

# ADMINISTRATIVE APPEAL IN SERBIAN LAW

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## Abstract

This paper addresses the issues of concept, features and place of the administrative appeal in Serbian administrative law. Special attention is given to the relation between administrative appeal and judicial review of administrative acts. The paper is part of a wider analysis regarding the effectiveness of administrative appeals in the framework of administrative justice on European level, put forward at the EGPA Conference in Toulouse in 2010. The paper is limited to scrutiny of normative aspects of administrative appeal, with the intention to be followed by an empirical research on its effectiveness.

## **1. Introduction**

### **1.1. Significance of administrative legal remedies**

Despite being chronologically the first form of controlling activities of administration, administrative legal remedies did not lose their position and significance in the process of protection of rights and legal interests of private parties (natural persons and organizations) vis-à-vis administration. They are equally important means for the protection of legality and public interest. Even after the work of administration was subjected to judicial control, as external, more objective type of legal control, administrative legal remedies, i.e. administrative control of administration, remained a vital ingredient in the proceeding for review of administrative acts.

The compatibility of judicial and non-contentious, administrative legal protection has been recognized at a pan-European level by the Council of Europe. It has been affirmed that administrative legal remedies help developing greater respect for individuals' rights and freedoms and building a climate of confidence between administration and citizens. "Furthermore, the advantage of such remedies is that they keep judicial disputes to a minimum and relieve the workload on the courts" (Themis Project, 1997, p. 149). The Council of Europe gave noticeable weight to these remedies in its recommendations in the area of administrative law (CoE Rec(2007)7; CoE R (80); CoE, Rec(2009)1). In spite of often mentioned "lack" of impartiality and objectiveness in relation to judicial review of administrative acts, administrative legal recourses have their advantages in this comparison. They enable wider, deeper and faster control of administrative acts, as well as broader authorizations of controlling authorities.

Before going *in medias res*, we need to briefly outline the notion of acts that can be rendered in administrative proceeding and legal remedies which can be used against them. This will enable us to describe, analyze and explain the concept and place of the administrative appeal in Serbian law.

### **1.2. Administrative acts**

In Serbian law, only administrative acts can be rendered in administrative proceeding and only they can be challenged by administrative appeal. The administrative proceeding is regulated by General Administrative Proceeding Act (GAPA)<sup>1</sup>. GAPA codifies general administrative proceeding and most of the state administration authorities use it when making their decisions. Other authorities and organizations of public administration that perform their duties in special administrative areas (e.g. environment, taxes, competition, public procurement, data protection, home affairs, military etc.) use it as a set of subsidiary rules when deciding. Laws regulating their respective administrative domains (GAPA refers to them as "special laws") add special procedural features to their decision-making process.

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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.

The administrative act in Serbian legal doctrine is defined as a legal (normative), individual, unilateral, binding act of administrative authority deciding on administrative matters (Krbek, 1957, p. 16; Milkov, 1983, p. 349). Administrative matter is a legal, individual, non-contentious situation in which the administrative authority is entitled to and obliged by the law to decide on a right, duty or legal interest of an individual or an organization. Administrative acts are individual in the sense that they refer to a particular case or cases and their application is limited to that case(s). GAPA is not using this theoretical terminology. Instead of administrative act, it uses the term resolution. Resolution is the most common name for administrative acts, although special laws sometimes use other terms, such as, permit, consent, approval, decision etc.

Unlike GAPA, Administrative Disputes Act (ADA)<sup>2</sup>, the law regulating judicial review proceeding, contains a definition of the administrative act. Pursuant to its article 4, the administrative act is an individual legal act, by which the competent authority decides on certain right or duty of a natural or legal person, or another party in administrative matter, by direct application of regulations. There is a rich case-law on whether certain sorts of acts are administrative acts or not (Bačić and Tomić, 1985, pp. 49-57). ADA further defines the administrative matter as an individual non-contentious situation of public interest in which the need for authoritative legal determination of future party's behavior derives directly from legal regulations (art. 5 ADA). It can be seen that main elements of the administrative act and the administrative matter, identified in the theory of administrative law, *via* ADA, found their place in legislation.

General administrative acts, i.e. bylaws issued by administrative authorities, administrative contracts and factual acts of administration cannot be challenged by administrative appeal.

Serbian administrative law distinguishes three different features that an administrative act can have. The administrative act can be non-appealable, final<sup>3</sup> and enforceable. These features are reached at different procedural moments. Reaching them is connected with the usage of administrative legal remedies and challenging such acts before the Administrative Court. For this reason they must be explained.

The administrative act becomes non-appealable when an administrative appeal cannot (or can no more) be filed against it<sup>4</sup>. Therefore, if it was allowed, appeal was not (timely) used or was exhausted.

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2 Official Gazette of the Republic of Serbia, no. 11/2009, enacted on December 29, 2009.

3 It must be explained that in Serbian law an administrative act can reach different levels of finality, i.e. non-appealability. The problem arises when the terms used for these two different procedural stops are translated. In English, they both translate as final administrative act, even though there is a linguistic distinction in Serbian language [*konacan* and *pravosnazan*]. In order not to unnecessarily complicate this matter, we used different terms for them in English, which in the best possible way describe their substance, even though this could be questionable from the linguistic standpoint.

4 At this procedural moment, an administrative act was either 1) rendered by a first instance administrative authority and appealed against to the second instance (higher) adminis-

When an administrative act cannot (or can no more) be challenged by both administrative appeal and by the suit to the Administrative Court, it becomes final<sup>5</sup>. The suit was either not (timely) used or was exhausted. Only non-appealable administrative acts can be challenged before the Administrative Court. Therefore, final administrative acts are always non-appealable, as well. Final administrative acts can be challenged only by extraordinary legal remedies.

The administrative act can also become enforceable. This means that its content can be enforced, i.e. realized by force, if necessary. As a rule, an administrative act becomes enforceable when it becomes non-appealable. However, it can become enforceable before that, if the administrative appeal, which can be submitted against it, does not delay its execution.

### **1.3. Remedies against administrative acts**

Administrative acts can be challenged by administrative legal remedies, which encompass administrative appeal, as a regular (ordinary) administrative legal remedy, and a set of extraordinary legal remedies, as well as before the Administrative Court.

The right of appeal is a constitutionally recognized right. Article 36, paragraph 2 of the Constitution of the Republic of Serbia<sup>6</sup>, provides that everyone has the right to an appeal or other legal remedy against a decision determining his/her rights, duties or legally based interests. Moreover, one of the fundamental principles of administrative proceeding is the principle of two-tier proceeding (principle of deciding in two instances) (art. 12 GAPA), prescribing the right of a party to an administrative proceeding to appeal against an administrative act rendered by an administrative authority in the first instance. Also, this principle explicitly excludes a three-tier proceeding, by excluding the possibility of filing an administrative appeal against the administrative act rendered by the second-instance (higher) administrative authority (appellate authority). The principle of two-tier proceeding is, however, not a universal one. It allows for the exclusion of the administrative appeal in certain administrative matters, provided that it is prescribed by a law (act of Parliament), which offers another means for protection of rights and legal interests of parties and protection of legality. Therefore, the possibility to file an administrative appeal is a rule, but both GAPA and special laws can and do contain exceptions (infra 2.4.).

