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SERBIAN JUDICIAL REVIEW OF ADMINISTRATIVE ACTS AND EUROPEAN STANDARDS FOR ADMININISTRATIVE DISPUTES

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Abstract. *In Serbia, when a right or a direct personal interest, based on law, of a citizen or legal person has been violated by an individual decision of authority of some government administrative agency, or the law has been violated by such a decision in favor of an individual, judicial control of administrative action is exercised in a special form of action, the administrative lawsuit.*
In first part of this paper author discusses in details this form of judicial control of administrative acts, indicating the specific nature of its purpose, grounds of competence, scope, and procedure according to Administrative Disputes Act 1996.
In second part of the paper author analyze basic European standards (specified in Council of Europe's Committee of Ministers Recommendations, other legal documents and ECHR case law) that are, or should be applied in administrative procedure and judicial reviewing of administrative acts.

Key words: *judicial review of administrative action, administrative acts and matters, European standard of judicial review, administrative decision, Article 6, ECHR, administrative suit, government agency, administrative action, human rights, European court, administrative authority, legal protection, administrative proceeding, administrative agency.*

1. JUDICIAL REVIEW OF ADMINISTRATIVE ACTS IN SERBIA

1.1. Preliminary Remarks

In all States governed by the rule of law the administration is subject to the law and supervision by the courts on the same basis as any individual and any citizen, in accordance with the principle of the pre-eminence of law. In Serbia, judicial control of administrative action is exercised in a number of different forms. First, public officials discharging administrative affairs are criminally liable before regular municipal or county courts,

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and can be prosecuted without any previous permission. Second, tort cases, i.e., proceedings for recovery of damages caused to citizens or private legal persons by illegal acts or unlawful actions of public officials, are decided, upon petition of the injured party, by the regular county courts competent for the location where the damage was done. This damage is now compensated by the state or local government, whose official is responsible for the damage. The state or local community is entitled to recover compensation paid for such damage from the official person whose unlawful action caused such damage. The courts of general jurisdiction, municipal or county, also decide suits arising from contracts concluded between government administrative agencies and private physical or legal persons. And third, where a right or a direct personal interest, based on law, of a citizen or legal person has been violated by an individual decision of authority of some government administrative agency, or the law has been violated by such a decision in favor of an individual, judicial control of administrative action is exercised in a special form of action, the administrative suit. Here, we shall discuss in details this form of judicial control, indicating the specific nature of its purpose, grounds of competence, scope, and procedure.

1.2. Administrative Acts Suitable for Judicial Reviewing According to Administrative Disputes Act

Judicial control of administrative actions and acts is conducted according to Administrative Disputes Act from 1996 (hereinafter ADA). In fact, this Act is a slightly amended Administrative Disputes Act from 1952, and one of the finest examples (along with General Administrative Procedure Act, and all of its versions) of skillful and intelligent nomotechnique in Former Yugoslavia.

Subject matter of administrative suits is an "administrative act." According to ADA, it does not include all acts of public administration. On the other hand, acts of other government agencies may also form the subject matter of an administrative suit, if they can be considered administrative acts. "Administrative act" according to Serbian legal theory, as well as the case law, means an **individual, concrete legal act of authority of a government agency, which unilaterally determines in an authoritative manner questions of rights, obligations or legal interests of a particular individual or legal person**.[1] This

[1] See, for example: Z. Tomić, Administrative law – System (4th ed.), Belgrade, 2002, p. 270-318. According to Recommendation Rec(2004)20 of the Committee of Ministers to member states on judicial review of administrative acts (Adopted by the Council of Europe's Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies, hereinafter referred to as the Recommendation):
"1. By "administrative acts" are meant:
a. legal acts - both individual and normative - and physical acts of the administration taken in the exercise of public authority which may affect the rights or interests of natural or legal persons;
b. situations of refusal to act or an omission to do so in cases where the administrative authority is under an obligation to implement a procedure following a request.
2. By "judicial review" is meant the examination and determination by a tribunal of the lawfulness of an administrative act and the adoption of appropriate measures, with the exception of review by a constitutional court."
As we can see the concept of administrative act in Serbian administrative law system is narrower and is equal to notion of administrative decision (acte administratif). The both terms (administrative decision and administrative acts) exclude acts having purely private law character and acts or proceedings of the Parliament in its legislative function. In Serbia review of certain normative acts of administration is entrusted to the constitutional court. In such cases, a specific procedure is followed, different to that before an administrative or ordinary court. This is why review of acts of administration by a constitutional court does not fall within the scope of Serbian judicial review

is most frequently an act of public administration, but it may also be the act of other government agencies which under the constitutional organization are not termed administrative agencies and do not have such standing, though they sometimes may issue acts on "administrative matters." Consequently, normative acts (rules), material acts, and contracts cannot constitute the subject matter of administrative suits because they are not administrative acts by definition, even though they are acts of public administration. An unlawful material act of government administration or a contract may be challenged in a regular civil or commercial suit. A normative act (rule) of administration or some other government agency cannot be directly challenged – as is the case in the French legal system – in an administrative judicial action.

Next important notice is that only **final administrative acts** constitute the subject matter of administrative suits. An administrative act is final when all possibilities of appeal to a higher administrative agency have been exhausted. The Serbian administrative procedure applies the principle of double instance. Citizens have the right to have an administrative act reviewed by a supervisory agency, and such review is also an essential precondition for filing the administrative suit. An administrative act is subject to review in administrative proceeding, but when such complaint has not been filed within the period of limitation, and if restitutio in integrum is not an option, the decision becomes final, since no administrative suit can be raised against it. As a result, the subject matter of administrative suit most frequently is an administrative act brought in the second instance. Nevertheless, an administrative act brought in the first instance may become final and as such constitute the subject matter of an administrative suit if petition to the second instance administrative authority in specific matters is expressly precluded by law or if the rules of organization of the agency whose administrative act is in question do not provide for administrative review.

