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TITLE

"THE ADMINISTRATIVE APPEAL OF THE ADMINISTRATIVE ACTS IN THE REPUBLIC OF ARMENIA"

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LIST OF ABBREVIATIONS

CAP- Code of the Administrative Procedure

COE- Council of Europe

ECHR- European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR- European Court of Human Rights

LFAAP- Law on Fundamentals of Administrative Action and Administrative Proceedings

RA – The Republic of Armenia

INTRODUCTION

Over the past few years the topic of administrative appeal of administrative acts has become one of the most debated in the framework of multiple international organizations and countries, and also among national legal communities. Therefore, by examining valuable international sources this research intends to suggest a new strengthened form of the administrative appeal procedure.

First of all, when talking about any legal phenomenon, it is first necessary to figure out its main essence. This is especially important when the phenomenon (such as the mandatory administrative appeal) is unfamiliar with the national legal system or it is new to the latter. Furthermore, by proposing to introduce a mandatory pre-trial administrative appeal institute in the RA, we will first present what is a pre-trial administrative appeal institute and then identify the pros and cons related to judicial oversight of administration.

The administrative appeal of administrative acts in other words can be characterized as administrative review. Administrative review means the audit of any activity, including the still unfinished operations, as to whether they comply with applicable regulations[1]. Administrative review provides a mechanism by which a person can seek redress against a decision made by a government entity that affects them. Administrative review also provides a mechanism for the government to rectify decisions if they are wrong. Administrative review, over time, results in better government decisions when the outcome of the review process is referred back to the original decision maker[2].

What concerns terms of administrative appeal of administrative acts and administrative review, most of the doctrinal articles as well as international documents do not distinguish the terms. Thus, in the scope of the paper, the terms will be used interchangeably.

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[1] Հ. Թովմասյան, Օ. Լուխթերհանդթ, Գ. Մուրադյան, Վ. Պողոսյան, Վ. Ռայմեբս, Ռ. Ռուբել, Հայաստանի Հանրապետության ընդհանուր վարչական իրավունք, p. 354, (2011).

[2] Administrative Review Policy, June (2018), *available at* https://www.justice.qld.gov.au/__data/assets/pdf_file/0004/334228/administrative-review-policy.pdf Last visited May 11, 2020.

A paramount feature of administrative justice is that it allows parties to resolve their dispute at administrative level: they have the possibility to challenge the decision before the administration itself. It is, in a sense, an 'alternative dispute resolution' tool in the area of administrative justice; also, it has been strongly recommended by the Council of Europe (2001)[3] and has found its way into most of the Council's jurisdictions and, also, EU law[4].

The research is designed as a practical tool to help unloading of administrative courts. Hence, the core question that needs an answer is the following: *whether the mandatory system of administrative appeal of administrative acts might serve as an effective measure for the protection of human rights?* The research question will be duly examined and answered in the framework of the paper. Thus, the notion, main characteristics and types of administrative appeal of administrative acts are studied. Additionally, the comparison between the mandatory and optional administrative appeal is presented, outlining the main peculiarities.

The paper makes references to a broad array of research articles, scholarly papers, state projects as well as books by reputable agencies, authorities and world-acclaimed authors. Certain legal instruments in terms of conventions, treaties and recommendations are as well cited in the paper. Furthermore, relevant COE recommendations, ECHR and foreign countries' court decisions, which may have fundamental importance for the interpretation of the administrative review mechanism in the ambit of human rights protection, are cited in the paper.

In addition, the practices of foreign states, that applied the institute and achieved the desired results, are examined, along with the currently existing initiations towards the integration of the institute into Armenian legislation. So, possible ways of implementation of the institute under the RA regulations will be revealed.

Therefore, the study assists in designing the outlook regarding regulations that might have the potential of successful implementation in the RA.

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[3] Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties, (Adopted by the Committee of Ministers on 5 September 2001 at the 762th meeting of the Ministers' Deputies), *available at* https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2b59#globalcontainer Last visited May 11, 2020.

[4] Dacian C. Dragoş, Mariusz Swora, Andrzej Skoczylas, *Administrative Appeals In Romania And Poland – A Topical Comparative Perspective*,* Transylvanian Review of Administrative Sciences, No. 37 E/2012, pp. 38-54.

CHAPTER 1. INTRODUCTION TO THE INSTITUTION OF ADMINISTRATIVE APPEAL OF ADMINISTRATIVE ACTS

§1. The Nature and Forms of the Administrative Appeal of Administrative Acts

The right to administrative appeal of decisions, actions or inactivity of subjects of authority directly to themselves or to administrative bodies, which are higher in the system of hierarchical subordination, is an important and necessary mechanism for pre-trial settlement of a dispute between a citizen and the relevant authority. The resolution of such disputes within the framework of an administrative appeal enables business entities, individual citizens to protect their interests, identify shortcomings in the work of public authorities and promptly eliminate them, save time and effort, bypassing the judicial form of protection[5].

The administrative appeal proceedings as filing a lawsuit to the court serve as a defense to the rights of persons injured by the activities of an administrative body. There must be at least a violation of rights of the complainant, or in the opinion of the applicant. That possibility exists when the latter claims that the provisions of the Constitution or the law are violated. This is in all cases when a complainant is the addressee of the interfering administrative act against him[6].

Thus, the administrative appeal is a request addressed to a public authority by which the aggrieved/interested person demands administrative measures to be taken regarding an administrative act: annulment, modification, or even issuance of a new act (when the latter has been refused by the administration)[7].

What is more, a person seeking review of agency action had to show that he had a *legally protected interest* – that is, one recognized by the Constitution, by statute or common law – which was

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[5] Illia Yuriichuk, *Administrative Appeal as an out-of-Court Procedure for the Protection of the Rights of Individuals and Legal Entities*, 6 Eur. J. L. & Pub. Admin. 98 (2019), *available at* https://home.heinonline.org Last visited March 29, 2020.

[6] Հ. Թովմասյան, Վ. Պողոսյան et al., Հարցեր և պատասխաններ «Վարչարարության հիմունքների և վարչական վարույթի մասին» ՀՀ օրենքի վերաբերյալ, p. 175, (2nd ed. 2015), *available at* http://lawlibrary.info/ar/books/giz2015-ar-Frag_u_Antw.pdf Last visited May 11, 2020.

[7] Dacian C. Dragos, *Administrative Appeal,* Center for Good Governance Studies, Babes Bolyai University, Cluj Napoca, Romania, p. 1, (2016), *available at* https://www.researchgate.net/publication/304532967_Administrative_Appeal Last visited May 11, 2020.

adversely affected by the agency's decision. Therefore, the complaint must fall within the *'zone of interests'* to be protected by the statutory provisions whose violation forms the legal basis of the complaint[8].

The administrative appeal can be addressed to the authority that issued the unlawful act – *contestation, opposition, recours gracieux, appeal in reconsideration, or remonstr*ance – or to its superior body, *hierarchical appeal or recourse*. There is also the so-called *quasi-hierarchical appeal, external appeal,* or sometimes *recours de tutelle*, addressed to an agency that is not the superior body of the issuer of the act, but has the power to control such decisions, in its quality of specialized control agency or overseeing body (*the prefect*, for instance). A variation of the administrative appeal is also the quasi-judicial appeal, regulated by special rules in different fields. It is addressed to a specialized public authority that is a combination of an administrative body and a judicial one. The decision on the appeal is still an administrative decision, issued by an administrative body, but the procedure has also features comparable to court procedures (public procurement review bodies, for instance). *Id.*

So, the pre-trial proceedings against administrative authorities give the administration a chance to revise its decision and therefore operate as a filtering mechanism so not all complaints end up in the courts. Generally the administrative appeal of the acts can be mandatory or optional; it depends on the legislation of a particular country. In the case of alternative administrative appeals, a person may choose between administrative or judicial appeals. In the RA the choice of administrative or judicial procedure is the right of the individual, and the lodging of an administrative appeal is not a prerequisite for appealing the act to the court, except in cases provided by law. The Armenian regulations concerning the administrative appeal will be duly discussed in Chapter 3.

