

APPEALS IN SPECIAL ADMINISTRATIVE DOMAINS

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Abstract

This paper is preceded by another work on the administrative appeal in Serbian law, as prescribed by General Administrative Proceeding Act. It builds upon that by describing and analyzing the most often modifications made to the general regime of the administrative appeal in various policy areas. It furthermore depicts special administrative control mechanisms, different from the administrative appeal, that exist in the fields of public procurement, education and broadcasting. These two articles should conclude the normative analysis of the system of administrative appeal and its counterpart administrative recourses. Normative analysis should further allow empirical research of the efficiency thereof and enable drawing of conclusions on respective features of the appellate proceeding that provide the best results in protection of the legality and private and public interests.

Keywords: appeals, special administrative control mechanisms, public procurement, education, broadcasting, Serbia.

1. Introduction

The rules of the administrative proceeding in Serbian law are codified in General Administrative Proceeding Act¹ (GAPA). GAPA, *inter alia*, regulates the general regime of the administrative appeal. However, GAPA allows the change of this regime by, what it refers to as, “special” laws (art. 3). Special laws are substantive laws regulating particular administrative domains, such as environment, taxes, competition, public procurement, data protection, home affairs, military, education, broadcasting etc. These laws determine the competence of a particular administrative authority to decide in the first instance administrative proceeding or the second instance (appellate) proceeding (competence *ratione materiae*). Furthermore, they add special procedural features to administrative proceedings in the administrative areas they regulate, thus altering the general regime prescribed by GAPA.

As the general regime of the administrative appeal has already been described and analyzed (see Cucić, 2011), the purpose of this article is to build upon that analysis by describing and analyzing the alterations made to such regime by special laws. The criterion used for choosing administrative areas that should be analyzed were the changes made to the general regime. Chosen special laws are those that most significantly modify GAPA’s provisions on the administrative appeal. This has been done so that two goals could be achieved. The first aim was to illustrate various modalities of administrative protection of rights and interests of private parties and of public interest in Serbian law. The second goal was to set grounds for an empirical analysis of efficiency of these different administrative control procedures. This should enable us to compare the efficiency of general and special appellate proceedings and, potentially, derive conclusions on procedural features that provide the best results in reducing courts’ workload and protecting private and public interests².

2. The general regime

In order to easier explain appeals in special administrative areas and for the convenience of reading, we will briefly portray the key features of Serbian administrative law and the most important traits of the general regime of the administrative appeal, as prescribed by GAPA³.

Administrative acts in Serbian law are legal (normative), individual (referring to a particular case), unilateral, binding acts of administration deciding on administrative matters (Krbek, 1957, p. 16; Milkov, 1983, p. 349). Administrative matter is a legal, individual, non-contentious situation in which the administration is entitled to and obliged by the law to decide on a right, duty or legal interest of an individual or an organization. The most common name used for administrative acts in legislation is

1 Official Gazette of the Federal Republic of Yugoslavia, no. 33/1997 and 31/2001; Official Gazette of the Republic of Serbia, no. 30/2010, enacted on July 11, 1997.

2 This article is restricted to normative scrutiny, while the empirical analysis of efficiency will be part of a separate study.

3 For more thorough description and analysis thereof, see Cucić (2011).

resolution (i.e. in GAPA), although other names are used as well, i.e. permit, license, approval, decision etc. Only administrative acts can be rendered in the administrative proceeding and only they can be challenged by the administrative appeal. Besides the administrative appeal, Serbian administrative law contains six extraordinary administrative legal remedies⁴ regulated by GAPA, as well as a judicial remedy, the suit to the Administrative Court, regulated by Administrative Disputes Act⁵. When an administrative act cannot be challenged by the administrative appeal (the appeal was either exhausted or was not allowed), the administrative act becomes non-appealable. Only non-appealable acts can be challenged before the Administrative Court. When an administrative act cannot be challenged by the administrative appeal and the suit to the Administrative Court (the suit was either exhausted or not submitted at all), the administrative act becomes final.

The key characteristics of the administrative appeal under GAPA are:

1) It is, as a rule, allowed against all administrative acts rendered in the first instance administrative proceedings. However, it can be excluded by a special law. If it is allowed, its usage is a precondition for judicial review.

2) It has devolutionary effect.

3) It has, as a rule, *de jure* suspensive effect.

4) It can be used for challenging any kind of illegality or inopportunity (misusage of discretionary powers) of the administrative act.

5) When the appeal is submitted by a private party, except where provided to the otherwise, the appeal has *non reformatio in peius* effect.

6) General time period for submission of the administrative appeal is 15 days as of the day of delivery of the respective administrative act. Additionally, the administrative appeal can be submitted against omission of an administrative authority to issue an administrative act in the prescribed period of time, i.e. in the case of the “silence” of administration. General time period stipulated in GAPA is one month for shortened proceeding or two months when the regular proceeding is conducted. If the act is not rendered within this period of time, it is considered that the submitted request was rejected (negative presumption).