There is only one Administrative Court in the Republic of Serbia. It is part of the judiciary, not part of the special administrative court system. It is one of the courts

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trative authority which rendered its own administrative act upholding (appeal was dismissed or rejected) or changing the first-instance administrative act; 2) rendered by an administrative authority whose acts cannot be appealed to a higher administrative authority; or 3) not appealed in the prescribed period of time.

5 At this procedural moment, the non-appealable administrative act was 1) challenged before the Administrative Court, which rendered its judgment upholding such an act (the suit was dismissed or rejected); or 2) not challenged before the Administrative Court in the prescribed period of time.

6 Official Gazette of the Republic of Serbia, no. 98/2006.

with special competence<sup>7</sup>. The Administrative Court is competent to adjudicate administrative disputes in the first instance for the entire territory of the Republic of Serbia<sup>8</sup>. Administrative court proceeding (judicial review proceeding) is initiated by the suit to the Administrative Court (art. 17 ADA). The suit can be submitted only against non-appealable administrative acts (art. 14 ADA). Administrative appeal is mandatory in the Serbian legal system, given that, provided it is not excluded, it has to be exhausted prior to initiation of judicial review proceeding. As a rule, administrative court proceeding has only one instance, i.e. there is no regular legal remedy in it. Therefore, after the Administrative Court decides on it, the administrative act becomes final (provided it was not annulled by the Court). However, ADA prescribes an extraordinary legal remedy, Request for Reassessment of Decision of the Court (arts. 49 – 55 ADA)<sup>9</sup>. Competent to decide on this legal remedy is the Supreme Court of Cassation of the Republic of Serbia, as the highest court in the country (art. 9 ADA).

Finally, GAPA prescribes a set of six extraordinary<sup>10</sup> legal remedies. These remedies can be invoked on different grounds, on the initiative of different subjects (parties' request, *ex officio*, request of the Public Prosecutor) and before different authorities. Some of them can be used against non-appealable administrative acts, i.e. after the administrative appeal has been exhausted, while others can be used against final administrative acts, i.e. even after the judicial review has been done. They are used for challenging administrative acts on the basis of strictly enumerated, more serious illegalities, within longer time periods or without time limitation. One of them can even be used for removal of perfectly legal, but "dangerous" for the public interest administrative acts. They will be mentioned only where necessary for explaining the effects of administrative appeal. Deeper analysis thereof shall not be part of this paper.

## **2. Administrative appeal**

### **2.1. General**

Besides the principle of two-tier proceeding, GAPA contains a special chapter dedicated to administrative appeal (Chapter XIV). It contains provisions dealing with who has the right to appeal, when, against which and whose (in)actions and to which extent, to whom, in what time, on what grounds, what should it contain, what are its effects, what are the powers of appellate authorities etc.

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7 Art. 11 of the Courts' Organization Act, Official Gazette of the Republic of Serbia, no. 116/2008 and 104/2009, also art. 8 ADA.

8 Art. 29 of the Courts' Organization Act and art. 8 ADA.

9 ADA contains another extraordinary legal remedy – Repetition of (Administrative-Court) Proceeding (arts. 56 - 65 ADA). Unlike Request for Reassessment of Decision of the Court, it has no link with administrative proceeding. It can be used only for repetition of administrative court proceeding for those reasons that appeared in that proceeding only. For this reason, it is not analyzed in this paper.

10 Literal translation of Serbian term [*vanredni pravni lekovi*].

## **2.2. Notion of administrative appeal**

Administrative appeal, as prescribed by GAPA, is a regular (ordinary) legal remedy in administrative proceeding. In order to file the suit to the court, a party first has to exhaust the administrative appeal (mandatory model). There are no exceptions to this rule – if administrative appeal is allowed against an administrative act, it has to be used prior to initiation of the judicial review. As mentioned before, when administrative appeal can no more (or cannot at all) be used, an administrative act becomes non-appealable.

The “regularity” of administrative appeal derives from its main features. First, the administrative appeal does not allow for an administrative act to become non-appealable. The administrative act will not become non-appealable until the time period for filing administrative appeal has lapsed, and if an administrative appeal was filed within this time period, until a decision on it was rendered. Second, administrative appeal is a regular legal remedy because it is, as a rule, permitted against all first-instance administrative acts (though exceptions exist). Third, second instance administrative proceeding, i.e. regular administrative control proceeding, is being initiated by the submission of administrative appeal. Forth, the administrative appeal is the only legal remedy, which can be used to challenge both legality and opportunity (merits) of administrative acts. Therefore, it is regular in the sense that it is a remedy initiating regular administrative control of all administrative acts on all the possible grounds.

## **2.3. The right of appeal**

The administrative appeal can be submitted by a party<sup>11</sup> that participated in the first instance proceeding, who is not satisfied with the administrative act issued in it (art. 213, para. 1 GAPA). According to the case-law, the same applies to the persons or entities that did not participate in the first instance administrative proceeding as parties, even though they had the right to do so (Tomić and Bačić, 2007, p. 305). In addition, the administrative appeal can be submitted by the Public Prosecutor, the Public Defense Attorney and other state authority if: 1) they are entitled by a law to do so; and 2) they believe that the law was breached by an administrative act, in favor of an individual or an organization and to the expense of the public interest (art. 213, para. 2 GAPA).

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<sup>11</sup> The following can be parties to an administrative proceeding: 1) natural persons; 2) legal persons; 3) state authorities, organizations, inhabitants, groups of persons etc. not having legal capacity, if they can be holders of rights and duties decided on in the administrative proceeding; 4) trade unions, when proceeding relates to rights or duties of their members; and 5) the Public Prosecutor, the Public Defense Attorney and other state authorities, when they are entitled by a law to defend public interest in the proceeding (art. 40-42 GAPA).

## 2.4. Exclusion of the right of appeal

Administrative appeal, being regular legal remedy, as a rule, can be submitted against all administrative acts issued in the first instance administrative proceeding. However, there are two types of exceptions.

First, it is generally not allowed to appeal against administrative acts of certain state authorities when they are deciding in the first instance. These are the highest state authorities, such as the Parliament, the President of the State and the Government. Administrative appeal is not allowed here for the simple reason that there is no higher state (administrative) authority in hierarchy<sup>12</sup>. If it is prescribed by the law, individual acts of these authorities can be challenged before judiciary or the Constitutional Court. Furthermore, the administrative appeal cannot be submitted against first instance administrative acts of independent state administration authorities (art. 214, para. 1 GAPA). There are three sorts of state administration authorities – ministries, administrative authorities within ministries, and special (administrative) organizations (art. 1 of the State Administration Act<sup>13</sup> – SAA)<sup>14</sup>. Independent state administration authorities are ministries and special organizations which are not supervised by any ministry. Nevertheless, there are exceptions to this rule. First instance administrative acts of ministries and non-supervised (independent) special administrative organizations can be appealed to the Government (art. 59, para. 3 SAA), only when this is stipulated by a special law (art. 214, para. 1 GAPA)<sup>15</sup>.