The Serbian system, similarly to French, in defining the extent of administrative suits, applies the **general clause principle in combination with negative enumeration**: judicial review proceedings may be instituted against all final administrative acts, except those the review of which has been expressly precluded by law.

1.3. Proceedings before Administrative Courts

A **petition** for review may be filed within 30 days after service of an administrative act (decision) on the party.[2] In the case of so called "administrative silence", judicial review is also allowed. In such a case, there is an assumption of law that the request of the party has been rejected if the government agency fails to render any decision after two successive requests within the terms prescribed (60 days plus 7 days).

The **petitioner** may be any individual or legal person who considers that his right or direct personal interest based on law is injured by an administrative decision.[3] The petitio-

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of administrative acts.

[2] For example, applicants usually have a period of 30 days in Albania, Azerbaijan, Finland, Hungary, Romania and Switzerland, of 60 days in Belgium and Italy, of 6 months in Malta and Norway, and of 6 weeks in Austria and the Netherlands.

[3] The Recommendation also applies solely to cases where rights or interests are directly affected. This means that there must be a close link between the act and the rights or interests concerned. If the link between the challenged act and the right asserted is too tenuous and distant, the Recommendation does not apply (Balmer-Schafroth judgment, 1997). Such acts must therefore adversely affect the applicant and have the effect of alte-

ner may also be a trade-union organization which considers that the right or direct interest based on law of its members has been violated by the administrative decision. Even an institution, organization, or community not recognized as a legal person may be a petitioner if, under the rules of administrative procedure, it can be a party to the administrative proceeding. A government agency authorized by law, the state, or public prosecutor, may appear as a petitioner as well, in the case that law has been violated by an administrative decision in favor of some individual or legal person. If the administrative decision has not been passed to the public prosecutor, he may file a petition for review within three months after it has been served on the party in whose favor it was given.[4]

The **defendant** is the government agency whose administrative decision has been challenged.

A so-called **third or interested person**, who would be adversely affected by quashing of the challenged decision, is also a party to the dispute; the court is required to serve the petition on this person for respond and summon it to appear at the trial; such a party is also entitled to appeal if this is otherwise permissible.

The petition, unlike the appeal in administrative proceeding, does not regularly (as a rule) stop execution of the challenged administrative decision. However, on the petitioner's request, the authority competent to order the execution of an administrative decision must stop its execution until the final court judgment is rendered, if the execution of such decision would cause irreparable damage to the petitioner, and if the halt is not contrary to the public interest nor likely to cause irreparable damage to the other party or interested person. This duty of the authority responsible for execution of an administrative decision is under the control of the courts of law.

The Serbian system provides the classical **grounds for judicial review**, as are known in French and American systems. But in addition, certain others are also allowed. The Administrative Disputes Act[5] provides the following grounds for challenging administrative decisions: (1) substantive violation of law arising from incorrect application of law or some other directions based on law, or omittance to apply some legal provisions; (2) violation of jurisdiction committed in the form of excess or arrogation of jurisdiction; (3) violation of the requirements of administrative procedure precedent to the making of the decision; (4) finding of fact to which legal provision has been applied, if the facts are either not properly ascertained or a wrong conclusion has been drawn from the properly found facts. Here, one should have in mind that not every violation of the rules of procedure, constitutes ground for successful judicial review of administrative action, but only such violation "as would affect the determination of the matter." Even a **discretionary administrative decision** may be challenged on the grounds stated above. The difference is only that it is not considered that legal provisions have been incorrectly applied in the case

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ring persons legal situation. This precludes certain categories of administrative acts from a judicial remedy, such as preliminary measures.

[4] In order to protect collective or community interests that have been jeopardized by an administrative act, the Recommendation encourages the member states to take into consideration the possibility of granting associations or other persons or bodies empowered to protect these interests the capacity to bring proceedings before a court. The reference is to administrative decisions which adversely affect not just one individual but also those which affect any community. Such decisions, which might relate, for instance, to the environment or consumers' rights, could be eligible for judicial review without the direct interests of any particular individual being at issue.

[5] Article 10, ADA.

"where a competent government authority decides upon free judgment on the basis of and within the scope of the powers conferred to him by legal provisions."[6] The existence and the scope of such powers may be challenged in a concrete case, which is decided by the court. The power of discretionary decision exists only where the law leaves the possibility to the government agency to decide upon free judgment whether or not some administrative action shall be taken, or where it is possible to choose between several alternatives with regards to the content of administrative action.

Usually the administrative suit in Serbian judicial review of administrative acts is an action to annul an administrative decision, or to resolve a controversy regarding its legality. In exceptional cases, the petitioner may seek **restitution of objects and compensation of damages** suffered because of the execution of the challenged decision. Such demands, however, cannot constitute independent claims, but only supplement the petition for annulment of the decision; such claims are subject to the so-called "adhering proceedings." Other cases of full jurisdiction in administrative actions will be discussed below.

When it comes to the **jurisdiction** for administrative review, there are some consequences of slow judicial reform. Administrative suits are steel decided by the Supreme Court in a separate session of three judges, although Serbian legislation provides for the establishment of specialized Administrative court, which should start to function this year.[7]

1.4. Procedure in judicial review of administrative acts

The Administrative Disputes Act 1996 contains special provisions relating to the procedure in administrative actions, though they are not complete. To the questions of procedure not regulated by this Act the rules of procedure in civil disputes apply by reference of the Act itself.[8] Further, we'll examine the most important of these special provisions.