7) The administrative appeal must be sent to the first instance authority, the one that rendered the appealed act. This is prescribed because GAPA provides a self-control mechanism within appellate proceeding. Namely, the first instance authority has the right to, provided it finds the appeal to be founded, replace the appealed act with a new one in order to satisfy requests made in the appeal. If it does not do so, nor it dismisses the administrative appeal for formal reason (i.e. for being untimely),

4 The term “extraordinary legal remedies” is a literal translation of the terminology used in GAPA [*vanredna pravna sredstva*]. Unlike the administrative appeal, they can be used only for challenging the legality of administrative acts (not the opportunity) and only in the circumstances prescribed by the law. For this reason, and in comparison to them, the administrative appeal is referred to as regular (ordinary) administrative legal remedy.

5 Official Gazette of the Republic of Serbia, no. 11/2009

the first instance authority will send it to the appellate authority. This feature of the administrative appeal in Serbian law makes it both remonstrative (the first instance authority is given a chance to change its act) and devolutionary (second instance authority decides on the appeal) legal remedy.

8) It has been mentioned that the first instance authority can dismiss the administrative appeal if it finds it to be formally incorrect (i.e. untimely, incomplete, filed by an unauthorized person, not allowed). In such a case, a special “procedural” appeal can be submitted to the appellate authority against a conclusion on dismissal of the (“main” or “substantive”) appeal. If the appellate authority finds the “procedural” appeal to be well founded, it will annul the conclusion and proceed with the appellate proceeding and decide on the “main” appeal as well. This is additional procedural safeguard representing another important feature of the administrative appeal. and

9) Appellate authority can dismiss the appeal (for formal reasons), reject it as unfounded or accept it as founded (well founded), and annul or alter challenged act.

3. The most often modifications of the general regime

It would burden the text to mention different administrative fields in which the general regime of the administrative appeal has been only scarcely modified. Therefore, we chose to mention the most frequent alterations and make reference to some examples.

The most frequent change made to GAPA’s provisions relate to the time periods for filling and deciding on the administrative appeal. These changes could hardly be disputed, especially when they shorten the period of time for deciding on the appeal. However, some concerns could be raised in cases where the time period for submitting the administrative appeal is too short, for example the appeal against a resolution of school board on disciplinary measures against a pupil has to be filed within three days as of its delivery (art. 115, para. 11 of System of Education and Upbringing Act⁶). Given that the administrative appeal must be exhausted before initiating judicial review process, this might impair party’s right to access to court.

Nevertheless, there are other, more tangible alterations of the general regime. Firstly, there are laws that exclude the right to submit an appeal in the administrative proceeding⁷. Unsatisfied parties in such cases can directly submit the suit to the Administrative Court. The main reason for excluding the administrative appeal is enabling certain

6 Official Gazette of the Republic of Serbia, no. 72/2009

7 For example, art. 168, para. 3 of Police Act (Official Gazette of the Republic of Serbia, no. 101/2005 and 63/2009), art. 38, para. 4 of Competition Protection Act (Official Gazette of the Republic of Serbia, no. 51/2009), art. 9, para. 4 of Banks Act (Official Gazette of the Republic of Serbia, no. 107/2005 and 91/2010), art. 13v, para. 2 of Financial Leasing Act (Official Gazette of the Republic of Serbia, no. 55/2003 and 61/2005), art. 146, para. 3 of Insurance Act (Official Gazette of the Republic of Serbia, no. 55/2004, 70/2004, 61/2005, 61/2005, 85/2005, 101/2007, 63/2009 and 107/2009), art. 14, para. 5 of Free Zones Act (Official Gazette of the Republic of Serbia, no. 62/2006), and art. 61, para. 4 of Food Safety Act (Official Gazette of the Republic of Serbia, no. 41/2009).

authorities, i.e. regulatory agencies, to be independent from the executive in their work. In addition, there are some important matters that are decided in the first instance by the central state administrative authorities, i.e. ministries, because of their significance. This is a matter of legal policy and in most cases it is founded, but the trend of having more and more domains in which administrative appeal is excluded reduces the overall protection of rights and interests of private parties. Although they can go to the court, they still lose the opportunity to promptly and inexpensively protect their rights in the administrative proceeding itself. Secondly, often special laws exclude suspensive effect of the administrative appeal, i.e. the appeal is allowed, but it does not delay the execution of the appealed act⁸. This modification reduces appellant's protection and should therefore be paid special attention when introduced. It is important to carefully weigh and strike balance here between the need of the administration to perform its tasks rapidly and without disruptions, on the one hand, and protection of private parties' (appellants) interests. Thirdly, there are laws that lay down the so called "positive presumption" in the case of administrative silence, i.e. that in the case of omission of an administrative authority to render administrative act in the prescribed period of time, it is considered that the request of a party was accepted⁹. Unlike two previously mentioned modifications, this one reinforces the position of the party submitting the request and in such cases there is no need for the administrative appeal.

4. Special administrative control mechanisms

In the aforementioned cases, we had the general regime of the administrative appeal as a foundation that had been altered by special laws. In the laws mentioned under this subtitle, this is not the case. Here we have various administrative control mechanisms that in some manner may resemble the appellate administrative proceeding, but are not relying on it as their basis.