Otherwise speaking, the RA LFAAP enshrines that the oversight of administrative procedure is carried out in two ways: administrative or judicial, or we can refer to it as *self-control and external control*[9]. Superior administrative authorities and officials are obliged to supervise the activities of administrative bodies and officials subject to them as they already have the authority to give instructions. *Id.*

The administrative appeal proceedings have three main functions:

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[8] *Utah Shared Access Alliance v. Glenn Carpenter*, 348 F. Supp. 2d. 1265, (9 Dec. 2004), *available at* https://www.courtlistener.com/opinion/2306450/utah-shared-access-alliance-v-carpenter/ Last visited May 11, 2020.

[9] Հ. Թովմասյան, Օ. Լուխթերհանդթ, Գ. Մուրադյան, Վ. Պողոսյան, Վ. Ռայմեբս, Ռ. Ռուբել– Հայաստանի Հանրապետության ընդհանուր վարչական իրավունք, §21.1, p. 364 (2011).

Legal protection for the complainant.

The self-control of the administrative body.

Unloading of administrative courts. Id.

In addition to the abovementioned functions we think that another function of administrative appeal is the promotion of good governance principles and accountability towards the higher administrative body.

Moreover, the higher administrative body must take clear responsibility for the violations of subordinate administrative bodies and never be satisfied with the status of "*observer*" [10].

The mandatory administrative appeal system, adopted by a large number of legal systems (for instance, Germany, the Netherlands, Hungary, Slovenia, Poland, Serbia, Denmark, Czech Republic, Romania, etc. Dragos and Neamtu 2014), precludes an action to court in the absence of a prior administrative appeal. At the level of EU law, in specific areas, administrative appeals are required prior to launching procedures by the Commission – regarding infringements of Union law by Member States, aids granted by Member States or when it comes to access to Union documents, appeals of servants within the Union civil service and in procedures of EU agencies. In the case of the mandatory appeal, which is more formalistic than the optional one, the proceedings are to be conducted, within clear time limits, in an adversarial manner, and the final decision is subjected to extensive rules of motivation[11].

The second type of appeal (*recours administratif*), promoted by the French legal system and those inspired by it (partially Belgium, Italy), attaches certain effects to the exercise of an administrative appeal (prorogation of the time limits for bringing an action in a court of law) without making it mandatory (van Lang et al. 1999). The rules that govern the optional appeal have typically a jurisprudential source and are quite flexible. The claimant does not have to prove that there is a specific interest at stake; there usually is no requirement to conform to formal provisions, and, often, there is no time limitation for appeal. No jurisdiction confines itself to only one system of administrative appeals. Even where the appeal is optional, there are instances where special legislation makes its use mandatory (for instance, in France). *Id.*

However, the requirement to exhaust all administrative remedies should not essentially frustrate the right to administrative justice. For example, if pursuing an administrative remedy prior to seeking

[10] Այվազյան Ն. Ա., Դանիելյան Գ. Բ. et al., Հայաստանի Հանրապետության վարչական իրավունք, p. 432, (2012).
[11] Dragos *supra* at 2.

judicial review would result in irreparable harm to the private person's interests, access to justice will effectively be denied[12].

In this context, it can be concluded that different administrative appeal regimes exist in different countries, sometimes even combinations of those.

The administrative review of administrative acts attracted the attention of COE also, which in its Recommendation Rec(2001)9 of the Committee of Ministers to Member States on alternatives to litigation between administrative authorities and private parties stipulated internal reviews as alternative means[13].

The Recommendation Rec(2001)9 of the Committee of Ministers states that the regulation of alternative means should:

a. ensure that parties receive appropriate information about the possible use of alternative means;

b. ensure the independence and impartiality of conciliators, mediators and arbitrators;

c. guarantee fair proceedings allowing in particular for the respect of the rights of the parties and the principle of equality;

d. guarantee, as far as possible, transparency in the use of alternative means and a certain level of discretion;

e. ensure the execution of the solutions reached using alternative means. *Id.*

As regards to the internal reviews as alternatives to litigation between administrative authorities and private parties, the abovementioned recommendations sets out special features of internal reviews:

a. In principle, internal reviews should be possible in relation to any act. They may concern the expediency and/or legality of an administrative act.

b. Internal reviews may, in some cases, be compulsory, as a prerequisite to legal proceedings.

c. Internal reviews should be examined and decided upon by the competent authorities. *Id*.

When examining the above-mentioned requirements of administrative appeals as an alternative to the litigations, we may conclude that the alternative dispute resolution has been strongly recommended by the COE (Recommendation 2001) and has found its way into most of jurisdictions.

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[12] Handbook for Monitoring Administrative Justice- (OSCE, September 2013), para 4, *available at* https://www.osce.org/albania/105271?download=true Last visited May 11, 2020.

[13] Recommendation Rec(2001)9 of the Committee of Ministers to Member States on alternatives to litigation between administrative authorities and private parties, (Adopted by the Committee of Ministers on 5 September 2001 at the 762th meeting of the Ministers' Deputies), *available at* https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2b59#globalcontainer Last visited May 11, 2020.

The COE Committee of Ministers in its Explanatory memorandum of Recommendation Rec (2001)9 highlighted that the increasing problems have been observed (...): there has been an overburdening of the courts in general (...). The problem is common to all COE member states. The need to find alternative means for more effective resolution of such disputes has thus become plain. The development of alternative means for setting disputes between the administrative and private parties is due to situational and structural factors[14].

Recommendation Rec (2004) 20 of the Committee of Ministers to the Member States on judicial review of administrative acts Principle 2.B states that natural and legal persons may be required to exhaust remedies provided by national law before having recourse to judicial review[15]. The length of the procedure for seeking such remedies should not be excessive. The Explanatory Memorandum stipulates the right of access to judicial review must be an effective right. *Id.*

The Recommendation seeks to ensure that the obligation for natural and legal persons to exhaust other remedies first does not prevent them from seeking judicial review of the administrative acts. It specifies that the time needed to deal with the case must be reasonable even during the preliminary procedure, as from the taking of the initial act. It is true that the safeguards laid down by Article 6 of the ECHR[16] have, in principle, only to be respected at the judicial proceedings stage. However, according to the case law of the European Court, the reasonableness of the length of proceedings conducted before one or more administrative body where such an administrative procedure exists as a remedy, which must be exhausted before the case can be brought before the courts. The period to be taken into account can therefore begin as soon as an administrative appeal is lodged with an administrative appeal body (*König* judgment, 1978[17]). *Exhaustion of the other remedies before seeking judicial review makes it possible to prevent an excessive workload for the ordinary courts with a view*

[14] Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties, (Adopted by the Committee of Ministers on 5 September 2001 at the 762th meeting of the Ministers' Deputies), *The Explanatory Memorandum*.

[15] Recommendation Rec (2004) 20 of the Committee of Ministers to the Member States on judicial review of administrative acts, (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies), *available at* https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805db3f4 Last visited May 11, 2020.

[16] European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November, 1950), Article 6, *available at* https://www.echr.coe.int/Documents/Convention_ENG.pdf Last visited May 11, 2020.

[17] *König v. Germany,*6232/73, (ECHR 1978), *available at* https://hudoc.echr.coe.int/eng#{"itemid":["001-57512"]} Last visited May 11, 2020.

to judicial efficiency. This is in the interests of both the judiciary and the administration and may also contribute to reducing the cost of the procedure for the individual[18].

Overall, it can be concluded that administrative appeal is the simplest avenue of relief, which provides administrative autonomy and serves as an efficient tool for the protection of human rights. While analyzing the above mentioned characteristics of mandatory administrative appeal it appears that the main policy and aim of implementing the latter form of appeal is the following:

The maintenance of administrative **autonomy**

The establishment of **final** administrative agency decision

The **nearest** and **easiest** form of protection should be sought

Avoidance of **premature** interruption to the administrative procedure

Promotion of **good governance** principles in administrative bodies

The **accountability** towards the higher administrative body.

