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HISTORICAL DEVELOPMENT OF THE JUDICIAL CONTROL OF ADMINISTRATION IN SERBIA

This paper shows the development of the judicial control of administration in Serbia, in the period from the introduction of the Council of State to the present day. The paper also deals with the most important regulations concerning judicial control of administration, administrative courts, and administrative disputes, starting with the Constitution of 1869, with comparisons between previous regulations and present-day provisions, comments, and conclusions regarding how constitutional and legal regulations influenced the development of the judicial control of administration in Serbia throughout history, and how this type of control had changed over time.

Key words: *Judicial control of administration. – Administrative dispute. – Serbia. – Historical development. – Legal regulations.*

1. INTRODUCTION

Judicial control of administration is a form of control that is performed mainly in an administrative dispute, either by special administrative court or courts, or by courts of general jurisdiction. The judicial control of administration can also be performed by civil and criminal courts. An administrative dispute is a form of judicial control of administration, which can be defined as a form of external legal control over administrative activities in the procedure provided for by law, on the occasion of a filed lawsuit.[1]

An administrative-judicial matter, as disputed, grows out of an administrative matter, as non-disputed, the legality of which is examined in

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1 Zoran R. Tomić, *Komentar Zakona o upravnim sporovima sa sudskom praksom,* Službeni glasnik, Beograd 2012, 65.

an administrative dispute. As a rule, an administrative dispute is preceded by an administrative control of administration, following an appeal in the second-instance procedure. An administrative dispute is a separate category of a court dispute, which considers the legality of a specific administrative legal act, and is resolved by the competent court, of general or specialised jurisdiction, according to the rules of a special procedure. In an administrative dispute, the defendant is a public administration body or a public administrative organisation. Judicial control of administration appears in three main modalities: control by regular judiciary – courts of general jurisdiction, control by special judiciary – administrative judiciary, and control by constitutional judiciary.[2] Judicial control of administration is carried out by bodies that are organisationally independent from the administration and belong to another branch of government, while through the administrative control of administration, an authorised entity that performs an administrative activity also supervises the administrative activity of another.[3]

Historically speaking, the administrative dispute arose as a result of liberal-individualist concepts that appeared after the French bourgeois revolution, in order to protect individuals against the state and public authorities.[4] The main reason for the introduction of an administrative dispute in Serbia was the fact that the administrative control of administration could not guarantee a comprehensive implementation of the principle of legality when it came to the administration's actions.[5] Serbia has a long tradition of administrative disputes, that were, at the very beginning, related to the position and role of its Council of State.[6] Therefore, Serbia implemented the French model regarding the main body that has the right to solve administrative disputes. The French system is the result of a long and slow evolution of specialised judicial control of the administration that began during the French Revolution and continues almost to the present day.[7] In France, since the beginning of the development of administrative disputes, the Council of State acted as the supreme administrative court. Even before the French revolution, the Council existed un-

2 *Ibid.*

3 Зоран Р. Томић, *Опште управно право*, Универзитет у Београду, Правни факултет, Београд 2021, 65–69.

4 Милена В. Јакшић, Милан М. Мацура, „Историјски развој управног спора у правној науци", *Баштина* 2/2018, 181.

5 Stevan Lilić, *Upravno pravo,* Savremena administracija, Beograd 1998, 212.

6 Милица Вукићевић Петковић, *Предмет управног спора* (докторска дисертација), Универзитет у Нишу, Правни факултет, Ниш 2017, 179.

7 Драган Милков, *Управно право III, Контрола управе*, Универзитет у Новом Саду, Правни факултет, Нови Сад 2019, 43.

der the name "King's Council",[8] an institution that dates back to the 13th century, and which gathered lawyers who assisted the king in exercising his judicial power.[9] However, the Council of State that can be compared to today's Council was created during Napoleon's time, by the Constitution of 1799. At that time, the Council's role was to prepare draft laws and regulations of public administration, as well as to solve difficulties that appeared in the field of administration. This type of Council still wasn't a true administrative court, but rather an advisory body that concerned itself with matters that were in relation to the state's administration.[10]

The Council itself didn't resolve administrative disputes, since it only drafted a decision that would be adopted by the head of state.[11] This system of administrative dispute resolution was permanently changed by the Law of 24 May 1872, which allowed the Council to resolve administrative disputes by adopting its own decisions, without the interference of the head of state. Even before the adoption of this Law, the head of state would rarely adopt a decision that wasn't in accordance with the Council's draft.[12] For more than a century and a half (1799–1953), the Council of State was the only administrative court in France. Then, on two occasions, the administrative jurisdiction was expanded. First, in 1953, new first-instance administrative courts were introduced, in relation to which the Council acted as a second-instance court. In 1987, appellate administrative courts were established, and the Council became, in the vast majority of cases, a third-instance administrative court. The reason for the introduction of new administrative judicial instances was a large number of pending cases (more than 25 thousand).[13]

Compared to the other countries of Europe and the world, the administrative dispute in Serbia was introduced very early, and was developed almost without any interruptions.[14] The development of judicial control of administration in Serbia can be divided into three phases. The first phase is the administrative-judicial control performed by the Council of State, that was inspired by the French model, and was practically

8 Драгаш Ђ. Денковић, *Добра управа*, Универзитет у Београду, Правни факултет, Београд 2010, 344.

