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LEGAL ISSUES CONCERNING JUDICIAL CONTROL OF THE LEGALITY OF NORMATIVE ADMINISTRATIVE ACTS

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Annotation. *The Article analyses constitutional preconditions which secure the legitimacy of administrative normative acts, concept of administrative normative act in jurisprudence of administrative courts and procedural problematic aspects in review of legality of normative administrative acts. The article summarizes jurisprudence of the Supreme administrative court of Lithuania, which forms the notion of an administrative act. Court practice on this issue is very important, because the procedure of judicial review of normative administrative acts is specific because the right to file a petition for the review of administrative normative acts is provided only to an expressly defined group of subjects. The Law on Administrative Proceedings provides only notions of normative and individual legal acts; however, administrative law doctrine together with normative and individual legal acts lays down one more type of administrative acts – composite administrative acts. These are the acts, which contain both legal norms and individual orders. This formalisation of the concept of the normative administrative act by law, which does not in all cases correspond to the tendencies of development of legal doctrine, prevents flexible judicial interpretation of the notion of normative administrative acts. The object of review of legality of a normative administrative act is not an individual dispute arising from specific substantial administrative legal relation*

but normative legal acts adopted by institutions of the executive. Administrative court, while deciding a case concerning the legality of normative administrative act, does not resolve administrative dispute concerning the infringed rights of a specific interested person but verifies the compliance of a contested normative administrative act (or parts thereof) with legal acts of superior power. Therefore, the nature of the dispute concerning the examination of legality of such normative administrative acts, in author's opinion, requires special rules for such proceedings. However, the procedure of this category of administrative cases is conducted according to the common procedural norms which regulate resolution of administrative disputes concerning rights infringed or interests secured by the law.

Keywords: administrative procedure law, administrative justice, administrative proceedings, normative administrative act.

Introduction

Relevance of the Topic. The Constitutional Court has noted many a time that the principle of the state under the rule of law conferred in the Constitution presupposes the hierarchy of legal acts. It prohibits establishing of legal regulation by legal acts of lower power that compete with the one established by the acts of superior legal power, *inter alia* by the Constitution itself¹. This principle is closely related to the constitutional principle of the superiority of the law over the sub-statutory legislation. The latter principle is ensured only if the norms of the law, which are implemented by a sub-statutory act do not compete by their power with the norms of the law since sub-statutory legal acts should not replace the law itself and create new legal norms of general character².

One of the links in safeguarding the hierarchical legal system is the Constitutional Court. The Court decides whether the law or other acts of Seimas (the Parliament) are not in conflict with the Constitution and whether the acts of the President of the Republic and the Government are not in conflict with the Constitution or the laws (Paragraph 1 of Article 102 of the Constitution). However, legal acts, which are enacted by other institutions of the executive or municipalities, are outside of the constitutional justice limits.

In its decision of 20 September 2005, the Constitutional Court has stated that such legal situations are impermissible where it would not be possible to verify in a court whether legal acts (parts thereof), *inter alia* legal acts issued by ministers, other legal acts of lower power, as well as legal acts issued by municipalities, whose control as re-

1 Constitutional Court of the Republic of Lithuania, 17 June 1997, Ruling No. 58-135. *Official Gazette*, 1997. Constitutional Court of the Republic of Lithuania, 29 October 2003, Ruling No. 103-4611. *Official Gazette*, 2003.

2 Constitutional Court of the Republic of Lithuania, 3 December 1997, Ruling No. 112-2849. *Official Gazette*, 1997.

gards their compliance with the Constitution does not fall within the jurisdiction of the Constitutional Court, are not in conflict with the Constitution and laws³.

Until the system of administrative courts was established, the judicial control of legality of normative legal acts, which are not attributed to the competence of the Constitutional Court, was very limited and ineffective. A court, while hearing a case under civil procedure and having established that a normative administrative act is in conflict with a law or an act of the Government, was under the obligation not to follow it and to inform by separate order the institution or the public official that pursuant to the law has control over the activity of the institution or the public official, which adopted the act in question⁴. A normative administrative act that the court has declared unlawful could not be applied *ad hoc* only in certain case, however, the administrative act in question was not eliminated from the legal system and could have been applied to other subjects of legal relations. The power of the court, as regards the review of legality of normative legal acts, not attributed to the competence of the Constitutional Court, basically equalled to the power of the State Council, which operated in the interwar Lithuania⁵.

Having reformed the system of administrative justice in Lithuania, judicial control of legality of normative administrative acts was attributed to the competence of administrative courts. Thus creation of the hierarchical system of the judicial control of legality of normative legal acts was completed.

The control of the legality of normative administrative acts, which were adopted by the territorial authorities of public administration, is attributed to the competence of regional administrative courts. Appeals of the adopted decisions may be lodged with the Supreme Administrative Court of Lithuania. The Supreme Administrative Court of Lithuania is the single and the last instance for the cases relating to normative administrative acts adopted by the central entities of public administration.

Procedural issues concerning petitions for reviewing of the legality of normative administrative acts are not thoroughly analyzed in the jurisprudence of Lithuania. Certain aspects of the procedure of these cases have been discussed by V. Valančius⁶, J. Pau-

3 Constitutional Court of the Republic of Lithuania, 20 September 2005, Decision No. 113-41-32. *Official Gazette*, 2005.

4 Code of Civil Procedure of the Republic of Lithuania, Item 5 of Article 11, valid until 1 January 2003 (the wording of the law of 8 November 1994 No. I-636. *Official Gazette*, 1994, No. 93-1809): “The court having established that legal act that is not attributed to the competence of the Constitutional Court is in conflict with the law or other act of the Seimas of the Republic of Lithuania, act of the President of the Republic or act of the Government of Lithuania shall not follow it. The court shall notify an institution or official, which pursuant to laws controls activity of institution or official that adopted the act, about this act by enacting a separate order”.