[18] Recommendation Rec (2004) 20 of the Committee of Ministers to the Member States on judicial review of administrative acts (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies), *The Explanatory Memorandum.*

§2. Human Rights Protection Perspective in Case of Mandatory Administrative Appeal

According to paragraph 1 of Article 61 of the RA Constitution everyone shall have the right to effective judicial protection of his or her rights and freedoms[19].

According to paragraph 1 of Article 63 of the RA Constitution everyone shall have the right to a fair and public hearing of his or her case, within a reasonable time period, by an independent and impartial court[20].

By virtue of the above-mentioned articles, the state is obliged not only to protect the human rights and freedoms, but also to create feasible legal structures that can effectively prevent and eliminate any violations, including the violations of state bodies and officials.

While referring the basic rights and freedoms we should consider also the Article 81 of the RA Constitution, which stipulates that the practice of bodies operating on the basis of international treaties on human rights, ratified by the RA, shall be taken into account when interpreting the provisions concerning basic rights and freedoms enshrined in the Constitution. Paragraph 2 of the same article

[19] Constitution of the Republic of Armenia (with December 2015 amendments), Article 61, *available at* http://www.irtek.am/views/act.aspx?aid=150151 Last visited May 11, 2020.

[20] Ibid, Article 63.

states restrictions on basic rights and freedoms may not exceed the restrictions prescribed by international treaties of the RA[21].

Article 6 § 1 of the ECHR sets out in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The Article 13 of the ECHR everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity[22].

The right of access must be effective which means that the individual "*must have a clear, practical opportunity to challenge an act that is an interference with his rights*". However, the right of access to court is not absolute and it may be subject to limitations[23].

ECtHR stated in its decision that the right to a court, of which the right of access constitutes one aspect, is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. Nevertheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved[24].

It is worth noting, that the 2015 Constitution has revised the regulations of the limitation of basic human rights and freedoms. The clarification of the requirements for restrictions has particular importance. Besides, it is worth mentioning also the case-law guides of the ECtHR, as the key-cases are presented in the latter.

Accordingly, the right of access to a court for the purposes of Article 6 was defined in Golder v. the United Kingdom (§§ 28-36)[25]. Referring to the principles of the rule of law and the avoidance of

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[21] Ibid, Article 81.
[22] European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November, 1950), Article 6, 13, *available at* https://www.echr.coe.int/Documents/Convention_ENG.pdf Last visited May 11, 2020.
[23] Davit Melkonyan, *CONCEPT OF THE RULE OF LAW IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS,* p. 349, (2014), *available at* http://ysu.am/files/Davit_Melkonyan-1415702096-.pdf Last visited May 11, 2020.
[24] *Khalfaoui v. France*, 34791/97, § 35, 36, (ECHR 1999), *available at* https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58374%22]} Last visited May 11, 2020.
[25] *Golder v. United Kingdom,* 4451/70, §§ 28-36, (ECHR 1975), *availabale at* https://hudoc.echr.coe.int/eng#{"fulltext":["Golder%20v.%20United%20Kingdom%20judgment%20of%2021%20February

arbitrary power, which underlie the Convention, the Court held that the right of access to a court was an inherent aspect of the safeguards enshrined in Article 6 (Zubac v. Croatia[26] [GC], §§ 76 et seq.).[27] The right of access to the courts is not absolute but may be subject to limitations permitted by implication (Golder v. the United Kingdom, § 38; Stanev v. Bulgaria [28][GC], § 230; Zubac v. Croatia [GC], § 78). This applies in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (Luordo v. Italy[29], § 85; Zubac v. Croatia [GC], §§ 107-109) [30].

Considering the need for access to a court and the need for full and complete legislative enforcement of the right to an effective remedy, the RA Constitutional Court has expressed the following legal positions particularly in its decisions N-1192[31] and N-1257[32]:

- "no procedural peculiarity or proceeding may impede or prevent the possibility of effective exercise of the right to access to court, discredit the right guaranteed by Article 18 of the RA Constitution [Right to effective judicial remedy, RA Constitution, 2005] or be an obstacle to its implementation",

- "no procedural peculiarity can be interpreted as justifying the restriction of the right of access to a court guaranteed by the RA Constitution",

- "access to a court may have some limitations that should not undermine the very essence of that right",

- "when applying to the court, the person should not be burdened with excessive requirements",

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[26] *Zubac v. Croatia*, 40160/12, § 76, (ECHR 2018), *availabale at* https://hudoc.echr.coe.int/eng#{"fulltext":["Zubac%20v.%20Croatia"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-181821"]} Last visited May 11, 2020.

[27] Guide on Article 6 of the ECHR, Right to a fair trial (Civil limb), (updated 31 august 2019), p. 22, *available at* https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf

[28] *Stanev v. Bulgaria*, 36760/06, § 230, (ECHR 2012), *available at* https://hudoc.echr.coe.int/eng#{"fulltext":["Stanev%20v.%20Bulgaria"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-108690"]} Last visited May 11, 2020.

[29] *Luordo v. Italy*, 32190/96, (ECHR 2003), *available at* https://hudoc.echr.coe.int/eng#{"fulltext":["Luordo%20v.%20Italy"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-61231"]} Last visited May 11, 2020.

[30] Guide on Article 6 of the ECHR, Right to a fair trial (Civil limb), (updated 31 august 2019), p. 26, *available at* https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf Last visited May 11, 2020.

[31] ՍԴՈ-1192, RA Constitutional Court, 16.06.2015, *available at* http://www.concourt.am/armenian/decisions/common/2015/pdf/sdv-1192.pdf Last visited May 11, 2020.

[32] ՍԴՈ-1257, RA Constitutional Court, 10.03.2016, *available at* http://www.concourt.am/armenian/decisions/common/2016/pdf/sdv-1257.pdf Last visited May 11, 2020.

- "given the requirement to ensure legal certainty, the existence of a certain imperative precondition for the exercise of the right of access to a court cannot in itself be considered contrary to the Constitution of the RA. It is another matter that such a precondition must be feasible, reasonable and not lead to a violation of the essence of the law". [33]

Hence, the compatibility of mandatory administrative review with the right of access to court is in line with the legal positions expressed in the decisions of the RA Constitutional Court and ECtHR. In addition, as mentioned in the previous paragraph many international documents also accept the mandatory administrative review mechanism and highly encourage the EU states to implement it.

Conversely, one can argue that the mandatory administrative appeal is not compatible with the conventional requirements and cannot serve as an effective measure for the protection of human rights and freedoms, as if the administrative act of the administrative body is not appealed, the court will not accept the lawsuit and thus restrict the rights of access to a court, and at the same time it will deprive the person's right to an effective remedy. While in a democratic society nothing will frustrate the right to judicial remedy and therefore limit it.

On the contrary of the abovementioned argument it should be mentioned again that the right of access to a court is not an absolute right, and the legislation may provide some peculiarities for legal regulations that will restrict that right to some extent, of course, without compromising its main essence. Consequently, we think that the abovementioned argument is exaggerated and it is an unacceptable approach to this model of appeal.

In this context, when revealing the compatibility of such mechanism with the right to a fair trial and identifying the characteristics of administrative review, it is necessary to sum up the pros and cons of not only mandatory administrative appeal, but also the administrative appeal in general in relation to judicial oversight. In other words, we consider it necessary to distinguish between positive and negative aspects of the procedure for appealing decisions, actions or omissions of the state and its bodies in an administrative manner compared with judicial appeals.

