

# The Extent of Judicial Administrative Control the Power of the Administrative Court

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## Abstract

The application of the principle of legality must meet various requirements dealing specifically with its *extent or its reach in the administrative activity*. The question that we will seek to answer in this paper is the following: with the entry into force of the Law on Administrative Courts and the start of the functioning of administrative courts on November 2013, how far extends Albanian judicial review? What are the limits of this control? What is the actual power of the Albanian administrative court? The Law on Administrative Courts has defined and directed the limits of judicial control over the legality of administrative actions towards three aspects: facts, time and discretionary power. Therefore, this paper aims to present an analysis of the different aspects that direct and limit the judicial review of administrative acts and which are: the reach of judicial review in the legal qualification of the facts, the reach of judicial review in time, and the reach of the judicial review in the exercise of discretionary power by the public administration.

**Keywords:** judicial review; administrative review; administrative action; legal qualification of the facts; control in time; discretionary power

## Introduction

In Albanian administrative law, the judicial control, as one of the main types of control through which the activity of the public administration must undergo, should be understood as a compliance control of administrative acts with the constitutional, conventional and legal provisions. This control is what the legal doctrine calls the judicial review of administrative acts or the control over the legality<sup>1</sup>.

The principle of legality, according to which the activity of public administration must be in accordance with the law, is the principle that limits and leads this activity. This principle directs the actions of the public administration bodies in their entirety, which means by being applied to all the legal concepts contained in the Law no. 49/2012 "On the organization and functioning of administrative courts and administrative disputes" (hereon "Law on Administrative Courts") and which are: the administrative

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<sup>1</sup> Ermir Dobjani, E.Toska, E. Puto, Erajd Dobjani, "Administrative Law, Control over the Public Administration", EMAL, Tirana, 2013; E. Stavileci, M. Batalli, S. Sadushi, "Administrative Law, Organization and Administrative activity", Prishtina, 2012; S. Sadushi, "Administrative Law 2", Fourth Edition, Grand Prind, Tirana, 2008; E. Dobjani, "Administrative Law 1", Third Edition, Tirana, 2007.

action (Article 2, paragraph 7) that includes the administrative act in both of its forms (individual administrative act and the normative sublegal act), the administrative contract and the other administrative action; and as well administrative inaction (Article 2, paragraph 5), and which means all the omissions of a public administration body to exercise administrative activity, according to the public function, and which creates juridical effects on subjective rights or legitimate interests.

The application of the principle of legality, as prescribed by the Law on Administrative Courts, must meet various requirements dealing specifically with its *extent or its reach in the administrative activity*. The question that we will seek to answer in this paper is the following: with the entry into force of the Law on Administrative Courts and the start of the functioning of administrative courts on November 2013, how far extends Albanian judicial review? What are the limits of this control? What is the actual power of the Albanian administrative court? The Law on Administrative Courts has defined and directed the limits of judicial control over the legality of administrative actions towards three aspects: facts, time and discretionary power. Therefore, this paper aims to present an analysis of the different aspects that direct and limit the judicial review of administrative acts. We will try to analyse each of these three limits as follows: 1) the reach of judicial review in the legal qualification of the facts; 2) the reach of judicial review in time; and 3) the reach of the judicial review in the exercise of discretionary power.

### **The reach of judicial review in the legal qualification of the facts**

In addition to reviewing *law issues*, Albanian courts, based on the procedural law for administrative disputes, but also based on the support of the administrative doctrine<sup>2</sup>, have jurisdiction to review the *fact issues*. So, besides the control of legal issues, administrative courts control as well fact issues of administrative acts. This means that judicial review extends to the legal qualification of the facts that justify the issuance of an administrative act. Thus, courts examine the compliance of facts with the administrative act. If the facts of the case do not match the actual fact elements which the administrative act should be based on, this will mean that the public administration body which has issued the administrative act has made a mistake in the legal qualification of the facts, thus the administrative act is based on the wrong facts and this will justify the nullification of the administrative act by the court.