Generally, the court decides an administrative suit in **closed sitting**, on the basis of the record, petition, and the respond to the petition. Within the period stated, the defendant government agency is bound to pass on to the court all the papers related to the matter in dispute. If a party fails to provide the documents required after a second notice, or declares its inability to do that, the court may decide the matter even without such documents. The court may decide on its own initiative or on motion of one of the parties to hold a he-

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[6] Article 10, paragraph 2.

[7] In aim to improve court effectiveness and to assure better implementation of right to appeal, Serbia adopted the Act on Organization of Courts which has been amendment for several times (Official Gazette RS, 63/01, 42/02, 17/03, 27/03, 29/04). This act reorganized the judiciary and introduced the Appellate Court as a court of general jurisdiction, in addition to the existing municipal and district courts. Apart from the specialized commercial courts that had already existed, the Act envisages the establishment of an Administrative Court as a specialized court (Art.10). The Act amending the Act on Organization of Courts (Official Gazette RS, 48/05) introduces another type of specialized courts - Misdemeanor courts and the second instance Higher Misdemeanor Court with four departments – in Novi Sad, Kragujevac, Niš and Priština (Art. 1 and 36a). The Supreme Court is the highest court in Serbia (Art. 11). However, the opening of new courts has been delayed. The appellate and administrative courts were initially to have been set up by October 1st 2001, then by January 1st 2004. As they were still not constituted by the end of 2003, the Serbian Constitutional Court suspended the implementation of the provisions on the establishment of these courts to preclude violations of the right of appeal to a higher court (Official Gazette RS, 130/03). The amendments to the Act on Organization of Courts adopted in March 2004 moved the deadline for the constitution of these courts to January 1st 2007 when the misdemeanor courts are also to start operating (Article 15).

[8] Article 59.

aring, if this is necessary for the better examination of the case.[9] Absence of a party from the hearing does not prevent action by the court, nor can be so interpreted as to mean that the parties have gave up their claims; in such a case, the court shall read the written documents submitted by the parties and decide the dispute, unless the hearing is postponed, even if both parties fail to appear. Without petition, no proceedings for review are instituted, and the court is, in principle, bound by the scope of the claims stated in the petition, but in its evaluation of the legality of the challenged administrative decision the court is not bound by the argument of the petitioner. Furthermore, where the petition is already filed, the court must consider ex officio whether the administrative decision is void or not.

The court may reject the petition in the course of **preliminary proceedings**, if it is untimely, premature, or lodged for review of a decision which is not administrative or reviewable, as also is the case of res iudicata, and some other cases. In the preliminary proceedings, the court may quash the challenged administrative decision even without serving the petition for answer, if such decision "contains essential shortcomings which prevent evaluation of the legality of the decision".[10] This is the case where the rule upon which the decision is based is not stated, where the decision is not substantiated, or the issuing authority is not stated, and the like.

The proceedings under review may be stopped in the following cases: when the petitioner withdraws the petition, which is permitted at all stages of the proceedings; when in the course of proceedings the government agency renders another administrative decision which amends or repels the challenged decision, or administrative decision is rendered afterwards, in case the proceedings have been instituted because of the "administrative silence", and the petitioner declares before the court that he is satisfied with the new or subsequent decision, or fails to declare within the period prescribed whether or not he is satisfied with such decision.

The most interesting and the most complex question related to the judicial review of administrative acts is the **question of fact-finding**. In principle, the Serbian court decides an administrative action on the basis of the facts ascertained in the administrative proceedings. The court, however, is not bound in advance by such fact-finding and is entitled to examine the existence of the material evidence relevant for determination of the question of legality of the administrative decision. In exercising this control, the court is entitled either to require the administration to determine the relevant facts completely and correctly, or to ascertain them itself, and on the basis of such findings of fact decide the controversy.

Next interesting matter is the question of **legal nature of judgments** in administrative reviewing. The court decides an administrative suit by its judgment granting the petition or rejecting it as unfounded. If the petition for review of an administrative decision is granted, the court quashes the challenged decision, restoring the matter to the position that existed before the quashed administrative decision was brought. If a petition, which has been filed because of the administrative silence, is granted as justified, when admitting the petition the court determines the terms of the administrative decision to be issued by the government agency concerned.

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[9] Which should, as we will see, become obligatory phase of the judicial review procedure.
[10] Article 29, ADA.

In both of these cases, the judgment of the court determines the legal issues but does not directly create any legal relation with respects to the petitioner, except the right of the petitioner and the duty of the administrative agency to execute the judgment. It is only after a new or subsequent administrative decision is rendered pursuant to the judgment, that the legal relation sought by the petitioner is created.

This effect of the judgment is a logical consequence of the administrative suit disputing the legality of the administrative decision. This is one form, and the regular one, of judicial reviewing of administrative acts in Serbian system, but not the only one. In fact, the Serbian system, as has been mentioned above, provides also for administrative lawsuits with **complete** (**plenary) jurisdiction**. In a judgment nullifying an administrative decision, the execution of which has deprived the petitioner from some object or caused material damage on him, the court may, if that is requested by the petitioner, adjudicate compensation of the damage and/or order restitution. The court will make such a decision if reliable grounds appear in the evidence presented. Otherwise, the court refers the petitioner to a civil-law court for recovery and merely declares the challenged administrative decision invalid. Two more examples of full jurisdiction in the Serbian system of judicial review of administrative decisions will follow below, but let's first take a look at the conclusive effect of judgments in administrative suits.

Articles 4 and 61 of the Administrative Disputes Act 1996 provide that judgments of the Supreme Court competent to decide administrative suits are binding on government agencies which "can do nothing that would be contrary to these judgments". What is the concrete content of this obligation and what sanctions exist for its violation?

The administrative agency whose decision has been quashed (1) is bound to issue immediately, not later than 30 days after service of the judgment, a new or subsequent administrative decision conforming to the judgment; (2) it must not give another administrative decision contrary to the judgment to replace the one quashed.