The advantages of administrative appeal include: its efficiency, less formalized and cost-effective; the rapid elimination of violations of the law and the application of penalties to the guilty parties; effective administrative appeal significantly reduces the burden on the judicial branch of government; identification of deficiencies in the work of the organs, decision which are appealed; if the

[33] *See also* RA Constitutional Court decisions: N-652, N-690, N-719, N-765, N-844, N-873, N-890, N-932, N-942, N-1037, N-1052, N -1115, N-127, N-1190, N-1196, N-1197, N-1220, N-1222, N-1289.

complaint is resolved, the body (official) that made the decision on the complaint is obliged to take the necessary measures to restore the violated right, as well as to oblige the persons responsible for this violation to apologize to the complainant in writing, and at the request of the complainant to inform the interested handling complaints of individuals; due to consideration of the complaint, the authorized body or official does not only cancel the appealed decision, but also can change it[34].

The disadvantages of appealing decisions, actions or inaction of public authorities in the administrative procedure include the following: the speed and efficiency are positive only on simple issues, in other cases it can only cause harm; the interest of the body in the protection of its departmental interests; a significant number of legal acts regulating administrative appeal creates problems in the process of appealing decisions by citizens. *Id*.

To sum up, we can conclude that the requirement of mandatory administrative appeal does not contradict the right of access to court (right to judicial protection) guaranteed by the RA Constitution and ECHR provided that during the examination of the administrative complaint the requirement of reasonable time is met and the proper administration is provided; in that case the mandatory administrative appeal will not be an excessive burden for the complainant. Moreover, even in case of pre-trial administrative appeal prerequisite, the right to judicial protection or in other words the judicial oversight is not excluded.

CHAPTER 2. THE EXPERIENCE OF FOREIGN COUNTRIES ON THE ADMINISTRATIVE APPEAL OF THE ADMINISTRATIVE ACTS

As it is noted, the domestic law adopts the constitutional concept that a person is not obliged to defend his/her rights in court only by submitting a complaint to the administrative body. The experience of the foreign countries, went in another direction, as a rule, to apply to the courts first of all it was necessary to file a complaint with a higher administrative body[35].

In some jurisdictions, there are legal requirements to exhaust all administrative remedies prior to initiating proceedings before a court (e.g., filing an administrative complaint to initiate an internal

[34] Yuriichuk, *supra* at 102.

[35] Այվազյան Ն. Ա., Դանիելյան Գ. Բ. et al., Հայաստանի Հանրապետության վարչական իրավունք, p. 432, (2012).

review by the administrative authority). In other jurisdictions, however, an internal administrative review may be stayed by the initiation of court proceedings[36].

In this paragraph, the experience of foreign countries on the administrative appeal of administrative acts is illustrated. Besides, it is worth mentioning, that while selecting countries within the framework of this study, factors such as the long-term experience of the implementation of the institute in those countries or similarity of the legal frameworks of the states with the RA legislation, particularly the constitutional legal norms, have been taken into consideration, as well.

Administrative appeal of administrative acts in Poland

Poland has the second oldest Act of administrative procedure in Europe, and a huge experience in dealing with administrative matters. In Poland, the administrative appeal is a mandatory stage before going to court. In order to file a complaint with an administrative court one must exhaust all other means of appeal (if available to the complaining party). If no means of appeal are provided for by applicable regulations, the appeal can be filed after requesting the issuing body to correct the decision if it breaches the law[37].

The Act precisely specifies also the formal prerequisites for filing a complaint if no means of appeal are provided (in the light of the Act, means of appeal also include a request for rehearing, and an administrative complaint) and regulates the situation where a complaint must be preceded by requesting the issuing body in writing to correct the decision if it breaches the law (art. 52 of the Administrative Court Proceedings Law – ACPL). In Poland, the scope of appeal in administrative procedures does not affect the scope of appeal in court procedures, as the latter is not based on the former. *Id.*

Administrative court proceedings may be initiated only after all the means of appeal have been exhausted, if the complainant had recourse to such resources during proceedings before the relevant court[38].

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[36] Administration and You: Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons - A Handbook, (Strasbourg: Council of Europe, April 1996), para. 77.2., *available at* https://www.coe.int/en/web/cdcj/completed-work/standard-setting/administrative-law Last visited May 11, 2020.
[37] Dragoş et al., *supra* at 47.
[38] ADMINISTRATIVE JUSTICE IN EUROPE, Report for Poland, available at http://www.aca-europe.eu/en/eurtour/i/countries/poland/poland_en.pdf Last visited May 11, 2020.

Administrative appeal of administrative acts in Netherlands

In Netherlands the general rules for administrative decision making and legal protection are organized in General Administrative Law Act (GALA)[39]. If a person or organization with a directly involved interest wants to object to an administrative decision, such a person or organization has first to file an objection with the administrative authority that made the decision. The GALA has a special procedure outlined in Chapter 6 and 7. Most administrative authorities have an advising committee to hear the objecting interested persons[40].

Hence, the objection proceedings are generally mandatory. They are administrative appeal mechanisms addressed to the authority that took the original decision. They give the administration a second chance and provide a filtering mechanism before cases go to the administrative law division of the first instance courts. The objection does not have a suspensive effect[41].

Some formalities (timeframe, submission in writing etc.) have to be observed. Standing is limited to those who have a direct interest in the challenged decision. The law recognizes the possibility that collective interest groups can be affected by administrative orders and grants them standing. The objection is generally decided upon by an external committee consisting of a majority of persons who do not work for the administrative authority that issued the challenged decision. Normally, public hearings take place. The objection procedure defines the scope of future administrative litigation. *Id.*

Earlier empirical studies suggest that the pacification impact and filtering effect of the objection procedure against mass decisions produced by so-called "decision factories" (between 30,000 and 1.5 million decisions per year) is very high with 97% of cases settled through this procedure. It is only between 25 and 50% in the case of more complex decisions made in so-called "decision workshops" (space planning decisions, licenses for oil drilling etc.). *Id.*

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[39] General Administrative Law Act (Gala) of the Netherlands, *available at* https://www.legislationline.org/download/id/5382/file/Netherlands_administrative_law_act_2010_en.pdf Last visited May 11, 2020.

[40] Philip Langbroek, Milan Remak, Paulien Willemsen, *The Dutch System Of Dispute Resolution In Administrative Law*, (2014), p. 113, *available at* https://books.google.am/books?id=PGWSBAAAQBAJ&pg=PA130&lpg=PA130&dq=pre+trial+administrative+appeal+in+the+netherlands&source=bl&ots=1OeJxB8Xm8&sig=ACfU3U133anx2gEpqhkwF4GFdVr4n47qBQ&hl=en&sa=X&ved=2ahUKEwj_nqXN2qnpAhXdw8QBHZduCekQ6AEwCXoECAoQAQ#v=onepage&q=pre%20trial%20administrative%20appeal%20in%20the%20netherlands&f=false Last visited May 11, 2020.

[41] Pre-trial Procedures in Administrative Justice Proceedings in England and Wales, France, Germany and the Netherlands, World Bank, *available at* http://documents.worldbank.org/curated/en/203161468110646088/Pre-trial-procedures-in-administrative-justice-proceedings-in-England-and-Wales-France-Germany-and-the-Netherlands-a-comparative-study-with-a-view-to-the-possible-development-of-pre-trial-procedures-in-administrative-law-in-Turkey Last visited May 11, 2020.

Administrative appeal of administrative acts in France

In general, the French administrative law system offers administrative authorities "the second chance". An individual may file an objection against the administrative decision to an administrative authority. In order to avoid court proceedings the administrative authority may change, quash or reconsider its former decision. In this case we talk about *recours administratif préalable* (administrative objection or application for reconsideration) [42].

This procedure is in general optional (facultative) but in exceptional cases it can be obligatory. The administrative authority may, following this *recours administratif préalable* procedure, adopt a new administrative decision, so that the complainant will not start proceedings before the administrative court. Because of this quality of the *recours administratif préalable* it may be stipulated that it is considered an alternative *interne* dispute settlement by the administrative authority itself. By re-examination of the case the administrative authority can successfully avoid court proceedings i.e. proceedings that commence by the *recours contentieux* (administrative appeal or application for a judicial review of the administrative decision). *Id*.