5 Maksimaitis, M. *Valstybės taryba Lietuvos teisinėje sistemoje (1928-1940)*. Vilnius: Justitia, 2006, p. 158; Römeris, M. *Valstybės Taryba. Teisė*, 1929, 16: 23–37. Article 3 of the Law on the State Council provided that the Council having noticed non-conformity of orders, rules and instructions adopted by institutions of the executive with the laws in force, should notify the Cabinet of Ministers or certain minister. The State Council having established the issue of unlawfulness of administrative act was not entitled to annul it. The Cabinet of Ministers or the minister was entitled to regard or disregard the opinion of the Council.

6 Valančius, V. Kai kurie bendrosios kompetencijos, konstitucinių ir administracinių teismų santykio aspektai. *Jurisprudencija*. 2004, 51(43): 70–79.

žaitė-Kulvinskienė⁷, D. Raižys⁸. However, both the research on practical issues arising in the cases concerning judicial review of the legality of normative administrative acts and the research on issues concerning legal regulation of the procedure in these cases were not properly done.

The Object of the Research. The review of the legality of a normative administrative act in administrative court and the legislation regulating the proceedings concerning the review of the legality of normative administrative acts in administrative courts.

The Objective of the Research. To reveal the notion of the subject matter of petitions for review of the legality (of normative administrative act) in the jurisprudence of the Supreme Administrative Court of Lithuania, to evaluate whether legal regulation of the procedure in the cases concerning the review of the legality of normative administrative act ensures effective judicial control over normative administrative acts.

Methodology of the Research. In the course of reaching the objective of the research both theoretical and empirical methods of the scientific research were employed, i.e. methods of comparative, systemic analysis, analytical-critical, linguistic, also methods of documentary analysis and generalization were used.

1. The Concept of a Normative Administrative Act in the Jurisprudence of the Supreme Administrative Court of Lithuania

The Supreme Administrative Court of Lithuania has stated that the object of the hearing pursuant to the Section 16 “Petitions for Review of Legality of Regulatory Administrative Acts” of the Law on Administrative Proceedings⁹ (hereinafter LAP) may be only a normative administrative act (or a part thereof).

The legislation of Lithuania distinguishes two types of administrative acts – normative and individual¹⁰.

Public administration, interpreting it as a factual mechanism of regulation of administrative legal relations, is a procedure where two levels may be distinguished: normative and individual¹¹.

7 Paužaitė-Kulvinskienė, J. *Administracinė justicija: teorija ir praktika*. Vilnius: Justitia, 2005, p. 211–222.

8 Raižys, D. *Procesas pirmosios instancijos administraciniame teisme*. Daktaro disertacija. Vilnius: Mykolas Romeris universitetas, 2008, p. 74–94.

9 Law on Administrative Proceedings of the Republic of Lithuania. *Official Gazette*. 1999, No. 13-308.

10 Supreme Administrative Court of Lithuania, 4 May 2001, Ruling in administrative case No. 111-3-01/2001. *Administrative Courts Practice*. 2001, No. 1, p. 28–31.

11 Law on Public Administration of the Republic of Lithuania. *Official Gazette*. 1999, No. 60-1945. Item 9 of Article 3 provides: Individual administrative act means in most cases an act of single application of law directed to a specific person or a definite group of persons. Item 10 of this Article sets that administrative regulatory enactment means a legal act establishing the rules of conduct and intended for an individual indefinite group of persons. Item 14 of Article 2 of Law on Public Administration defines an individual act as a single act of law application, intended for a particular entity or a group of entities characterized by individual features. Item 13 of Article 2 of the Law on Public Administration defines normative administrative legal act - a law, administrative or any other legal act which establishes the rules of conduct for group of entities, not characterized by individual features.

The normative level is an administrative regulation as one of the spheres of public administration (Item 1 of Article 5 of the Law on Public Administration¹²). The result of the activity in the sphere of this public administration is, precisely, the adoption of normative administrative legal acts that are applied to the group of persons not defined by individual features and concerns in unlimited number of typical situations. Normative acts of public administration are adopted in order to regulate uniform social relations and have no particular (personalized) addressee, i.e. these acts concern indefinite group of subjects¹³.

Public administration transforms from normative level to individual level when an individual act, which is based on the setting of particular facts laid in norms of positive law, is adopted¹⁴. The following characteristics are incidental to individual administrative acts: individual administrative acts solve cases and issues of individual nature; they are addressed to particular natural or legal persons; they serve as juridical facts that constitute the basis for administrative legal relations to emerge, change and end¹⁵.

The doctrine of French administrative law classifies administrative acts in the same manner too. It distinguishes normative acts (*l'acte réglementaire*); these are the acts of general nature that set rules applied to indefinite group of individuals and situations; and individual acts (*l'acte individuel*) – applied to one or several specifically named individuals¹⁶. However, German administrative law does not divide administrative acts into normative and individual. Article 35 of the Law on Procedure of Administrative Courts (*Verwaltungsverfahrensgesetz*) describes an administrative act as a certain measure that is applied by administrative organ in order to regulate a particular case. It should be noted that the legal doctrine, aside from normative and individual acts, distinguishes one more type of administrative acts – composite administrative acts. These are the acts, which contain both legal norms and individual orders¹⁷.

Semantic analysis of the structure of the notion of normative administrative legal act, as it is established in the legislation of the Republic of Lithuania, reveals three basic features of normative administrative acts. The sum of these features identifies a legal act as a normative administrative act:

1) The act is adopted by a subject of public administration while it performs administrative functions;

12 The Law on Public Administration defines administrative regulation as the adoption of statutes, rules, regulations and other legal acts for the purpose of implementation of laws.

13 Bakaveckas, A.; Dziegoraitis, A.; Dziegoraitienė, A. ir kt. *Lietuvos administracinė teisė. Bendroji dalis*. Vilnius: Mykolo Romerio universitetas, 2005, p. 497.