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12 There are other reasons for exclusion of the right to appeal their decisions. These are the highest state authorities, with high political reputation, making political decisions, which could not be subject to review or control of administrative authorities that are subordinated to them. In addition, they rarely decide in administrative matters (Tomić, 2009, p. 309, fn. 296).

13 Official Gazette of the Republic of Serbia, no. 79/2005 and 101/2007.

14 Ministries are independent state administration authorities, created to perform state administration tasks in one or more connected areas (art. 22 SAA). Ministries may have one or more administrative authorities within them, created for performing executive or inspection tasks, which by their nature or amount require more independence than that having the internal organizational units of a ministry (art. 28, para. 1 and 2 SAA). Special organizations (in literature, also referred to as administrative organizations) are created for performance of expert tasks, which by their nature require more independence than that having authorities within ministries (art. 33 SAA), for example, Republic Geodesic Directorate. Special organizations can be under supervision of a certain ministry or can be subjected directly to the Government (“independent” administrative organizations) (art. 50 SAA).

15 The most recent changes to GAPA (Act on Changes to the General Administrative Proceeding Act, Official Gazette of the Republic of Serbia, no. 30/2010) were performed, mainly, with the aim of adjusting terminology. Namely, GAPA was enacted in 1997, as a law of the former Federal Republic of Yugoslavia (FRY), which later dissolved, leaving the Republic of Serbia as a unitary state. GAPA, as well as all other federal laws, continued to be applied as the laws of the Republic of Serbia. However, their terminology was not adapted to the new circumstances and still mentioned non-existent division between federal

Second type of exceptions had already been mentioned. Right to administrative appeal can be excluded by a special law, offering another means for protection of rights and legal interests of parties and protection of legality (art. 12 GAPA). This exception is often used when reasons of legal policy require public authorities or organizations to be independent from the executive. Administrative acts of such authorities and organizations are non-appealable at the moment they are rendered and are subject only to judicial review, e.g. the National Bank of Serbia<sup>16</sup> and independent regulatory agencies, such as, the Commission for Securities<sup>17</sup>, the Commission for the Protection of Competition<sup>18</sup>, the Republic Radio-Diffusion Agency<sup>19</sup> and the Republic Agency for Telecommunications<sup>20</sup>.

Nevertheless, in many administrative areas, highest administrative authorities (ministries, non-supervised special administrative organization, independent regulatory agencies), given the nature of the request, position of the party submitting the request or for reasons of legal policy, are those deciding in the first instance proceeding. This impairs the principle of two-tier proceeding, leaving the party with the possibility to directly seek judicial protection. With the aim of ameliorating party's position in such cases, and with the idea of integrality of administrative and judicial legal review of administrative acts, ADA set down a possibility of filing an extraordinary legal remedy in the administrative court proceeding – Request for Reassessment of Decision of the

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and republic (former federal entities) authorities and federal and republic regulations. Therefore, the changes to GAPA related mainly to erasing this terminology. Nevertheless, whether intentionally or not, paragraph 1 of the article 214 was completely changed (art. 20 of the Act on Changes to the General Administrative Proceeding Act). Aside from words “federal” and “republic”, the word “independent” in front of “other state authorities” has been erased. This created the situation in which the administrative appeal cannot be submitted against administrative acts of lower state (administration) authorities, unless this is explicitly prescribed by a special law. This was not the case before the said changes. It is doubtful that the legislator had the intention to make such a substantial change (almost making the administrative appeal an extraordinary legal remedy with respect to the possibility of its submission against administrative acts), given that the entire law contains only technical (terminology) changes. Due to the fact that the changes are so recent (May 5, 2010), we cannot predict the future position of administrative practice and case law on this issue. Additionally, a working group for writing a draft of the new GAPA was formed. It is likely that the new draft shall correct this, probably non-intentional, inconsistency. For these reasons, we presented this provision the way it was interpreted before the changes.

16 Article 9 of the Banks Act, Official Gazette of the Republic of Serbia, no. 107/2005.

17 Article 225 of the Securities and Other Financial Instruments Market Act, Official Gazette of the Republic of Serbia, no. 47/2006.

18 Article 38 of the Protection of Competition Act, Official Gazette of the Republic of Serbia, no. 51/2009.

19 Article 54 of the Radio-Diffusion Act, Official Gazette of the Republic of Serbia, no. 42/2002, 97/2004, 76/2005, 62/2006, 79/2005, 85/2006, 86/2006, 41/2009.

20 Article 23 of the Telecommunications Act, Official Gazette of the Republic of Serbia, no. 44/2003.



Court. This legal remedy can be used against judgments of the Administrative Court. Amongst other reasons, it can be used when administrative appeal was excluded in the administrative proceeding (art. 49, para. 2, subpara. 3 ADA). Consequently, combined administrative and judicial control of administrative acts gets potential third instance (first instance administrative proceeding, proceeding before the Administrative Court upon submitted suit, and proceeding before the Supreme Court of Cassation upon the Request for Reassessment of Decision of the Court), as it would normally have, had not the administrative appeal been excluded (first instance administrative proceeding, appellate proceeding, proceeding before the Administrative Court upon submitted suit). As a result “integral legal protection in administrative matters is more balanced and more complete” (Tomić, 2010, p. 41).

Only when administrative appeal is excluded, and thus, an administrative act is non-appealable as of the moment it is rendered, a party may go straight to judicial review proceeding.

### **2.5. Competence for deciding on administrative appeal**

Competence to decide on administrative appeal has the authority determined by a law, i.e. by a special (material or organizational) law regulating certain administrative area (art. 215 GAPA) (determination of the competence *ratione materiae*). If an administrative act in the first instance was rendered by a company or other organization entrusted with administrative powers, and the second instance authority is not determined by a law, then the appeal shall be decided on by the state authority competent for the pertinent administrative area (art. 219 GAPA). If the first instance administrative act was a complex one, i.e. if it was a result of one authority issuing it and another one giving its consent, authorization or confirmation thereof, than somewhat different rules apply. The competent authority for deciding on the administrative appeal is the one determined by a law, except if this would be the authority that gave the consent, authorization or confirmation on the appealed act (art. 218 GAPA). Obviously, that authority is not allowed to both participate in the making of the first instance administrative act and to decide on the appeal. In such a case, the authority competent to decide on the administrative appeal would be the one determined by a law (usually the authority competent to decide on the administrative appeal to the decisions rendered by the authority giving consent, authorization or confirmation), and if such authority is not determined, such an act would be non-appealable. Such an act could be directly challenged before the Administrative Court. The same authority cannot decide in both first instance and on the administrative appeal (art. 216 GAPA), excluding also the possibility of different persons working within the same authority to do that. GAPA foresees one exception to the mentioned rule. Namely, if an administrative act was rendered by a dislocated unit of a state administration authority, that authority (its head) is then competent to decide on the administrative appeal against it (art. 217 GAPA). This is the exception to the rule that administrative appeal has devolutionary effect, i.e. the effect of transferring competence to another authority (infra 2.7.).