The Recours administratif préalable procedure thus on one hand helps to create a broader dialogue between the administration and those that are administered and on the other one helps to decrease the amount of cases directed by the administrative courts that in the last years became very busy. *Id*.

At the same time, as mentioned, in certain cases the administrative appeal can be mandatory, such as the fiscal administrative appeal[43]. French legal literature fiscal administrative appeal was described as a "mandatory court *preliminariu*. It is a means of linking litigation, but only a condition of validity for reporting fiscal Judge". The fiscal administrative appeal is an administrative appeal before administrative and fiscal authorities. This appeal is mandatory and is a condition of admissibility of fiscal administrative action[44].

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[42] Pre-trial Procedures in Administrative Justice Proceedings in England and Wales, France, Germany and the Netherlands, World Bank, p. 2, (July 19th, 2010).

[43] *The fiscal administrative appeal* is the appeal, which is available to taxpayers who consider themselves harmed by the acts fiscal and administrative organs.

[44] Octavia-Maria Cilibiu, *The Fiscal-Administrative Appeal Comparative Law*, 2013 Annals Constantin Brancusi U. Targu Jiu Juridical Sci. Series 49, p. 49, (2013), *available at* https://home.heinonline.org Last visited March 11, 2020.

Administrative appeal of administrative acts in Germany

Speaking about administrative appeal in Germany means, above all, speaking about the so-called objection procedure, which is foreseen as a prerequisite for specific kinds of court action before the administrative courts[45].

Germany has developed an administrative justice system, which, unlike the French system, is to a very large extent codified. In terms of formal pre-trial procedures, there is the general procedure of objection (*Widerspruch*) as the most important formal remedy. Other procedures such as protest (*Einspruch*) and formal complaint (*förmliche Beschwerde*) are limited to acts related to the financial administration. In general, the objection procedure is mandatory, but there are exceptions. The procedure serves three purposes: to give the administration a chance to correct its decision, to diminish the workload of the administrative courts, and to provide a cheap and speedy way for citizens to obtain redress. The objection procedure brings final closure in about 90% of the cases. Generally, the objection is directed to the authority that has issued the decision. When it disagrees with the objection, the case is normally sent to a court-like objection committee (*Widerspruchsbehörde*) that will review the legality and expediency of the procedure. Recourse against its decision is open at the Administrative Court[46].

The preliminary proceedings begin with the objection, which shall be lodged in writing within (in general) 1 month after the *Verwaltungsakt* [administrative act] or its rejection has been announced to the aggrieved party (§ 70 VwGO (*Verwaltungsgerichtsordnung* (Code of Administrative Court Procedure)[47], § 355 AO, § 84 SGG). As *Singh* correctly points out, because a *Verwaltungsakt* is required to mention the remedy against it and the time within which it can be sought, the objection is facilitated to this extent. If the *Verwaltungsakt* fails to mention the remedy and the time limit, an objection can be filed within 1 year (see § 58 VwGO, § 356 AO, § 66 SGG)[48].

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[45] Ulrich Stelkens, *Alternative Appeals in Germany,* (July 2014), *available at* https://www.researchgate.net/publication/312705558_Administrative_Appeals_in_Germany Last visited May 11, 2020.
[46] Pre-trial Procedures in Administrative Justice Proceedings in England and Wales, France, Germany and the Netherlands, World Bank, *supra* at 2.
[47] *Verwaltungsgerichtsordnung* (Code of Administrative Court Procedure), *available at* https://germanlawarchive.iuscomp.org/?p=292#68 Last visited May 11, 2020.
[48] Dacian C. Dragos, Bogdana Neamtu Editors, *Alternative Dispute Resolution in European Administrative Law,* Springer-Verlag Berlin Heidelberg, p. 9, (2014).

After the expiry of that deadline, the *Verwaltungsakt* or its rejection becomes (in general) definitive, which means, it can – despite its possible unlawfulness – no longer be challenged in the courts. *Id*.

Besides, the specific case of non-decision within a reasonably period is referred to in § 75 VwGO (§ 46 FGO and § 88 SGG provide for similar provisions): If with regard to an objection or an application to carry out an *Verwaltungsakt* it has not been decided on the merits within a suitable period without sufficient reason, the action shall be admissible in derogation from § 68. The action may not be lodged prior to the expiry of three months after the lodging of the objection or since the filing of the application to carry out the *Verwaltungsakt*, unless a shorter period is required because of special circumstances of the case. This means if there is an inexplicable delay, the applicant may go directly to court without having to exhaust the objection procedure. *Id.*

The administrative act is being suspended once an objection is registered with the upper authority or an action is introduced and cannot be executed or implemented unless the authority in charge issues a special order to do so with regard to the public interest[49].

Dr. Carsten Günther judge at the Federal Administrative Court mentioned the lawfulness and expedience of an administrative act should be reviewed in preliminary proceedings by the higher authority. However, in recent years some federal states have adopted legislation, which abandons this internal review and grants direct access to the Administrative Courts[50].

Administrative appeal of administrative acts in UK

During the last century up until now, the English government has sought to develop other ways to enable citizens to find redress for errors of administrative authorities. Within the English tradition, Parliament and administrative authorities have created a patchwork of statutory inquiries, administrative appeals and complaint proceedings[51].

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[49] Efficiency of administrative justice in Germany, *available at* https://www.aeaj.org/page/Efficiency-of-administrative-justice-in-Germany Last visited May 11, 2020.

[50] Dr. Carsten Günther, Judge at the Federal Administrative Court, Leipzig, Report for Germany, ADMINISTRATIVE JUSTICE IN EUROPE, *available at* http://www.aca-europe.eu/en/eurtour/i/countries/germany/germany_en.pdf Last visited May 11, 2020.

[51] Pre-trial Procedures in Administrative Justice Proceedings in England and Wales, France, Germany and the Netherlands, World Bank, p. 13, (July 19th, 2010), *available at*

England has the following mechanisms for achieving redress against actions of the administration:

customer complaints procedures;

appeals and tribunals systems;

references to independent complaints handlers or ombudsmen; and

resort to judicial review (and other forms of legal action). *Id.*

In the context of a commentary on "*les recours administratifs*", it is important to note that the judicial review procedure includes a requirement that an individual should first request a public body to change a decision before the matter is brought to court. The requirement is found in Pre-action Protocols that were initially introduced in England and Wales and which now also operate, to a greater or lesser extent, throughout all of the UK. At the heart of the Protocol are requirements about the exchange of letters between an individual and a public authority whose decision is under challenge, as this is meant to facilitate the resolution of the dispute where that is at all possible. In the event that resolution of the dispute is not possible, the individual is free to initiate judicial review proceedings subject, of course, to observing all relevant rules of procedure (time-limits; standing; etc.)[52]

The applicant's pre-action letter should contain the date and details of the decision, act, or failure to act that is being challenged, as well as a clear summary of the facts on which the challenge is based. *Id.*

It is thus here that UK law employs mechanisms that are akin to "*les recours administratifs*" and where it tries to balance resource considerations with the related values that define good governance[53].

Administrative appeal of administrative acts in US

The efficiency of administrative appeal, especially the mandatory administrative appeal, is stipulated in US case-law also, for instance, in the case of *Reiter v. Cooper*, the U.S. Supreme Court held that whenever a relief is available from an administrative agency, the plaintiff is ordinarily

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http://documents.worldbank.org/curated/en/203161468110646088/Pre-trial-procedures-in-administrative-justice-proceedings-in-England-and-Wales-France-Germany-and-the-Netherlands-a-comparative-study-with-a-view-to-the-possible-development-of-pre-trial-procedures-in-administrative-law-in-Turkey Last visited May 11, 2020.

[52] Gordon Anthony, *Administrative Appeals in the United Kingdom*, p. 816, (2020).