8 For example, art. 12 of Custom Act (Official Gazette of the Republic of Serbia, no. 18/2010), arts. 38 and 52 of Expropriation Act (Official Gazette of the Republic of Serbia, no. 53/95, Official Gazette of the Federal Republic of Yugoslavia, no. 16/2001, Official Gazette of the Republic of Serbia, no. 20/2009), art. 37 of State Administration Act (Official Gazette of the Republic of Serbia, no. 20/92, 6/93, 48/93, 53/93, 67/93, 48/94, 49/99, 79/2005 and 101/2005), arts. 49 and 158 of Energy Act (Official Gazette of the Republic of Serbia, no. 84/2004), arts. 17 and 100 of Game and Hunting Act (Official Gazette of the Republic of Serbia, no. 18/2010), art. 106, para. 6 of Advertising Act (Official Gazette of the Republic of Serbia, no. 79/2005), art. 147, para. 1 of Tax Proceeding and Tax Administration Act (Official Gazette of the Republic of Serbia, no. 80/2002, 84/2002, 23/2003, 70/2003, 55/2004, 61/2005, 85/2005, 62/2006, 63/2006, 61/2007, 20/2009, 72/2009 and 53/2010), art. 110 of Forests Act (Official Gazette of the Republic of Serbia, no. 30/2010), art. 123 of Tourism Act (Official Gazette of the Republic of Serbia, no. 36/2009 and 88/2010), and art. 86, para. 4 of Railway Act (Official Gazette of the Republic of Serbia, no. 18/2005).

9 For example, art. 65, para. 2 of Competition Protection Act (Official Gazette of the Republic of Serbia, no. 51/2009), art. 26 of Commercial Enterprises Registration Act (Official Gazette of the Republic of Serbia, no. 55/2004, 61/2005 and 111/2009), and art. 32 of Associations Act (Official Gazette of the Republic of Serbia, no. 51/2009).

4.1. Public Procurement

Public procurements are regulated by Public Procurement Act¹⁰ (PPA). PPA excludes the administrative appeal (art. 118, para. 5), but institutes a special legal remedy – the request for protection of rights of bidders and public interest.

Proceeding upon submitted request is a two-tier one. In the first instance, the request is submitted to and decided upon by the procuring entity (public authority, institution, organization or public enterprise that procures (obtains) goods, services and/or works). The second instance authority is the Republic Commission for the Protection of the Rights in the Public Procurement Proceedings. The Commission is an independent state authority, responsible for its work to the Parliament, which enables the protection of the rights of bidders and public interest in the public procurement proceedings (art. 100, para. 1 PPA).

The first instance proceeding is initiated by a submission of the request to the procuring entity (art. 107, para. 1 PPA). The request can be submitted by any person that has the interest to conclude an agreement on a particular public procurement (art. 106, para. 1 PPA). In the case of breach of the public interest, the request can be submitted by the Directorate for Public Procurements (this is a state authority, a special administrative organization performing expert work in the field of public procurements), Public Defense Attorney and state authority or organization supervising procuring entity (art. 106, para. 2 PPA). Simultaneously, the copy of the request has to be sent to the Commission as a second instance authority (art. 107, para. 9 PPA). The request can be submitted during the entire public procurement proceeding and once the decision on selecting the best bidder has been made, the request can be submitted within eight days as of its delivery or publication in the official gazette (art. 107, paras. 2-5 PPA). The request can be filed against public call for bids and tender documentation until the opening of the bids. After the bids have been opened, the request can be submitted against any procedural action of the procuring entity (i.e. procuring entity delivered a certain document only to the part of bidders or discriminated some of them in another way) and against the decision on selection of the best bidder (art. 107, paras. 2 and 3 PPA). This is the first and perhaps the most significant difference between the administrative appeal and the request. The administrative appeal is used to challenge only administrative acts, while the request can be filed not only against the decision on the selection of the best bidder, but also against procedural actions and documents that are not administrative acts, such as public call for bids and tender documentation. The request stops further activities of the procuring entity in the public procurement proceeding, *i.e.* it has a suspensive effect (art. 108, para. 1 PPA). On the demand of the procuring entity, the Commission can decide that the request does not stop the public procurement proceeding, provided that it considers this to harm the interests of the Republic of Serbia (art. 108, paras. 1