If the competent government agency after losing an administrative case issues another or, in the case of previous inaction, a subsequent administrative decision contrary to the legal standing of the court as stated in the judgment or contrary to the objections of the court with respect to the proceedings, the court shall, upon a new petition, not only annul the new or subsequent administrative decision, but also generally **set out the administrative matter itself by new judgment.** Such a judgment completely replaces the decision of the agency concerned and takes effect as the decision which such agency was bound to render pursuant to the first judgment. In such a case, the court shall inform the superior government agency, which may raise the question of responsibility, disciplinary or political and possibly criminal, for such conduct of the official person concerned. If such conduct has caused material damage, the aggrieved party may file a claim for compensation of damages. Here then is a case in which proceedings for determining legality and annulment of the decision are transformed into a plenary action.

If the agency whose decision has been quashed, fails to bring a new or subsequent decision within 30 days, the other party may request by separate application for such decision to be provided. If the agency in question fails to render such decision within 7 days after the request, the other party may ask the Supreme Court which rendered the judgment in the first instance, to make such decision in place of the government agency. Upon such request of the petitioner, the court shall request the agency, whose decision has been quashed and which had failed to make another decision in execution of the judgment, to expla-

in why it failed to make the decision required. If such agency fails to give any information within the period of 7 days, or the explanation given does not, in the opinion of the court, justify failure to execute the judgment, the court is bound to render a decision which will totally replace the administrative decision of the agency. Thus also in this case, proceedings for protection of legality become a plenary action. The court shall transmit such decision to the executive agency, which is bound to execute it without delay. At the same time, the court shall give notice of its action to the superior agency, to which the one which was required but failed to render decision in execution of the judgment is responsible.

2. EUROPEAN STANDARDS IN PROCEDURAL ADMINISTRATIVE LAW

European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome on November 4th 1950, by 13 member states of the Council of Europe. The aim of the ECHR is not only to provide, but also to insure, actual respect of the provided rights. The ECHR is followed by 14 Protocols which are not obligatory for all ECHR member states, but only those that signed them. The ECHR is primarily oriented to the protection of political and civil rights, while the Protocols guarantee economic and social rights.

The ECHR was not originally intended to apply to the administrative field. However, as early as 1971, the European Court stated the following in its Ringeisen judgment: "to be applicable to a case ("contestation") it is not necessary that both parties to the proceedings should be private persons (...). The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc) and that of the authority which is invested with competence in the matter (ordinary court, administrative body, etc) are therefore of little consequence".[11]

When Serbia and Montenegro joined the council of Europe, it agreed to take on the obligation to harmonize its administrative acts and actions (as well as required legislation) to the European Convention on Human Rights and ratify the Convention one year upon accession. Serbia and Montenegro signed the ECHR on April 3rd 2003, with three reserves. One of these reserves concerns the **publicity of judicial review of administrative acts proceedings**. Serbia and Montenegro ratified the ECHR on December 26th 2003. The instruments of ratification were deposited to the Council of Europe on March 3rd 2004. From that day the ECHR became compulsory.[12] It is assumed that citizens of Serbia and Montenegro can apply to European Court of Human Rights, and the country took on the duty to harmonize its legislation with the ECHR and the case law of the European Court of Human Rights.

ECHR entered into force on the March 3rd 2004, and from that moment Serbia and Montenegro was obliged to open the office of counselor for European Court of Human Rights. The office of counselor officially started to work in January 16th 2006. There are a lot of individual applications against Serbia at European Court of Human Rights, but there are only two decisions.[13]

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[11] See: H.C. Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, Hague 1996, (Kluwer Law International), p. 26.

[12] Protocol No 1, Protocol No 4 and Protocol No 6 become obligatory on April 1st 2004; Protocol No 7 on June 1st 2004; Protocol No 13 on July 1st 2004, and Protocol No12 on April 1st 2005.

[13] Application No 10843/04 by Slaviša Durlić and Application No 34425/04 by Ljubiša Stojanović.

The Serbian administration is very often in the position to decide about civil rights of citizens (among others, the rights protected by the ECHR). Republic of Serbia, as the member state of the Council of Europe, has the duty to support the procedural principles specified by the Convention and especially its Resolution. Public administrative agencies themselves unfortunately do not live up to all the standards required by provisions of Article 6, especially the independence of decision bearers. Administrative agencies are also organized according to the principle of self-sufficiency which is more restrictive then the **principle of independence of the courts**. The notion of independence distinguishes between organizational independence of courts and personal independence of judges; court must be independent from all parties and from the administrative authorities. Judge must not in any way be dependent on the administrative authorities. Personal independence is manifested through the principle that judge, while performing judicial function, must not be bound by any guidance or directions issued by any authority. This independence of judges is firmly tied up with their impartiality.

In this way, administrative procedures always present some kind of "prelegal proceedings" in the meaning of the Article 6. According to the case law made by European Court for Human Rights in Strasbourg there is no violations of human rights if the agency or body which is performing the additional control of legality of administrative acts (the administrative courts, or ordinary courts) fulfills requests and standards stipulated by Article 6 of ECHR. This is called the **dual system** in legal protection of human rights. Hence there are no alternatives to judicial review of administrative actions.

2.1. Standard of Effective Legal Protection[14]

As the first principle in resolving administrative dispute, there is an imperative of efficient, namely true and effective legal protection, in every concrete case.[15] This principle is only a part of a broader one: the principle of **legal certainty**. It is not explicitly established neither in the Law of European Communities nor in the legal systems of individual member states; it is derived from the Articles 6. and 13. of the ECHR, obligatory for the EU as well.

