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GENERAL VIEW OF THE CHARACTER OF THE ADMINISTRATIVE DISPUTE IN THE FIRST YUGOSLAV STATE

Resume

The text is an attempt to re-test certain authorial hypotheses regarding the character of the administrative dispute in the first Yugoslav state, by using descriptive and evaluation methods. In the first part of the paper, the readers are briefly reminded of the basic theoretical assumptions concerning the concept, subject and classification of administrative dispute. The second part of the paper presents a review of the normative framework and accepted legal solutions in the analyzed period. In the third part of the paper, the author addresses the more significant doctrinal dilemmas on this issue. In the last part, instead of concluding, a simplified assessment of the character and legal nature of the administrative dispute in the mentioned period is offered. It is concluded that the system of administrative court control of the administration belonged to the group of European-continental ones, that the subject of the administrative dispute was determined by a combination of the general

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clause method and the negative enumeration method, and the dispute was defined as a subjective dispute about the legality of the administrative act. A particular emphasis is placed on the existence of an objective administrative dispute and the views on the existence of a form of full jurisdiction in the law of the first Yugoslav state are accepted.

Keywords: administrative judiciary, administrative dispute, administrative court, State Council, subjective dispute, objective dispute, dispute of full jurisdiction

INTRODUCTORY REMARKS

Legal control of the administration "appeared at first, in various forms of administrative control" (Dimitrijević and Marković 1986, 214), as a kind of internal control or self-control, "on-the-go control" (Tomić 1990, 426). However, leaving the administration to finally and always be a "judge of itself" has, over time, proved to be an unacceptable model.[1] "The understanding that the control of the legality of administrative activities should be entrusted to the court, as a body separate from the administrative and political authorities, has crystallized, all with the aim of more complete protection of citizens and their collectives from arbitrary and illegal administrative work, primarily state administration bodies" (Bačanin 2010, 20). It should be noted that, thus, one of the foundations of the rule of law lies "precisely in judicial supervision of administrative acts" (Jerinić 2011, 21).

In the domestic literature of administrative law, it has been established that the states of the former Yugoslavia inherit a bright tradition of direct judicial control of administration.[2] In that sense, one can often find praise for the period between the two world wars, during which, among other things, a two-tier administrative judiciary was introduced.

[1] "At best, the officials of higher administrative bodies could "never remain in the clear field of law; legal moments will always be taken into account and mixed together with moments of expediency, which was the guiding idea of their entire operations hitherto" (Kostić 1939, 56; Stjepanović 1958, 657).

[2] "The Serbian Council of State, although established as a political body, in the first period, until 1869, was predominantly a legislative body (performing some judicial functions), while in the second, it became, like the French *Conseil d'État*, primarily an administrative court, although it also performed other tasks" (Jovičić 1999, 68). Its functions expand over time and their nature changes (Kumanudi 1921, 62).

Since it seems "that the administrative-judicial appeal will be returned to the administrative-judicial procedure after almost fifty years" (Dimitrijević and Vučković 2021, 265), this text is an attempt to re-test certain authorial hypotheses regarding the character of the administrative dispute in the first Yugoslav state, using a descriptive and evaluative method. To that end, after recalling the basic concepts and theoretical assumptions concerning this issue, the following lines will provide a brief overview of individual normative solutions and a selective presentation of authorial views. Finally, instead of concluding, an attempt will be made to offer a simplified assessment of the character and legal nature of the administrative dispute in the analyzed period.

BRIEF REMINDER OF JUDICIAL CONTROL SYSTEMS OF THE ADMINISTRATION, CONCEPT, SUBJECT AND TYPES OF ADMINISTRATIVE DISPUTE

Numerous models of judicial control of administration are most often classified into two basic systems – European-continental and Anglo-Saxon (see Radošević 2013, 459–473). This classification has been based[3] on different types of courts exercising control. According to the first, the European-continental (which finds its source in the French administrative tradition)[4] – the control is exercised by special administrative courts. According to another, Anglo-Saxon – control is exercised by regular courts.