## **2.6. Subject of administrative appeal**

Administrative appeal can be submitted against first instance administrative act (with the exceptions we mentioned previously) and against first instance silence of the administration.

GAPA mentions two kinds of acts rendered in administrative proceeding, resolutions and conclusions. Resolution is the administrative act, which resolves the merits, the main issue, the subject of the administrative proceeding, i.e. the administrative matter (art. 192 GAPA) (supra 1.2.). Resolutions are rendered, as a rule, in the end of the proceeding and they are independent acts. As opposed to resolutions, as acts on the merits of the case, conclusions determine issues pertaining to administrative proceeding. Conclusions are mainly procedural acts, i.e. acts determining procedural issues (all other issues except the main issue – administrative matter), such as admission of the evidence, holding a public hearing etc. These acts are rendered in the course of proceeding and their purpose is to facilitate conduct of proceeding and issuance of a resolution. They are accessorial in nature, meaning that, even though they are rendered in proceeding, a resolution still has to resolve the main issue<sup>21</sup>.

Distinction between these two acts is important with respect to the possibility of submitting appeal against them. Resolutions are appealable as a rule. Appeal against them is always allowed, except where it is explicitly excluded by a provision of a special law (art. 213, para. 1 GAPA). On the contrary, conclusions are non-appealable as a rule. They cannot be appealed unless provisions of GAPA or other laws provide so (art. 212 GAPA). Therefore, there are two kinds of conclusions with this regard, those against which special administrative appeal is allowed and those against which it is not. Differentiation between them is important in the sense that the prior have to be in written form, justified (formally motivated, reasoned) and must contain recourse instruction, while the reasons (motivation) for the latter are given in the explanation (motivation) of the resolution rendered in the end of an administrative proceeding and they can be appealed only within administrative appeal against that resolution.

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<sup>21</sup>There are three special sorts of conclusions that are not accessorial, i.e. when they are rendered there is no need for issuance of a resolution. These are: conclusion suspending (ending) administrative proceeding, conclusion dismissing request for initiation of administrative proceeding and conclusion dismissing administrative appeal. Administrative proceeding shall be suspended by a conclusion, mainly, when there is no possibility or need to resolve the administrative matter that is its subject. This can happen, for instance, when the party explicitly or implicitly (as prescribed by a law) withdraws its request, when a party dies, when it becomes impossible to execute the administrative act that should be rendered etc. Conclusions dismissing party's request or appeal are rendered for formal, procedural reasons. Request or appeal shall be dismissed if it is not allowed, untimely (late or premature), not complete or submitted by an unauthorized person. However, in all of these cases, proceeding ends for procedural reason, without the resolution of its subject, i.e. administrative matter.

Silence of the administration is a theoretical construction enabling parties to appeal to a higher authority when a first instance administrative authority obliged to render a decision on request of a party did not do so. This means that in certain cases an administrative authority is obliged to render an administrative act within a time period prescribed by the law. If it fails to deliver the act in such cases, a party may submit an administrative appeal as if its request was rejected, i.e. as if a negative administrative act was rendered (art. 236 GAPA)<sup>22</sup>.

## **2.7. Effects of the administrative appeal**

The administrative appeal has two legal effects: the devolutionary and the suspensive effect.

Having devolutionary effect means that it transfers jurisdiction for deciding on a certain matter from the first instance authority to the second instance (higher, appellate) authority. In other words, the same authority cannot be competent to decide both in the first instance and on the appeal (art. 216 GAPA). The appellate authority is put in the position of the authority that rendered the appealed administrative act. It can re-analyze challenged administrative acts and has the authority to remove and change them. This is the main feature distinguishing administrative appeal from the objection, as a special kind of internal (administrative) recourse. Objection is a remonstrative remedy, i.e. it does not transfer jurisdiction for deciding on a certain matter. Instead, the same authority is called upon to decide on a certain matter for the second time. Hence, the administrative appeal appears to be a more objective legal recourse than objection, not being means of self-control, but of a true control of one entity over another. Objection, as a legal remedy, exists in special administrative domains, such as radio-diffusion law.

This legal effect of administrative appeal endures serious exception. Administrative acts rendered by a dislocated unit of a state administration authority, are being appealed before the head (chief) of that authority (art. 217 GAPA). Exception is serious due to the fact that, according to Serbian administrative law, (central) state administration authorities are appellate instances in numerous cases. Nevertheless, it has to be said that this kind of derogation of transferring effect is not complete. Formally, the same authority appears twice in a row in the same case. Still, substantively, different persons are deciding. First, we have “local” staff making the decision and then afterwards, the people from the “center” controlling their work. Z. Tomić calls this “quasi-two-tier proceeding”. He mentions another example of derogation from “real” two-instance

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<sup>22</sup>GAPA as a general law attaches negative meaning to the silence of the administration. However, other laws may and do have a different solution. They consider silence to be positive, i.e. if the administrative authority obliged to render an administrative act does not do so in the prescribed period of time, it is considered that the party's request was accepted. Such a solution has, for example, article 26 of the Registration of Commercial Enterprises Act, Official Gazette of the Republic of Serbia, no. 55/2004, 61/2005.

proceeding. This is the competence of ministers to decide on appeals filed against first instance administrative acts of authorities within ministries (e.g. inspectorates and directorates) (art. 59, para. 2 SAA). Although ministries and authorities within ministries are different kinds of state administration authorities, although they are formally separate authorities, they are closely connected (Tomić, 2007, p. 541).

The second legal effect of administrative appeal is the suspensive effect. The time period for filing administrative appeal has the same effect. This is to say that the first instance resolution cannot be executed (enforced) before a time period for filing the administrative appeal, as prescribed by the law, has lapsed. If the appeal has been filed within this time period, then the resolution cannot be executed before decision on the appeal has been made (art. 221, para. 1 GAPA).

Consequently, the rule is that the appeal suspends execution of the first instance resolution. This rule undergoes exceptions as well. Administrative appeal, as well as the time period for its filing, shall not suspend, i.e. delay execution of first instance resolution provided that: 1) this is explicitly stipulated in a law; 2) the conditions for undertaking emergency measures, as provided in GAPA, are met; or 3) delay of execution could result in party incurring damage that would be hard to repair (art. 221, para. 2 GAPA).

As for the first exception, it must be mentioned that ADA has a provision enabling the appellant to request the Administrative Court to postpone execution of a resolution if the following conditions are met: 1) due to its execution, the appellant would incur damage that would be hard to repair; 2) execution is not opposed to public interest; and 3) the opposite party or third interested person would not incur bigger or non-repairable damage due to the postponement (art. 23 ADA). The Administrative Court has to decide on this issue within five days as of the day of filing of the request. This provision reinforced the suspensive effect of the administrative appeal. It also balanced positions of parties in multi-party administrative proceedings, by giving similar opportunities to both parties, i.e. the party whose interest is execution of a resolution can invoke exception made by GAPA, while the other party, whose interest is opposite, can call upon the Administrative Court to decide otherwise<sup>23</sup>.