9 Vuk Cucić, „Francusko upravno sudstvo: Veličanstveno delo francuske istorije", *Pravni život* 10/2013, 288.

10 Д. Милков, *Управно право III,* 43.

11 Marcel Waline, *Droit administratif*, Sirey, Paris 1959, 29.

12 V. Cucić, „Francusko upravno sudstvo", 289–290.

13 Dobrosav Milovanović, Vuk Cucić, „Reforma upravnog sudstva", *Pravni život* 10/2016, 151.

14 Вук Цуцић, *Збирка пройиса из области управної права*, Службени гласник, Београд 2019, 24.

established by the Constitution of 1869. The second phase considers the judicial control of administration performed by the Council of State and administrative courts, which was introduced in 1921 and lasted until the beginning of the Second World War. Then, after a short break without administrative-judicial control, in 1952 began a period in which the administration was controlled by special departments of regular courts.[15] This type of control was abolished with the introduction of the Administrative Court of Serbia, that was established as a court of special jurisdiction, and started operating in 2010.

2. THE BEGINNING OF DEVELOPMENT OF THE COUNCIL OF STATE AND ADMINISTRATIVE JUDICIARY

The administrative judiciary and administrative dispute in Serbia have a very long tradition, which is related to the Council of State. The long history of this institution can be divided into two periods – the first one, from 1805 to 1869, during which the Council was primarily a legislative body, with certain judicial and executive functions, and the second one, from 1869 until the beginning of the Second World War, within which the Council mainly performed the function of an administrative court.[16]

The Council of State was already established in 1805, while the Sretenje[17] Constitution of 1835 introduced it as the body that had legislative and administrative power together with the Prince, and in one department also performed judicial functions in the third and last degree.[18] However, just as the Constitution of 1835 itself was short-lived, the Council of State was also the highest authority alongside the Prince for a short time. Instead, it quickly became an organ completely subordinate to the Prince. The Constitution of 1838 improved the Council's position by granting permanency to all its members.[19] This permanency was reflected in the fact that the members could be replaced only with the consent of the Porte and on the condition that they were found to have worked illegally and con-

15 Jelena Jerinić, *Sudska kontrola uprave u našem i uporednom pravu* (doktorska disertacija), Univerzitet Union, Pravni fakultet, Beograd 2011, 64.

16 Marko Davinić, „Dvostepeno upravno sudstvo u Kraljevini Jugoslaviji", *Pravni život* 10/2017, 283.

17 Sretenje is a Christian holiday that is celebrated in Serbia on 15 February. The first Sebian constitution was adopted at the National Assembly on Sretenje, in 1835, and therefore, it is also known as the "Sretenje Constitution". Since 2002, Sretenje is celebrated as the Statehood day of Serbia.

18 Д. Милков, *Управно право III*, 58.

19 М. Вукићевић Петковић, 139–140.

trary to the interests of the state. Based on this Constitution, the Law on the Organisation of the Council of State was adopted in 1839. This Law marked the beginning of the development of true administrative judiciary in Serbia,[20] but it also granted certain executive and legislative powers to the Council. At the time of the "Constitution defenders" (1842 – 1858), the competences of the Council were broadened so that it not only exercised supervision over the work of ministers, but, moreover, started deciding on appeals against ministerial decisions, even though there weren't regulations allowing it to do so.[21] However, since the Council called the ministers to account by asking them to provide explanations, which were given at the Council's meetings,[22] the administrative dispute in Serbia wasn't practically introduced yet, and the Council kept its legislative powers.

3. FORMAL INTRODUCTION OF THE ADMINISTRATIVE DISPUTE

3.1 The Constitution of 1869

The Constitution of 1869 represented a turning point regarding administrative dispute and competences of the Council of State. This Constitution transferred the legislative power to the National Assembly, so the Council stopped being a legislative body and became an administrative one, considering that article 90, paragraph 1, items 3 and 4 of the Constitution prescribed that the Council is competent "to consider and resolve appeals against ministerial decisions in disputed administrative matters, as well as to resolve conflicts between administrative authorities". Therefore, the concept of "administrative dispute" was introduced, based on the French "*contentieux administratif*".[23] However, since the French Council of State became officially independent in resolving administrative disputes in 1872, we could argue whether the Serbian administrative judiciary, in terms of independent resolution of disputes against final individual administrative acts, is three years older than the French. Firstly, it is important to point out that the administrative judicial function of the French Council of State was separated from its administrative, advisory function in 1806, and that the procedural norms according to which the Council acted when resolving administrative disputes were established in 1831.[24]

20 Д. Милков, *Управно право III,* 47.