14 Law on Public Administration. Item 1 of Article 8 of the sets that individual administrative act shall be based on objective findings (facts) and legal norms.

15 Bakaveckas, A.; Dziegoraitis, A.; Dziegoraitienė, A., p. 498.

16 Laubadère, A.; Venezia, J.-C.; Gaudement Y. *Traité de droit administratif*. Paris: L.G.D.J., 1996, p. 582–586.

17 Кононов И. П.; Машаров И. М. *Административно-правовые акты: понятие, основные черты, классификация, проблемы нормативного регулирования. Административное право и административный процесс актуальные проблемы*. [Kononov I. P.; Masharov I. M. Administrative legal acts: the concept, main features, classification, problems of normative regulation. Administrative law and administrative procedure – current problems]. Москва: Юристъ, 2004, с.152–165.

- 2) The act sets rules of conduct;
- 3) The act concerns group of subjects not characterised by individual features.

While forming the doctrine of the concept of a normative administrative act, the jurisprudence of the Supreme Administrative Court of Lithuania is particularly orientated towards interpreting the meaning of the aforementioned features.

The first feature defines the group of law-making entities which are entitled to adopt normative administrative acts and are described by two aspects: institutional (entity of public administration), which indicates its place in governmental system, and functional (performing functions of administration).

The position of the Supreme Administrative Court of Lithuania concerning the entity, which adopted a normative administrative act, is clear and homologous: “an essential condition to declare a legal act as a normative administrative act – it must be adopted by a subject of administration”¹⁸ and shall be only adopted while implementing public administration¹⁹.

The other feature of a normative administrative act is its normative nature, i.e. it establishes a rule of conduct (rights and duties) applied to participants of particular social relation²⁰. It is acknowledged in the jurisprudence of the Constitutional Court that normative sub-statutory legal acts are the acts that provide compulsory rules of general nature. It is not the particular verbal form of the rule that matters but the fact that pursuant to the content of the text it is clear beyond doubt that it discusses the order intended for a certain subject in particular circumstances to act in appropriate manner²¹.

The Supreme Administrative Court of Lithuania in one of the cases has stated that normative legal acts, as recognized in the legal doctrine, are decisions of law-making entities, expressed in a written form (official written documents), that embody legal norms. They contain orders of general nature intended for particular participants of social relation that are oriented towards the future and are supposed to be applied many a time. These acts are addressed to an indefinite group of individuals or a group of individuals defined by specific features. They are always abstract and connect social relations that bear resemblance by their typical specific features. Moreover, they are still valid after they were implemented in individual relations or applied to behaviour of particular individuals. Attribution of legal acts to the group of normative administrative acts describes the extent of their application and obligation (normative legal acts are of compulsory nature)²².

However, the Supreme Administrative Court of Lithuania in some cases, while defining the concept of a normative administrative act, accentuates not the normative

18 Supreme Administrative Court of Lithuania, 24 September 2004, Ruling in administrative case No. A²-736/2002. *Administrative Courts Practice*. 2003, 3: 71–75.

19 Supreme Administrative Court of Lithuania, 19 February 2007, Decision in administrative case No. I(1)-1/2007. *Official Gazette*. 2007, No. 24-923.

20 Vaišvila, A. *Teisės teorija*. Vilnius: Justitia, 2000, p. 196.

21 Sinkevičius, V. Poįstatyminis teisės aktas Konstitucinio Teismo nutarimuose. *Jurisprudencija*. 2003, 46(38): 56–67.

22 Supreme Administrative Court of Lithuania, 24 March 2003, Decision in administrative case No. A⁵-63-03. *Administrative Courts Practice*. Vilnius, 2004, No. 4, p. 350–364.

nature but identifies the normative administrative act pursuant to the formula: if an act possesses features of an individual act (it must be applied only once or is intended for particular subject or the group of subjects defined by individual features), then it is not acknowledged as a normative act even if it forms rules of conduct.

In one of the cases the Supreme Administrative Court of Lithuania, having established that the administrative act is of onetime application, did not examine whether it is compatible with the laws²³. However, in this case the normative nature of administrative acts, which were reviewed, in our opinion, does not raise any doubts. The provisions of legal acts under examination that entitled revision and reduction of remuneration of officials 2,5 times are clearly formed rules of conduct (rights and duties) applied to participants of official legal relations. The statement of the court concerning the nature of onetime application of these legal acts is also under question because the revision of remuneration in this case is a continuous process. An administrative act should be acknowledged as an individual one if its application is directly orientated towards certain individual or group of individuals defined by special features in order to create, change or annul particular administrative legal relation. In other words, this act constitutes the basis for a particular administrative legal relation to emerge, change or end.

The second criterion whereby legal act is attributed to the category of a normative administrative act in the jurisprudence of the Supreme Administrative Court of Lithuania is its application to the group of individuals defined by special features.

Linguistic interpretation of the notion “individual features” means characteristics typical to individual (individual person)²⁴. These are the features which enable us to identify a person, i.e. which are attributed only to this person. A natural person is identified by its name, surname, code, etc., whereas a legal person – by its name²⁵.