Therefore, the administrative appeal has *de jure* suspensive effect, which can be eliminated in certain cases, either by a law (GAPA or a special law), or by an administrative authority, under the conditions set down by the law. However, when the administrative appeal does not have suspensive effect pursuant to a certain law, the Administrative Court can grant it such effect upon a request of the party submitting the appeal.

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<sup>23</sup>The old Administrative Disputes Act did not contain such a provision. This was not in accordance with provisions of the Council of Europe's Recommendation no. R (89) 8 of the Committee of Ministers to Member States on Provisional Court Protection in Administrative Matters, adopted on September 13, 1989 (Cucić, 2009, pp. 257-261).

If the administrative appeal (when allowed) is filed against a conclusion, then the rule is the other way around. As a rule, administrative appeal against a conclusion does not postpone its execution, unless a law or the conclusion itself provides to the otherwise (art. 212, para. 4 GAPA).

### **2.8. Time period for filing administrative appeal and deciding on it**

The general time period for filing an administrative appeal is 15 days as of the day of delivery of the first instance resolution (art. 220 GAPA). Other laws can set a different (shorter or longer) time period. If a potential appellant misses this time period, he/she is precluded from filing the appeal and the resolution becomes both non-appealable and final. The only thing left then to do, is to request a return (of the proceeding) in a previous state (*restitutio in integrum*), provided there is a justification for the failure to file administrative appeal in the prescribed period of time (art. 93-98 GAPA), and then submit the appeal.

The former provision applies if a first instance resolution was rendered. However, if there is no first instance resolution, but a silence of the administrative authority, whose decision, if rendered, could be appealed, than the time period is set differently. Administrative appeal can be filed, as if party's request was rejected, after the time period for rendering the first instance resolution has lapsed without issuance of an act. GAPA prescribes that this period is one or two months as of the day when a party submitted its request or the day when an administrative authority initiated administrative proceeding *ex officio* in the interest of a party<sup>24</sup>, depending on whether the administrative authority could conduct a shortened administrative proceeding (conditions are set in art. 131 GAPA) or it had to conduct a regular administrative proceeding (art. 208 GAPA). GAPA allows for another law to set a different time period, but unlike the time period for administrative appeal when first instance resolution was rendered, this time period can only be shorter than the one in GAPA. Administrative appeal filed before this period lapsed shall be dismissed as premature (art. 224, para. 2 GAPA). Once this period lapses, a party may submit the administrative appeal at any time, without limitation. If the administrative authority would render the resolution after this period lapsed, but before the party submitted an administrative appeal, then the regular time period of 15 days as of the day of delivery of such resolution (or a different period laid down in a special law) would apply.

GAPA, as well, sets a time period for rendering and delivering an act deciding on administrative appeal. This time period is two months as of the day of submission of the administrative appeal, or a shorter period prescribed by another law (art. 237 GAPA).

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<sup>24</sup> Such cases are rare, but they, nevertheless, exist. For example, article 125 of the Family Act (Official Gazette of the Republic of Serbia, no. 18/2005) prescribes that the administrative proceeding for appointment of a tutor to a minor is initiated *ex officio* by a competent administrative authority. This is in the interest of the minor.

Time periods for submitting and deciding on the appeal, as well as the time periods for rendering first instance resolutions (i.e. for appealing against administrative silence) are set in such a way as to insure effectiveness of administrative work, and they do not impede party's right to trial within a reasonable time, as prescribed by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The mentioned time periods also give a party sufficient time to prepare the case, especially given that the appellant is not obliged to legally justify the appeal, and it suffices if he/she only indicates in which way is unsatisfied with the issued administrative act (art. 222, para. 1 GAPA). This is to say that this general time limit for the submission of administrative appeal does not hinder party's right of access to court (given that the administrative appeal system in Serbian law is mandatory) within the meaning of article 6 of the European Convention. However, questions could be asked about administrative appeals in some of the special administrative areas, such as the time period of three days as of the day of delivery for filing administrative appeal against the resolution on disciplinary measure against a pupil (including expulsion from school)<sup>25</sup>. It would have to be seen in a particular case whether this time period precludes a party to exercise the right to access to court, as a part of the right to a fair trial (especially in this very sensitive area of pupils' rights).

### ***2.9. Content of administrative appeal***

The administrative appeal must contain all the information necessary for the identification of the appellant (name, address, name of their representative, if there is one) and the challenged act (name and address of the administrative authority which rendered it, its number and date of issuance) (art. 222, para. 1 GAPA). The appellant is not obliged to legally justify the appeal, and it suffices if he/she indicates in which way is unsatisfied with the issued act (art. 222, para. 1 GAPA). The appellant is allowed to put forward new facts and new evidence in the administrative appeal, under the condition that justification is presented for not putting them forward in the first instance proceeding (art. 222, para. 2 GAPA). New facts are those that existed at the time the appealed resolution was rendered, i.e. during the first instance proceeding, but, for a justified reason, the appellant was not able to put them forward in the first instance proceeding<sup>26</sup>. Thus, this does not apply to the facts, which appeared after the first instance proceeding ended. They could potentially lead to a new administrative proceeding. If there was an opposite party in the first instance proceeding, this party has to be given the opportunity to pronounce on those new facts (art. 222, para. 3 GAPA).

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25 Art. 115, para. 11 of the Basis of the System of Education and Upbringing Act, Official Gazette of the Republic of Serbia, no. 72/2009.

26 Decision of the (former) Supreme Federal Court no. UZ. 6552/58 as of November 21, 1958.

## **2.10. Work of the first instance authority on administrative appeal**

Administrative appeal is formally, physically handed in to the first instance authority, i.e. the one that rendered the challenged act (art. 223, para. 1 GAPA). Even if a party would hand in the administrative appeal directly to the appellate authority, the latter would send it to the first instance authority (art. 223, para. 2 GAPA). Reason for doing this is the fact that the authority whose act is appealed has a role to play in the appellate proceeding as well. It has certain authorizations with regard to administrative appeal. In addition, the appellate authority shall deliver its resolution rendered on administrative appeal to the appellant through the first instance authority (art. 238 GAPA). The aim of this provision, as well as of the previous one, is to facilitate the appellate proceeding for the appellant, because it is easier to communicate with the first instance authority, with which he/she had already communicated in the past and which might be closer to his/her place of residence, than with the appellate authority (especially in the case of administrative appeal to the head of the state administration authority, when its dislocated unit conducted the first instance proceeding).

To begin with, first instance authority has to check whether the administrative appeal fulfils the necessary formal (procedural) conditions, i.e. whether it is allowed, timely and submitted by a person authorized to do that. If any of these conditions is not met, the first instance authority shall dismiss it by a conclusion (art. 224, para. 1-3 GAPA). Against a conclusion dismissing the administrative appeal, a special (procedural)<sup>27</sup> appeal can be filed to the authority which would have the competence to decide on the dismissed administrative appeal. If this authority finds that the initial (substantial) administrative appeal was formally (procedurally) correct, it shall decide on the initial administrative appeal as well (art. 224, para. 4 GAPA). In this way, the appellant is protected from arbitrariness of the first instance authority, which might try to cover up its mistakes in this way.