21 *Ibid.*

22 *Ibid.*

23 Стеван Сагадин, *Управно судство, поводом стогодишњице рада Државног савета 1839–1939*, Државна штампарија, Београд 1940, 180.

24 M. Waline, 30.

In addition, before the adoption of the already mentioned Law of 24 May 1872, draft decisions of the Council were, in the vast majority of cases, acknowledged by the head of state who would only formally sign them, without any changes or additions. Therefore, it can be concluded that the independent resolution of administrative disputes in France was developed earlier than in Serbia.

Lastly, the Constitution of 1869 is of perhaps the greatest importance for the administrative dispute. It was the first time that a specialised administrative court was introduced in Serbia in the true sense of the word. In this way, Serbia was among the first countries to formally introduce an administrative dispute and the first of the countries of future Yugoslavia to do so. Moreover, the Constitution was of great importance for the Serbian National Assembly which became a legislative body for the first time.[25]

3.2 The Law on the Council of State and Rules of Order in the Council of State Act

Considering that the Constitution of 1869 had laid the foundations and frameworks of the administrative dispute, it was necessary to pass legal regulations in order to specify the constitutional provisions and the competence of the formally established administrative court – the Council of State. Therefore, in 1870, two acts were adopted – the Law on the Council of State and Rules of Order in the Council of State Act. The latter was much more important for the concept and understanding of the administrative dispute.

Article 35 of the Rules of Order in the Council of State Act defined an administrative dispute as "a dispute between a private person, on the one hand, and an administrative authority, on the other, which exists when the right of a private party is violated by an unlawful order or decision of an administrative authority". The administrative dispute is still understood in the same way in Serbia today, as it is considered to be a dispute about the legality of final administrative acts that is conducted between the plaintiff, who is usually a dissatisfied private party in an administrative procedure, and the defendant, who is always a public administrative body that passed the final administrative act. In accordance with the constitutional provisions, the Act gave the Council of State the right to finally resolve administrative disputes and thus, the Council became a true administrative court.[26] This brought the administrative power under the legal control of

25 Зоран С. Мирковић, *Српска правна историја*, Универзитет у Београду, Правни факултет, Београд 2017, 134.

26 Добросав Миловановић, „Предмет управног спора", Вук Цуцић (ур.), *Зборник радова, 150 година управног спора у Србији 1869 – 2019*, Управни суд Републике Србије/Правни факултет Универзитета у Београду, Београд 2019, 84.

a body that, although part of the executive power, independently resolved disputes between citizens and the administrative power in a judicial procedure, which provided significant guarantees for the legal regularity of the adopted decisions.[27] There was no possibility of evaluating the expediency of an administrative act, neither of conducting an administrative dispute due to the failure to adopt one.[28] The Act also stipulated, in Article 37, paragraph 1, that an administrative dispute can be initiated "only after the appellant has submitted an appeal to the minister, within one month after receiving the minister's decision". These provisions are essentially the same as the relevant provisions of the modern-day Law on Administrative Disputes of Serbia, which prescribes that an administrative dispute can be initiated against an administrative act that was passed in the final instance while at the same time prohibiting the court from evaluating the expediency of final administrative acts. The difference compared to the 1870 Act is the possibility of filing a lawsuit against the silence of administration.

Hence, it can be said that the Rules of Order in the Council of State Act had a very important role in defining the key principles and provisions regarding the judicial control of administration and the administrative dispute, which were adopted in all subsequent legal regulations, and remain existent to this day.

3.3 The Constitution of 1901

The duties of the Council of State were significantly broadened by the Constitution of 1901. The Council became competent to decide on appeals against decrees that violate private rights, along with being able to decide on appeals against ministerial decisions that were made in cases in which the minister was not entitled to decide or exceeded the scope of his jurisdiction determined by law.[29] Consequently, in addition to administrative disputes against decrees, regular administrative disputes against ministerial decisions were foreseen, as well as special administrative disputes stemming from incapacity of the administrative bodies and excess of authority.[30] This way, administrative legal protection was extended. Nonetheless, since the Constitution of 1901 was imposed by King Aleksandar Obrenović, whose regime was autocratic, it was highly unlikely that, for example, the King`s decree could be overturned by the Council of State. This became a realistic possibility with the adoption of the more liberal Constitution of 1903, after the King's assassination in May of the same year.

27 С. Сагадин, 181–182.

28 Д. Миловановић, 85.

29 Ustav Kraljevine Srbije, čl. 35, st. 1, tač. 1, 3, *Državna štamparija Kraljevine Srbije,* 1901.

30 Д. Миловановић, 87.

Overall, it can be concluded that the competences of the Council of State were gradually expanding throughout the development of the Kingdom of Serbia, as the Council had extensive administrative and advisory functions, while the experience gained in resolving administrative disputes was used in drafting regulations and giving opinions on these drafts.[31] On the other hand, given the fact that the decisions of the Council of State were not binding for the ministers, there were difficulties in terms of their execution, which were yet to be overcome. Even so, by adopting certain constitutional and legal regulations in the period from 1869 to 1921, Serbia had established a very clear and detailed system of judicial control of administration that was advanced for its time.