This is the correct interpretation of notion “individual features” used in the legislation and widely applied in the jurisprudence of the Supreme Administrative Court of

23 Supreme Administrative Court of Lithuania, 12 July 2001, Decision in administrative case No. I³-6/2001. *Administrative Courts Practice*. Vilnius, 2001, No. 2. p. 26-32. In this case the Court reviewed the legality of Items 2 and 3 of Order No. 621, which was adopted by the Police Department under the Ministry of Interior on 16 October 1998. The contested items provided that it is permissible to reduce and review the remuneration of officials, which was increased 2,5 times. Also Items 1 and 2 of the Order No. 8 of 12 January 1999, issued by the Police Department under the Ministry of Interior were under consideration. The latter established that it is permissible not to pay and to reduce the remuneration of officials increased 2,5 times. The court stated that both acts are intended for implementation of financial indexes of state budget allocations for years 1998 and 1999. They (the items pointed out by the court) contained orders intended for heads of subordinate institutions in order to perform onetime application activities; or these acts provided for a concrete decision of the Police Department under the Ministry of Interior, administrator of financial allocations, concerning the distribution of funds for years 1998 and 1999. These orders, pointed out by the court in the items, did not contain rules of conduct; both orders were single acts of law application. Therefore, the review of their legality is not possible pursuant to the course of proceedings for the review of legality of normative administrative acts provided by Section 16 of the Law on Administrative Proceedings. The legality of these acts may be contested according to general rules for the challenge of legal acts of individual nature established in the Law on Administrative Proceedings.

24 *Dabartinės lietuvių kalbos žodynas*. Vilnius: Mokslo ir enciklopedijų leidykla, 1993, p. 212.

25 Article 2.39 of the Civil Code establishes that a legal person shall have its name whereby it was possible to distinguish it from other legal persons. *Official Gazette*. 2000, No. 74-2262.

Lithuania. The court notes that the notion “individual features” must be interpreted as features belonging to individual person²⁶. Moreover, the Supreme Administrative Court of Lithuania in one of the cases has stated that if a legal act does not point out particular (individual) subjects, then it should be admitted that the legal act is intended for indefinite group of individuals²⁷.

However, presently the jurisprudence is not coherent. For example, the Supreme Administrative Court of Lithuania, while assessing the nature of contested act, has recognized the judges of district courts as a group of individuals characterised by special features²⁸.

This jurisprudence, in our opinion, should be revised. If normative administrative act sets the rules of conduct for the group of individuals defined by specific features, it does not lose its normative nature. Therefore, an administrative act, which sets the rules of conduct, cannot be taken as an individual one judging only by the aforementioned feature. However, in some cases the Supreme Administrative Court of Lithuania departs from this jurisprudence. For example, in one of the cases the court stated that an official written document containing orders of general nature addressed to an indefinite group of subjects or to subjects described only by specific features, usually intended not for a onetime application but establishing a rule of repeated conduct, is usually recognized as a normative administrative act²⁹.

Having reviewed the jurisprudence of the Supreme Administrative Court of Lithuania concerning the review of legality of normative administrative acts, it may be concluded that the the jurisprudence of administrative courts fails to provide a thorough and detailed concept of a normative administrative legal. This situation is partly caused by the polyfunctional nature of activities performed by the institutions of the executive and the municipalities. This nature determines the variety of legal acts adopted in the process of public administration. Consequently, it is difficult to squeeze these various acts into the frame of the concept and classification of normative and individual acts provided by the law.

2. Procedure of Judicial Review of Legality of Normative Administrative Acts

Paragraph 1 of Article 114 of the Law on Administrative Proceedings provides that cases concerning the legality of normative administrative acts are heard according to the general rules set by the Law on Administrative Proceedings. However, considering the

26 Supreme Administrative Court of Lithuania, 25 April 2001, Decision in administrative case No. I-5/2001. *Official Gazette*. 2001, No. 38-1319.

27 Supreme Administrative Court of Lithuania, 15 September 2006, Ruling in administrative case No. A-16-1036/2006. *Official Gazette*. 2006, No. 99-3850.

28 Supreme Administrative Court of Lithuania, 4 March 2002, Ruling in administrative case No. 14-10/2002. *Administrative Courts Practice*. 2003, 3: 26–29.

29 Supreme Administrative Court of Lithuania, 28 October 2004, Decision in administrative case No. I (1)-08/04. *Official Gazette*. 2004, No. 160-5858.

distinctiveness of cases attributed to the category in question, direct application of all procedural rules is not possible since general procedural rules for hearing cases are not prescribed in order to decide disputes concerning a right infringed or an interest secured by law. Moreover, the nature of proceedings for examining petitions concerning the legality of normative administrative acts is completely different.

The object of the hearing of administrative case concerning the legality of normative administrative act is not the individual dispute arising from a particular substantial administrative legal relation but the normative legal acts adopted by institutions of the executive. An administrative court while hearing a case concerning the legality of a normative administrative act does not decide over an administrative dispute concerning an infringed right of a particular interested person but only reviews the conformity of the contested administrative act (or a part thereof) to a legal act of superior power.

In French administrative legal doctrine disputes are divided according to their nature into objective disputes (*contentieux objectif*) and subjective disputes (*contentieux subjectif*). During hearings objective disputes the legality of an act is only decided in the view of the objective law, i.e. whether the act is in conformity with the constitution, laws and international treaties and norms that are adopted by various institutions of the executive. Whereas in deciding the subjective disputes subjective rights of an individual as of a subject of legal relations are evaluated³⁰.

Any dispute concerning a law must have the following compulsory features: 1) substantial legal relation between the parties of dispute should be probable; 2) one or two parties must not perform legal duties arising from disputed legal relation, 3) it must be decided by the competent body in the course set by the law³¹.

Hearing the cases concerning the legality of normative administrative legal acts, the dispute is also decided in an objective manner. Even though only the conformity of the contested act with the legal acts of superior power is assessed, the institution, which adopted the act under scrutiny, is entitled to provide its arguments concerning the legality of normative administrative act and to challenge the filed petition. Moreover, cases of this category may be decided on the issues of facts too. This happens in cases when the court, while deciding for the legality of normative administrative act, must review the procedure of its preparation, adoption and publishing. Procedure of proving factual circumstances is an obvious expression of contention principle in the proceedings in cases of this category.