As the administrative dispute is "the crown of administrative law and its legal ending" (Tomić 2010, 112) and it is distinguished from the regular court proceedings by a special case, significantly different procedure and nature of the court, as well as the special character of

[3] Today, thus "described control models no longer exist in a large number of countries. In a number of countries, a significant number of courts of special jurisdiction (but also other bodies) have been formed, which have taken over parts of the control and thus made at least part of the previous systematization meaningless. Other changes have taken place, such as the approximation of the English system to the model with a special department of the European Court" (Jerinić 2012, 381).

[4] Some of the principles emerged by the French Council of State (*Conseil d'État*) "represented a turning point in legal practice and theory and contributed to the disappearance of certain hitherto ruling conceptions of the state, its sovereignty and law" (Košutić 1973, 124). The importance of the decisions of this body in economic and financial matters is no less. Thus, "in an affair concerning the price of flour from 1952, a legal error costed the Government several billion francs, even after the verdict of the Council of State" (Braibant 2002, 376).

the applicable law, the doctrine of administrative law gave rise to a real "forest" of the administrative dispute definitions (see Milkov 1993). It can be accepted that "legal theory has failed to find a single criterion by which to define the concept of administrative dispute" (Milkov 2010, 45), and that different views can be reduced to the so-called formal and the so-called material point of view.[5] Conditionally and most closely observed, it implies a dispute in which the competent court in a special procedure "decides on the legality of the administrative act (on which the administration has already given its final word, or should have, but has not done it)" (Bačanin 2000, 578), and in which the defendant is a public administration body/organization.

The subject of an administrative dispute (what is decided upon in an administrative dispute) is often defined differently, depending on the applicable legal solutions of each specific state (see Lončar 2014). From the perspective of comparative law, the case is somewhere set narrowly and it implies only control of the legality of individual administrative acts (the so-called German-Austrian model), while in other legal systems it is set wider (the so-called French model), where such control includes both individual, as well as general acts of the administration (Dimitrijević 2019, 411).

When determining the subject of an administrative dispute, two methods are used – the general clause method and the enumeration method. The method of a general or common clause implies such a solution according to which one general legal provision allows conducting a dispute, in principle, against all administrative acts. The enumeration system (precise citation) enables the initiation of a dispute only against acts listed *explicite* by law (positive enumeration) or prevents the initiation of a dispute against certain acts that are listed as exceptions to the generally permitted conduction of a dispute (negative enumeration). Historically, "the enumeration system was created first because in the first period of judicial control, only a limited number of administrative cases was left to it, and only in later development was the general clause system created" (Popović 1955, 56).[6]

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[5] The formal observation is based on the formal features of the administrative dispute that are prescribed in the law, while the material point of view is most often based on the criteria of the subjects of the dispute or the legal rules by which the dispute is resolved (Popović 1969, 45–46).

[6] Today, in legislative practice, the system of general clause is mostly used in combination with the system of negative enumeration (Rađenović 2010, 66).

Administrative disputes are differentiated according to different criteria (see Ljubanović and Britvić Vetma 2011). In the systemic parts of administrative law, mostly there is a common distinction between subjective and objective administrative disputes and administrative disputes of full and limited jurisdiction.[7]

Classification into subjective and objective administrative disputes is done according to the purpose and subject of the administrative dispute. In the case of subjective administrative disputes, the subject of protection is (conditionally speaking) subjective, and in the case of objective disputes – objective law. By initiating a subjective administrative dispute, an attempt is made to protect the right and legal interest of a private (natural or legal) person from violations committed by an individual administrative act. An objective dispute, which is initiated against general acts of the administration, is far rarer in practice than a subjective one. Its initiation seeks to protect objective (general) legality (Milosavljević 2008, 321–322).