10 Official Gazette of the Republic of Serbia, no. 116/2008

and 2 PPA). This solution is similar to the one existing in GAPA. Namely, GAPA sets down a rule that the administrative appeal has suspensive effect, but that it could be excluded by a special law and that when it is not excluded by a special law, it can be still excluded in a concrete case under certain conditions (art. 221, para. 2 GAPA). There are also special laws that provide reverse provision – the administrative appeal has no suspensive effect, as a rule, but the execution of the appealed act can be, under certain conditions, delayed on demand¹¹. There are three possible decisions that might be reached by the procuring entity upon the request. The procuring entity can dismiss the request if it finds it to be untimely, submitted by an unauthorized person and/or incomplete (arts. 109 and 110 PPA). Against a conclusion on dismissal of the request the party that submitted it can file an appeal to the Commission within three days as of its delivery (arts. 109, para. 4 and 110, para. 3 PPA). This appeal has the same characteristics as the “procedural” appeal that can be submitted against a conclusion on dismissal of the administrative appeal by the first instance authority (*supra* under 2.). If it does not dismiss the request, the procuring entity shall proceed and decide on its merits within ten days as of the day of its submission. The procuring entity can reject a request as unfounded or accept it as well founded and partially or completely annul the public procurement proceeding (art. 111, para. 1 PPA). It can be observed that the first instance proceeding upon the request is analogous to the work of the first instance authority on the administrative appeal, i.e. to the possibility of the first instance authority to replace its appealed administrative act and thus rectify its mistake. In both cases we have remonstrative, self-control mechanism. Nonetheless, there is one substantial difference between them. In the proceeding upon request for protection of rights in the public procurement proceeding, the first instance authority has to issue a resolution deciding on it, while the first instance authority whose act was appealed is not compelled to do so, it has a discretion to decide whether to react if it finds the appeal to be well founded or not.

If it is not satisfied with the resolution of the procuring entity, or if the procuring entity failed to render a resolution within a prescribed period of time, the party that submitted the request can submit a written notification to the procuring entity that it wants to continue with the proceeding for protection of rights before the Commission as a second instance authority. The notification has to be submitted within three days as of the day of delivery of the resolution or the day when the prescribed period of time for its issuance expired (arts. 111, para. 4 and 112, para. 3 PPA). Copy of the notification is submitted to the Commission (art. 112, para. 2 PPA). The Commission has to decide on the request within 15 days as of the day of receipt of complete file of the case from the procuring entity (art. 114, para. 1 PPA). The Commission can in especially justified cases prolong this time period for additional 20 days (art. 114, para. 4 PPA). The Commission is not limited by the submitted request when deciding, but also decides on the breaches that party that submitted the request did and could

¹¹ This is the solution from art. 12, para. 3 of Custom Act (Official Gazette of the Republic of Serbia, no. 18/2010).

not have known about, and which influenced the decision of the procuring entity in the public procurement proceeding (art. 113, para. 2 PPA). On the other hand, when deciding on the appeal, the appellate authority is bound by the request made in the appeal. Similarly to the procuring entity, the Commission can dismiss the request for formal reasons, reject it as unfounded or accept it as well founded and partially or completely annul the public procurement proceeding (art. 117 PPA). PPA explicitly excludes the possibility of submitting an appeal to the resolution or silence of the Commission, but only leaves the opportunity of pursuing the judicial review (art. 118, paras. 5-7). Excluding the administrative appeal is a normal consequence of the position and independence of the Commission, as well as the existence of the proceeding upon request.

It can be inferred from the aforementioned that the legislator made a legal policy choice to introduce a special administrative remonstrative-devolutionary, two-tier control mechanism. It also decided to avoid duplication of procedures, given the similarities that exist between the administrative appeal and the request for protection of rights of bidders and public interest in the public procurement proceeding. In comparison to the administrative appeal, we can observe that the request is following the logic of the appellate proceeding, but that it is wider at least in three aspects. Firstly, the request can be used for challenging not only administrative acts, but the public call for bids, tender documentation and procedural actions of the procuring entity as well. Secondly, the procuring entity, as a first instance authority, is obliged to decide on the request, while the first instance authority in the administrative appeal proceeding has discretion to use provided self-control mechanism or not. Finally, the Commission, as a second instance authority, is not limited to the scope of request itself, but also decides on the breaches that party that submitted the request did and could not have known about, and which influenced the decision of the procuring entity in the public procurement proceeding.

4.2. Education

The main law regulating education in the Republic of Serbia is Basis of the System of Education and Upbringing Act¹² (BSEUA). It regulates preschool, elementary school and secondary school education and upbringing¹³. Two fields in which administrative proceedings in the area of education are conducted will be analyzed, rights and duties of pupils and supervision.

12 Official Gazette of the Republic of Serbia, no. 72/2009

13 BSEUA is a general law in the area of education, regulating these three fields, which are in more detail regulated by the following special laws in this area: Pre-School Education and Upbringing Act (Official Gazette of the Republic of Serbia, no. 18/2010), Elementary School Act (Official Gazette of the Republic of Serbia, no. 50/92, 53/93, 67/93, 48/94, 66/94, 22/2002, 62/2003, 64/2003, 101/2005, 72/2009) and Secondary School Act (Official Gazette of the Republic of Serbia, no. 50/92, 53/93, 67/93, 48/94, 24/96, 23/2002, 25/2002, 62/2003, 64/2003, 101/2005, 72/2009). Another important law in this field is Higher Education Act (Official Gazette of the Republic of Serbia, no. 76/2005, 100/2007, 97/2008, 44/2010.).

4.2.1. Rights of pupils

BSEUA contains a special chapter on the rights of children and pupils and duties and responsibilities of pupils (Chapter VII). The proceedings for protection of rights and for determination of responsibility are different. Only prior shall be depicted, because latter relies on the general administrative appeal provisions, i.e. GAPA (art. 114, para. 4 BSEUA).