The principle of effective legal protection was established by European Court in the decision from 1986. and is understood as elementary and basic cornerstone of judicial review of administrative actions in Europe. On the one hand, its goal is the realization of party's rights, and on the other, it prevents negative responses to petitions for the legal protection.

This standard seeks to guarantee that a tribunal may take the necessary measures to restore a lawful situation. It implies provisional measures, procedural and substantive decisions, i.e. the power to prevent potentially prejudicial material actions; the power to order the adoption of a material action which should have been but was not adopted, particularly in connection with enforcing administrative decisions already taken; the power to order the adoption of administrative acts and decisions, in the case of limited discretion; and the possibility of preventing the adoption of decisions in cases of limited discretion, where the administration has acted ultra vires.

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[14] See: B. Tratar, Some Reflections on General European Principles of Rights Protection in Judicial Review of Administrative Action, Legal Life, No. 9/2001, p. 621-634.

[15] B. Tratar, op. cit. p. 622.

The standard of effective legal protection does not exclude the possibility of replacing the administrative act by the judicial ruling. The case-law of the European Court does not require the administrative tribunal to substitute an act held to be unlawful. Nevertheless, the tribunal must be in a position to impose its judgment on the administrative authority when the latter issues a new decision, on referral after the original judgment has been set aside. This rule does not apply to cases where after annulment of an act the administration is not required to take a new decision (for instance, in appointment matters, if an appointment decision is annulled, the administration has discretionary power to decide whether to resume the appointment procedure).

This principle recognizes that the tribunal has jurisdiction not only to deal with the substance of a complaint, but also, where the complainant is successful, to award some form of redress. Where appropriate, compensation for both pecuniary and non-pecuniary damage resulting from a violation must in principle be possible. In general, compensation is made by setting the decision aside. The tribunal should also be empowered to exempt parties from liability for costs where justified.

This standard is also aimed at ensuring that implementation of the contested measure can be suspended in cases where its enforcement would place the person concerned in an irreversible situation.[16]

This standard also recognizes that the tribunal should have authority to grant provisional measures of protection pending the outcome of judicial proceedings. Such measures can include the full or partial suspension of the execution of the disputed administrative act, thus enabling the tribunal to reestablish the de facto and de jure situation which would prevail in the absence of the administrative act or to impose appropriate obligations on the administrative authorities.

In this respect this standard is consistent with Recommendation No. R (89) 8 of the Committee of Ministers to member states on provisional court protection in administrative matters, which provides that an applicant may request the court or another competent body to take measures of provisional protection against the administrative act.

This, in other words, means that this principle refers to realistic and efficient proceedings. In order to make judicial review widely accessible to natural and legal persons, the cost of proceedings must not constitute a deterrent to judicial action. The point at issue here is the cost of access to judicial review, rather than merely the cost of judicial review itself. This effective access condition implies a right to legal assistance to guarantee access to court for applicants who cannot afford to pay the costs where the interests of justice require, whatever the judicial body competent to adjudicate in cases involving the administration.

With respect to this principle, very significant is the provision of Article 6. of the EC-HR, which does not stretch to all kinds of law-suits and proceedings. Provision of Article 6. is applied in civil law cases or matters of criminal prosecution. Administrative disputes do not always fall under the provision of Article 6. This article focuses on the legal nature, the character and the purpose of the subject matter in dispute. We notice that Article 6 is tailored much more after the English common law system and that it may be criticized for not expressly including the public law disputes in its scope.

[16] See: Jabari judgment, 2000, and Conka judgment, 2002.

2.2. Standard of protection by independent and impartial tribunal (court)

It is undisputable that independence of tribunals (courts) is a very important principle of judicial review of administrative acts concerning human rights. However, this principle raises some difficult questions. For example, German and French laws recognize independent administrative courts, unlike English law and its notion of "**tribunals**".[17] This notion is widely extended to the areas of administrative, financial and social matters. The competence ot "Tribunals" concerns legality, accuracy of decisions, as well as substituting examined decision. Such "tribunals", in principle, are independent from their "parent authorities", but constitutionally are treated as executive branch of powers.

To answer the question which claims and requests must be responded by the administrative judiciary, one needs to remember the Article 6. par. 1. of the ECHR. This provision postulates that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." That means that sentence must be announced publicly, and that press and public can partially or completely be removed from the trial only for the reasons of preservation of public order or public security, if this requires the wealth of young persons or the protection of privacy of parties, so and then when according to the opinion of court the publicity of hearings would damage interest of justice.

As for the court it should comply with the following requirements:

– must be established by law;

– must be independent;

– must be impartial.[18]

The European court determines if the national court has established facts correctly, if on facts so established it has applied law and other legal rules appropriately, and if it has brought the decision which is obligatory for parties in the concrete matter. This power does not exclude discretionary power of tribunals in single cases.

The other required feature of national courts is that they must be composed only of the **professional judges**.[19] Here we come to the problematic part: bodies which cannot by themselves establish facts, and have only the nullifying powers over the decision of administrative agencies, do not present courts in the meaning of the Article 6. para 1. of the ECHR.

One of the basic demands, deriving from the principle of independence of courts, is the application of rules about **exemption of judge**, namely about their exclusion and refu-

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[17] See: D. Kavran, "Tribunals and Public Hearing in Anglo-Saxon Law", Actual Questions of Yugoslav Procedural Legislature, Belgrade,1996, p. 319-329.

[18] In order to reinforce respect for this principle, the Council of Europe drew up Recommendation No. R (94) 12 on the independence, efficiency and role of judges, which specifies the preconditions for judicial independence. Opinion No. 1 (2001) of the Consultative Council of European Judges (CCJE) concerning the independence of the judiciary and the irremovability of judges further develops the provisions of this Recommendation: in endorsing the requirements of the European Charter on the Statute for Judges in this respect, the CCJE considered that "the fundamental principles of judicial independence should be set out at the constitutional or highest possible legal level in each member state, and its more specific rules at the legislative level."
The Right to court protection has been established by the article 32. of the Serbian Constitution, which contains the rule that everyone is entitled that about his rights and duties as well as accusations against him decides independent, impartial and on the basis of the law established court, without the unnecessary delay.