The nature of disputes concerning the legality of normative administrative acts presupposes the necessity of specific procedural rules in these cases. However, the laconic special rules and the regulation of the procedure pursuant to the general procedural rules of hearing cases, provided by Section 16 of the Law on Administrative Proceedings and intended for deciding disputes concerning a right infringed or an interest secured by

30 Chapus, R. *Droit du contentieux administratif*. Paris: Montchrestien, 2004, p. 198–199.

31 Жеруолис, И. А. К вопросу о сущности исковой формы советского гражданского процесса. [Zeruolis J. A. On the question of the essence of the contentious form of soviet civil procedure]. *Правоведение*. 1966, № 4, с. 60–68.

the law, presumes certain procedural issues, which will be discussed more thoroughly below.

Section 16 of the Law on Administrative Proceedings provides for two forms of normative control: incidental and principal (abstract)³².

Incidental form of review of normative administrative acts is related to a particular case being decided in administrative court or court of general jurisdiction. Article 112 of the Law on Administrative Proceedings provides for the right of the court of general jurisdiction or specialized court to suspend the case and apply to administrative court with an application for reviewing whether particular normative administrative act (or part thereof) which is applied in the case under consideration is in conformity with the law or normative act of the Government. Analogous right of the court of general jurisdiction is established in Paragraph 4 of Article 3 of the Code of Civil Procedure³³.

Members of Seimas, the Seimas Ombudsmen, inspectors for the protection of children rights, officials of National Audit, Governors Administration, courts of general jurisdictions and courts of special jurisdiction, prosecutors and representatives of the Government in the case of principal or abstract review of normative administrative acts are entitled to apply to administrative court with a petition for reviewing the conformity of normative administrative acts (Paragraphs 1 and 2 of Article 110 of the Law on Administrative Proceedings).

However, Paragraph 1 of Article 110 of the Law on Administrative Proceedings establishes the courts as subjects performing abstract review for normative administrative acts without any basis. Recognition of the courts (including administrative courts) as the subjects of abstract review for normative administrative acts conflicts with the principle of disposition, which means that the case may be brought only upon the initiative of the interested person. The court is not permitted to bring the case on its own initiative. M. Riomeris has noted while analysing forms of judicial review of legality of the executive that “<...> the issue concerning legality and illegality of governmental act may be raised by the court (judge or panel of judges) which hears the case itself. Obviously, the court may raise this not in abstract but only in relation with one of the issues decided in the case under consideration when, in one way or another, a matter occurs to make a legal conclusion from this governmental act or apply an imperative of this act”³⁴.

Paragraph 1 of Article 110 of the Law on Administrative Proceedings provides the list of subjects that are entitled to apply to administrative court with an application for

32 Paužaitė-Kulvinskienė, J. *Administracinė justicija: teorija ir praktika*. Vilnius: Justitia, 2005, p. 217.

33 Item 4 of Article 3 of the Code of Civil Procedure: Having established that a legal normative act or a part thereof, whose control of the conformity with the Constitution and laws is not attributed to the competence of the Constitutional Court, is in conflict with the law of legal normative act of the Government, the court while adopting a decision shall not follow this act. The court of general jurisdiction is entitled to suspend the case hearing and apply to administrative court with the ruling asking to review if certain legal normative act or part thereof is in conformity with the law of legal normative act of the Government. Having received effective decision of administrative court, the court renews the case hearing. The normative administrative act (or a part thereof) is considered to be annulled and usually cannot be applied from the day the effective decision of the court concerning the declaration of normative administrative act (or part thereof) as illegal was published.

34 Römeris, M. *Konstitucinės ir teismo teisės pasieniuose*. Vilnius: Pozicija, 1994, p. 42.

review of legality of normative administrative act. This list is not exhaustive because the right to apply to court may be established in a special law too. For example, the Competition Council is entitled to apply to a regional court in order to initiate the annulment of a normative administrative act adopted by an institution of a municipality (Item 4 of Paragraph 1 of Article 19 of the Law on Competition)³⁵. These cases are heard in accordance with Section 16 of the Law on Administrative Proceedings³⁶.

In case of principal (abstract) control, the form of the application to administrative court for review is a petition, in case of incidental control – a ruling. First of all, the Law on Administrative Proceedings does not establish the requirements for the petition because such form of application to an administrative court is not provided by Item 20 of Article 2 of the Law on Administrative Proceedings³⁷.

A complaint (petition) is the form of realisation of defence for a subjective infringed right of an individual, which must match the requirements set by Articles 23 and 24 of the Law on Administrative Proceedings.

The content of a petition concerning the legality of a normative administrative act, as well as the content of complaint (petition) consists of two elements – the subject matter and the grounding. The subject matter is always the application to review whether the contested normative administrative act (or a part thereof) is compatible with the law or normative act of the Government. The grounding of a petition to review the legality of normative administrative acts consists of not only factual circumstances but also includes legal arguments according to which the applicant raises doubts concerning the legality of the normative administrative act in question. The requirement to include legal arguments is reiterated in Paragraph 2 of Article 111 of the Law on Administrative Proceedings. This provision sets the requirements for the application for review of legality of a normative administrative act, which was lodged in individual administrative case.

The content of the petition must be in conformity with the requirements applicable to a ruling concerning the application for review of legality of normative administrative acts, adopted by a court of general jurisdiction or a court of special jurisdiction, as established by Article 113 of the Law on Administrative Proceedings³⁸.

35 Law on Competition of the Republic of Lithuania. *Official Gazette*. 1999, No. 30-856. Item 4 of Article 19 of the Law on Competition provides: “The Competition Council shall examine the conformity of legal acts or other decisions adopted by public and local authorities with the requirements of Article 4 of this Law, and, where there is sufficient cause, apply to public and local authorities with the request to amend or revoke legal acts or other decisions restricting competition. In case of failure to satisfy the requirement the Council shall have the right to appeal against such decisions, except for the statutory acts issued by the Government of the Republic of Lithuania, to the Supreme Administrative Court of Lithuania, and appeal the decisions of the local authorities to the regional administrative court”.