BSEUA prescribes the rights of a child and pupil. It states that the rights of a child and pupil are exercised in accordance with ratified international agreements, this law and special laws, and that the educational institution and all employees have the duty to enable their exercise, and especially the following ones: 1) the right to quality educational and upbringing work in accordance with the principles and objectives of education and upbringing, as prescribed by this law; 2) the right to respect their personality; 3) the right to the support for overall development of personality, support for special talents and their affirmation; 4) the right to protection against discrimination, violence, molest and neglect; 5) the right to timely and complete information with respect to the issues of importance for their education; 6) the right to be informed about their rights and duties; 7) the right to participation in the work of school authorities; 8) the right to freedom of association in different groups, clubs and organizing pupils' parliament; 9) the right to file an objection and an appeal against the grade he/she was given and the exercise of other rights on the basis of education; 10) the right to make an initiative for assessment of responsibility of participants in educational and upbringing process if the rights from 1) to 7) cannot be exercised; 11) the right to the exercise of all the rights of child and pupil, the right to protection and fair process of school towards pupil, even when a pupil breaches its duties set down by this law; and 12) the right to scholarship, credit, accommodation and nutrition in pupils' dormitory, in accordance with a special law (art. 103, para. 1 BSEUA). Among other rights of child and pupil the law prescribes, the most important one is the right to free pre-school, elementary school and secondary school education and upbringing in the institutions founded by the Republic of Serbia, autonomous province or a local government unit (art. 91 BSEUA). Educational institution is obliged to create all the conditions necessary for the exercise of these rights (art. 103, para. 2 BSEUA).

The rights' protection mechanism functions on two levels, the level of the institution and the level of the Ministry or autonomous province. A pupil, his/her parent or a guardian can file a report (complaint) to the school principal in the case of breach of the aforementioned rights, or inappropriate behavior of employees towards child or pupil, within 15 days as of the day it occurred (art. 103, para. 3 BSEUA). The principal is obliged to take the report into account and to, in consultation with the pupil, parent or guardian and employee, decide on it and take the appropriate measures, within 15 days as of the day of receipt of the report (art. 103, para. 4 BSEUA). Aside from filing a report, the pupil, his/her parent or guardian has the right to submit an objection against a grade he/she was given during the school year, an appeal against final grade at the end of the school year or an appeal to exam (art. 110, para. 1 BSEUA). The

principal has to decide on the objection or the appeal, and if it finds that the grade was not made in accordance with the law, it shall annul it by a resolution and form a commission for assessment of pupil's knowledge (art. 110, paras. 3, 5, 6, 7 and 9 BSEUA). Grade given by the commission is final (art. 110, para. 10 BSEUA). Despite them being named objection and appeal, these recourses should not be confused with appropriate administrative legal remedies. Although they can have legal effects at a later stage, these two recourses are filed against a grade, and a grade is neither rendered in the administrative proceeding, nor it is an administrative act. Therefore, these recourses are not administrative legal remedies. They only serve as a means for enabling pupils to exercise their right to adequate grading, i.e. knowledge assessment process (the right of pupil mentioned in previous paragraph under 9). Hence, report, objection and appeal represent only a self-control mechanism.

At a second level of protection, we find recourse to the Ministry or, if the institution is on the territory of autonomous province, the competent authority of autonomous province. A pupil, his/her parent or guardian have the right to file a request for protection of rights to the Ministry or the competent authority of autonomous province, if they deem pupil's rights set down in BSEUA or a special law to be breached by: 1) issuance or non-issuance of decision after a report, an objection or an appeal have been filed, 2) breach of the prohibition of discrimination or the prohibition of violence, molest and neglect, or 3) breach of the previously mentioned rights (from 1 to 12). This request can be filed within eight days as of the day it was found out about the breach (art. 111, para. 1 and art. 166, para. 1 BSEUA). If the Ministry or the competent authority of the autonomous province finds this request to be founded, it shall warn the school about that and set down a period of time for redressing breaches of the law. The Ministry or the competent authority of autonomous province shall do this within eight days as of the day of receipt of the request (art. 111, para. 2 BSEUA). If the school does not act upon the warning, the Ministry or the competent authority of autonomous province shall decide on the request (art. 111, para. 3 BSEUA). This concludes the mechanism for protection of pupils' rights, leaving it with a major flaw. Namely, the mechanism works well if the Ministry or the competent authority of autonomous province finds the request to be founded, but it fails if they find to the contrary. If the Ministry or the competent authority of autonomous province finds the request not to be founded, it is neither obliged to render an act nor to take any other measures. Thus leaving the pupils' rights without appropriate protection. In such a case, given that they are not obliged to issue an administrative act deciding on the rights of a pupil, the person that filed the request cannot challenge such inaction before the Administrative Court. This has been confirmed in the case-law¹⁴. Therefore, judicial protection of pupils'