4. INTRODUCTION OF THE TWO – LEVEL ADMINISTRATIVE JUDICIARY

4.1 The creation of the unified state and the Vidovdan Constitution

Although Serbia was very progressive with its regulations on administrative dispute, specialised administrative judiciary, embodied in administrative courts, was established after the creation of the Kingdom of Serbs, Croats and Slovenians (the Kingdom of SCS). The administrative dispute also existed in other territories that became part of the unified state. In Slovenia, Istria and Dalmatia, which were within the Austrian part of the Austro-Hungarian Empire, administrative dispute was introduced by the Law on Administrative Court from 1875. The seat of the Court was in Vienna, and its practice greatly influenced the adoption of the first ever Law on General Administrative Procedure, that was passed in Austria in 1925. In Croatia, Slavonia, Banat, Bačka and Baranja, that belonged to the Hungarian part of the Empire, administrative dispute was established with a very narrow jurisdiction, based on laws from 1883 and 1896. In Montenegro, the Council of State had the jurisdiction of the administrative court and the administrative body.

The creation of the new state made it necessary to adopt a new constitution and new laws. In addition, in different parts of the state, particular provincial legislation was still in force, and this had to be taken into account when passing new laws, especially since their provisions had to be adapted to different political, economic and social conditions, which is always a difficult task for the lawgiver.

In order to solve the problem of legal particularism, not only in the area of administrative dispute and administrative law, but also in various

31 С. Сагадин, 186.

other branches of law, the Constitution of the newly formed state was passed in 1921 – the Vidovdan Constitution. With the adoption of this Constitution, a two-level administrative judiciary was envisioned, and administrative courts were introduced. The Constitution did not further specify the jurisdiction of the administrative courts, stipulating that the law would determine their seats, jurisdiction, and organisation.[32]

4.2 Council of State and Administrative Courts Act

In 1922, two legal acts were adopted in order to specify the constitutional provisions – Council of State and Administrative Courts Act and the Decree on the Rules of Order at the Council of State and Administrative Courts. Administrative dispute was regulated mainly by the Council of State and Administrative Courts Act, which granted the Council of State the role of the supreme administrative court.[33] By the provisions of the said Act, the Council decided on appeals against judgments of administrative courts, but its function did not end there, given that it also decided in the first and last instance on appeals against decrees and ministerial decisions.[34] This means that if the final administrative act was adopted by the ministries, a lawsuit could be filed directly to the Council of State. At the same time, it did not matter whether the ministry brought an administrative act on appeal, or in the first and last instance. However, if the final administrative act was adopted by an administrative body lower than the ministry, the lawsuit could be filed to the competent administrative court, whose decision could subsequently be appealed to the Council of State.[35]

The Council of State was divided into departments, which were composed of five members. Due to the relatively large number of them, there was a possibility of unequal interpretation of same regulations by various departments. In order to avoid this, it was prescribed that the legal issues that were resolved differently by the departments should be brought before the general session of the Council of State. The Council's president had the right to convene its general sessions, where legal issues that were resolved differently by the departments would be discussed and resolved. The decisions of the general session on such issues were binding for all departments.[36] Moreover, the parties in administrative disputes did not have

32 Ustav Kraljevine Srba, Hrvata i Slovenaca, čl. 102, *Službene novine Kraljevine Srba, Hrvata i Slovenaca,* Beograd 28. jun 1921.

33 Zakon o Državnom savetu i upravnim sudovima, čl. 1, *Izdavačka knjižarnica Gece Kona,* Beograd 1932.

34 Zakon o Državnom savetu i upravnim sudovima, čl. 17.

35 M. Davinić, „Dvostepeno upravno sudstvo", 286.

36 Nikola Stjepanović, Stevan Lilić, *Upravno pravo,* Zavod za udžbenike i nastavna sredstva, Beograd 1991, 376–377.

the right to demand the convening of a general session but could only inform the Council that certain departments have taken different points of view on certain legal issue.[37]

The Council of State consisted of 30 members, out of which at least 20 had to be lawyers, while all the members had to have a minimum of 10 years of experience in the civil service .[38] It should be noted here that it was not required for all members of the Council to have a law degree, even though the Council represented a supreme administrative court. The reason for this provision could be found in the fact that Serbia lost around 60% of its male population in the First World War. Therefore, it was certainly difficult to find 30 prominent lawyers, who also had 10 years of experience in the civil service, only 4 years after the war was over. Members of the Council were appointed by the King, on the proposal of the President of the Council of Ministers. They, like the judges of the administrative courts, could be relieved of their duties or retired by a Royal Decree, on the proposal of the President of the Council of Ministers, or the Minister of Justice.[39]

Special administrative courts were introduced as courts of first instance, and there were six of them (in Belgrade, Zagreb, Celje, Sarajevo, Skoplje and Dubrovnik). Each court consisted of one president and the necessary number of judges, who were appointed by a Royal Decree, on the proposal of the Minister of Justice. Disputes were resolved by departments of three judges.[40]