Further authorization of the first instance authority is to replace its resolution. This is the case in which the first instance authority, upon receiving an administrative appeal, realizes that the appeal is well-founded, i.e. that it made an error when it issued the appealed resolution. In that case, the first instance authority is authorized to replace its previous resolution with a new one, in order to correct itself (art. 225 GAPA). First instance, authority can do this, under prescribed conditions, with or without prior completion of the conducted first instance proceeding (art. 226 and 227 GAPA). In any case, a new appeal can be filed against new (replacing) resolution (art. 225-227 GAPA). This is an additional guarantee, necessary because the first instance authority might repeat the previous mistake or make another one. These provisions

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<sup>27</sup>Z. Tomić makes a linguistic difference between initial administrative appeal, filed against first instance act, calling it substantial appeal, and this appeal, which he calls procedural, given that it protects the appellant's right to appeal, as a special procedural right, distinguishable from the rights and/or duties which were decided on in the appealed act (Tomić, 2009, pp. 312-313).

offer a self-control mechanism, which could benefit both the discontented party, as he/she can get the request satisfied sooner, and the first instance authority, which can safeguard its reputation by correcting its own erroneous work. This mechanism can be compared to objections, as remonstrative, self-controlling remedies. It can be said that their content is the same, i.e. that the authority is given a second chance. Additionally, it can be said that this mechanism has a slight advantage over objection, given that the appellant does not have to wait for the same authority to pronounce on the same matter the second time before another form of (true, outer) control can be initiated, i.e. administrative appeal. This is another element encompassed by administrative appeal, as a complex legal remedy.

It can be explained here that it is not possible to challenge the same administrative act by a legal remedy before the administrative authority that rendered it and afterwards, before a higher administrative authority by using administrative appeal. There are two reasons for this. The first is the one mentioned in the previous paragraph. Administrative appeal enables the authority that rendered the appealed administrative act to replace it, and if it does not do so, it enables the second instance authority to review it. Therefore, insertion of another legal remedy where administrative appeal is already allowed would be redundant. The second reason is linked with one of the fundamental principles of administrative proceeding – principle of finality of administrative acts. Pursuant to this principle: “Resolution which can neither be appealed, nor challenged in administrative dispute [before a court] (final resolution), and by which a party gained certain rights and/or by which a party was ordered certain obligations, can be annulled, canceled or changed only in the instances prescribed by this law” (art. 13 GAPA). Thus, only the so-called “positive” administrative acts, i.e. the administrative acts by which a party was recognized certain rights or ordered certain obligations, can become, what is in theory of administrative law called, materially (substantially) final. This is to say that the administrative matter, which was resolved by such an administrative act, cannot be decided upon again – *ne bis in idem* (except upon extraordinary legal remedies). Of course, this can happen only once the administrative act became formally final, i.e. after administrative appeal and the suit to the court are exhausted. On the other hand, the so-called “negative” administrative acts, i.e. those rejecting party’s request, can become formally final, but never materially final. Consequently, if such an administrative act is issued, even if administrative appeal and the suit to the Administrative Court were unsuccessfully used against it, it does not prevent the party to submit again a request for deciding upon the same administrative matter (same case). This has been confirmed both in theory (Dimitrijević, 1963, pp. 303-305; Marković, 2002, p. 314; Tomić, 2009, pp. 255-256) and case-law<sup>28</sup>. According to the sentence of the judgment of the Supreme

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28 This stand has been maintained in the case-law for more than 50 years - judgment of the Federal Supreme Court UZ, no. 4707/58 as of November 7, 1958, judgment of the Supreme Court of Vojvodina P. no. U 682/77 as of December 12, 1977, judgment of the Supreme Court of Serbia U-V 1252/06 as of April 23, 2008.



Court of Serbia, “[a]n administrative matter is finally resolved if a party gained certain right or was ordered certain obligation by a final resolution, and not when the request of a party was rejected”<sup>29</sup>. This means that, if party’s request was rejected by an administrative act, a party can file administrative appeal against it, but it can also submit a new request for the resolution of the very same administrative matter (same case) to the same authority. In this way, the party is not appealing the rendered administrative act, but is actually asking the authority to render a new administrative act differently resolving the same administrative matter. If the administrative authority does so, it revokes (even though not formally) its previous, negative administrative act. Therefore, this possibility resembles optional remonstrative (self-control) legal remedies existing in administrative law of certain countries<sup>30</sup>. Of course, even after this second attempt with the same authority, the party could file administrative appeal, or if it is excluded, the suit to the Administrative Court.

If the first instance authority does not dismiss the administrative appeal, nor finds it necessary to replace its previous act, it shall send the appeal, along with the file of the case, to the second instance authority, within 15 days as of the day of receipt of the appeal (art. 228 GAPA).

### ***2.11. Resolving of the second instance authority on administrative appeal***

Different terminology used in GAPA for tasks of the first instance authority (work on the appeal) and the second instance authority (resolving, deciding on the appeal) is not unintended. Quite to the contrary, it indicates the different powers possessed by these two entities. The first has the authority to formally check the appeal, and potentially correct its own errors, which could be again appealed, while the other has the authority to make a decision on the content of the appeal and legality and opportunity (merits) of the challenged act.

The appellate authority first checks the formal, procedural correctness of the administrative appeal (whether it is allowed, timely and submitted by an authorized person) once again. If it finds that the first instance authority failed to notice any of these procedural flaws, it shall dismiss the appeal itself (art. 229, para. 2 GAPA).

If the administrative appeal stands this test once again, second instance authority shall proceed to evaluate whether it is justified. The second instance authority can reject the appeal as unfounded, or it can accept it as founded and in whole or partially annul (quash, *ex tunc*, *ab initio*) the appealed act or change it (art. 229, para. 3). After annulment of the resolution, the appellate authority can, depending on the circumstances, resolve the administrative matter (which is the subject of the

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<sup>29</sup>Judgment of the Supreme Court of Serbia Uvp. II 50/04 as of January 26, 2006.

<sup>30</sup>This kind of “gracious remedies” can be found in comparative law. For instance, institution of the so-called “non-organized” appeal exists in Belgian law. As opposed to “organized” appeal, the authority to which this appeal is submitted to is not obliged to answer or give its opinion upon it (Veny, Carlens and Verbeeck, 2009, pp. 151, 167).

administrative proceeding) itself or it can send the file back to the first instance authority to resolve it, giving it the necessary directions with respect to procedural flaws and misapplication of substantial law that must be rectified.

The appeal shall be rejected if the second instance authority determines that: 1) both the appealed resolution and the proceeding that preceded it were in accordance with the law; 2) the first instance proceeding was faulty, but none of the faults could result in a different resolution in the end; or 3) the first instance resolution is in accordance with the law, but for other reasons than those indicated in it, in which case it shall make new motivation in the second instance resolution (art. 230 GAPA).

