

JUDICIAL REVIEW OF ADMINISTRATIVE REGULATIONS: CONSTITUTIONAL JUSTICE VS ADMINISTRATIVE JUSTICE

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Abstract

The main purpose of the article is to discuss two forms of judicial control over administrative regulation (constitutional and administrative justice) and identify the problems related to the distribution of functions between them.

The core of the research is the theoretical characterization of judicial review of administrative regulations and examination of Armenian practice. In particular, the article explains the essence and the features of administrative regulations and, on this basis, attempts to provide a scientifically grounded answer to the question of how their legality should be verified.

As a result of the research, the author's approach to the separation of the mechanisms of constitutional and administrative justice during judicial control over administrative regulations is presented. It is stated that the legality of administrative regulations can be verified within the framework of constitutional justice only in case the protection of human rights has not been ensured by the mechanisms of administrative one. This includes cases where legality of administrative regulations is discussed regarding their compliance with constitutional requirements.

Keywords: administrative regulations, judicial review, constitutional justice, administrative justice, jurisdiction, executive power.

Introduction

Judicial protection from public authority implies the right to appeal any acts and actions of state and local government agencies. This constitutional right is being implemented through the constitutional and administrative justice systems, which provide for procedures against legislative and executive authorities.

There are various models of judicial protection against the public authorities' activities throughout the world. They can be divided into two large

groups: American and European.* In the American model, constitutional and administrative justice is usually carried out by courts of general jurisdiction in civil and criminal cases (with the exception of special bodies, who carry out activities specific to administrative justice in some areas). The European model generally entrusts the review of the public authorities' activities to specialized constitutional and administrative courts.

In this dual institutional system (specialized constitutional and administrative courts operate simultaneously), which is often found in the European model, the problem of correctly determining their jurisdiction often arises. If there is no disagreement regarding judicial control over legislative acts adopted by parliament (if a specialized Constitutional Court operates in a given country, the latter is authorized to verify the legality of legislative acts), the issue of reviewing executive authorities' acts always arouses scientific and practical interest.

Judicial control over administrative regulations** means that a judicial body should check its compliance with norms of higher legal force. Considering that the constitutional and legislative norms have a higher legal force than the administrative regulations, the question arises whether the judicial control of the administrative regulations includes the function of checking their compliance with the constitution or legislative acts.

To solve the problem raised, it is necessary to discuss the nature of the administrative regulations, which will eventually lead to an adequate understanding of judicial control over them. This becomes especially important for achieving a correct distribution of judicial control in legal systems with specialized constitutional courts.

Administrative Regulations

Basic provisions. The constitutional principles of rule of law and separation of powers require that laws should be adopted exclusively by parliament. This rule applies to any legal abstract commandment of regulatory (normative) nature.

However, the principle of separation of powers cannot be absolutized. In practice, there are some cases when executive authorities are in due to regulate abstract relations to effectively implement the provisions of law within their competence. At the same time, this does not mean that government usurps the power of the legislator. While applying legislative provisions executive power

* For a general view of this contrast between two models, see Favoreu, L. (1989).

** The term "administrative regulation" in this article refers to all the executive bodies' acts of individual and normative nature.

adopts administrative regulations (often called delegated legislation)* to reveal some aspects of the applicable law. Speaking figuratively, administrative regulations play the role of a “bridge” between legislative and individual acts (Tovmasyan et al., 2011, p. 285).

Administrative regulation is delegated by parliament and is secondary in comparison with legislative acts and cannot go beyond their scope (Daab, 2009). As the US Supreme Court has stated, in accordance with the principle of separation of powers, the legislator develops basic policies and standards, leaving the administrative authorities with the function of improving them, filling in gaps or applying these standards in specific cases (US Supreme Court, 1980). The German Federal Constitutional Court expressed the same approach, stating that essential issues should be regulated by acts of Parliament (Voßkuhle, 2007). The European Court of Justice, in turn, similarly describes the distribution of powers between the legislative and executive bodies of the European Union, reserving for the latter the right to establish regulatory provisions of an executive nature only (Haibach, 1997).