36 Supreme Administrative Court of Lithuania, 18 September 2001, Ruling in administrative case No. 1(6)-12/2001. *Administrative Courts Practice*. 2002, 2: 48–54.

37 Item 20 of Article 2 of the Law on Administrative Proceedings provides that a complaint(petition) means the form of appeal to the empowered institution requesting the resolution of an administrative dispute.

38 Article 113 of Law on Administrative Proceedings. “The Contents of the Ruling Adopted by the Court of General Jurisdiction or Court of Special Jurisdiction. 1. In the cases specified in Article 112 of this Law the following must be indicated in the ruling adopted by the court of general jurisdiction or court of special jurisdiction: 1) time and venue of adopting of the ruling; 2) the name and address of the court which adopted the ruling; 3) the composition of the court which adopted the ruling, the participants in the proceedings; 4)

In case of absence of requirements for applications for review of legality of normative administrative act, the right of the court to require the applicant to eliminate the shortcomings of the petition may be challenged. The right may be contested if there are no legal arguments, which substantiate the declaration of normative administrative act illegal, and/or the claim of the petition is not formulated or is formulated incorrectly.

Therefore, the Law on Administrative Proceedings should establish requirements of the form and the content of petitions for review of legality of normative administrative acts.

Article 113 of the Law on Administrative Proceedings establishes requirements of the form and the content applied to the ruling for review of legality of normative administrative act adopted by courts of general jurisdiction or courts of special jurisdiction. However, this does not ensure that the ruling is always compatible with the requirements set by the law in a particular case. Non-conformity of the content of the ruling with the requirements set by the law, in our opinion, is an obstacle to hear the case (possible flaws of the ruling are: missing legal arguments forming the basis for the doubt in normative administrative legal act under consideration; missing or incomplete identification of laws or legal acts of the Government whose non-conformity is asked to be reviewed indicated in the application and so on). However, the Law on Administrative Proceedings does not establish how an administrative court should act while deciding on the issue of initiating the case if the application for review of legality of normative administrative act submitted by a court of general jurisdiction or a court of special jurisdiction is not in conformity with the requirements set by the law.

In order to fill the abovementioned gaps of the Law on Administrative Proceedings it must be supplemented with the norm, which would entitle the administrative court to return the application for review of legality of normative administrative act to the applicant if the application or its annexes are not in conformity with the requirements set by the law. This norm should also establish that a return of application does not eliminate the right to apply to administrative court in a common manner when the shortcomings of the application are eliminated.

However, not only a failure to follow the requirements of the form or the content of the application may constitute an obstacle to hear a case concerning the review of legality of normative administrative act in the administrative court.

There may be other cases when a petition for review of legality of normative administrative act cannot be considered on the merits, i.e. under certain circumstances the application is refused or, if the petition is received, the case is terminated. Although the

the merits of the case and the legal acts on which the parties to the proceedings base their claims or rebuttals; 5) information about the contested act: who passed it, date of passing, full title of the act; 6) legal arguments on which the claimant court bases its doubt about the legality of the contested act (a part thereof); 7) petition by the claimant court and to which administrative court it is addressed. 2. The following shall be attached to the court ruling: 1) the case, proceedings on which have been suspended in the court of general jurisdiction or court of special jurisdiction; 2) full transcript (copy) of the text of the contested act; 3) a copy of the law or Government regulation which the contested act conflicts with; 4) a copy of the court ruling for inclusion in the documentation of the administrative court.”

Law on Administrative Proceedings does not establish such cases, the jurisprudence of the Supreme Administrative Court of Lithuania establishes that the following circumstances are recognized as the grounds for refusal to receive the petition or grounds of termination of the case:

1) When a subject who applies to the court is not entitled to apply to administrative court concerning the review of normative administrative act³⁹;

2) When the court has established that the legal act which is to be reviewed is not a normative administrative act⁴⁰;

3) When normative administrative act which is to be reviewed is not valid because it was not published in the manner set by the laws⁴¹;

4) When contested normative administrative act is annulled⁴².

These cases will be discussed in a more thorough manner below.

The laws provide for exhaustive list of state institutions and officials that are entitled to apply to administrative court with the petition for review of legality of a normative administrative act. Therefore, the right to apply to administrative court concerning the legality of a normative administrative act is not universal. As a result, a case instituted by a subject that is not entitled to initiate the review of legality of a normative administrative act should not be heard on the merits. However, the Law on Administrative Proceedings must provide for a normative ground in the light of which the administrative court would be entitled to refuse to receive this petition.

The broadening of the right to apply to administrative court with an application for review of legality of normative administrative act is arguable. On 4 July 2007, the Seimas with its Resolution No. X-1264 approved “The Concept of Establishment of Institute of Individual Constitutional Complaint”⁴³, which defines the model of the institute of individual constitutional complaint. Having implemented this concept, the individual right to apply to the Constitutional Court directly would be established in cases where a law or other act (or a part thereof) of the Seimas, the President of the Republic or the Government, which was a basis for the court to adopt a decision, infringes constitution-

39 Supreme Administrative Court of Lithuania, November 2003, Ruling administrative case No. A⁴-1131-2003. In this case the court has stated that the claim of the applicant is directly related with the legality of General plan of Kaunas city (normative act) and emerges from it. Therefore, the court stated that this claim does not fall into the sphere of regulation provided by Article 111 of the Law on Administrative Proceedings. The court of first instance should have regarded the impossibility to receive this complaint at the stage of acceptance and had to refuse to receive it and, if new circumstances emerge while hearing the case on the merits – terminate it pursuant to special norms of LAP.

40 Supreme Administrative Court of Lithuania, 4 May 2001, Ruling in administrative case No. A⁴-111-3-01/2001. *Administrative Courts Practice*. 2001, 1: 28–31. Supreme Administrative Court of Lithuania, 19 September 2001, Ruling in administrative case No. 1(10)-16/2001. *Administrative Courts Practice*. 2002, 2: 54–56.