Under Article 17, paragraph 2 of the Law on Administrative Courts "*It [the Court] makes a correct setting/qualification of the facts and actions related to the dispute, without being tied to the qualification that the parties may propose*". The administrative court

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<sup>2</sup> Ermir Dobjani, E.Toska, E. Puto, Erajd Dobjani, "Administrative Law, Control over the Public Administration", EMAL, Tirana, 2013; S. Sadushi, "Administrative Law 2", Fourth Edition, Grand Prind, Tirana, 2008; E. Dobjani, "Administrative Law 1", Third Edition, Tirana, 2007.

can do this because according to the Law on Administrative Courts the latter must “... resolve disputes in accordance with legal provisions and other applicable norms that are binding” (Article 17, paragraph 2). Judicial review of the facts clearly results as well from the disposition of a final court decision, when the administrative court overrules an administrative claim, because the Law on Administrative Courts specifically states that “The court decides the overruling of the lawsuit when it estimates that the administrative action or the normative sublegal act is lawful and founded” (Article 40, item 3). The overruling of the lawsuit for lack of foundation/grounding of the administrative action it clearly means that the judicial review extends to the foundation/grounding of the administrative action and therefore the administrative court controls the factual issues of the dispute. This means that the administrative court not only does a consistency control of the facts with the administrative action, but it also has the right to legally qualify the facts, giving it a different qualification from one party or the parties in the case. Thus, besides the control which has to do with the compatibility of the facts of the case with the fact elements where should be based the administrative act, the administrative court has also the right to legally qualify the facts, by qualifying them as a different administrative action from the administrative action set from the parties in the case. Consequently, the non-compliance of the facts of the case with the factual elements where the administrative act should be based will allow the administrative court to nullify the administrative act.

The requalification of the legal facts of the case is important because it is the main factor that determines the applicable legal framework regarding the administrative act which has been brought before the court. In trials in which the legality of administrative actions is examined are always applicable the Code of Administrative Procedure (substantive law), administrative judicial procedural provisions, as well as the substantive law that specifically regulates the legal matter relevant to the particular administrative field. Therefore, the requalification of the legal facts of the case conducts the court to proceed to a change of the material applicable law of the particular case. This is very important because one or the other party to the proceedings may have more interest for the implementation of a legal framework rather than the implementation of certain other legal framework. For example, to requalify a legal fact from an individual administrative act which has been proposed by the parties in the trial to an administrative contract, will make that the applicable legal framework for the resolution of the dispute will no longer be the provisions of the Administrative Procedure Code of the administrative act, but the applicable legal framework will be the provisions of the Administrative Procedure Code on administrative contracts, combined with the provisions of the Civil Code regarding contracts, and depending on the type of administrative contract, the provisions of Law no. 9643, dated 20.11.2006 “On Public Procurement” or the Law no. 125/2013, dated 25.04.2013 “On Concessions and Public Private Partnerships”. Therefore, the extent

of control of the court on factual issues and the legal qualification of the facts is of particular importance for the administrative judicial process.

### **The reach of judicial review in time**

The Law on Administrative Courts has set some limits as to the time at which the review of the legality of administrative actions shall be appreciated. The question here is what are the factual issues that should be considered by the administrative court and which law is applicable to the administrative judicial process of the dispute? In other words, the administrative court in the resolution of the administrative dispute, will it be based on factual issues and the law in force at the time when it renders the judicial decision or will it be based on factual issues and the applicable law at the time when the administrative action has been issued? It should be specified that the hypothetical problem submitted is valid only when the factual and legal situation has changed from the moment of the issuance of the administrative act or from the moment the plaintiff's request to issue an administrative act and until the court decision. To answer this question, we must distinguish between administrative acts issued on the initiative of the administrative organ, administrative contracts, other administrative actions and administrative acts, the issuance of which has been required by the claimant or commanded by law.

### **Administrative acts issued on the initiative of the public body, administrative contracts and other administrative action**

The Law on Administrative Courts states that *"the court reviews the legality of the administrative action on the basis of... the legal and factual situation that existed at the time of the issuance of the administrative action"* (Article 37, paragraph 1). Therefore, concerning the administrative acts issued on the initiative of the public body, administrative contracts and other administrative action, the court must be based on factual issues and the applicable law at the time of the issuance of the administrative action. The factual and legal situation in which the administrative court should be based for resolution of the dispute is the time when the administrative action has been issued. If this factual and legal situation has changed between the times the administrative action has been carried out and the decision of the court, this change of the factual and legal situation will not be taken into consideration by the administrative court for the resolution of the judicial conflict. The reason for this is that the administrative act issued on the initiative of the public body, administrative contracts and other administrative action, have already produced legal effects and therefore it is only right for the court to assess the legality of the administrative actions at the time of their commission.