[53] Anthony *supra* p. 817.

required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed[54].

While referring U.S. system firstly one of the most debated doctrines should be referred. In US law, *ripeness* refers to the readiness of a case for litigation; "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all"[55]. Under the "*ripeness doctrine*", an agency must have taken "*final*" action before judicial review is appropriate. It is the imposition *of an obligation* or *fixing of a legal relationship* that indicates finality of admin process. *Id.* For example, if a law of ambiguous quality has been enacted but never applied, a case challenging that law lacks the ripeness necessary for a decision.

Ripeness generally refers to the fitness of an agency case for appellate review. Ripeness, however, of all the prerequisites to judicial review, is often confused with other preconditions, and even the courts are at odds with the distinction between ripeness and other judicial prerequisites, especially finality and exhaustion[56].

Courts can review agency decisions under the Administrative Procedure Act (APA) only when they are "final." The policy behind the finality requirement is a simple one: Temporary day-to-day management decisions are best left to the government agency, while final definitive determinations that cause hardship to private parties should be subject to judicial review[57].

In *Abbott Laboratories v. Gardner* case the U.S. Supreme Court held the case was ripe, since the regulation was a final agency action and required immediate compliance under threat of civil/criminal sanctions[58].

The Supreme Court formulated a two-part test for assessing ripeness challenges to federal regulations. The case is often applied to constitutional challenges to federal and state statutes as well. The Court said in *Abbott Laboratories v. Gardner* case that. " [w]ithout undertaking to survey the

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[54] *Reiter v. Cooper,* 507 U.S. 258, 269 (1993), *available at* https://www.law.cornell.edu/supct/html/91-1496.ZO.html Last visited May 11, 2020.

[55] *Texas v. United States*, 523 U.S. 296 (1998), p. 300, *available at* https://supreme.justia.com/cases/federal/us/523/296/ Last visited May 11, 2020.

[56] Toni M. Fine, *Appellate Practice On Review Of Agency Action: A Guide For Practitioners,* University of Toledo, p. 4, (1997)

[57] Stephen Hylas, *FINAL AGENCY ACTION IN THE ADMINISTRATIVE PROCEDURE ACT,* p. 1643, (November 2017), *available at* https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-92-5-Hylas.pdf Last visited May 11, 2020.

[58] *Abbott Laboratories v. Gardner*, 387 U.S. 136, 1967, *available at* https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2818&context=facpubs Last visited May 11, 2020.

intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration". *Id.*

CHAPTER 3. APPLICABILITY OF THE MANDATORY ADMINISTRATIVE APPEAL OF THE ADMINISTRATIVE ACTS IN ARMENIA

§1. Regulation of Administrative Appeal and Current Initiatives Towards Applicability of the Mandatory Administrative Appeal in Armenia

As already mentioned the Articles 61 and 63 of the RA Constitution envisage the right to a fair trial[59]. According to Article 18 of RA Constitution (Adopted 27.11. 2005) everyone shall — for the protection of his or her rights and freedoms — have the right to effective judicial remedies, as well *as effective legal remedies before other state bodies*. Everyone shall have the right to protect his or her rights and freedoms by all means not prohibited by law[60].

The amended Constitution, in a separate Article 61, stipulates the right to effective judicial protection and the right to apply to international bodies for the protection of human rights and freedoms, which was previously enshrined in paragraphs 1 and 4 of the Article 18 of the Constitution. This right is consistent with the obligation to have effective justice and to guarantee it[61]. Meanwhile, in comparison with the provisions of Article 18 of RA Constitution (Adopted 27.11. 2005), Article 61 lacks only the definition of "*right to effective remedies before other state bodies*", which, in essence, falls under the right of the proper administration provided for in Article 50 of the amended Constitution (2015). *Id.*

What regards *proper administration*, the Article 50 of RA Constitution sets forth that everyone shall have the right to impartial and fair examination by administrative bodies of a case concerning him or her, within a reasonable time period[62].

As it can be noticed, the Article 50 of the RA Constitution (2015) lays down the right to proper administration. The Constitution (Adopted 27.11. 2005) makes partial reference to it. In particular, in 2005 Article 18 (1) of the Constitution states that everyone has the right to effective remedies before

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[59]Constitution of Republic of Armenia (with December 2015 amendments) Article 61, 63, *available at* http://www.irtek.am/views/act.aspx?aid=150151 Last visited May 11, 2020.

[60] Constitution of Armenia (Adopted 27.11. 2005) Article 18, available at https://www.president.am/en/constitution-2005/ Last visited May 11, 2020.

[61] Վարդան Պողոսյան & Նորա Սարգսյան, Հայաստանի Հանրապետության 2015 թ. խմբագրությամբ Սահմանադրությունը, (2016) p.73, *available at* http://lawlibrary.info/ar/books/giz2016-ar-Brief_explanations_of_Consitution_2016.pdf Last visited May 11, 2020.

[62] Constitution of the Republic of Armenia (with December 2015 amendments) Article 50, *available at* http://www.irtek.am/views/act.aspx?aid=150151 Last visited May 11, 2020.

the courts, as well as other state bodies. With the 2015 constitutional amendments Article 50 of the Constitution broadens and clarifies constitutional regulations by stipulating that everyone has the right to an impartial, fair and reasonable hearing by administrative authorities. The administrative body, within the meaning of this article, includes the republican and territorial administration, local self-government bodies, as well as any other state body performing the executive function.[63]

Commonly as the highest law of the RA, the Constitution is considered to be binding upon all state agencies and authorities, including the legislature, executive branch and judiciary. Laws, regulatory frameworks and policies should therefore be in conformity with the RA Constitution. From the above mentioned articles of RA Constitution can be stipulated that the effective protection of the rights and freedoms are protected on a constitutional level, which means that the legislator is obliged to introduce the most effective models for the protection of basic rights and freedoms. Protecting fundamental liberties and human rights, defending the public interest, ensuring that public governance of a high quality are required to deal rapidly.

Armenia is among countries where administrative appeal of administrative acts is optional, which means administrative appeal is not a prerequisite to apply for judicial defense. At the same time, it is worth mentioning that in certain cases special legislation makes its use mandatory and therefore indicates the current initiatives toward the mandatory administrative appeal.

The Section IV of RA LFAAP is titled as "Appeal Procedure", which provides not only the grounds and procedure for bringing administrative appeal, but also consideration and settlement of an administrative appeal[64].

According to Article 69 of the RA LFAAP for the purpose of protection of their rights, persons shall have the right to appeal the administrative acts, including the interfering clauses of administrative acts, the action or inaction of the administrative body[65]. Paragraph 1 of Article 70 of the RA LFAAP sets out that the act may be appealed through administrative or judicial procedure[66].

According to paragraph 2 of the same article an appeal may be filed through administrative procedure with: (a) the administrative body having adopted the act; (b) superior administrative body of the administrative body having adopted the act. *Id.*

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[63] Վարդան Պողոսյան & Նորա Սարգսյան, *supra* p. 65.
[64] RA LFAAP, 18.02.2004, Section IV, *available at* https://www.arlis.am/DocumentView.aspx?DocID=75264 Last visited May 11, 2020.
[65] Ibid, Article 69.
[66] Ibid, Article 70.

Moreover, Paragraph 4 of Article 70 of the same law stipulates that the decisions of the administrative body envisaged by point 2 (b) of the same article may be appealed to the appeals commission envisaged by the RA Law on Inspection Bodies. The existence of this norm is a result of the legislator's inconsistency, as the commission has been abolished and does not exist today due to the 23.03.2018, 267-N Law "On Making Amendments and supplements to the RA Law on Inspection Bodies"[67].

In this context, it is worth mentioning the Tax and Customs Appeals Commission of the State Revenue Committee under the RA Government, which is an operating permanent body within the Committee formed by the Chairman of the Committee[68]. The statistics[69] show that the commission operates quit effectively and can serve as an example model for the other administrative bodies.