Dispute of limited jurisdiction (dispute for annulment of an administrative act) is a dispute on the legality of an administrative act in which, as a rule, in case of its illegality, the case is returned to the body that brought it for re-resolution. On the other hand, in a similar situation, in a dispute of full jurisdiction, the case would not be returned, but the court itself would be "put in the place of administration" (Tomić 2021, 211) and would decide on it. In other words, in a dispute of limited jurisdiction, the court primarily controls the performance of an administrative function. In a dispute of full jurisdiction, the court simultaneously controls the performance of an administrative function and performs an administrative function, regulating the merits of a specific administrative matter (Bačanin 2011, 212).

REVIEW OF THE NORMATIVE FRAMEWORK AND ACCEPTED SOLUTIONS

Although some other territories that became part of the new Kingdom of Serbs, Croats and Slovenes had some tradition of administrative

[7] Full and limited jurisdiction are "two terms uncharacteristic of the Serbian language because they represent the literal translation of the French terms for these two concepts. However, we use them because they are accepted in domestic jurisprudence" (Cucić 2019, 186).

judiciary,[8] immediately after the unification, the area of administrative court jurisdiction of the Serbian State Council was extended to the entire territory of the new state. The first constitutional act of the new state (Constitution of the Kingdom of Serbs, Croats and Slovenes 1921) [hereinafter: St. Vitus day Constitution], establishes a two-tier administrative judiciary. The State Council becomes the supreme administrative court (St. Vitus day Constitution, Art. 103, Par. 1)[9] among the newly established administrative courts (Art. 102). It decides on the appeals against judgments of administrative courts, and in addition to this jurisdiction, its duty to resolve the disputes on appeals against decrees and ministerial decisions in the first and last instance is determined (Art. 103, Par. 5, Item 1).[10]

The issues of the organization of the State Council and administrative courts and the procedure placed before them were regulated in detail by lower acts adopted during 1922 – The Council of State and Administrative Court Act (The Council of State and Administrative Courts Act 1922) and Decree on the Rules of Order in the State Council and Administrative Courts (Decree on the Rules of Order at the Council of State and Administrative Courts 1922). Both acts underwent certain changes by the end of the monarchy's existence. After the establishment of the dictatorship on January 6, the Council of State and Administrative Court Act was amended (The Law on amendments and additions to the Council of State and Administrative Courts Act 1929), followed by the enactment of Council of State and Administrative Court Act (The Rules of Order at the Council of State Act 1929), which replaced the abovementioned Decree. As the September Constitution of 1931 (The Constitution of the Kingdom of Yugoslavia, 1931), did not change the

[8] I would refer those interested in a more detailed analysis of this issue to the following texts: (Medvedović 1987; Medvedović 2014; Koprić 2006; Đerđa and Kryska 2018; Đanić Čeko 2021).

[9] It is interesting to note that "this Constitution does not apply the earlier practice of enumerating all the functions of the State Council, but turns it into a supreme administrative court" (Aleksić 1991, 194).

[10] "This means that if the final administrative act was adopted by the ministries, a lawsuit could be filed against it directly to the State Council." At the same time, it did not matter whether the ministry issued its 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, then the lawsuit was submitted to the competent administrative court, whose decision could subsequently be appealed to the State Council" (Davinić 2017, 286).

jurisdiction of administrative courts, the provisions of the Council of State and Administrative Court Act, with the above amendments (Council of State and Administrative Courts Act 1930) [hereinafter: CSACA 1930], and the Rules of Order at the Council of State and Administrative Courts Act, as amended (The Law on amendments and additions to the Council of State and Administrative Courts Act 1930), which referred to this issue, were applied throughout the interwar period.