The subject of an administrative dispute was the legality of the administrative act, while the Act used the term "act of administrative authority". If such an act was to be the subject of an administrative dispute, it had to be final.[41] Just like in today's regulations, the subject of an administrative dispute was determined by using the general clause method, combined with the system of negative enumeration, and there was only the possibility of conducting a subjective administrative dispute. Special administrative courts decided in the first instance, while the Council of State decided on appeals against the judgments of administrative courts.[42] In certain situations, the Council also adopted decisions in the first and last instance. That was the case when it came to lawsuits against decrees

37 M. Davinić, „Dvostepeno upravno sudstvo", 287.

38 Zakon o Državnom savetu i upravnim sudovima, čl. 1, st. 2, čl. 11, st. 1.

39 Zakon o Državnom savetu i upravnim sudovima, čl. 12.

40 Zakon o Državnom savetu i upravnim sudovima, čl. 7,8, čl. 11, st. 2.

41 J. Jerinić, 68.

42 Zakon o Državnom savetu i upravnim sudovima, čl. 37.

and ministerial decisions.[43] On top of that, there was a department of the Council which specialised in financial administrative disputes,[44] so it can be said that the Kingdom of SCS introduced a very detailed and complex system of judicial control of administration for its time.

Another important novelty established by this Act was that the Council of State was given right to pass the corresponding act on its behalf, in case of silence of administration in the execution of the Council's decision.[45] This provision represented the main step towards the introduction of disputes of full jurisdiction in the true sense of the word, and there was a tendency to enable a completely independent resolution of administrative disputes by the Council. However, as the Council was already entrusted with important and wide-ranging powers, the Act did not go a step further, as it prescribed that the Council passes a decision that completely replaces an administrative act only if the administrative authority does not adopt an act which is necessary for the execution of the judgment of the Council, or the judgment of the administrative court, and only if a person in whose interest the judgment was passed submits an appeal to the Council.[46]

Furthermore, the Act prescribed certain restrictions when it came to the administrative dispute. The acts adopted on the basis of a free assessment weren`t subjected to judicial control, if the adoption was performed within the limits of legal authority.[47] Although the linguistic interpretation of this provision could easily lead to the conclusion that discretionary administrative acts were completely excluded from judicial control, this was not the case in practice. Namely, such administrative acts could also be the subject of judicial control, whereby the court examined in the preliminary proceedings whether the authority was really authorised to perform a free assessment, and whether it exceeded or abused its discretionary power. If the court determined that the authority didn't exceed or abuse its discretionary power, it would reject the lawsuit, since, as it is the case today, the court didn't evaluate the act's expediency.[48] However, the judicial control of discretionary acts rarely occurred.[49]

43 Zakon o Državnom savetu i upravnim sudovima, čl. 17.

44 Zakon o Državnom savetu i upravnim sudovima, čl. 3, st. 2.

45 Вук Цуцић, Управни спор пуне јурисдикције – модели и врсте (докторска дисертација), Универзитет у Београду, Правни факултет, Београд 2015, 37.

46 Боривоје Франтловић, *Коментар Закона о Државном савету и управним судовима*, Издавачко и књижарско предузеће Геце Кона, Београд 1935, 80.

47 Zakon o Državnom savetu i upravnim sudovima, čl. 19.

48 M. Davinić, „Dvostepeno upravno sudstvo", 290.

49 Лазо М. Костић, *Административно право Краљевине Југославије, трећа књига, Надзирање управе*, Издавачко и књижарско предузеће Геце Кона, Београд 1939, 89.

Another important novelty established by the Act was the principle of separate administrative-judicial hierarchy regarding the judgments of administrative courts and the Council of State, which means that administrative judiciary was separated from the active administration and that there was no hierarchical continuity between the active administration and administrative judiciary, i.e. that these were two separately organised authorities, with separate jurisdiction.[50]

The Act also introduced (for the first time) the right of a party to file a lawsuit due to the silence of administration, which was crucial for covering all the possible reasons for initiating an administrative dispute. Moreover, there was a possibility of passing a decision of the Council of State that replaced the act of the corresponding administrative body in case of failure of the body to act according to its own act. Finally, even though the suspensory effect of a lawsuit wasn't a rule, the plaintiff had the right to request that the execution of the administrative act be postponed until the decision of the court was passed. The postponement could only be granted if the public interest allowed it.[51]

Most of these provisions are still applied today, which shows the great importance of the Act for the development of administrative dispute, along with its contribution to the modernisation of judicial control of administration. Hence, the Act has established a solid system of administrative-judicial control that wasn't and didn't need to be the subject of many amendments.

4.3 The laws from 1929 and the Constitution of 1931

The system that was established in 1921 and 1922 was not significantly changed with the adoption of the Law on amendments and additions to the Council of State and Administrative Courts Act and the Law on the Rules of Order at the Council of State and Administrative Courts. Both laws were passed in 1929, after the introduction of the 6 January dictatorship by King Aleksandar I and were adopted mainly to adapt the legislation to the new state and social order, rather than to essentially change the organisation and powers of the administrative courts and the Council of State.

