appeal is generally available unless excluded. Therefore, the Supreme Court of Cassation has limited case-law in administrative law matters, in only certain policy domains (e.g. competition, broadcasting, cooperation with UN International Criminal Tribunal for Former Yugoslavia).[52]

52 *Bulletin of Case-Law*, Administrative Court, no. 6, Belgrade, 2016, 327–328, 336–338, 342–343.

Reopening is available both before AC and the Supreme Court of Cassation (Art. 58 ADA). The latter is possible if the Supreme Court of Cassation conducted proceeding upon reexamination request and the reason for reopening occurred in that proceeding.

The reasons for reopening are the following: 1) new facts or new evidence (*beneficium novorum*); the facts had to exist at the time when the decision of the court was rendered, but the party was justifiably not aware of their existence; 2) if a court decision was a consequence of a crime committed by a judge or other employee of the court, or if it was a consequence of fraudulent behavior of a party or its representative; 3) if a court decision was based on a judgment rendered in a civil or criminal proceeding, which was later removed by another, final court decision; 4) if a court decision is based on a false document, false testimony, false findings of an expert witness or false statement of party; 5) if a party finds earlier court decision in the same case; this is the situation in which different plaintiffs, without knowing one about the other, submitted lawsuits against the same decision, which went to different panel, which decided the case differently; obviously, the existence of this provision shows that this has happened in practice; this is a consequence of the right to have the case heard by a judge who was accidentally picked; 6) if an interested person was not given the chance to take part in the proceeding before the court; 7) if a later decision of the European Court of Human Rights in the same case could have impact on the legality of final court decision (Art. 56, par. 1 ADA). Reopening shall be admitted only if the party was without its fault not able to mention these circumstances (reasons 1–5) in the original proceeding (Art. 56, par. 2 ADA).

The deadline for requesting reopening is 30 days as of the day the party realized that there is a reason for reopening or six months as of the day of publication of the decision of the European Court of Human Rights in the 'Official Gazette of the Republic of Serbia' (for reason 7), but not later than five years as of the day of delivery of the contested court decision (Art. 57 ADA).

When it reopens its proceeding and repeats the parts thereof influenced by the reason for reopening, the court can either decide to leave its decision in force or to remove or alter it (Art. 63 ADA). What is interesting is that if a proceeding was reopened before AC, then a party can request reexamination of the decision reached in the reopened proceeding before the Supreme Court of Cassation. This is one of the situations in which it reexamination is explicitly prescribed by a law (see above, Art. 49, par. 1, subpar. 1 ADA).

11. CONTEMPORARY DEVELOPMENT OF SERBIAN ADMINISTRATIVE JUDICIARY

Instead of summarizing the analysis of the current regulation of the administrative dispute in Serbia, we will describe the reform tendencies that occurred in the last four years and its probable future prospects.

Namely, on July 1, 2013, the National Parliament adopted the National Judicial Reform Strategy for the period 2013–2018. One of the strategic aims enshrined therein is the introduction of a two-tier administrative judiciary.[53]

Since then, the Ministry of Justice undertook steps towards realization of this strategic aim. It prepared the necessary analyses and formed a working group tasked with drafting of the new Administrative Dispute Act and amendments to the Organization of Courts Act. The Ministry's idea was to establish four new first-instance administrative courts and to transform the existing Administrative Court into Appellate Administrative Court. The working group almost finished the draft laws when its work was temporarily suspended. The reason for suspension were austerity measures, which did not allow creation of new administrative courts and appointment of new judges. The author of this paper was at that time working for the Ministry of Justice on this project and was a member of the working group. Currently, the Minister of Justice mentioned in several public appearances that the continuation of the work on the administrative judiciary reform, including drafting of new ADA is planned for the beginning of 2018.

The working group identified the most important issues that need be changed in comparison to current ADA and took a stance on most of them. These concerned preliminary measures, oral hearing, deciding on the merits of the case (full jurisdiction), legal recourse to the Appellate Administrative Court and legal recourse to the Supreme Court of Cassation.

As to preliminary measures, the working group opted for introduction of new, or better yet, missing preliminary measure – temporary regulation of the case (e.g. temporary regulation parental rights, adoption, enrolment to the university). An issue that recently appeared, but was not considered in detail by the working group was the issue of legal remedies against decisions on preliminary measures.