The courts for administration were considered to be the administrative courts and the State Council, which in the first and last instance decided against decrees and ministerial decisions (CSACA 1930, Art. 17, Par. 2) and in the second instance on appeals against judgments of administrative courts (Art. 17, Par. 1). The Council of State and the administrative courts were, therefore, "as well as their French role-model, considered to be part of the administration, i.e. executive power, not judiciary. This structure of administrative judiciary lasted until the beginning of the World War II" (Cucić 2019, 183).

An administrative dispute was initiated by a lawsuit that could challenge an administrative act by which the administrative authority either did not apply or did not properly apply the law or regulation (CSACA 1930, Art. 23, Par. 1, Item 1), or because in the foregoing proceedings it did not take into account the procedural regulations (Art. 23, Par. 1, Item 2). It was legally defined as "only the dispute between an individual or a legal entity on the one hand, and the administrative authority, on the other hand [...] which exists where an act of the administrative authority violates some right or immediate personal interest of the plaintiff based on the law" (Art 15, Par. 1). The lawsuit was not allowed: in matters falling within the jurisdiction of the regular courts; in disciplinary matters unless otherwise provided by the law; in matters in which the administrative authorities are empowered to make decisions on the basis of a free assessment, and, against the administrative affairs of the regular courts (Art. 19). Consequently, it seems clear that the subject-matter of the administrative dispute was determined by the combination of the general clause system with the negative enumeration system and that it was a dispute over the legality of an administrative act.[11]

[11] In the case of the so-called silence of the administration, a dispute could be initiated if three months have passed since the party's repeated request for the adoption of an administrative act and the administrative body has not adopted it (Art. 22. Par. 2). The party could file a lawsuit only against the administrative authority that decides in the last instance, and remained unprotected in case of silence of

Active legitimisation was provided to a natural or legal person whose right or direct interest based on law was violated by a decision of the administrative authority. Exceptionally, it was possible for a "special" state body to appear in the role of a prosecutor. The possibility was provided for the Minister of Finance to designate a special body at each administrative court that could file a lawsuit in certain cases (CSACA 1930, Art. 21, Par. 3). If the law would be violated in favor of an individual (primarily by decree or ministerial decision, and, later, by other acts),[12] according to the legal solution, that body would be the Chief Control (Supreme Court of Public Finance).

Council of State and Administrative Court Act (CSACA 1930) allowed that in the case of the so-called "silence of the administration" the State Council also passed an administrative act. "If judgments of the State Council and the administrative courts require the issuance of a new administrative act, and the administrative authority does not issue it within three months from the delivery of the judgment, the person in whose favor the judgment was rendered has the right to make an appeal to the State Council. In that case, the State Council will pass a decision, which completely replaces the administrative act" (Art. 43).

A GLANCE AT SOME DOCTRINAL REVIEWS

Representatives of modern administrative law doctrine sometimes value the interwar period "as golden age of the Serbian administrative judicial theory and practice" (Vučetić 2019, 218), among other things, because "many issues of administrative dispute in post-war Yugoslav law were based [...] on the solutions of precisely these pre-war regulations" (Bačanin 1996, 207). Moreover, if we consider the fact that the General Administrative Procedure Act from that period was "the fourth law of that kind in the global context" (Davinić 2013, 144), such an assessment could perhaps be acknowledged to the wider corpus of administrative law at the time. As special administrative courts were established

the first administrative instance, which was not the last at the same time (Medvedović 1987, XX).

[12] With the changes made by the financial law for 1933–34 (§ 80, t. 10) the Chief Control appears on behalf of the state as a prosecutor, if the law is violated in favor of an individual by Decree, Ministerial decision, Ban's decision, decision of the commander of the gendarmerie or the decision of any other authority on the official relations of civil servants, contract clerks of the civil and military order as well as state traffic institutions (Krstić 1935, 61).

as holders of judicial control of the administration, it seems indisputable that the system of administrative justice of the first Yugoslav state belonged to the European-continental group, regardless of whether its French or Austrian roots were first noticed.[13]