However, in specific situations it can be extremely difficult to draw the line that prohibits the executive power to exercise its regulatory function. The separation of power requires that there must be some compulsory basic rules adopted by legislator, meanwhile the executive power is enabled to regulate only issues that are related to the implementation of law (for instance, fills in gaps, solves technical problems, etc). But this is not enough to limit executive power’s scope of competence. Administrative rules can sometimes significantly affect the subject of the law, since the material and substantive part of the law depends on the way the law is implemented (Puto, 2016).

If in the 19th century the US Supreme Court demonstrated a strict approach to granting law-making power to the executive branch, considering that the delegation of legislative power by the Parliament contradicts the US Constitution (*non-delegation doctrine*), in the 20th century it became more and more soft. Firstly, the court recognized that the Parliament could delegate law-making power to the President if the latter has no discretion. Then, the only restriction was that the Parliament could not delegate essential legislative functions (*relative-delegation doctrine*) (Schutze, 2011).

Changes in the approach of the US Supreme Court were the result of the fact that the latter recognized the absoluteness of the non-delegation doctrine, which has little to do with reality (Gellhorn & Byse, 1974). As a result, the US Supreme Court has recognized that “in (...) increasingly complex society, replete with ever changing and more technical problems, Congress simply

* So called “sub-legislative normative act” in Armenian practice.

cannot do its job absent an ability to delegate power under broad general directives (US Supreme Court, 1989).

The Armenian practice. After the amendments in 2005 the Constitution of the Republic of Armenia started to exhaustively list issues that can be regulated exclusively by legislative act. Thus, the Constitution did not provide for the authority of the executive power to regulate issues related to *inter alia* the conditions and procedure for the application, protection and restrictions of individual rights, freedoms and obligations.

The Constitutional Court of the Republic of Armenia, considering the shares of pension funds as personal property of participants, stated that there is a problem of establishing the conditions and procedure for exercising and protecting the rights of citizens and qualified the government's authority to establish quantitative and currency restrictions as well as the procedure and conditions for disposing and managing the guarantee fund as violation of Article 83.5 of the Constitution (Deputies of the National Assembly v National Assembly, 2014).

However, it is difficult to imagine, how the legislator is going to be capable of considering and regulating all the conditions and procedures for the implementation and protection of the rights and freedoms of individuals and legal entities, including restrictions on their rights, freedoms and obligations in practice? After all, each issue affects (directly or indirectly) the legal status of individual, the scope of his/her rights and obligations. At the same time, the Constitutional Court of RA emphasized that Article 83.5 of the Constitution refers to all the rights and obligations of individuals (Deputies of the National Assembly v National Assembly, 2014).

Strict approach, enshrined in Article 83.5 of the Constitution of the Republic of Armenia, was criticized during the discussions on the draft of constitutional reforms in 2015. Experts involved in the process of constitutional reforms, in particular, noted: *“As a result of the provision on the establishment of the procedure for the exercise of rights exclusively by legislative act, the executive power turns into just an executive body, deprived of the opportunity to regulate through by-laws current relations that arise constantly and require the most prompt intervention. Moreover, such legal regulation is unrealistic, since the completely legitimate duration of the normal stages of legislative activity simply does not allow it and, in fact, one should not expect parliament to adopt laws at such a speed and on such a scale”* (Danielyan et al., 2015, p. 142).

It is not surprising that after the constitutional changes of 2015, the extremist provision enshrined in Article 83.5 of the Constitution of the Republic of Armenia was excluded from the Basic Law. Instead, the Constitution requires that many fundamental rights can be limited only by

legislative acts.* In addition, Article 79 of the Constitution enshrines the principle of certainty, which requires that, when restricting fundamental rights and freedoms, laws should be formulated clearly to give one an opportunity to predict legal consequences. The Constitutional Court also stated that the restriction of any fundamental right is possible only by legislative act (President v National Assembly, 2020; Human Rights Defender v National Assembly and Government, 2021).