The Constitution of 1931 didn't have anything new to add in terms of judicial control of administration and administrative dispute. Just like its predecessor, this Constitution provided that administrative courts are

50 М. Вукићевић Петковић, 183.

51 Јелена Ивановић, „Историјски развој управног судства Србије", Вук Цуцић (ур.), *Зборник радова, 150 година управног судора у Србији 1869–2019*, Управни суд Републике Србије/Правни факултет Универзитета у Београду, Београд 2019, 52.

established for disputes of an administrative nature, while the Council of State represents the supreme administrative court. Special laws were left to regulate the organisation, structure and jurisdiction of the administrative courts and the Council of State.[52]

The fundamental and essential change in the system of judicial control of administration in Serbia occurred after the end of the Second World War.

5. JUDICIAL CONTROL OF ADMINISTRATION AFTER THE SECOND WORLD WAR

The post-war period brought about a very different organisation and system of control of administration, seeing how the new state and social order affected the changes in various branches of law. The Council of State and administrative courts were abolished, so the judicial control of administration completely ceased to exist. In accordance with the prevailing understanding at the time, which was influenced by the Soviet Union, it was considered that the courts should not interfere in the administrative affairs, and that there was no need for administrative disputes to exist. It was understood that all the control should be completed before a higher state authority, and that the administration could also be controlled by representative bodies, as well as special control commissions.[53] In addition, the idea of judicial control of administration conflicted with self-governing socialism that was imposed. Nevertheless, it soon turned out that the administrative and political control of administration could not and should not be the only types of control. Thus, the judicial control of administration was brought back with the adoption of the Law on Administrative Disputes in 1952. However, special administrative courts were not reintroduced throughout the entire existence of Yugoslavia.

With the Law on Administrative Disputes from 1952, for the first time in post-war Yugoslavia, control through administrative disputes was introduced as a regular systematic form of judicial control of the legality of administrative acts,[54] but it was no longer based on the French system, and neither the Council of State nor special administrative courts have been re-established. Instead, administrative disputes were resolved by courts of general jurisdiction.[55]

52 Ustav Kraljevine Jugoslavije, čl. 98,99, *Službene novine br. 200*, 3. septembar 1931.

53 Д. Милков, *Управно право III*, 48.

54 N. Stjepanović, S. Lilić, 378.

55 М. Вукићевић Петковић, 183.

This Law introduced the administrative dispute "in order to protect the rights of the citizens to the greatest extent possible and to strengthen the legality of the decisions and actions of the state bodies".[56] Additionally, the Law stipulates that an administrative dispute can only be initiated against administrative acts, which in the context of this Law are acts of a state body adopted in an administrative matter.[57] Administrative acts didn't include business acts on the basis of which state administration bodies enter into civil-legal relations with individuals and legal entities that regard property affairs. Those acts could only be a matter of civil dispute.[58] There was also the possibility of conducting an administrative dispute against the silence of administration.[59]

A major novelty introduced by the Law is an administrative dispute of full jurisdiction. For the first time, it was envisioned that the court could decide in full jurisdiction, on the basis of a lawsuit filed against administrative acts adopted in matters of social insurance.[60]

The biggest change that came after the adoption of the 1952 Law was the expansion of the possibility of deciding in full jurisdiction outside the domain of social insurance. That became possible after the Law was amended in 1964 and the revised text was published in 1965. In this text, a dispute of full jurisdiction was determined by a general clause, and in order for it to be conducted, certain conditions needed to be met – the nature of the matter had to allow resolution in full jurisdiction and the factual situation had to provide a reliable basis for it.[61] Thus, a dispute of full jurisdiction was regulated for the first time, but it differed from today's regime of full jurisdiction. Namely, according to the current regulations, a dispute of full jurisdiction is excluded if the subject of the administrative dispute is an administrative act whose passing was based on a discretionary assessment,[62] which was not explicitly stipulated by the 1952 Law and its amendments. However, in practice, the legal standard *nature of the matter* was interpreted in a way that didn't allow the initiation of an administrative dispute of full jurisdiction if the subject of the dispute was a discretionary administrative act.

56 Богдан Мајсторовић, *Коментар Закона о управним сиоровима*, Службени лист, Београд 1967, 5–6.

57 Д. Миловановић, 187.

58 Б. Мајсторовић, 16.

59 Б. Мајсторовић, 24–25.

60 Luka Dragojlović, *Spor pune jurisdikcije u pravu SFRJ* (doktorska disertacija), Univerzitet u Sarajevu, Pravni fakultet, Sarajevo 1978, 87.

61 L. Dragojlović, 87.

62 Zakon o upravnim sporovima, čl. 43, st. 2, *Službeni glasnik RS, broj 111/2009.*

The main shortcoming of the Law from 1952 was the fact that it didn't bring back special administrative courts, while its important innovation was the establishment of the administrative dispute of full jurisdiction.