The subject of special discussion among the successors of administrative law at that time was the question of the (non)existence of an objective administrative dispute. Since the legislator defined an administrative dispute as a dispute between an individual or a legal entity on the one hand, and an administrative authority on the other, which exists where an act of administrative authority violates a right or direct personal interest of the plaintiff based on law – some authors considered that one cannot speak of an objective administrative dispute in Yugoslav law. Some of them, "adhering to the French theory and probably the stated definition of our system" (Stjepanović 1937, 433), understood an administrative dispute as a type of dispute that can only be established by a natural or legal person against the state (see Danić 1922, 106). *Lazo Kostić* (1939) reckoned that that in Yugoslav law "there is only a subjective administrative dispute" (157). *Slobodan Jovanović* (1924), on the other hand, assessed the dispute initiated by the Chief Control as "reversed" and emphasized that it could be considered administrative only in a formal, but not in a material sense (414). Again, there were those writers who objected to the views that the legal formulation of interests was reduced only to subjective law (see Jurkovič 1936, 6), and those who emphasized the undoubted presence of an objective administrative dispute in the law of the first Yugoslav state. To exempifly, *Nikola Stjepanović* (1937) emphasized that this dispute was "an objective administrative dispute in any case" (435), while *Ivo Krbek* (1937) was of a similar attitude, although somewhat more subtle in his assessment.[14] Their position can be described as more correct, given that the law provided that the Chief Control could file lawsuits against decrees or ministerial decisions.[15]

[13] The prevailing understanding is that it was about accepting the French type of judicial control of the administration. Krbek (1962), for example, also stated that Roger Bonard himself claimed that in terms of regulating the administrative judiciary, of all foreign laws, the Yugoslav system is the closest to the French (305). Again, there are writers who believe that the Yugoslav administrative judicial system has its roots in Austrian legislation (see Đerđa and Kryska 2018, 94).

[14] "It must be admitted that our dispute about the legality of an act of administrative authority represents a very mild form of an objective administrative dispute" (127).

[15] The views of some contemporary authors point us to this conclusion (see Milovanović 2019, 100).

Scientific controversy was also caused by the question of the legal nature of the decision of the State Council, which completely replaced the administrative act. *Ivo Krbek* (1929) considered that it was an administrative-judicial act (47), *Lazo Kostić* (1939) – that it was an act of an active administrative body (63),[16] and *Ljubomir Radovanović* – that it was an act that is materially and legally administrative, and formal and organical from the judicial point of view. The last assessment should be considered the most acceptable, as we are reminded by *Zoran Tomić* (2021) as well (213).

There was also a dilemma regarding the existence of a dispute of full jurisdiction in the law of the first Yugoslav state. *Lazo Kostić* thus claimed that the administrative dispute "does not have any of the [...] essential features of disputes of full jurisdiction", because, among other things, the administrative courts are "related to the facts established in the administrative process" (Tomić 2021, 213), while *Danilo Danić* (1926), on the other hand, wrote that in this case the administrative courts were "reforming" the administrative act (63). After the Second World War, we can mostly notice the statements that in the interwar period there was still a form of dispute of full jurisdiction. Such an attitude, for example, was shared by *Slavoljub Popović* (1955, 28) and *Vuk Cucić* (2015 8, 262). We believe that it would be worth agreeing with such assessments, considering that the legislator envisaged a procedure in which the State Council did not "return" the case to the administrative courts, but passed a decision which completely "replaced" the administrative act.

INSTEAD OF CONCLUDING

The first Yugoslav state possessed a system of administrative-judicial control of the administration, which belonged to the group of European-continental systems. The Administrative Courts and the Council of State were not considered part of the judicial power, but of the administrative power (like their French models). The subject matter of the administrative dispute was determined by a combination of the general clause method and the negative enumeration method. The dispute was defined as a subjective dispute about the legality of an administrative act. However, there was practically an objective administrative dispute as well. It can be accepted that the legislation in the mentioned period was enriched by the existence of a form of full jurisdiction.