First instance resolution shall be annulled if the second instance authority determines that: 1) it was rendered by an authority not having the jurisdiction to do so (art. 231, para. 2 GAPA); 2) the facts were not determined well or that the procedural rules were breached in the first instance proceeding, or that the ruling (decision) of the resolution is not clear or that it is in contradiction with its explanation, and after rectifying these procedural errors, the second instance authority finds that the administrative matter had to be resolved differently (art. 232 GAPA); or 3) the evidence were evaluated incorrectly in the first instance proceeding, that the wrong factual conclusion was drawn from otherwise well determined facts, that a substantial law was misapplied, or that a different resolution should have been reached on the basis of application of discretionary power (art. 233, para. 1 GAPA).

It can be noticed that not only the legality of a resolution is being tested, but the opportunity, i.e. the proper application of discretionary powers (authorizations), as well, and that it can likewise lead to annulment. Administrative appeal is the only legal remedy which can be used for testing opportunity of administrative acts. This is due to the fact that the appellate authority is an administrative entity itself, so that the discretionary powers can pass (devolve, be transferred) to it. This is the key element making administrative appeal the most comprehensive administrative legal remedy. Due to the devolutionary effect of administrative appeal, the appellate authority can completely subrogate itself into the first instance authority's legal position, i.e. it has all the powers of the first instance authority. This is neither the case with extraordinary legal remedies, nor with the suit to the Administrative Court.

Second instance authority shall change the appealed act when it finds that it was in accordance with the law and that the facts were well-determined, but that the aim for which it was rendered could have been achieved by other means, more favorable for the party (art. 233, para. 2 GAPA).

When an administrative act is appealed by a private person, the principle of *non reformatio in peius* applies. Moreover, the law allows the second instance authority to change the appealed resolution to the benefit of the appellant, even outside the appeal request, but within the request made in the first instance proceeding, provided that this does not impair rights of third persons (art. 234, para. 1 GAPA). Hence, the second instance authority can put a party into a better position than the one it requested by the appeal, but not better than the one requested in the first instance proceeding.

There is an exception to this rule. Pursuant to article 234, paragraph 2 of GAPA, the second instance authority can, on the appeal, change the first instance administrative act to the detriment of the appellant, but only when there are grounds for using one of the extraordinary legal remedies regulated by GAPA. These are the Annulment or Cancellation on the Basis of Official Supervision, the Extraordinary Cancellation and Declaring Resolution Null and Void. Nonetheless, this exception does not worsen the position of the appellant, given that the second instance authority is authorized to, on an *ex officio* basis, check whether these legal remedies can be used and apply them to the detriment of a party even if the appeal was not submitted. Accordingly, the administrative appeal itself is no more than a means for the authority to discover that there is a reason for applying these legal remedies. There is also a question of possibility for the appellate authority to utilize this authorization. Namely, the abovementioned extraordinary legal remedies enable the appellate authority, under the conditions prescribed in the provisions regulating them (arts. 253, 256, and 257 GAPA) to annul, cancel or declare the administrative act to be null and void. On the other hand, this provision of the appeal proceeding enables the appellate authority to change the first instance resolution on the same grounds. However, it depends on the circumstances of the case whether the appellate authority shall be able to rectify the respective illegalities by only changing the administrative act, especially given that these are more serious breaches of legality. If not, the appellate authority would have to use aforementioned extraordinary legal remedies by initiating proceeding *ex officio* on the basis of the provisions regulating them. Thus, the administrative authority would not be able to change the appealed act, but to annul, cancel or declare it to be null and void.

If the administrative appeal is submitted by the Public Prosecutor (or another authorized state authority), then the situation is different. The Public Prosecutor defends general legality. It can, thus, submit administrative appeal if it considers that an administrative act is illegal and that the law has been breached to the benefit of a private party and to the expense of the public interest (art. 213, para. 2 GAPA). Obviously, the aim of this appeal is set towards aggravating private party's legal position.

Appeal, as well, enables the second instance authority to declare the first instance administrative act to be null and void, provided it determines that there was an irregularity in the first instance proceeding, making the appealed act null and void. Furthermore, part of the first instance proceeding, conducted after such an irregularity was made, shall be declared null and void as well (art. 231, para. 1 GAPA). Null and void administrative acts are those containing the most severe breaches of legality, strictly enumerated in the law and explicitly denoted as grounds for declaring an act to be null and void<sup>31</sup>. Effects of annulment and declaring an act to be null and

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31 Illegal administrative acts in Serbian law (and doctrine) are divided in two groups. First, the one that can be validated (made lawful, legalized) and those that cannot. The first are voidable [*rulsjivi*], while the others are null and void [*nistavi*] (or only null). Voidable

void are the same – the act is being removed as of its inception (*ex tunc*). However, null and void acts can be removed without time limitation. This authorization of the appellate authority is linked with the usage of the appropriate extraordinary legal remedy – Declaring Resolution Null and Void<sup>32</sup>.

We will end appellate authorities' powers with the possibility of granting compensations to aggrieved parties. Administrative authorities have no such authorization under the general administrative legal regime. Their powers are limited to examination of legality and opportunity of the first instance administrative act, and annulment, change or declaration of an act to be null and void. On the other hand, the Administrative Court has this power. Provided it annuls or declares the challenged administrative act to be null and void, the Administrative Court is allowed to compensate the aggrieved party, either in kind, by ordering the return of the object taken away from the party, or by providing damages (art. 45 ADA). The same provision leaves to the discretion of the Administrative Court to either do this itself or to direct the applicant to seek relief in civil litigation. There is no reported case-law indicating that the Administrative Court ever did this itself. Therefore, an aggrieved party is forced to deal with the disputed administrative act in one proceeding (appeal and/or administrative court proceeding) and with the compensation for the damage it caused in another (civil litigation). This practice of the Administrative Court is not necessarily a bad one. Specifically, as the only first instance administrative court for the entire territory of Serbia, it does not have enough judges<sup>33</sup> to deal with all the challenged administrative acts, and this would additionally slow down its work. Moreover, given that the administrative judges are specialized in administrative and not civil law, compensation requests would be better decided in civil litigations.

### **3. Relation between administrative appeal and judicial review**

The relation between administrative appeal and judicial review of administrative acts can be examined in four different aspects.

The first aspect concerns conditionality between administrative appeal and the suit to the Administrative Court. Administrative appeal in Serbian law is mandatory.

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administrative acts contain breaches of law for which they can be removed from the legal system by the usage of prescribed legal remedies – the administrative appeal, extraordinary legal remedies and the suit to the court. However, all of these legal remedies can be used in a prescribed period of time. If the time period passes without them being used, then these acts are validated (legalized), i.e. they can attain legal force by the lapse of time. This means that, for the reason of legal certainty, their illegality shall be disregarded, and they will be considered to be in accordance with the law. On the other hand, null (and void) administrative acts contain the most severe breaches of the law. For this reason, they cannot be validated. They can be removed from the legal system at any time.