The Law on Administrative Disputes from 1977 didn't change anything significantly and it was practically in force until 2009, since the amendments to this Law that were passed in 1992, 1993 and 1994, as well as the Law on Administrative Disputes from 1996, were all adopted mainly to adapt the administrative legislation to the changes of state order and organisation.[63]

6. RE-ESTABLISHMENT OF SPECIALISED ADMINISTRATIVE JUDICIARY

After the Second World War, the new Yugoslav state not only disposed of specialised administrative judiciary, but the judicial control of administration was abolished as well. In the period after the end of the war, the judicial control was returning gradually. Nonetheless, special administrative courts were not brought back before the dissolution of Yugoslavia, although the state had changed its organisation several times. Therefore, after more than 60 years, specialised administrative judiciary was reintroduced in Serbia in 2009, when the new Law on Administrative Disputes (LAD) was adopted. The same Law is still in force today.

The first and most important reason for passing this Law was the formation of the special administrative judicial system. Interestingly, this was the reason for a deviation from the general rule that laws enter into force on the eighth day from the day of publication in the "Official Gazette of the Republic of Serbia", so the LAD was published in the Gazette on 29 December 2009, and it entered into force the very next day. The exception was justified by the fact that the new judicial system began to operate on 1 January 2010. Until the adoption of the LAD, administrative disputes were resolved by administrative departments of the Supreme Court of Serbia and district courts. The LAD introduced the Administrative Court, whose task is to resolve all administrative disputes on the territory of Serbia. The seat of the Administrative Court is in Belgrade and the Court has three departments that are located in Novi Sad, Kragujevac and Niš. Since the adoption of the LAD, decision-making in administrative disputes is possible only for the Administrative Court and the Supreme Court of Serbia, while the latter can resolve administrative disputes only upon the request for review of a court decision, which is an extraordinary legal remedy.

63 Dragan Milkov, „O upravnom sporu u Srbiji", *Zbornik radova Pravnog fakulteta u Novom Sadu* 3/2011, 124–125.

Another reason for the adoption of the LAD was the need for its harmonisation with the Serbian Constitution of 2006, which, unlike the LAD from 1996, did not allow the exclusion of judicial review of administrative acts.[64] The 2006 Constitution stipulates that the legality of final individual acts deciding on a right, obligation or legally-based interest is subjected to review before the court in an administrative dispute, if, in a certain case, the law does not provide for different judicial protection.[65] The third reason for the adoption of the new Law was the need for harmonisation with Article 6 of the European Convention on Human Rights, that concerns the right to a fair trial.[66]

The LAD, unlike its predecessors, contains a definition of an administrative matter, which it determines as an individual undisputed situation of public interest in which the need to authoritatively determine the future behaviour of the party arises directly from legal regulations.[67] On the other hand, the Law on Administrative Procedure from 2016 (LAP) significantly expands the concept of an administrative matter, so in addition to the adoption of administrative acts and the issuance of public certificates, administrative matter also includes the adoption of guarantee acts, the signing of administrative contracts, the undertaking of all administrative actions and the provision of public services, as well as any other situation determined by law as an administrative matter.[68] Regarding the mentioned definition, it is noticeable that the concept of an administrative matter is adapted to the subject of the administrative procedure. At the same time, the extended concept of an administrative matter given in the LAP does not clash with the LAD's definition of an administrative matter, since the lawsuits filed to the Administrative Court on the basis of an administrative matter that is related to the administrative procedure will be filed only against administrative acts.[69] Additionally, the definition of an administrative matter in the LAP is directly related to the system of legal protection foreseen by this Law. Namely, by defining an administrative matter as a situation in which the competent authority, based on the direct application of regulations, legally or factually affects the position of the party, the legislator laid the foundation for the introduction of a complaint as a new legal remedy, since it can be filed against administrative actions

64 В. Цуцић, *Збирка прописа,* 26.

65 Ustav Republike Srbije, čl. 198, st. 2, *Službeni glasnik RS,* br. 98/2006, 115/2021.

66 В. Цуцић, *Збирка прописа,* 26–27.

67 Zakon o upravnim sporovima, čl. 5.

68 Zakon o opštem upravnom postupku, čl. 2, *Službeni glasnik RS broj 18/2016.*

69 Зоран Р. Томић, Добросав Миловановић, Вук Цуцић, *Практикум за примену Закона о општем управном поступку*, Министарство државне управе и локалне самоуправе, Београд 2017, 22.

or services which factually affect the party's position, either by being undertaken or failing to be so. On the other hand, the influence of the administrative contract on the party's position is legal, but the complaint can be filed if the obligations that arise from it are not fulfilled.