[19] See rulings Le Compte, Out Leuven, De Meyere from 23. june 1981.

sal. Same, from the Article 6. para 1. of the ECHR stems the demand for the court to be established by the law, i.e. the court must be established constitutionally or by the statute; jurisdiction of the court must not be left to the discretion of the executives, but it has to be established by the appropriate statute in advance.

ECHR explicitly prohibites any action of state which aimes at artificially qualifying certain procedure as special procedure, with the purpose to avoid the review of its accordance with the Article 6. of the ECHR. Not only must the courts be authorized to decide about every single case, but the state can not voluntarily transfer jurisdictions of courts on any administrative authorities.

Principle which lies in the foundations of the request for the independence and impartiality of the courts, is that of **division of powers**, but neither ECHR nor its bodies can determine in which way this request would be fulfilled. From judicature of ECHR it is apparent that agencies with executive powers cannot be granted judicial powers. ECHR judicature has shown difficulties in differentiating the notions of impartiality and independence, in the case Langborger against the Sweden, from 1990, in which petitioner have disputed the participation of the private assessor in the Housing and Tenancy court. ECHR have established the violation of Article 6. on the grounds that it is important to respect the principle of objective impartiality and independence, although in the this case the participation of professionally trained persons has been an issue, and there has not been any motive for suspicion about their personal integrity. In the case Sramek against the Austria from 1984, the Court has established the violation of Article 6. because one member of the court was subordinated to one of parties, with respect to his professional engagement .

2.3. Standard of Oppressive Legal Protection

Legal protection in administrative disputes (judicial review of administrative acts) usually is repressive. That means that this legal protection is successive by nature. The protection is carried out by reviewing decisions already brought by administrative agency. Judicial control of administrative actions which goes on at the same time as administrative proceedings or which would rip in the administrative proceeding, would damage the administrative activity in large measure, and this impermissible intrusion is directly contrary to the principle of division of powers. Therefore it is only exceptionally and in narrow frameworks permitted as preventive legal protection.

2.4. Standard of Fair Trial ("fair hearing")[20]

Principle of the fairness, firmly based on the Article 6. para. 1. of the ECHR, should be specified in both material and procedural sense. In the material sense, this principle calls for the rational outcome, and in the formal sense, it refers to the conduct of proceedings. According to the case-law of the European Court, the reasonableness of the time-limit stipulated in Article 6 of the ECHR must always be evaluated in the light of the specific circumstances of the case, such as its complexity, the applicant's conduct and the manner in which the case is

[20] See: N. Petrušić, Jurisprudence of European Court of Human Rights in Protection of Right to Solving Civil Metters in Reasonable Time, European System of Protecting Human Rights: Experiences and New Challenges, Niš, 2005, pp. 199-221.

dealt with by the administrative or judicial authorities.[21] As stated in paragraph 42 above, the "reasonable" length of time stipulated in Article 6 of the ECHR does not refer solely to the duration of the proceedings conducted before the administrative tribunal. The time taken into consideration may **begin on the day the party starts an appeal procedure** within the administration, if this is a precondition for the judicial review in question.

Principle of fair hearing demands only that the interested party can **effectively be represented** during the juridical proceedings. There are several subprinciples contained in principle of fair trial:

– principle of **equalities of arms**. In administrative cases there is a particular risk of infringement of this principle by the parties' relative positions, with one side representing the authorities and the other demanding that their rights be respected. Applicants should therefore have the full benefit of the protection provided by Article 6.1 of the ECHR in general in order to make good this inequality inherent in administrative proceedings. The principle of equality of arms requires that each party have the same facilities for presenting its case under conditions which do not place it at a clear disadvantage compared with the opposing party;[22]

– demand to **query for files**. This principle confirms that the administrative authority is obliged to make available all the documents in its case-file on which it bases its decision. Access by parties to the administrative file is one of the preconditions for a fair trial. According to the case-law of the European Court, this principle implies that a citizen must have access to the administrative file as forwarded to the tribunal by the administration (Schuler-Zgraggen judgment, 1993). This requires the administration to supply all the facts on which its act was based. The European Court has confirmed this requirement in connection with documents that might help the applicant in putting his/her case (Bendenoun Judgment, 1994). It is essential for the fairness of the trial that the administrative file be forwarded in sufficient time. Effect can be given to these requirements either by imposing a duty on the authority to disclose all the relevant documents to the tribunal, or by giving the tribunal the power to require disclosure of these documents. In certain circumstances it should be possible to apply special protective measures to sensitive documents (for instance, where national security is at stake);[23]

– right to **adversarial proceedings**. In administrative cases it involves notifying the appeal to the opposing party and any other interested parties. According to the case-law of the European Court, the fundamental right to adversarial proceedings "means the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party" (Ruiz-Mateos judgment, 1993). This includes documents and all information admitted by the tribunal. That does not prevent various means of protection being given by the tribunal to sensitive documents (for instance in order to protect national security, professional secrecy or intellectual property rights). The adversarial nature of the proceedings must be safeguarded in cases where evidence concerning the case's admissibility is disputed.;

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[21] See O., 1987; Tomasi, 1992; Poiss, 1987; judgments.

[22] See: Ruiz-Mateos case; Dombo Beheer case, Ankerl case, Neumeister case, Borgers case, Monell and Morris case, Deumeland case, Lobo Machado case, Stran Greek Refineries case and Stratis Andreadis case.

[23] See, also: Brandstetter case, Edwards case, Mialhe case, and Foucher case.