41 Supreme Administrative Court of Lithuania, 10 January 2002, Ruling in administrative case No. I-6-9/2002. *Administrative Courts Practice*. 2003, 3: 7–12.

42 Supreme Administrative Court of Lithuania, 28 September 2001, Ruling in administrative case No. 1(4)-13/2001. *Administrative Courts Practice*. 2002, 2: 64-72. Supreme Administrative Court of Lithuania, 11 May 2006, Ruling in administrative case No. I-1-1/2006. *Administrative Courts Practice*. , 2006, 9: 13–25.

43 Resolution of the Seimas of the Republic of Lithuania of 4 July 2007 “On Approval of the Concept of Establishing an Institute of Individual Constitutional Complaint”. *Official Gazette*. 2007, No. 77-3061.

nal rights and freedoms of individual. As mentioned above, proceedings of review of normative administrative acts together with constitutional justice comprise a uniform system of judicial review in hierarchical legal systems. Therefore, a possibility to apply to administrative court directly as regards legality of a normative administrative act is also unavoidably under consideration.

Administrative jurisprudence in cases where it is established that the normative administrative act, which was asked to be reviewed, is not valid because it was not published in the manner set by the law, is not coherent. Earlier, administrative courts were hearing these cases on the merits; the conformity of the normative administrative act with the laws, which regulate the course of publication of normative administrative acts and their coming into effect, was examined and then a decision was adopted⁴⁴.

Later, a precedent was formed in the jurisprudence of the Supreme Administrative Court, providing that in the cases where it is established that a normative administrative act is not published in the manner set by the law, the case concerning the review of legality of the legal act in question must be terminated⁴⁵.

In our opinion, this practice is correct.

Only legal norms that have come into effect have an impact on social relations regulated, i.e. the rules provided by the legal norm should be followed and applied since the norm comes into effect. An ineffective legal norm (because it has not been published) is not a part of hierarchical legal system because full procedures of law-making are not completed if a legal act is not published in the manner set by the law⁴⁶. When the administrative court is applied to with a request to review legality of a normative administrative act that has not been published, this case cannot be heard in the court because there is no object of the case hearing.

However, there may be another situation related to the invalidity of the contested normative administrative act, i.e. when the legal act in question has been published but still has not entered into force. Although there are no such precedents in the jurisprudence of the Supreme Administrative Court of Lithuania, it is possible to refer to the jurisprudence of the Constitutional Court.

44 Supreme Administrative Court of Lithuania, 25 April 2001, Decision in administrative case No. I-5/2001. *Official Gazette*. 2001, No. 38-1319. The court has stated that rules of conduct established by the Instruction conform to the concept of legal norm by their content, however, this act is not published in "Valstybės Žinios" ("Official Gazette") in a manner set by the law, thus, the normative act is not valid.

45 Supreme Administrative Court of Lithuania, 28 September 2001, Ruling in administrative case No. I-6-9/2002. *Administrative Courts Practice*. Vilnius, 2001, No. 1, p. 64-72. Supreme Administrative Court of Lithuania, 10 January 2002, Ruling in administrative case No. 1(3)-14/2001. *Administrative Courts Practice*. 2003, 3: 7-12. In these cases the court has stated that cases concerning applications to review whether the ineffective normative administrative acts are not in conflict with the laws or normative administrative acts of the Government are not subject to the jurisdiction of administrative courts.

46 Vaišvila, A., p. 228. The author distinguished two main stages of creation of legal norms (law-making) regulated by the law: 1) preparation of an act of legal norms; 2) adoption and publication of an act of legal norms.

The Constitutional Court in its Ruling of 19 September 2002 stated that the Constitutional Court has powers to consider the compliance with the Constitution of laws and other acts (or parts thereof) adopted by the Seimas and officially published, irrespective of the date on which the application of such laws or other acts (or parts thereof) the commences⁴⁷. Therefore, while defining the boundaries of its jurisdiction the Constitutional Court has stated that pursuant to the Constitution it has a power to examine the conformity with the Constitution of laws and other legal acts that have not come into force yet. It is important that these laws and other legal acts are adopted and officially published⁴⁸. Therefore, the administrative courts also should review the legality of normative administrative acts that are ineffective, provided these acts are adopted and officially published.

Another basis for termination of the case is the end of validity of the contested normative administrative act. However, the jurisprudence of the Supreme Administrative Court of Lithuania acknowledges that this is not an absolute ground for termination of a case. The Court has stated many a time that when a contested normative legal act is deprived of its power (effect) the case may be terminated only in case of abstract normative control when the application is not related to the individual case under consideration by the court⁴⁹.

The jurisprudence of the Constitutional Court⁵⁰ contains an analogous provision concerning the termination of proceedings instituted when constitutionality of a legal act is reviewed and the act loses its effect.

47 Constitutional Court of the Republic of Lithuania, 19 September 2002, Ruling No. 93-4000. *Official Gazette*, 2002.

48 Sinkevičius, V. Lietuvos Respublikos Konstitucinio Teismo jurisdikcijos ribos. *Jurisprudencija*, 2002, 30(22): 132–147.

49 Supreme Administrative Court of Lithuania, 28 September 2001, Ruling in administrative court No.1(4)-13/2001. *Administrative Courts Practice*. 2002, 2: 64–72. Supreme Administrative Court of Lithuania, 11 May 2006, Ruling in administrative case No. I-1-1/2006. *Administrative Courts Practice*. 2006, 9: 13–25. In these cases the court has noted that annulment of the contested normative administrative act before a decision in the case is adopted means that in those cases when the administrative court is applied to not by the courts but by other subjects provided by Article 110 of the Law on Administrative Proceedings concerning the legality of a normative administrative act, the case loses its object due to the nullity of the contested normative administrative act. In the cases when administrative court is applied not by the courts but by other subjects established in Article 110 of the Law on Administrative Proceedings concerning the legality of normative administrative act, it is only the review of legality of effective normative administrative acts attributed to administrative courts.