32 This has been confirmed in case-law, e.g. judgments of the Supreme Court of Serbia, U. 1595/2004 as of July 6, 2006; U. 8159/2005 as of August 17, 2006; U. 1838/2007 as of March 12, 2009; judgment of the Administrative Court U. 4384/2010 (2008) as of April 29, 2010.

33 It has only 38 judges (art. 6 of the Decision on the Number of Judges in Courts, Official Gazette of the Republic of Serbia, no. 43/2009, 91/2009, 35/2010).

Unless administrative appeal is excluded in a certain administrative domain, it has to be utilized against a first instance administrative act before such an act, as non-appealable, can be challenged by the suit to the Administrative Court. As for the conditionality between the two, it exists when it comes to the scope of challenging an act, while the legal reasoning can be changed. Namely, if an administrative act is not challenged by administrative appeal (when it is not excluded) within the prescribed time period, it becomes non-appealable and final at the same moment. If, in such a case, a party would submit a suit, without submitting administrative appeal first, the suit would be dismissed by the court (art. 26, para. 1, subpara. 6 ADA). If a first instance resolution would be only partially appealed (e.g. only one of the requests resolved by the administrative authority is appealed), the part that was not appealed would become non-appealable and final, i.e. only the appealed part could be challenged by the suit after the end of the appellate proceeding. Hence, the scope of the suit cannot be wider than that of the administrative appeal that preceded it. As for the legal reasoning, the regulation is set differently. The appellant is not obliged to legally reason the administrative appeal, and it suffices if he/she indicates in which way is unsatisfied with the issued act (art. 222, para. 1 GAPA). Consequently, the appellant could change the legal argumentation once he/she gets to court. Furthermore, even the court itself is bound only by the request contained in the suit. It must examine the legality of the challenged act within the limits of that request, but it is not bound by the legal reasons set down in the suit (art. 41, para. 1 ADA). This is to say that the court can find an act disputed, for instance, on the basis of misapplication of substantial law to be illegal for other reason than that put forward in the suit (e.g. that it breaches another substantial law, and not the one mentioned in the suit). Additionally, both the appellate authority on the appeal and the Administrative Court on the suit, must *ex officio*, even without the request of a party, examine whether the challenged act is null and void, and if it is, to declare it as such (art. 231, para. 1 GAPA; art. 41, para. 2 ADA).

The second connection in this relationship relates to the application of one extraordinary legal remedy in administrative court proceeding. As we explained, the Request for Reassessment of Decision of the Court, as an extraordinary judicial legal remedy, can be used against judgments of the Administrative Court. Amongst other reasons, it can be used when administrative appeal was excluded in the administrative proceeding (art. 49, para. 2, subpara. 3 ADA). Therefore, the legal protection mechanism gains another instance in administrative court proceeding, in the place of the one lost in the administrative proceeding (excluded administrative appeal).

The third link is the impact of an action of the appellate authority undertaken after the initiation of the judicial review proceeding to that proceeding. There are two different situations here. First, when the appellate authority issued the second instance resolution, which was later challenged before the administrative court. In such an instance, the appellate authority can use the Change and Annulment of the Resolution in Relations to Administrative Dispute, as an extraordinary legal remedy,

to fulfill the party's requests put forward in the suit, by changing or annulling the challenged resolution. Second, if the suit was submitted against the silence of the administrative authority, then the authority can issue the requested administrative act during the judicial proceeding. Both actions should be considered as attempts of amiable resolution of the administrative dispute. Should any of these happen, the court shall call the applicant to declare whether is satisfied with the defendant's action, in which case the judicial proceeding shall end, or not, in which case the court proceeding shall continue and the suit shall be extended to the new act as well (art. 29 ADA).

The fourth link concerns the relation between time periods for submitting and deciding on administrative appeal and right to access to the court. Time limit for submitting the suit to the Administrative Court is 30 days as of the day of delivery of the non-appealable administrative act to the party or the public authority authorized to submit the suit against it. A shorter time limit may be prescribed by another law (art. 18, para. 1 and 2 ADA). If an act was not delivered to a public authority or a third interested person, who can submit the suit, the time limit is 60 days as of the day of delivery of the act to the party (art. 18, para. 3 ADA). If the suit is submitted against the silence of the administrative authority that should have rendered a non-appealable act, the suit can be submitted after the lapse of two consecutive time periods. The first time period is 60 days as of the day of the submission of the administrative appeal to the appellate authority, or, if the suit is submitted against a first instance non-appealable administrative act, then it is the time period for issuance of the resolution prescribed by GAPA (supra 2.8.). After this time period lapses, the party has to submit another, so called 'hurrying notice', requesting once again the administrative authority to render a resolution. When seven days lapse as of the day of submission of this subsequent request, a party may submit the suit to the court (art. 19 ADA).

These time limits do not prevent party's access to the court in the sense that they allow appropriate preparation of the case. On the other side, given the conditionality between administrative appeal and the suit, time limits for filing an administrative appeal could preclude party's access to the court if they are too short. While this is not the case with the general time limit under GAPA, there are those prescribed by a special law which might be troublesome (supra 2.8.).

Finally, administrative appeal and the suit have one similar function. While administrative appeal makes the practice of first instance authorities more constant and equal, the suit does the same to the practice of both first instance and appellate authorities. Probably even more so, given that there is only one Administrative Court.

#### **4. Concluding remarks**

In the end, based on what has been said, it must be concluded that the administrative appeal is the most comprehensive administrative legal remedy. First, this is the only legal (administrative or judicial) remedy that allows control of opportunity (merits, usage of discretionary powers) of administrative acts. All other remedies

can be used for challenging only legality thereof. Second, by administrative appeal, an administrative act can be challenged for any alleged illegality (unlawfulness), including incompetence for its issuance, procedural mistakes, breach of substantial law or mistakes in determination of the facts or in drawing conclusions on the facts of the case<sup>34</sup>. Extraordinary legal remedies can be invoked only for certain (more serious) illegalities. Third, administrative appeal enables first instance authority to conduct self-control (work of the first instance authority on administrative appeal). Fourth, it contains additional, procedural appeal, safeguarding appellants' right to appeal, in a case of dismissal of initial, substantive appeal by the first instance authority. Fifth, appellate authority has both cassation and merits authorizations (Marković, 2002, p. 475). This is to say that appellate authority can both annul administrative acts if it finds them to be irregular (illegal and/or not opportune) and change them. It has completely the same powers as the authority that rendered the appealed administrative act, i.e. it can subrogate itself into its position. Sixth, submission of administrative appeal also enables appellate authority to declare an administrative act to be null and void. Finally, exhaustion of administrative appeal is a prerequisite for initiation of judicial review of administrative acts. Besides conditionality, there are other legal ties connecting administrative appeal and the suit to the Administrative Court.

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<sup>34</sup>The same goes for the suit to the Administrative Court. It can be used for challenging any alleged illegality, but, on the other hand, opportunity of the administrative acts cannot be challenged by the suit.

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