– the tribunal should be in a position to **examine all of the legal and factual issues** relevant to the case presented by the parties (Ortenberg judgment, 1994). The arguments relied on may concern points either of law or of fact. Regarding questions of law, where the contested measure was taken under the administration's regulatory powers, the tribunal to which the case is referred must be empowered to examine whether the administrative authority remained within the limits of the law; in this connection, the tribunal must be able to review the challenged measure "in the light, inter alia, of principles of administrative law" (Oerlemans judgment, 1991). Regarding the facts, the court must be competent to ascertain these (Fischer judgment, 1995) or at least to correct errors of fact (Albert and Le Compte judgment, 1983). One possibility is that the court should be able to ascertain the relevant facts itself by rehearing the case. However, Article 6.1 of the ECHR apparently does not preclude a system whereby the court must rely on the facts ascertained by the administrative authority. In that case it is nonetheless vital that the procedure before the administrative authority should offer guarantees concerning the decision-making process and also that the court should be able to ascertain, firstly, that the administration's findings of fact were based on sufficiently sound evidence and, secondly, that the administrative act did not result from a conclusion which no administrative authority, acting rightly, would have drawn from the facts (Potocka judgment, 2001). A number of legal systems allow administrative tribunals to rule on the lawfulness of the contested act, even where the ground relied on in a finding of unlawfulness was not raised by a party, if it finds that the act is unlawful. This system strengthens judicial control of the administration by a tribunal and thus the judicial protection of applicants. The administrative tribunal is entitled and obliged to offset any inequality between the parties. For instance, the tribunal may invite the parties to submit additional factual evidence (or to supplement the information available on the circumstances of the case). The tribunal should have the initiative in determining the progress of the administrative proceedings. In annulment proceedings the tribunal should verify the existence of the facts. Where the administrative act involved the exercise of a discretionary power, it ascertains that the limits on the exercise of that power have not been overstepped. It also verifies application of the law to the facts.

– right to a **public proceedings** (see bellow).[24]

– public **pronouncement of judgment**. The principle that judgments should be pronounced in public, which is confirmed by Article 6 of the ECHR, requires all interested parties to have access to a judgment in which they have a legitimate interest, whereby judgments of general scope should also be accessible to a broad public, taking account of language considerations and such facilities as publication in a journal or in the electronic media. [25]

– right to a **reasons** for the judgment. The reasoning of the judgment should be presented in writing and relate to the tribunal's response to all of the applicant's arguments, justifying the decision reached. The scope of this obligation may vary in accordance with the nature of the judgment. The reasons given must be specific and suited to the facts of the case, not confined to mere references to certain pieces of legislation. However, no detailed reply is required to each argument, as the European Court confirmed in its Ruiz Torija judgment (1994). Any lack of or inadequacy in the reasons given is liable to invalidate the judgment in formal terms. The terminology used in the reasons is extremely impor-

[24] See, also: B. Tartar, op. cit., p. 627.
[25] Pretto judgment, 1983.

tant for the parties' understanding of them. Special attention must be paid to the use of terms from other fields which might prove inappropriate in the judicial context.

– liability to a **appeal to a higher tribunal**. The decision of the tribunal that reviews an administrative act should, at least in important cases, be subject to appeal to a higher tribunal, unless the case is directly referred to a higher tribunal as is the case in Serbia.[26]

2.5. Standard of Determination Within a Reasonable Period

Similarly as with the principle of the effectiveness of legal protection, the right to determination within a reasonable period poses the imperative that the proceeding ends within the reasonable period of time. This requirement is constitutional standard of human rights protection relating to judicial review, and concerns providing legal protection with the goal of the realization of substantive rights in the event of the excessive tenure of procedure. It emphasizes the time dimension in every judicial proceeding. Determination of deadlines for court to bring decisions, should not be clashed with the principle of independence of courts. The practical consequences of ECHR decision in connection with the deciding in the reasonable period lies in the obligation of the state to organize judicial system in such manner that the legal protection can be provided within the period of time which more or less can always be considered rational.

This criterion "reasonable time", is relative and the Court was able to distinguish between civil and criminal matters. With respect to criminal cases, ECHR has established that the deadline starts running from the moment when the authorized power officially hands over to the suspect the notice about the doubt that he has committed the crime.[27] In the case Eckle against the Federal Republic of Germany 1982, the Court has refused government arguments that the lack of personnel and general administrative difficulties caused delay. However, in one case ECHR has established that six years on the national level (plus six more years of procedures in Strasbourg) fulfills criterion of reasonable time according to the Article 6.[28]

In connection with civil actions, ECHR has established the violation of Article 6. ECHR in case of when the procedure of divorce has lasted the nine year,[29] or in case when, after seven year and seven months, a case came from the administrative court to the constitutional court (Conseil d'Etat).[30] The |Court arrived at the same result when it took six years and seven months for bringing final decision about damages.[31] Among circumstances which the Commission and Court take into consideration, crucial are: complexity of

[26] The Recommendation accordingly goes further than the ECHR and requires a right of appeal in the most important cases. Proper judicial protection involves the right to two-tier proceedings. Nevertheless, while appeal facilities are not compulsory under the ECHR, they are still possible with a view to reducing the risk of arbitrary decisions, inter alia within the judicial system. This principle should be applied to the most important cases, particularly those involving heavy administrative sanctions, subject to any exceptions provided for in domestic legislation. The applicant's right to appeal against the judgment pronounced should be recognized within a reasonable time-limit. Involvement of a higher instance in administrative proceedings is essential to guarantee the consistency of administrative case-law.

[27] Deweer against the Belgium 1980.

[28] Pretto and others against the Italy 1983.

[29] Bock against the Federal Republic of Germany 1989.

[30] H against the France 1989.