This constitutes a logical consequence of the fact that the administrative lawsuit on the legality is a judicial process or trial against administrative act. To determine whether an administrative act is valid or not, the court must extend its appreciation at the time when the administrative act has been issued. Consequently, the legality of the administrative act must be assessed depending on the fact situation that existed at the time of issuance of the administrative act and depending on the legal rules that have existed at the moment of the issuance of the administrative act. From this rule it results that changes to the fact or the law after the issuance of a lawful administrative act cannot provoke its illegality and vice versa changes to the fact or to the law after the issuance of an unlawful administrative act cannot remove its illegality.

As we will see below, concerning administrative acts, the issuance of which is required by the claimant or commanded by law, the Law on Administrative Courts has reserved a different solution about the timing of the factual and legal situation where judicial review should be based on.

### **Administrative acts, the issuance of which is required by the claimant or commanded by law**

The question in here is raised only for individual administrative acts and normative sublegal acts, the issuance of which is required by the claimant or commanded by law. The hypothesis is that the plaintiff has required from the competent public organ the issuance of an administrative act or the material law governing the particular matter obliges the issuance of an administrative act. The administrative organ competent to issue the administrative act, explicitly or tacitly, does not comply with the plaintiff's request or does not respect the substantive law that compels the issuance of an administrative act. Thus, the plaintiff files an administrative lawsuit with object the obligation of the administrative to issue the administrative act, which has been refused, or for which the administrative organ has remained tacit, although there was a request from the plaintiff. The question here is whether the court will review the dispute and will base its reasoning on the factual and legal situation in force at the time the request has been made by the plaintiff, at the time the application is refused by the administrative organ or the court will review the dispute and will base its reasoning on the factual and legal situation in force at the time when the judicial decision is rendered?

The Law on Administrative Courts has solved this problem by stating that *"in cases where the plaintiff or the substantive law require the issuance of an administrative act, the court bases its decision on the factual and legal situation at the time of the decision"* (Article 37, item 2). Therefore, the factual and legal situation where the administrative court should base the resolution of the dispute is the time when the administrative court takes its decision. It must be specified that the time of the judicial

decision differs from the time when the court carries on the judicial review. This is very important because between the two moments, the factual and legal situation may have changed. Therefore, it must be understood that in this case, the administrative court, to resolve the issue, will not base its reasoning on the factual and legal situation in force at the time of the examination of the case, but it will base its reasoning on the factual and legal situation in force at the time of the judicial decision. The reason for this choice has to do with the fact that the administrative act has not yet been issued and therefore it has not created any legal effect. Therefore, it seems legitimate for the administrative court to base its decision on the factual and legal situation in force at the time of the judicial decision.

### **The reach of the judicial review in the exercise of discretionary power by the public administration**

In the Albanian administrative law, it has been widely accepted, by the law<sup>3</sup> and as well by the legal doctrine of administrative law<sup>4</sup>, the principle that the courts, in reviewing the legality of the administrative activity, have the right to review questions of fact and law, but in contrast to administrative review where administrative organs have the right to control the regularity of the administrative action, courts do not have the right to control the regularity of the administrative action. The control of the regularity of the administrative action is also known as the *control of appropriateness* or *opportunity control* when carrying out an administrative action.

The opportunity or appropriateness when performing an administrative action is associated directly with the *discretionary power* of the public administration bodies. The Code of Administrative Procedure, Article 7, defines the discretionary power of the public administration as “... *the right of the latter to exercise public authority in order to achieve a lawful purpose, even without explicit authorization by law*”. The Code of Administrative Procedure also states that “*In cases where public administration exercises discretionary power, this power must be exercised in accordance with the Constitution and the spirit of the legislation in force in the Republic of Albania*” (Article 149). The analysis of these provisions shows that the exercise of public authority by public administration bodies will necessarily materialize through an administrative action or through administrative inaction. Consequently, the discretionary power of public administration bodies is *the right to choose* between two or more administrative

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<sup>3</sup> Article 137, paragraph 2, of the Code of Administrative Procedure states that “*The administrative body, to which the complaint is directed, reviews the legality and foundation of the administrative act*”. While the old Article 332 of the Code of Civil Procedure, in force before the Law on Administrative Courts, stated that “*the court shall justify its decision, especially when it comes to the foundation (facts) of the administrative act*”. The interpretation of these two provisions was that courts when reviewing the legality of an administrative act have the right to control matters of fact and law, but do not have the right to control the regularity of the administrative action, which means that courts cannot control the opportunity (the appropriateness) of the administrative action. In contrast, in the administrative review, administrative authorities have the right to control the regularity of the administrative action.