14 Former Administrative Department of the Supreme Court of Serbia (at that time competent to resolve administrative disputes) made a decision stating that, when an administrative authority (the Ministry) is not obliged to render an act, if it considers the request to be unfounded, it is not possible to consider its inaction as an administrative silence and to challenge it before the court. It is only possible to challenge the decision on a request made

rights is disabled. The Ministry or the competent authority of autonomous province, as administrative authorities, have the discretion when deciding on pupils' rights and it is not possible to control even the legality of the use of such discretionary powers before the court. Furthermore, this flaw of the protection mechanism is aggravated by the fact that on the first level we have a self-control of the institution, done by the school principal, and on the second level, we have the Ministry or the competent authority of autonomous province, which have a significant role in the process of appointment of the school principal (principal cannot be appointed without the consent of the Minister or, if the institution is on the territory of autonomous province, of the competent authority of autonomous province – arts. 60, 61 and 166 BSEUA). This could, potentially, lead to the school principal breaching pupil's right, deciding on its own responsibility and later being questioned by the authorities, which appointed him/her to that position. It is, therefore, questionable whether this remedial mechanism provides sufficient protection to pupils' rights.

4.2.2. Supervision

The supervision over application of BSEUA is conducted by the Ministry of Education (art. 11 BSEUA). The inspection supervision is conducted by education inspectors of local government units and inspectors of the Ministry or autonomous province. The inspection supervision over the educational institution in the first instance is conducted by the inspectors of the local government units (cities or municipalities) (art. 146, para. 2 BSEUA). More municipalities can organize joint inspection supervision (art. 146, para. 3 BSEUA). The inspectors supervise implementation of this and special laws and bylaws by direct insight into the work of an institution (art. 147, para. 1 BSEUA). Among other aspects of the application of the law, education inspectors control realization and protection of the rights of children and pupils (art. 147, para. 3 BSEUA). The education inspectors, among others, have the authority to: 1) produce the record on determined irregularities and defects and to order measures for their removal by the same record; 2) render the resolution ordering the execution of measures, which were prescribed by the record, but were not executed by the institution itself; and 3) render the resolution prohibiting realization of actions that are not in accordance with this or special laws (art. 148, para. 1 BSEUA). Resolutions of the inspector of local government units can be appealed to the Ministry or, if the institution is on the territory of autonomous province, to the competent authority of autonomous province (art. 146, para. 5 and art. 166, para. 1 BSEUA). Decision on the

by the Ministry after the school did not act upon the warning made by it. Resolution of the Supreme Court of Serbia, U no. 3531/2002 as of February 6, 2003, published in Bulletin of the Case-Law of the Supreme Court of Serbia, no. 2/2003, p. 137. It must be mentioned that this decision of the Supreme Court was rendered with respect to former article 66 of the Secondary School Act (Official Gazette of the Republic of Serbia, no. 50/92, 53/93, 67/93, 48/94, 24/96, 23/2002, 25/2002, 62/2003, 64/2003, 101/2005), which was subsequently erased, while the provision with the same wording was inserted in BSEUA.

appeal is rendered by the Minister or head of the competent authority of autonomous province, while the draft of such decision is prepared by the educational inspectors of these authorities (art. 149, para. 1 BSEUA). Second instance resolution, as a non-appealable administrative act, can be challenged before the Administrative Court.

The way it is set down, the inspection supervision system suffers from the same defects as the above mentioned request for protection of pupil's rights. Namely, pupil or his parent or guardian can report a breach of pupil's rights to the educational inspector (art. 148, para. 4 BSEUA). The inspector is obliged to act upon the report and produce a record on the determined factual state. However, if the inspector finds that there were no irregularities and defects, he/she shall not order any measures for their removal (art. 148, para. 6 BSEUA). The resolution, which is, unlike the record, an administrative act, and can be appealed, shall be rendered only in the case that the inspector found irregularities or defects and ordered measures for their removal, and the institution failed to execute them. Consequently, pursuant to the described mechanism, the inspector has the last saying as to whether pupil's rights were breached or not. If he fails to notice the breach of pupils' rights, with or without intention, the person who reported the breach is left without further protection¹⁵. This protection framework provides even less guarantees than the one on the request for protection on pupil's rights, in a sense that the final word has the authority on the level of a local government unit and not the Ministry. Here the person filing the report is deprived not only of judicial protection, but the protection of central state administrative authority (the Ministry) as well. Moreover, the law authorizes the school principal to submit his objections [*primedbe*] to the record if the inspector finds the pupil's rights to be breached, but gives no such opportunity to the pupil, his/her parent or guardian if the inspector finds to the otherwise.

4.2.3. *Concluding remarks*

Pupils' rights protection is aggravated by the mechanisms instituted by BSEUA that are meant to replace regular administrative appeal system. In the first place, the regime of protection of children and pupils' rights is needlessly complicated and provides protection if the institution breaches them, but not if the administrative state authorities do that. In other words, it is only the educational institution (that allegedly breached children and pupils' rights), whose conducts can be controlled, while the Ministry's control work is not subject to any review, including judicial one. In addition, the inspection supervision provisions provide no cure to this faulty remedial path, but follow a same pattern of "gracious" protection of pupils' rights.

¹⁵ For instance, in 2010, educational inspectors on the territory of the City of Belgrade received 2,470 reports on the alleged breaches of the law. In 1,117 cases, persons submitting the requests were not satisfied with conclusions and responses of educational inspectors and repeated their request. Published in *Politika* (Serbian daily newspapers) on July 17, 2010.