The LFAAP defines the appeal procedure, formal requirements, time limits for bringing the administrative appeal and also the legal consequences of the appeal. Article 74 of RA LFAAP sets out that bringing an administrative appeal shall suspend the execution of the disputed administrative act, except for (a) cases prescribed by law, when the administrative act is subject to execution without delay; (b) cases, when execution without delay is necessary for the public interests, (c) in cases when an administrative act on suspending or depriving of the right to drive a vehicle is appealed.[70]

In cases prescribed in this part, the need (interest) for execution without delay of the administrative act shall be substantiated in writing. Substantiation shall not be required, if suspension of the execution of the administrative act may result in immediate danger to life, health, or property of persons, and for the prevention of such danger the administrative body will have to take extraordinary measures, as well as when the danger has already arose. *Id.*

Hence, the abovementioned provision reflects the suspensive effects of the administrative appeal and the regulations indicate that administrative appealing of administrative acts automatically suspends the execution of administrative acts.

The suspensive effect means that the administrative appeal stays the execution of the contested act. The COE's Committee of Ministers 2001 recommendations state that "[national] regulations may provide that the use of some alternative means to litigation will in certain cases result in the suspension

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[67] Law "On Making Amendments and supplements to the RA Law on Inspection Bodies", 23.03.2018, *available at* https://www.arlis.am/documentview.aspx?docid=120948 Last visited May 11, 2020.
[68] https://www.arlis.am/DocumentView.aspx?docid=124497 Last visited May 11, 2020.
[69] The statistics of Tax and Customs Appeals Commission are illustrated in the Chapter 3, §2.
[70] RA LFAAP, 18.02.2004, Article 74, *available at* https://www.arlis.am/DocumentView.aspx?DocID=75264 Last visited May 11, 2020.

of the execution of an act, either automatically or following a decision by the competent authority." There are two options for the suspension: automatic suspension or suspension decided by the appellate body or court[71].

Meanwhile, we should consider that this paragraph is designed not only to introduce the general regulation of administrative appeal but also the current initiatives toward the mandatory administrative appeal. More precisely, in the framework of the latest legal reforms, we should consider the recent amendments of administrative justice. The Article 3 of CAP was incorporated with the Law on Amendments of the CAP of the RA, which was adopted on 23.10.2019 and came into force on 30.11.2019[72]. Currently, the Paragraph 1.2 of the Article 3 of the CAP stipulates that administrative acts on administrative offences provided for in Article 287 (2) of the RA Code of Administrative Offences may be challenged in court only after an administrative appeal[73].

Simultaneously Article 79 of the RA CAP was also amended, which states the legal consequence of not following the abovementioned requirement. The latter states that the judge shall return the application if in the case provided for by CAP, the administrative act has not been appealed (appealed) in an administrative manner[74].

The acts on administrative offences provided for in Article 287 (2) of the RA Code of Administrative Offences mainly refer to violations of the rules of operation of vehicles. The latest amendments highly contribute to unloading the courts and act in the interests of both the judiciary and proper administration. The abovementioned legal reforms of administrative justice are the evidence of necessity and expediency of the mandatory system of administrative appeal of the acts. That is why it is currently essential to examine all the possibilities of implementing the mandatory administrative appeal procedure and create a feasible legislative framework to contribute the developing practice.

Further, it is necessary to mention what issues arise the current system, and simultaneously what problems will be solved due to mandatory appeal system. The issues that we have recorded are as follows; the burden of the administrative court, the requirement of examining cases within a reasonable time and the effective use of administrative court resources, both human and financial.

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[71] Dragos, *supra* p. 4.
[72] Law on Amendments to the CAP of the RA, (30.11.2019), *available at* https://www.arlis.am Last visited May 11, 2020.
[73] RA Code of Administrative Offences, article 287 (2), 06.12.1985, *available at* https://www.arlis.am Last visited May 11, 2020.
[74] Ibid, article 79.

It is undeniable, that the overloading of administrative court has a negative impact on the efficiency of justice. In particular, there are cases that do not present any difficulties but the law envisages the opportunity of administrative and judicial review. So, those cases cause unnecessary burden for the court. For example, the cases initiated against the Yerevan Municipality with the demand to quash the administrative acts made on the application of the RA Code on Administrative Offenses under Article 124.7[75]. Most of the cases are terminated, as the respondent administrative body, on its own initiative, abolishes the disputed administrative act. However, the court still spends human and material resources on the examination of these cases.

The direct consequences of the workload of administrative court are the longer deadlines for the examination of cases; even the cases that do not present a particular complication can be examined for a long time. As a result, one of the components of the right to a fair trial enshrined in the Constitution and ECHR- the right to trial within a reasonable time is violated.

Thirdly, the burden of courts and long deadlines for the examination of case require a large amount of material and human resources which even makes impossible the effective management and use of it. It is necessary to take into account the economic aspect of our life, because the effectiveness of judicial protection largely depends on its timeliness. Mainly by way of administrative appeal, the opportunity to review the decision on its expediency. In addition, it must be remembered that the court, even recognizing the contested decision as illegal, cannot take a positive decision instead of an administrative body, and the person still has to wait for the body to execute the court decision and take the corresponding administrative act. In this sense, an administrative appeal is an additional guarantee for the protection of the rights and legitimate interests of a person[76].

Anyway, the current developments toward the application of mandatory administrative review in certain cases are quite acceptable, but the question of applying the general rule of mandatory administrative appeal should be considered and developed.

[75] RA Code of Administrative Offences article 124.7 states that failure to pay the local fee for parking vehicle or its attachment in the paid community parking shall result a fine in the amount of five times the established minimum wage.
[76] Yuriichuk, *supra* at 102 .

§2. The Model of Mandatory Administrative Appeal for Armenia

After the comprehensive observation of international standards (particularly, the COE recommendations and ECHR), experiences of foreign countries and studies of doctrinal sources, in case of the introduction of a mandatory pre-trial administrative institute, it is necessary to consider whether all cases should be subject to mandatory administrative appeal and which body must be authorized to examine the complaints.

In our opinion it is more expedient to define the obligation of administrative appeal as a general rule to ensure the unity of the regulations related to the administrative appeal. At the same time, it is necessary to define some exceptions to this rule, taking into account the specifics of the possible situations. Law should envisage the scope of cases that needs to be an exception from the general rule.

As an exception, first of all, we would like to underline the cases when specific deadlines are set for appealing the administrative act and examining it in court. The main concerns behind this exception are the short deadlines, as if a person is obliged to file an administrative appeal, his or her right to go to court may be disproportionately restricted. In such cases the requirement of administrative appeal will not ensure the effective protection for the human rights and freedoms, moreover it will be meaningless.

For instance, the paragraph 1 of Article 204 of CAP stipulates an action against the decisions and actions of the community head concerning assembly may be filed to the court within three days after the decision enters into force or notification of the meeting, and if the decision has been made or the notification has been notified from the date of the meeting later than 7 days before, within 24 hours[77]. Besides, in case of protection of the right to vote, Paragraph 1 of the Article 209 states that a lawsuit

[77] RA CAP, 05.12.2013, article 201.1, available at https://www.arlis.am/ Last visited May 11, 2020.

may be filed to the administrative court within 3 calendar days from the date on which the plaintiff learned or was obliged to know of the violation of his right to vote[78].

These cases have their own peculiarities, and the time limits for requesting judicial protection of rights are conditioned, in the first case the complainant should get the judicial act until the day of the assembly, in the second case before the day of the election (referendum) or the day of summarizing the results. So, in such cases the obligation to lodge an administrative appeal will result of violation of right to judicial protection.

The second case is when a person's administrative rights are not interfered by the original administrative act, but by the administrative act, which was adopted by the higher administrative body as a result of appeal. That is a result of the examination of the administrative complaint. So the act has been repealed and the person[79] applying to the court does not agree with the administrative act made as a result of the appeal. In this case the higher administrative body has already made its final decision and the issue should not be a subject to double administrative examination.