This leads to two important conclusions: firstly, it is impossible to reasonably deny the fact that the legislature cannot solely regulate all legal relations in all details; secondly, it is not effective to leave all the regulations on parliament, since a number of issues can be resolved faster and more professionally at the executive level because specialized administrative bodies are more familiar with the details of a specific case.

At the same time, it is important to determinate the range of functions that cannot be transferred to the executive power. The Constitution of the Republic of Armenia seems to have shown a principled approach to this issue, prohibiting the legislator to delegate the authority to restrict fundamental human rights. This also follows from the rule of law criterion that is firmly established in the case law of the European Court of Human Rights. According to it, fundamental human rights can only be limited by law (Greer, 1997).**

At the same time, the Parliament has a wide discretion in delegating other (than fundamental rights restriction) issues to the executive power. However, this discretion cannot be applied arbitrarily. When delegating an authority to regulate any public relation to the Government, the Parliament should take into account that decisions made by the Government imply less amount of political consensus. It means that in case the question is sensitive enough and requires the participation of the political opposition, the legislator must not delegate it to the executive power, thus avoiding the corresponding political responsibility.

* The right to physical and mental integrity (article 25), personal freedom (article 27), the right to inviolability of private and family life (article 31), the right to inviolability of the home (article 32), freedom of communication and confidentiality (article 33), the right to get acquainted with personal data (article 34), freedom to marry (article 35), deprivation or restriction of parental rights (article 36), right to free movement (article 40), expression of freedom of conscience and religion (article 41), freedom of expression (article 42), freedom of assembly (article 44), freedom of association (article 45), the right to receive information (article 51), the right to strike (article 58), the right to property (article 60) may be restricted only by legislative act.

** The case law of the European Court of Human Rights does not limit the term “law” only to parliamentary act, however, the criteria of “law” is so strict that it can mainly be satisfied as a result of the legislative activity of parliament.

Judicial Review

Basic provisions. Judicial control over administrative regulations means that a judicial body must verify its compliance with the norms of higher legal force.

On the one hand, the verification of the constitutionality of the parliamentary act (and not of the government's decision) is a constitutional court's competency. This approach comes from the basic idea that it is the government that implements the law, so the possible unconstitutionality can occur to the legislative act, and not to the administrative regulations related to its implementation (Chelaru, 2017).

On the other hand, the substantive solution of the issue regulated by the administrative regulation may be legally completely left to the executive power. In that case, according to the Russian Constitutional Court, the provisions of the administrative regulations can become the subject of constitutional control in case they form a normative unity with the legislative act, that is, the administrative regulation is authorized by the legislative act that does not provide substantive regulation to a specific issue (Belov, 2014). German Federal Constitutional Court also has a jurisdiction over administrative actions in the narrow sense (Rupp, 1969). Everyone may lodge a constitutional complaint on the assertion that his or her fundamental rights have been directly infringed by an act of public authority, including a measure of an administrative body (Baer, 2014).

The Armenian practice. Article 135 of the Administrative Procedure Code of RA adopted in 2007 prescribed the judicial control over administrative regulations as follows: the Administrative Court of the Republic of Armenia had jurisdiction over cases concerning lawfulness of all the administrative regulations but at the same time it included verifying the constitutionality of regulations adopted by all departments, excluding the President, the Government, the Prime Minister and the local self-government bodies (administrative regulations adopted by these bodies could be reviewed by the Administrative Court only in terms of verifying compliance with normative acts with a higher legal force, besides the Constitution).

The Constitutional Court of the Republic of Armenia criticized this approach on the grounds that the Constitutional Court has the authority to ensure the supremacy and direct effect of the Constitution in the Armenian legal system through constitutional justice and the existing confusion of administrative and constitutional justice can create different approaches to the interpretation of constitutional norms, which seriously threatens the supremacy and direct effect of the Constitution and the implementation of a unified policy of constitutionalization of public relations (Shmavonyan v National Assembly, 2008).