4.3. Broadcasting

Broadcasting is regulated by Broadcasting Act (hereinafter: BA)¹⁶. This area shall not be examined in detail. The only issue examined shall be the one that is important from the point of view of the topic of this work, and this is a special administrative legal remedy not existing in GAPA – objection [*prigovor*]. The objection is a remonstrative administrative legal remedy, i.e. it has no devolutionary, transferring effect, but rather the same authority, which rendered the challenged administrative act, is called, once again, to decide upon its legality and opportunity (merits)¹⁷.

BA regulates the proceeding for the issuance and withdrawal of permits for broadcasting radio and television programs, which shall be briefly outlined. A permit is issued by the independent organization with public authorizations, created by this law, the Republic Broadcasting Agency (art. 6 and art. 8, para. 1, subpara. 3 BA). Body of the Agency making decisions within its competence is the Council (art. 7, para. 2 BA). The Council has nine members elected by the Parliament, among esteemed experts in this area, including media experts, advertising experts, jurist, economists, telecommunication engineers (arts. 22 and 23 BA). A permit is issued on the basis of a public competition (art. 49 BA). The Council can dismiss an application that is not complete or contains false data, provided the applicant does not rectify these defects within additional period of seven days (art. 53, para. 1, subpara. 1 BA). Provided the Council does not dismiss an application, it shall decide on it, either by issuing the permit, or rejecting the application by a motivated (founded) resolution (art. 53, para. 1, subpara. 8 BA). The Council can issue permit with qualified majority of five members, i.e. more than half of all the members (art. 20, para. 1, subpara. 3 of the Statute of the Republic Broadcasting Agency)¹⁸. The applicant can submit an objection against resolution on rejection of the request, to the Council, within 15 days as of the day of its delivery (art. 54, para. 1 BA)¹⁹. The decision on the objection has to be rendered within 30 days as of its submission (art. 54, para. 2 BA). The decision on the objection can be challenged before the Administrative Court (art. 54, para. 3 BA). Once issued, a permit can be withdrawn by the Agency. BA lists ten reasons for

16 Official Gazette of the Republic of Serbia, no. 42/2002, 97/2004, 76/2005, 79/2005, 62/2006, 85/2006, 86/2006, and 41/2009

17 The term objection is sometimes used in other laws to indicate transferrable administrative remedy, i.e. the administrative appeal. This is, for instance, the case with article 32 of Privatization Act (Official Gazette of the Republic of Serbia, no. 38/2001, 18/2003, 45/2005, 123/2007, 123/2007, 30/2010). Unlike its predecessor, Administrative Disputes Act contains provision on objection as a legal remedy (art. 27). However, given that it is used in administrative court proceeding, this is a judicial, not an administrative legal remedy and shall thus not be analyzed in this paper.

18 Official Gazette of the Republic of Serbia, no. 102/2005

19 Z. Tomić lists this as exception from the principle of two-tier proceeding, i.e. a rule that the administrative proceeding is conducted in two instances, the first instance proceeding and second instance (appellate) proceeding, calling it “repeated one-instance proceeding” (Tomić, 2007, p. 542).

withdrawing the permit (art. 61 BA). Provided the conditions are met, the Council can do this by a majority of two thirds of all the members, i.e. six members (art. 62, para. 3, BA). A permit holder has the right to submit an objection against such decision to the Council within eight days as of the day of its delivery (art. 62, para. 5 BA). The objection delays the execution of the decision (art. 62, para. 6 BA). The decision on the objection can be challenged before the Administrative Court (art. 62, para. 7 BA).

All the remonstrative legal remedies, including objection, suffer from inherent deficiencies. As a means of self-control, they do not provide sufficient objectivity and the possibility of treating the respective matter from a different point of view (Milkov, 2003, p. 204). Although it exists in comparative law, objection, as a legal remedy, did not find its place in GAPA. Objection is mentioned only in one provision of GAPA, article 54, as one of the submissions used by private parties when addressing administrative authorities (i.e. complaints, forms, suggestions, reports etc.). This kind of objection, mentioned in GAPA, has no character of administrative legal remedy (Popović, 2004, p. 535). Potentially, objection in GAPA could be regarded as a submission upon which the addressed authority could act *via gratiae*, i.e. “at its mercy”. This means that the person submitting the objection would not have the procedural right to protection of its substantive rights, which is encompassed in the notion of legal remedies, but would have to rely on the authority’s will to change its decision, probably, by using one of the extraordinary legal remedies prescribed by GAPA that can be initiated *ex officio*²⁰. Aside from mentioned deficiencies, there is another reason for that. As we already explained that the first instance authority, the one that rendered an appealable act, has the possibility to correct its mistakes by replacing the challenged resolution during its work in the appellate proceeding. This has the same (remonstrative) effects as if the objection was submitted to the respective authority (*supra* under 2.). As for the objection to the authority whose decision is non-appealable, as is the case here, GAPA contains a special extraordinary administrative legal remedy, the change and annulment of the resolution in relation to the administrative dispute (art. 251 GAPA). This legal remedy is remonstrative as well. It enables the authority, against whose act the suit was submitted to the Administrative Court, to change or annul its resolution, with the aim of satisfying the claims made in the suit and correcting its mistakes. Consequently, this saves the time for the parties and the Court, by ending the court proceeding. For these reasons, the objection did not find its way to the general administrative proceeding rules. It bears the risk of being just a cumbersome, formal request for the party, slowing down and complicating (real, outer) control system, without adding a new quality to it.