Anyway, it is obvious that these exceptions cannot be exhaustive. In a number of other cases, it may be necessary to set an exception, allowing individuals to go to court regardless of whether they have appealed the administrative act.

The second major issue of the possible mandatory administrative appeal model is the body that will examine the administrative appeals.

According to RA legislation an administrative complaint may be filed by the body that adopted the act and to the superior administrative body of the latter[80]. In this context, it is necessary to examine also the efficiency of these models. It may be argued that in first case the issuing authority will be subjective in reassessing its decision, but on the other side it is "the appeal to the best informed authority". What regards hierarchical appeal, it is also justified as the superior body has, supposedly, more diverse means of action than the subordinated body[81]. We think that even in case of mandatory administrative appeal it is necessary to maintain such ways of appeal.

In order to ensure the efficiency of the examination of complaint we think it is possible to discuss the possibility of creating a special commission within the administrative body, which will examine the

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[78] Ibid, article 209.1.
[79] The third party participating in the administrative proceedings whose rights have been violated by the decision made as a result of the administrative appeal.
[80] RA LFAAP, 18.02.2004, Article 70 (2), *available at* https://www.arlis.am/DocumentView.aspx?DocID=75264 Last visited May 11, 2020.
[81] Yuriichuk, *supra* at 107.

administrative appeal not only in terms of legitimacy but also in terms of expediency. One should raise a question that the higher authorities of the administrative body may have a negative attitude towards the complaints brought against its decisions or will not be willing to abolish its administrative acts.

In fact the practice shows that the higher authorities of the administrative body are ready to abolish the administrative acts adopted by the same body. The bases for recording such fact are statistics of the State Revenue Committee's tax service.

According to 10.05.2020 statistics of the appeal of the tax authority or the tax officer of the tax service as of a total of 725 administrative complaints were filed, 550 complaints were satisfied, 11 complaints were partially satisfied, 46 complaints were dismissed and 116 complaints were rejected[82]. The 2019 statistics of the appeal of the tax authority or the tax officer of the tax service show that a total of 1543 administrative complaints were filed, 758 complaints were satisfied, 99 complaints were partially satisfied, 189 complaints were dismissed and 495 complaints were rejected[83].

These statistics show that the special commissions within the administrative bodies can provide the effective protection for human rights and freedoms. In addition, the composition of the commission investigating the complaint is also important. We think that the administrative appeal will be more effective if the commission will be comprised with the high ranked official of the administrative body, lawyers and also other specialists. This is because despite the administrative body investigating the complaint has the right to appoint an expert[84]; special knowledge is required to find out the factual circumstances of the case. Therefore, we think that there should also be specialists in the relevant field, besides it will ensure the public trust to the impartiality of the commission investigating the complaints.

Thus, an administrative appeal may be more effective in establishing special commission in each administrative bodies consisting of members with the knowledge and experience necessary to conduct a comprehensive examination of the dispute.

The other aspect of mandatory administrative appeal is whether the complainant can file a claim to the court with grounds and arguments different from those presented in the administrative appeal. In other words whether the plaintiff is limited to the grounds and justifications presented during the administrative appeal.

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[82] https://www.petekamutner.am/Content.aspx?itn=tsLBRStatisticsOnAAATBTS Last visited May 11, 2020.
[83] https://www.petekamutner.am/Content.aspx?itn=tsLBRA2019 Last visited May 11, 2020.
[84] RA LFAAP, 18.02.2004, Article 45, *available at* https://www.arlis.am/DocumentView.aspx?DocID=75264 Last visited May 11, 2020.

On the one hand, taking into account that the mandatory administrative appeal is way of human rigths protection, it can be assumed that the person must be constrained by the grounds and justifications of the administrative complaint.

However, on the other hand, it should be considered that administrative and judicial appeals are not the same, all guarantees for protection of human rights are not included in the administrative appeal proceedings, so the person's right to judicial protection should not be limited to that extent.

Moreover, in our opinion, such a restriction is not expedient, taking into account that the RA legislation does not require justification for an administrative complaint. Thus, the examination of the case in court should not be limited to the grounds and justifications of the administrative complaint.

What regards to time-limits we think that the general time-limit set forth for the administrative procedure (30 days[85]) is appropriate for administrative appeal procedure, besides the LFAAP also provides that the obligation of administrative body to act as soon as possible, without complicating it, holding additional hearings, appointing additional expertise or conducting an examination, if there are no necessary reasons for clarifying the factual circumstances[86]. In addition, we think that if the administrative body fails to solve the dispute in a competent time-limit set forth in law, the complainant has the right to apply for judicial protection without exhaustion of administrative remedies, taking into account the principle of effective protection of human rights in reasonable time.

At the same time, it should be emphasized that the employment of such appeal procedure necessitates the improvement of resources of administrative bodies and the increase of the level of professionalism, as only in such conditions can a proper administration be carried out, and therefore an effective examination of complaints and protection of human rights. Notwithstanding the abovementioned, it is hard to foresee the exact consequences what the execution of mandatory mechanism might induce. There will certainly appear unanticipated repercussions and problematic circumstances. Thus, the amendments will prove their effectiveness only after a certain period of its application.

[85] Ibid, article 46.
[86] Ibid, article 36.

CONCLUSION

When summarizing the results of the research paper the following conclusions can be highlighted:

The functions of administrative appeal, besides the protection of complainants rights, the self-control of the administrative body and unloading of administrative courts are the *promotion of good governance principles and accountability towards the higher administrative body.*

The mandatory administrative review can serve an effective and feasible tool for administrative authorities to give the administration a chance to revise its decision, and therefore operate as a filtering mechanism so not all complainants end up in the courts.

The mandatory administrative appeal is designated as oversight mechanism among majority of countries examined, since it maintains the administrative autonomy, establishes the final administrative agency decision, makes the case "ripe" for judicial review, allows the complainant to seek the easiest form of protection and avoids premature interference to the administrative procedure.

The requirement of mandatory administrative appeal does not in itself contradict the right of access to court (right to judicial protection) guaranteed by the RA Constitution and ECHR, provided that during the examination of the administrative complaint the requirement of reasonable time is met and the proper administration is provided; in that case the mandatory administrative appeal will not be an excessive burden for the complainant.

Moreover, the employment of such appeal procedure necessitates the improvement of resources of administrative bodies and the increase of the level of professionalism, as only in such conditions can a proper administration be carried out, and therefore an effective examination of complaints and protection of human rights.

It is more expedient to establish the mandatory administrative appeal as a general rule to ensure the unity of the regulations, at the same time, it is necessary to define some exceptions to this rule, taking into account the specifics of the following situations:

- the cases when specific short deadlines are set for appealing the administrative act and examining in court. In such situations the requirement of mandatory administrative appeal disproportionately restricts the access to court and frustrates the right to judicial protection.

- the cases when a person's administrative rights are not interfered by the original administrative act, but by the administrative act, which was adopted by the higher administrative body as a result of appeal, since the higher administrative body has already made its final decision on that matter. So, double administrative examination of the same issue should be avoided.

The proposed model is the possibility of creating a special commission within the administrative body, which will consist of the high ranked officials of the administrative body, lawyers and also other specialists with the knowledge and experience necessary to conduct a comprehensive examination of the dispute.

The complainant can file an action to the court with grounds and arguments different from those presented in the administrative appeal. In other words, the plaintiff is not limited to the grounds and justifications presented during the administrative appeal, as it will frustrate the essence of the right to judicial protection.

To recapitulate, every legislative initiative, ultimately, bears certain risks and it is up to the country, to take the risk or not. Nevertheless, the current developments toward the application of mandatory administrative review in certain cases are quite acceptable, but the question of applying the general rule of mandatory administrative appeal as an effective measure for the protection of human rights should be considered and implemented, as it will highly contribute to unloading the courts and act in the interests of both the judiciary and proper administration.

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