As a result, the new Administrative Procedure Code adopted in 2013 (valid until today) did not provide the Administrative Court the authority to review any administrative regulation in terms of verifying compliance with the Constitution. The Administrative Court preserved the power to check validity of administrative regulations only in terms of compliance with the normative acts with a higher legal force, besides the Constitution. At the same time, after constitutional reforms of 2015, the authority to determine the compliance of administrative regulations with the Constitution has been assigned to the Constitutional Court.

The question that validity of administrative regulation is related to its compliance with the legislative act, but not the constitution, has not been solved by constitutional and legislative reforms. If the legislative act authorizes the executive power to regulate public relations at the administrative level, its compliance with the legislative act should be verified by the court. If the administrative regulation was adopted in the absence of the authority defined by the law, it means that the administrative body simply went beyond the limits of its jurisdiction (*ultra vires*). If the court recognizes that the administrative body was not authorized to adopt the relevant regulation, it does not mean that by stating this, the court starts to act as a constitutional court.

The approach of the Constitutional Court of the Russian Federation is also not sufficient. The fact that an administrative regulation forms a normative unity with the legislative act when the issue under consideration is not substantially regulated by the latter does not necessarily bring to verifying the validity of administrative regulation within the framework of constitutional justice. In this case, the court checks the compliance of the administrative regulation with the principles and criteria established by law, and finds out whether the administrative regulation violates the applicant's rights. Although human rights are mostly enshrined in the Constitution, it is not a constitutional justice to decide whether they have been violated. Administrative court's task is to establish if the appealed act (whether normative or individual) violates the applicant's rights. Part 1 of Article 192 of the Administrative Procedure Act of the Republic of Armenia explicitly establishes that individuals and private law organizations can appeal administrative regulations only if they justify the violation of their constitutional rights.

It is a misconception to suppose that the application of any constitutional norm presupposes constitutional justice to be held which brings to defining the process of determining the compliance of administrative regulations with the Constitution as constitutional justice. Administrative courts also should have a power to refer to constitutional norms when carrying out administrative justice. Because in the end the final purpose of all the types of justices

(constitutional, administrative, criminal, civil) is to protect constitutional rights of private parties.

Constitutional justice, of course, can also include verifying the validity of administrative regulations (and not only of a normative nature).^{*} However, this should be, firstly, preceded by the framework of administrative procedures, carried out by the Administrative Court. The Constitutional court may discuss the compliance of administrative regulations with constitutional standards only in case the basic rights of people are not protected within the framework of administrative justice.^{**}

This position, which denies the possibility of discussing the issue of constitutional law within the framework of administrative justice, leaves the review of administrative regulations outside the competence of the Administrative Court. For instance, in one of the cases, the Administrative Court considered that the applicant was challenging the compliance of an administrative regulation with the Constitution for the reason that in the application was indicated that the disputed act violated applicant's right to property guaranteed by Article 31 of the Constitution (Torosyan v Government, 2021). Meanwhile, in order to justify his right to appeal to the court the applicant is obliged, under Article 194 of the Administrative Procedure Act, to indicate in the application his right, which, in his opinion, was violated by the contested act.

The study of the Constitutional Court's case law also demonstrates that the process of verifying compliance of administrative regulations with the Constitution is sometimes artificial and replaces the verifying compliance of administrative regulations with the legislative act.

The Constitutional Court of the Republic of Armenia, having stated that taxes and their constituent elements should be established exclusively by legislative act, recognized the provision of the Government's act as contrary to the Constitution, as it defined an integral part of income tax (Human Rights Defender v National Assembly and Government, 2018). However, in this case the Government's act should not be recognized as contradicting the Constitution. If the Tax Code authorized the Government to establish the elements that make up the content of the tax, the relevant provision of the Tax Code contradicts the Constitution, and if the latter has not given the Government such power, the executive body has exceeded its power (*ultra vires*). In the first case, the Constitutional Court invalidates the relevant

^{*} As it is in German practice. See more in detail in Baer, S. (2014).