One of the most important novelties in the LAD is an expansion of the subject of an administrative dispute. Thus, apart from deciding on the legality of final administrative acts, the Administrative Court also decides on the legality of final individual acts that regulate individual rights, obligations or legally based interests.[70] The aim of this provision was to enable an initiation of an administrative dispute against political acts. These are, for example, acts of the National Assembly, by which numerous functionaries are elected (such as judges of the Constitutional Court or the Governor of the National Bank of Serbia) and decrees of the President of the Republic of Serbia, by which the ambassadors are appointed and recalled.[71] When it comes to other novelties worth mentioning, it should be pointed out that the LAD prescribes that the Administrative Court is competent to decide on the postponement of the execution of an administrative act.[72] Before the adoption of the LAD, the decision on the postponement was adopted by the administrative body that passed an administrative act. Apart from that, the LAD gives single judges an important role in the preliminary proceedings and introduces a complaint as a legal remedy against a single judge's decisions.[73] Special attention is also paid to the oral hearing, which, according to the LAD form 1996, was held only exceptionally. On the contrary, the LAD from 2009 stipulates that "the the Court shall decide based on the facts determined in an oral hearing", as well as that the Court will forgo an oral hearing "only if the matter of the dispute is such that it obviously does not require direct hearing of the parties and special determination of the factual state, or if parties explicitly agree to this".[74] Finally, the LAD is the first law which explicitly excludes a dispute of full jurisdiction when the subject of the dispute is a discretionary administrative act.[75] The administrative authority that passes discretionary administrative acts has the right to a discretionary assessment because individual situations that are regulated by this type of acts are delicate and not completely predictable. Therefore, it is considered that the

70 Zakon o opštem upravnom postupku, čl. 3, st. 2.

71 Марко Давинић, *Закон о општем управном поступку, Закон о управним споровима*, Универзитет у Београду, Правни факултет, Београд 2020, 40.

72 Zakon o upravnim sporovima, čl. 23, st. 2.

73 М. Давинић, *Закон о општем управном поступку, Закон о управним споровима*, 44–45.

74 Zakon o upravnim sporovima, čl. 33, st. 1, 2.

75 Zakon o upravnim sporovima, čl. 43, st. 2.

Administrative Court can decide only on the legality of a final discretionary administrative act and not on the administrative matter itself, since the Court doesn't possess the specific knowledge, not completely related to law, that is required to resolve an administrative matter.[76]

Novelties introduced by the LAD created a more comprehensive system of protection of the rights of the parties and the Law itself regulated certain institutes in a more detailed and precise manner than its predecessors, which brought about a higher level of legal certainty.

7. CONCLUSION

Lastly, it can be concluded that the judicial control of administration in Serbia began to develop very early, much earlier than in most European countries. Administrative judiciary already appeared in 1869 and was embodied in the institution of the Council of State. The 1869 Constitution was followed by two laws, one of which specified the term "administrative dispute" in essentially the same way as it is defined by today's legislation. Thus, the regulations laid solid foundations for further and successful development of administrative judiciary and administrative dispute, as Serbia had established a very detailed system of judicial control of administration that was ahead of its time. Furthermore, the practice of the Council of State that consisted of numerous cases, dating all the way back to 1869, had a great influence on the lawgiver when the time came to adopt the administrative legislation of the first unified Yugoslav state.

Moreover, introduction of the two-level administrative judiciary in 1921, after the creation of the Kingdom of Serbs, Croats and Slovenians, represented a significant step towards the modernisation of the newly formed state. On top of that, there was a specialised department responsible for resolving administrative disputes of financial nature. Therefore, administrative judiciary was well developed in the period between two world wars, especially considering legal particularism and different provincial laws that were in force (prior to the unification) on territories that became part of the common state.

After the end of the Second World War, the development of the administrative dispute took a step backwards, since the judicial control of administration was completely abolished. Even though judicial control had returned in 1952, the two-level administrative judiciary was not revived, and, in Serbia, that remains the case to this day. After all, the judicial control of administration was not entirely in accordance with the concept of self-governing socialism, so there were no efforts to reintroduce special administrative courts.

76 М. Давинић, *Закон о општем управном поступку, Закон о управним споровима*, 47.

Administrative legislation after 1952 was mostly passed to adapt the legislative system to the changes in the organisation and order of the state. Hence, later regulations didn't introduce many novelties, and courts of general jurisdiction continued to resolve administrative disputes in Serbia for more than 10 years after the dissolution of Yugoslavia. Even so, specialised administrative judiciary was finally reestablished in 2009, which was a much-needed change.

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ИСТОРИЈСКИ РАЗВОЈ СУДСКЕ КОНТРОЛЕ УПРАВЕ У СРБИЈИ

Сажетак

У раду је приказан развој судске контроле управе у Србији, у периоду од увођења Државног савета као својеврсног управног суда, до данашњих дана. Обрађени су и најважнији правни акти који се тичу судске контроле управе, управног судства и управног спора, почев од Устава из 1869, уз поређења некадашњих решења са онима која предвиђају данашњи прописи и давање коментара и закључака у погледу тога како су уставни и законски прописи утицали на развој судске контроле управе у Србији кроз историју, и на који начин се овај вид контроле мењао током времена.

Кључне речи: *Судска контрола управе. – Управни спор. – Србија. – Историјски развој. – Правни прописи.*

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