<sup>4</sup> S. Sadushi, “Administrative Law 2”, Fourth Edition, Grand Prind, Tirana, 2008.

actions and /or inactions which should be all in accordance with all legal requirements. This right to choose of the public administration may be recognized by law. But the law may also be mute concerning this right. What is important is that the choice of the administrative organ is exercised in compliance with the law. Thus, the discretionary power of public administration is nothing but the freedom the administrative organ has into evaluating the opportunity of issuance of a lawfully specific administrative act or performing a lawful particular administrative action, instead of issuing another administrative act, as well lawful, or instead of performing another administrative action, as well legal. The exercise of discretionary power by public administration bodies may not result or effect into the issuance of an illegal administrative act or illegal administrative action. Discretionary power must be exercised in accordance with the principle of legality, which means that the selection of the most appropriate decision should be done in accordance with the requirements of the law. The larger is this freedom to choose between various legal administrative actions, the wider will be the discretionary power of the public administration.

The Code of Administrative Procedure, by the way it deals with the discretionary act of the public administration (Articles 7, 149 and 150), it seems that it tries to distinguish this kind of administrative act from the rest of the public administration activities, and it creates the impression that the discretionary act is a specific administrative act, same as the individual administrative act or that sublegal administrative act. In fact it cannot be so. This is because the public administration bodies, unless they have a bound competence<sup>5</sup>, exercise discretionary power whenever performing an administrative action, as well when they are mute by their inaction. Any administrative action when performed, whether an administrative act, an administrative contract or another administrative action, as well as an administrative inaction, all these administrative actions or inactions, when being carried out have an inherent exercise of discretionary power by the public administration bodies<sup>6</sup>.

The issue lies in the fact that while on the one hand it is largely accepted that judicial review cannot bring on the regularity of an administrative action (opportunity), on the other hand, the Code of Administrative Procedure, allows not only the administrative review, but as well the judicial review of administrative acts of a discretionary nature<sup>7</sup>. Therefore, the question arises what is the meaning of the rule that the administrative

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<sup>5</sup> The public administration is deemed to have bound competence in case when with the finding of certain facts, the law obliges the public administration to decide in a certain direction without leaving any choice to the public organ about the decision. For example, if an employee reaches 65 years old, the public administration body in the quality of the employer is obliged to issue an individual administrative act for the release from duty because the employee has reached the retirement age. In this case, the administrative organ has no right to assess whether or not to issue the administrative act and it does not exercise any discretionary power here. In this case, the competence of the public body is completely tied up.

<sup>6</sup> O. Gohin, "Administrative Judicial Procedure", Seventh édition, Lexis Nexis, Paris, 2012; H. Le Berre, "Law of Administrative Judicial Procedure", Second édition, Ellipses, Paris, 2010.

<sup>7</sup> Article 150 of the Code of Administrative Procedures states that: "At the request of the interested parties, any administrative act of a discretionary nature may be subject to judicial or administrative review".



courts do not have the right to review the regularity or the opportunity of public administration acts? In fact, from the moment the law allows the extension of judicial control over administrative actions of a discretionary nature, therefore control over the factual issues, and from the moment that the exercise of discretionary power is controlled by the courts, don't we have here a contradiction of positive law? The court control over the factual issues of the dispute, and as well the court control over the exercise of discretionary power of the public administration, isn't it effective control over the regularity (opportunity) of administrative actions, therefore assessment of the court over the opportunity of performing an administrative action?

The answer to this question is nuanced. The administrative rule that courts do not have the right to review the opportunity of public administration activities; it only means that judicial review does not extend to the opportunity of a decision. But this does not mean that judicial review does not extend to the legality of the opportunity of the administrative decision. The difference is crucial. When the administrative court controls the facts and the exercise of discretionary power by the public administration, it necessarily controls the legality of the opportunity of the administrative action, which means the legality of the exercise of the opportunity by the public administration, but not the opportunity of the administrative action in itself.

This is the reach of judicial review in the exercise of discretionary power understood as the extension of judicial control over the legality of the exercise of discretionary power. With the entry into force of the Law on Administrative Courts and the start of the functioning of administrative courts on November 2013, this control, for some administrative acts, will be expanded into a complete control of proportionality.

### **Wide control**

The width of this control of the administrative court is expressly prescribed by the Law on Administrative Courts. This law has introduced in the legality requirements to be met by public organs in their exercise of discretionary power, a complete control of proportionality. It is a kind of deepening of judicial control and concretized through an evaluation method for the legal qualification of the facts that is very demanding. The decision taken by a public administration body, in the exercise of discretionary power, shall be considered legitimate only if it is in full proportion with the facts of the case.