^{**} For example, a constitutional complaint can be brought only after the exhaustion of judicial instances in German practice. See more in detail in Baer, S. (2014). The same approach is described in the Article 169 of the Constitution of RA.

provision of the Tax Code; and in the second one, the Administrative Court invalidates the Government's regulation.

In above mentioned case, the Constitutional Court emphasized that the Government was not authorized by the Tax Code to establish the elements of income tax. That is, the Government violated the relevant provision of the Tax Code and went beyond its jurisdiction. Therefore, the review of the Government's regulation is subject to the Administrative Court, not the Constitutional Court, until the Administrative Court protects the constitutional rights of the applicants. Throughout this case, the Human Rights Defender (Ombudsman) appealed directly to the Constitutional Court bypassing the Administrative Court. Although the Ombudsman has a right to appeal the Government's regulations of normative nature directly to the Constitutional Court by law, Article 3 of the Administrative Procedure Code provides the Ombudsman with a right to appeal the administrative regulations of normative nature to the Administrative Court. If the Ombudsman decides to enforce his/her right to apply directly to the Constitutional Court, a conflict of powers between the two courts occurs. It is notable that the Administrative Court declared the provisions of a similar content of another Government's regulation invalid (they were in force before the provisions disputed in the constitutional case), considering that the Government exceeded its power established by law (EL-IN-AR LLC v Government, 2020).

In a number of cases the Constitutional Court, having discussed the constitutionality of the Government's regulations of normative nature, considered, in particular, the following legal issues: whether the Government fulfilled the international obligations of the state within its competence (Human Rights Defender v National Assembly and Government, 2011); whether the Government lawfully applied the discretionary power granted by law (Human Rights Defender v Government, 2013); whether the Government did not regulate the issue that had to be resolved exclusively by a legislative act adopted by the National Assembly (Human Rights Defender v National Assembly and Government, 2017); was the interference with human rights by administrative regulations proportional (Human Rights Defender v National Assembly and Government, 2019) and not discriminatory (Administrative Court v Government, 2019); did the provisions of the administrative regulations correspond to the principle of legal certainty (Human Rights Defender v National Assembly and Government, 2021). In all these cases there is a question of compliance of administrative regulations with the principles and standards established by law or an international treaty. While the Administrative Court protects the constitutional rights of the private parties all of them are subject to administrative, not constitutional justice.

The Constitutional Court also recognizes that the review of the administrative regulations is mainly the subject of administrative justice. In one of such cases the Ombudsman appealed the Government's regulation on the ground that it violated the principle of independence of universities. The Constitutional Court stated that the case should be considered within the framework of administrative proceedings by verifying regulation's compliance with the normative acts of higher legal force. *“Obviously, in this case the Constitutional Court should be guided by the requirement of Article 5 of the Constitution of the Republic of Armenia and take into account that the issue of legality of the decision of the Government of the Republic of Armenia must firstly be challenged in the appropriate competent court within the framework of administrative justice”* (Human Rights Defender v National Assembly and Government, 2014, para. 4).

Conclusion

The confusion in distinguishing the Constitutional and Administrative Courts' jurisdiction appears due to the fact that, on the one hand, the Constitutional Court is empowered to review administrative regulations and, on the second hand, the Administrative Court has limited power to exercise judicial control over administrative regulations (the Administrative Court cannot verify the compliance of administrative regulations with the Constitution). The problem is also of a technical nature: to what extent is the revision of administrative regulations called by law complies with the Constitution and normative legal acts of higher force?

The problem raised by current constitutional norms can be solved by editing article 191 of the Administrative Procedure Code. This requires to change the provision, which authorizes the Administrative Court to consider cases challenging the compliance of administrative regulations of normative nature with normative legal acts of higher legal force (other than the Constitution) and adopt a provision that authorizes Administrative Court to review the legality of all the administrative regulations. As a result, the Administrative Court will be able to fully review administrative regulations by finding out whether they violate the constitutional rights or constitutional principles of the applicant, in particular. And the compliance of administrative regulations with the Constitution can still remain the subject to appeal in the Constitutional Court in case the applicant exhausts the lower judicial instances.

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