²⁰ This kind of “gracious remedies” can be found in comparative law. For instance, institute of so called non-organized appeal exists in Belgian law. As oppose to organized appeal, authority to which this appeal is submitted is not obliged to answer or give its opinion upon it. See Veny *et al.* (2009, pp. 151-167).

In the concrete case, in BA, the objection could potentially have one advantage over the mentioned extraordinary legal remedy. Specifically, this would be the possibility of preventing the administrative court proceeding from ever being initiated. The change and annulment of the resolution in relation to the administrative dispute can be used only once the judicial review had been initiated. On the other hand, omitting the objection has some advantages. First, the party would not have to wait for the objection proceeding to end before challenging the resolution before the court and, at the same time, opening the possibility to the Council to change or annul its resolution. Second, the chances of the Council changing or annulling its decision could be higher if it is pressured by the pending administrative court proceeding.

We are of the opinion that it is important to provide efficient control of administrative acts. Also, we believe that it is a good thing to give public authorizations in the area of broadcasting to an independent organization. In addition, we understand that it was not possible to provide the administrative appeal in this case, given the position and the independence of the Agency, and that any means of control is better than none. However, we believe that, at least in cases of remonstrative legal remedies, legislator could consider introducing an optional system, i.e. to make the use of a particular remedy, in this case, the objection, possible, but not compulsory before initiating judicial review of an administrative act. Thus, parties would have another chance with the same authority if they wish so, or, if they find it to be futile, the possibility to go directly to the court.

5. Conclusion

Most of the substance of the regulation of administrative appeal in Serbian law is to be found in GAPA. Special laws have the purpose of adjusting GAPA's generality to the needs of special administrative domains. When the administrative appeal is not excluded, special laws in most cases do not make considerable modifications to the general regime prescribed by GAPA. Most of the adjustments made to the general regime of the administrative appeal relate to determination of competence *ratione materiae*, which is not established by GAPA, changes of the time periods for filing and/or deciding on it and exclusion of its suspensive effect. Except for the latter, alterations made to the general regime are minor and acceptable from the viewpoint of the protection of private parties' rights and legal interests. In the case of exclusion of the suspensive effect of the appeal, the legislator should pay special attention to striking balance between the need to accelerate administration's functioning and the protection of individual rights and interests.

Besides the administrative appeal, Serbian law encompasses several distinctive administrative control mechanisms. They do not rely on the general provisions on the administrative appeal. In the field of public procurement, the request for protection of rights of bidders and public interest in the public procurement proceeding represent a remedy that is in some respects even wider and more comprehensive than the administrative appeal. It has a broader scope and the authorizations of the second

instance authority are more extensive. It also obliges the first instance authority to decide on the request. This enables us to compare how often the first instance authorities use the opportunity to replace its resolution in the appellate proceeding, on the one hand, and how often the procuring entity, as a first instance authority, accepts the request as well-founded in the proceeding upon the request. As for the area of education, a legal policy of replacing the administrative appeal with another remedial mechanism, providing less protection to individuals' rights, such as the described mechanism for protection of pupils' rights (especially given the exclusion of judicial protection in these cases), might be observed as a problem. Unless the empirical study proves its efficiency, the legislator should rethink this policy and maybe turn to classical administrative appeal protection followed by a judicial review proceeding. Lastly, few words should be said about the objection in Serbian administrative law. Despite being comparatively known and utilized legal recourse, objection, as a legal remedy, did not find its place in GAPA. However, it exists in special administrative domains, such as broadcasting, with the possibility to be introduced in other regulations. The objection, as a remonstrative, non-transferring, self-control legal remedy, might appear as superfluous and burdensome in Serbian administrative law. This is due to the well-established remonstrative, self-control means in GAPA that could be used by both first instance and appellate administrative authorities. These are the possibility of the first instance authority to replace its own resolution during the appeal proceeding, as well as the possibility of the second instance authority (or the first instance authorities in the cases where the appeal is excluded) to do the same by employing an extraordinary legal remedy - the change and annulment of the resolution in relation to the administrative dispute. Frequency of usage of said extraordinary remedy and efficiency of the objection in the broadcasting domain should be compared. This could allow us to make legislative propositions on whether objection should be introduced in those administrative fields where the resolutions rendered in the first instance proceeding are non-appealable and whether it should stay compulsory or made optional before pursuing judicial protection.

This paper, along with the one preceding it, on GAPA's provisions, should have concluded normative analysis of the system of administrative appeal and its counterpart administrative recourses in certain administrative domains. Normative analysis should further permit empirical research of the efficiency thereof and enable drawing of conclusions on respective features of the appellate proceeding that provide the best results in protection of the legality and private and public interests.

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