[16] Danilo Danić (1926) shared a similar opinion (63).

All doctrinal reviews that speak in favor of the assessment that this period can be seen as the golden age of the Serbian administrative judicial theory and practice have their foundation and seem appropriate. By virtue of, among other things, the existence of the institution of administrative judiciary, we can be proud of our administrative legal past, both in terms of legislative activity and in terms of the theory that provided its meaningful judgement. We could be especially proud of the heritage of the two-tier administrative-judicial procedure, because many countries still do not have a procedure for appealing against the decisions of administrative courts. Unfortunately, today's Serbia is among those countries.

However, in the domestic professional public, "some time ago, the aspiration was expressed, and even formalized, to 'return' to the two-tier system, which would revive the previously accepted and certainly advanced solution" (Jovanović and Andonović 2021, 239). Considering that the Strategy of Judicial Development for the period 2020–2025 (Strategy of Judicial Development for the period 2020–2025 2022) in order to improve the efficiency of the work of the administrative judiciary, it envisages a two-tier administrative judiciary procedure (obj. 4, measure 6.3), we can justifiably expect its legal regulation in the near future. The view of our administrative judiciary tradition can thus be made as a source of inspiration for future legislative action.

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ОПШТИ ПОГЛЕД НА КАРАКТЕР УПРАВНОГ СПОРА У ПРВОЈ ЈУГОСЛОВЕНСКОЈ ДРЖАВИ

Сажетак

Текст представља покушај да се коришћењем дескриптивног и евалуативног метода поново тестирају поједине ауторске хипотезе поводом карактера управног спора у првој југословенској држави. У првом делу рада читаоци се укратко подсећају на основне теоријске поставке које се тичу појма, предмета и класификација управног спора. Други део рада представља осврт на нормативни оквир и прихваћена законска решења у анализираном периоду. У трећем делу рада аутор се осврће на значајније доктринарне дилеме о овом питању. У последњем делу, уместо закључка, нуди се поједностављена оцена карактера и правне природе управног спора у наведеном раздобљу.

Закључује се да је прва југословенска држава поседовала систем управносудске контроле управе који је припадао групи европско-континенталних система. Управни судови и Државни савет нису се сматрали делом судске, већ управне власти (попут њихових француских узора). Предмет управног спора био је одређен комбинацијом метода генералне клаузуле са методом негативне енумерације.

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Спор је био дефинисан као субјективни спор о законитости акта управе. Но, практично је постојао и објективни управни спор. Може се прихватити да је законодавство у наведеном периоду било оплемењено и постојањем облика пуне јурисдикције.

Сви доктринарни осврти који говоре у прилог оцене да се овај период може сагледати као златни период српске управносудске теорије и праксе имају своје утемељење и чине се примереним. Благодареħи, између осталог, и постојању установе управног судства, можемо се поносити својом управноправном прошлошħу, како у погледу законодавне активности, тако и у погледу теорије која је о томе пружила свој прегнантан суд. Особито би се могли подичити баштином двостепеног управно-судског поступка јер поступак по жалби на одлуке управних судова многе државе немају ни данас. Међу тим државама је, нажалост, и данашња Србија.

Но, у домаћој стручној јавности је пре извесног времена исказана, па и формализована тежња „повратку“ у двостепеност, чиме би се оживело раније прихваħено и, свакако, напредно решење. Будући да се Стратегијом развоја правосуђа за период 2020–2025. године ради унапређења ефикасности рада управног судства предвиђа двостепени управносудски поступак, оправдано можемо очекивати његово законско уређивање у блиској будућности. Поглед на нашу управносудску традицију може се, тако, учинити и као један извор надахнуħа за предстојеħе законодавно делање.

Кључне речи: управно судство, управни спор, управни суд, Државни савет, субјективни спор, објективни спор, спор пуне јурисдикције