50 Constitutional Court of the Republic of Lithuania, 28 March 2006, Ruling No. 36-1292. *Official Gazette*, 2006. The Constitutional Court stated that in the cases when the Constitutional Court is applied to by courts, when, in the course of administration of justice they have doubts regarding the compliance of legal acts of lower power to legal acts of greater power, *inter alia* (and, first of all) to the Constitution, in accordance with the Law on the Constitutional Court (*inter alia* Paragraph 4 of Article 69 (wording of 11 July 1996)) the Constitutional Court does not have the power to dismiss the instituted legal proceedings (case) and must consider the case, and when the Constitutional Court is applied by other subjects specified in Article 106 of the Constitution, the Constitutional Court may, while taking account of the circumstances of the considered constitutional justice case, either terminate the instituted legal proceedings (case) or not terminate it.

Bearing in mind that functions of administrative court in the sphere of review of legality of normative administrative acts are analogous to constitutional justice, the grounds of the refusal to consider the petition submitted for review of legality of normative administrative act could be formed in an analogous manner with Paragraph 1 of Article 68 of the Law on the Constitutional Court⁵¹.

Conclusions

1. There is no coherent and clear concept of normative administrative legal act in the jurisprudence of the Supreme Administrative Court of Lithuania. Partly, this situation is caused by the polyfunctional nature of activities performed by institutions of the executive power and municipalities. This polyfunctional nature of activity results in variety of legal acts adopted in the process of public administration. As a result it is very difficult to practically categorise them according to features of normative and individual acts, as established by the laws.

2. The Law on Administrative Proceedings should establish requirements of the form and the content of petitions for review of legality of normative administrative acts. In the absence of these requirements the right of the court to require the applicant to eliminate the flaws of the petition may be challenged if the legal arguments that form the basis for declaring the contested normative administrative act illegal are not provided in the petition or if the claim is formed incorrectly.

3. The section of the Law on Administrative Proceedings, which regulates the procedure of consideration of applications for review of legality of normative administrative acts, should provide for the grounds on which the court must either refuse to consider a petition concerning the review of legality of a normative administrative act or terminate the case when these circumstances become known while considering the case on the merits.

51 Paragraph 1 of Article 69 of the Law on the Constitutional Court provides that by a decision, the Constitutional Court shall refuse to consider petitions to investigate the compliance of a legal act with the Constitution, if: 1) the petition was filed by an institution or person who does not have the right to apply to the Constitutional Court; 2) the consideration of the petition does not fall under the jurisdiction of the Constitutional Court; 3) the compliance of the legal act with the Constitution specified in the petition has already been investigated by the Constitutional Court and the ruling on this issue adopted by the Constitutional Court is still in force; 4) the Constitutional Court has already commenced the investigation of a case concerning the same issue; 5) the petition is grounded on non-legal reasoning.

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NORMINIŲ ADMINISTRACINIŲ AKTŲ TEISĖTUMO TEISINĖS KONTROLĖS PROBLEMAS

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Santrauka. Straipsnyje analizuojamos konstitucinės norminių administracinių aktų teisėtumo užtikrinimo prielaidos, bylų dėl pareiškimų ištirti norminių administracinių aktų teisėtumą proceso teisinio reglamentavimo problemos. Konstitucinis Teismas prisideda prie hierarchinės teisinės sistemos užtikrinimo, sprendamas ar įstatymas arba kiti Seimo priimti teisės aktai atitinka Konstituciją bei ar Prezidento ar Vyriausybės priimti aktai atitinka Konstituciją ir įstatymus (Konstitucijos 102 straipsnio 1 dalis). Tačiau teisės aktai, kuriuos priima kitos vykdomosios valdžios institucijos arba savivaldybės, nepatenka į konstitucinio teisingumo sistemą. Savo 2005 m. rugsėjo 20 d. nutarime Konstitucinis Teismas pareiškė, kad negalimos tokios teisinės situacijos, kai nebūtų įmanoma teisme patikrinti, ar Konstitucijai ir įstatymams neprieštarauja tie teisės aktai (jų dalys), kurių atitikties Konstitucijai kontrolė Konstitucijoje nėra priskirta Konstitucinio Teismo jurisdikcijai, inter alia ministrų išleisti teisės aktai, kiti žemesnės galios poįstatyminiai teisės aktai, taip pat vietos savivaldybių institucijų išleisti teisės aktai. Šių teisės aktų teisėtumo kontrolė nuo tada, kai pradėjo funkcionuoti administracinių teismų sistema, priskiriama administracinių teismų kompetencijai. Norminių administracinių aktų teisminės kontrolės procesas yra specifinis, o teisė kreiptis į administracinių teismų su pareiškimu ištirti norminio administracinio akto teisėtumą yra suteikta apibrėžtam subjektų būriui. Be to, norminio administracinio akto sampratos formalizavimas įstatymuose ne visuomet atitinka teisės mokslo bei teisminės praktikos vystymosi tendencijas. Administracinis teismas, nagrinėdamas bylą dėl norminio administracinio akto teisėtumo, nesprensdžia administracinio ginčo dėl konkretaus suinteresuoto asmens pažeistos teisės, o tik patikrina ginčijamo norminio administracinio akto (jo dalies) atitiktį aukštesnę galią turinčiam teisės aktui. Toks ginčo dėl norminių administracinių aktų teisėtumo pobūdis suponuoja būtinumą tokių bylų procesą reglamentuoti specialiomis normomis.

Reikšminiai žodžiai: *administracinio proceso teisė, administracinė justicija, administracinių bylų teisena, norminis administracinis aktas.*

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