Balancing capacities of this new administrative judiciary, the right to a fair trial and efficiency of the proceeding, the working group chose a more restrictive approach to oral hearings. It decided to introduce an opt-in, instead of the existing opt-out clause. This means that an oral hearing would be held only if at least one of the parties made such a request. Nevertheless, aware of the possible manipulation of legal representative with the aim of increasing costs of the procedure, the working group additionally stipulated that even in such a case, an administrative court would not be obliged to hold an oral hearing if it finds that the facts of the case can be established without it. This was a slippery slope from the standpoint of the protection of the right to a fair trial and especially the possibility of conviction before the European Court of Human Rights, but it was, nonetheless, made having in mind the need for increase of the efficiency of the proceeding. In order to counterbalance the threat of such conviction, the working group prescribed that a party could file a legal recourse to the Appellate Administrative Court claiming that the first-instance administrative court breached the rules of procedure.

53 National Judicial Reform Strategy for 2013–2018, available at *https://www.mpravde.gov.rs/tekst/2959/nacionalna-strategija-reforme-pravosudja.php*, last accessed on September 27, 2017, strategic aim no. 5.1.3.

This leads us to the following, most important issue – legal recourse to the Appellate Administrative Court. The working group decided to use Austrian law a role-model,[54] where legal recourse is allowed only on the points of law (not facts) and only if there on a particular legal issue there is no case-law, there is conflicting case-law or the first-instance court departed from the case-law established by the Appellate Administrative Court. The idea behind this provision was to use the second-instance administrative court only for establishment and unification of the case-law, while avoiding repetitive work, which would be done by the first-instance administrative courts.[55]

Given that the Supreme Court of Cassation is under the Constitution the highest court in the country in all legal matters, including administrative dispute, and that in the envisaged reform the Appellate Administrative Court would have the task only to establish or unify the case-law, the working group chose to allow legal remedy from the latter to the prior, but only in 'the most important cases'. This legal standard would intentionally be left vague, so as to enable the Supreme Court of Cassation to react only when it finds this absolutely necessary. This would also be in accordance with its capacities (only three judges deciding in the administrative matter).

The final issue was the question of how to regulate deciding on the merits of the case. The working group not only due to time constraints did not come to an agreement on this topic. Our idea was to increase the number of situations in which first-instance administrative courts would be obliged to decide on the merits of the case (e.g. when the lawsuit was submitted only on points of law[56]) and to replace the '*nature of the matter*' condition for full jurisdiction with other legal standards, which are less vague and less prone to abusive interpretation.[57]

Nevertheless, neither of the mentioned legislative changes have any sense or have any chance to succeed without a serious increase of the capacities of administrative judiciary, i.e. without sufficient administrative courts and enough judges to handle the workload, including the huge backlog that appeared as a consequence of systematic neglect of this branch of judiciary.

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54 See Art. 133, par. 4 of the Austrian Constitution, available at *https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1. pdf*, last accessed on September 27, 2017; Grassl, Guenter, "Austria: Major reform of administrative jurisdiction system takes effect as from 1 January 2014", Schoenherr Legal Insights, available at *http://www.schoenherr.eu/knowledge/knowledge-detail/austria-major-reform-of-administrative-jurisdiction-system-takes-effect-as-from-1-january-2014/*, last accessed on September 27, 2017; Hofstätter, Christoph, "Legal Remedies Against Factual Acts by Police Force – the Serbian and the Austrian Approach", *Annals of the Faculty of Law in Belgrade*, International Edition, no. 3, Belgrade, 2013, 181.

55 There was even a theoretical debate within the working group whether this legal remedy could be called appeal, given its limited scope, or should another term, like revision be used (which is also the case in Austria).

56 This is, for instance, the case in Macedonian law [*Закон за управните спорови*] (Art. 40), available at *http://www.pf.ukim.edu.mk/* Uploads/ZUS.pdf, last accessed on September 27, 2017.

57 Detailed overview of our stances on the issues of administrative judiciary reform in Serbia, see Миловановић, Добросав, Цуцић, Вук „Реформа управног судства", *Правни живот*, бр. 10, том II, Удружење правника Србије, Београд, 2016, 151–164.

ИСТОРИЈСКИ И САВРЕМЕНИ РАЗВОЈ СУДСКЕ КОНТРОЛЕ УПРАВЕ У СРБИЈИ

Овај чланак даје преглед историјског развоја српског управног судства, опис и анализу постојећег правног оквира, као и реформу управног судства, предвиђену у Националној стратегији реформе судства.

Кључне речи: *Управно судство.– Судска контрола управе.– Управно право. – Реформа судства.– Србија.*