[31] Neves e Silva against Portugal 1989.

case; on the manner in which authorities have considered the case; behavior of petitioner which could lead to prolonging the process; the special circumstance which could justify the lengthening of proceedings.

2.6. Standard of Hearing in Process

Principle of interrogation in process presents "essence" of the fair hearing and thereby an important part of judicial control of administrative action. This right has true constitutional rank in many countries, and is part of the international law – Article 6. para 1. ECHR, and other international legal documents, especially in the area of the criminal law.[32]

In this way this standard represents general respect of human dignity, as the starting base and the essence of communicational process between the court and participant. Parties in the procedure must be offered the possibility to bring out the substance of procedure; per contra there exists the duty of courts to inform participants of process. Possibility to respond to the process materials must be given to parties timely. Court has to recognize and evaluate statements of the participants in the process, which directly affects the reasoning of judicial rulings.

2.7. Standard of Public Proceedings

This is actually sub principle of standard of a Fair Trial, but because of its importance we analyze it independently. According to the article 6. para. 1. of ECHR everyone's case is entitled for public consideration. This principle has also been contained in Article 10. of the General declaration on the human rights and Article 14. of the International pact on civil and political rights from 16. December 1996. EU law, with respect to procedural provisions applied by the European court, also falls under the principle of public discussion as a general legal principle. Principle of procedural publicity must be understood as prohibition of the every **secret judiciary**. In that sense principle of public hearing embodies an important function of the third branch of power.

Nevertheless, the question of whether a hearing is necessary is dealt with differently in different national laws, particularly for administrative proceedings as they are often written proceedings and mainly concern questions of law. The right to a public hearing is particularly important where the tribunal examines contested **questions of fact**.

Principle of public inquiry, however, is not unlimited and does not apply in every phase of legal proceedings, which is in accordance with European tradition: because of the special interests inherent to the private sphere, the public may be eliminated from the hearing. **Both written and oral procedure** should be public. All members of the public should be able to acquaint themselves with the proceedings, in particular their course and conduct.

Relatively small number of cases from the ECHR practice carries off on this provision of Article 6. Paragraph 1 of the ECHR. The publicity of the proceedings is not of interest only for the parties, but also for the public in general, due to the reasons of confidence in the work of administrative agencies and judicial system.

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[32] See the article 10. of General declaration about the human rights, article 2. of the additional protocol No. 7 ECHR.

In the case Axen against the Federal republic of Germany from 1983. ECHR have established the rule that publicity requirements apply for **every phase** of the proceeding in which the dispute is being determined.

The parties should be able to waive the right to a public hearing of their own free will, either expressly or tacitly. However, this waiver should be ineffective where it runs counter to an important public interest.[33]

In general, Commission and Court in the first place examine existence of some **special conditions** enumerated in the Article 6. paragraph 1. - for example, the interest of morality, public order, state's security or protection of the privacy, and then decide if the fact that procedure runs behind the closed door is violation of this article.[34]

Where a case is examined at different levels by different bodies and is of a highly technical nature, it may be justifiable not to hold a public hearing in the final stages of the proceedings (Eisenstecken judgment, 2000).

2.8. Standard of Investigations

The standard of investigations represents the so called inquisitory maxim. It is understood as the general principle of administrative judicial protection in Europe. Regardless of right of the participants to the proceedings to decide which real facts to present to the administrative court, when the procedure once starts, the administrative court is free to determine the factual basis of the case.

The stated rule derives from the fact that in the administrative process public interest is much more involved, requiring complete and true establishment of facts by the court and excluding the dispositional rights of parties. Aspiration towards the material legality, hence does not allow the dispositional rights of parties with respect to determining the facts in judicial review of administrative acts.

2.9. Standard of Execution

Finally, it is necessary to provide an efficient mechanism for eliminating legal violations which have been proven in front of the court. Ultima ratio of the legal protection for the petitioner must be the compulsory execution of the judicial decision, as well as ensuring that the administration de facto acts according to the court's decision in administrative disputes. We have already examined judicial review of administrative acts in Serbian law.

The execution of judgments is an important aspect of the effectiveness of control, and it is imperative to ensure that the administrative authorities in question execute the tribunal's judgments. Because of that it is very important to further examine and implement the principles from Recommendation Rec(2003)16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law. The possibility of enforcing the administrative authority's compliance with the ju-

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[33] See: Schuler-Zgraggen judgment, 1993.In Le Compte, Van Leuven and De Meyere against the Belgium case from 1981, ECHR has determined that there is no violation of the right to public inquiry if both parties in the proceedings have agreed that the procedure runs behind the closed door

[34] In proceedings before a court of first and only instance "exceptional circumstances" must be shown in order to justify dispensing with a hearing (Gog judgment, 2001). Such circumstances are difficult to prove where the court deals with questions not only of law but also of fact (Fischer judgment, 1995).

dicial decision should be guaranteed. Means of enforcement should be consistent with national legal tradition.

3. CONCLUSION

At the end we may conclude that the procedure of judicial review of administrative acts in Serbia, when compared to some other Council of Europe member countries procedures is mostly in accordance with European regulations, at least when the procedural aspects are in question. The reason for that may lay in the fact that, in Serbia, judicial reviewing was know from the first decades of twentieth century.

But Serbia steel needs to correct deviations connected with independence in establishing the facts, obligation to hold oral hearings on party's suggestion and with respect to the publicity of decision, etc.

If we assume that Administrative Court is going to start working every moment, for the purpose of further strengthening of the independence of administrative judicial system in Serbia it is necessary to increase the number of judges in Administrative Court in order to respect the principle of judging in the reasonable period of time.

UPRAVNI SPOR U SRBIJI I EVROPSKI STANDARDI UPRAVNOG SUDOVANJA

Dejan Vučetić

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