The Law on Administrative Courts, in Article 37, paragraph 3, letters a), b) and c), states that when law gives to the public organ the right to alternative choices, in issuing an administrative act or in the performance of another administrative action, the court shall analyse the following: 1) the choice made by the public organ in accordance with the objective and purpose of the law; 2) the choice made by the public organ is made only to achieve the purpose of the law; 3) the choice made by the public organ is in the exact proportion with the need that has dictated it.



It should be immediately specified that the exercise of this wide control, as it will be explained below, is allowed only in cases where the law gives to the public organ the right to alternative solutions, in issuing an administrative act or to perform another administrative action. This means that this control is conducted by the administrative court only when the public organ exercises its discretionary power to choose between the issuance of an administrative act or carrying out another administrative action. Thus, this control is allowed if the administrative body has the legal right to choose between issuing an administrative act (individual administrative act or normative sublegal act) or performing a another administrative action. It must be specified that this control does not include administrative actions in general, because the signature of administrative contracts is not included in this form of control. Also, this control does not include administrative omissions.

What is the content of this control? This control has included in the requirements of legality for the exercise of discretionary power a demand for full proportionality between the facts of the case and the decision rendered by the public administration. The method of analysing the legality in the exercise of discretionary power which is used by the Administrative Court includes three conditions that must be met cumulatively, as follows.

### **The choice made by the public organ in accordance with the objective and purpose of the law**

Here the question arises whether the exercise of discretionary power, therefore the choice made by the public organ, is consistent with the objective and purpose of the law regulating legal relations in the relevant administrative field? There should be a full apportionment among the facts that constitute the fulfilment of the objective and purpose of the law with the administrative act or the other administrative action taken by the public organ. If the administrative action which has been chosen by the public organ in the exercise of its discretion is not able to meet the objective and purpose of the applicable law, then the choice made by the public organ will be declared illegal. In the contrary, if the answer to the abovementioned question is positive, the Administrative Court will pass on the control of the second condition which follows.

### **The choice made by the public organ is made only to achieve the purpose of the law**

Here the question arises whether the exercise of discretionary power, therefore the choice made by the public organ, is made exclusively to achieve the goal of the special law regulating the relations in the relevant administrative matter or it aims to achieve other purposes? There should be a full apportionment among the facts that constitute the fulfilment of the purpose of the law and the purpose followed when issuing the administrative act or performing the other administrative action. If the administrative

action chosen by the public organ in the exercise of its discretion does not exclusively meet the purpose of the law, but is intended to fulfil other purposes, then the choice made by the public organ would be illegal. In contrast, if the choice meets the specific purpose of the law and just this purpose, the administrative court will move on in controlling the third condition.

### **The choice made by the public organ is in the exact proportion with the need that has dictated it**

Here the question arises whether the exercise of discretionary power, therefore the choice made by the administrative body, does it comply with the need that has dictated it or this choice causes excessive disadvantages in relation to the necessity dictating it? There should be a full apportionment between the facts constituting the necessity which dictates the administrative action and the effects of the administrative action. If the administrative action chosen by the public organ in the exercise of its discretion does not have the effects to meet the need that caused its issuance, or worse, it brings excessive disadvantages in relation to the benefits sought by the administrative action, then the choice made by public organ would be illegal. In the contrary, if this choice is in full apportionment with the need that has dictated it; the administrative court will consider the choice made by the competent public organ in accordance with the law.

### **Conclusion**

The creation of administrative courts, which started functioning on November 2013, with the Law on Administrative Courts, has brought a deeper development of administrative law in Albania, and as never before in the Albanian administrative law, this development is in two aspects: in the substantial administrative law and in the judicial administrative law. This reform has a direct impact on the efficiency and the broadness of the judicial control of administrative acts. Now the judicial control of administrative acts is done in a wider way. In fact, with the Law on Administrative Courts the object of the administrative lawsuit on the legality has been broadened to other notions of administrative actions, such as the administrative inaction, the administrative contract, the normative sublegal act and the other administrative action.

But there are some legal aspects which direct and limit at the same time the judicial control over the legality of administrative actions. The Law on Administrative Courts has defined and directed these elements of judicial control over the legality of administrative actions towards three aspects: facts, time and discretionary power. The result is that the judicial review extends to the legal qualification of the facts, the judicial review is limited in time, and the judicial review is limited when to the exercise of discretionary power by the public organ.

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