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# Protection of Persons' Rights and Freedoms by Estonian Administrative Courts: Development and Key Problems

## 1. Outline of Developments of Administrative Court Jurisdiction

### 1.1. GENERAL INTRODUCTION

On 19 February this year 80 years have passed from the beginning of administration of justice by administrative courts in Estonia. Conditionally these years can be divided into two big stages. The first stage covers the period from 1919 to 1940 and coincides with the first period of Estonian statehood. In 1940, in connection with the occupation and annexation of the Republic of Estonia by the Soviet Union, the jurisdiction of administrative courts was liquidated. Its restoration became possible only after the re-establishment of Estonia's independence. The Constitution adopted in 1992 foresaw the formation of administrative courts. Next year the Administrative Court Procedure Code was adopted and in autumn of the same year administrative courts began to operate. But actually their work began in the autumn of 1993. In February 1993 the parliament passed a qualitatively new Administrative Court Procedure Code that will come into force on 1 January 2000. Thus, Estonia will enter a new century with the new Administrative Court Procedure Code.

### 1.2. JURISDICTION OF ADMINISTRATIVE COURTS IN THE FIRST PERIOD OF ESTONIAN STATEHOOD (1919-1940)

In 1919 the Administrative Court Procedure Act was passed which was substantially amended in 1929 and which served as the basis for the administration of justice in the field of administrative law.<sup>1</sup> There were no organisationally independent administrative courts established in Estonia. General courts and their departments administered justice in the field of administrative law. The administrative court system consisted of district courts (55), circuit courts (4) and the administrative law department of the Supreme Court.

A district court was the first-instance administrative court and apart from administrative cases it heard civil and criminal cases. Justice was administered in a district court by a single judge. Circuit courts operated within their jurisdiction also as the courts of first instance. Circuit courts were allowed to form departments according to the type of cases to be tried, thus including administrative law departments, but actually the latter were not established and a bench of three judges of civil departments resolved administrative disputes. The administrative law department of the Supreme Court was the highest administrative court that

operated as the final court of appeal for both district and circuit courts. The acts of the following persons and institutions fell within the competence of an administrative court:

(1) at the central state administration level - acts of ministers and ministries, governments and departments thereof and structural units equated with the latter two subdivisions;

(2) at the local state administration level – acts of county governments, structural units and members thereof, chief constables and others;

(3) at the local government level — acts of rural municipality, township and city governments and cultural governments of national minorities as well as structural units and members thereof.

Administrative courts were entitled to review both legislation (regulations, orders and resolutions) and the actual activity (including inactivity and delay) of an administration. The activities of the Government of the Republic were beyond the judicial control of administrative courts.

Complaints against the acts of rural municipality and township councils and governments as well as the departments and pertinent officials thereof fell within the competence of a district court.

A circuit court dealt with the complaints filed against the acts of city and county councils and cultural boards of national minorities as well as of city and county governments and cultural governments of national minorities and the departments and officials thereof.

The Supreme Court as the final court of appeal reviewed the cassation protests and complaints lodged against the decisions of district and circuit courts. The main task of these review proceedings was to control whether a first-instance court had properly and uniformly implemented the law in force. Review proceedings involved the elements of both cassation and appeal procedure.<sup>2</sup> In certain administrative cases (when dealing with ministerial regulations, etc.) the Supreme Court operated as the court of first instance.

An administrative court exercised relatively extensive powers while resolving the cases before it. A court might:

(1) reject the complaint;

(2) rescind the regulation, order or resolution in full or in part. A court might also require the issuance of a new administrative act instead of the rescinded one;

(3) order the pertinent administrative agency or official to perform a certain act if the law or regulation obliged it or him or her to perform the act. In order to safeguard the complainant's rights, a court might also require abstention from or abandonment of performing the act;

(4) remove officials from their office in the cases prescribed by law.

In summary it can be said that a relatively perfect

jurisdictional administrative control functioned in that period. In the administrative law sphere, the judicial protection of rights and freedoms of natural as well as legal persons was guaranteed.

### **1.3. JURISDICTION OF ADMINISTRATIVE COURTS AFTER THE RE-ESTABLISHMENT OF ESTONIA'S INDEPENDENCE**

The Constitution of the Republic of Estonia adopted by the referendum of 29 June 1992 foresaw a three-stage court system. Pursuant to § 149 of the Constitution, county and city courts, and administrative courts are courts of first instance. Circuit courts review judgements of the first-instance courts by way of appeal proceedings. The Supreme Court is the highest court in the state that reviews court judgements by way of cassation.<sup>3</sup>

On 21 June 1993, the Administrative Court Procedure Code was adopted by the parliament and in autumn of the same year the administrative courts began to operate.<sup>4</sup> Pursuant to the Code, the administrative court system can be described as follows:

(1) separate administrative courts or administrative judges who serve in county or city courts constitute the first-instance administrative courts. At the present moment there are two separate administrative courts in Estonia — in Tallinn and in Tartu; there are 23 administrative judges working in county and city courts. The total number of administrative judges in the first-instance courts is 36;

(2) administrative chambers of circuit courts operate as the courts of second instance whereat, pursuant to the law, the circuit courts are not obliged to establish administrative chambers. In the case no administrative chamber has been formed, the civil chamber will review administrative cases. Out of the three circuit courts of Estonia (the Tallinn, Tartu and Viru Circuit Courts) only the Tallinn Circuit Court contains a separate administrative chamber.

The 1993 Administrative Court Procedure Code belongs to so-called transitional-period laws characterised by the then understandings and the legal regulation of which was based on the then objective situation and existing possibilities. Besides essential deficiencies the Code is of a comparatively low norm-technical level. In order to guarantee the protection of persons' rights and freedoms in the sphere of administrative action, the Administrative Law Chamber of the Supreme Court has tried to eliminate the drawbacks of the Code in its decisions by extending the administrative judicial protection of persons.

On 25 February 1999, the parliament adopted a new Administrative Court Procedure Code that will come into force on 1 January 2000.<sup>5</sup> In the elaboration of the Code our current court practice, problems arisen in connection with court proceedings and court decisions, proposals made by administrative judges, the relevant procedure codes and court practice of other states (Germany, Austria, Switzerland, France and others) as well as treatments and

positions presented in the pertinent legal-theoretical literature were taken into account. The requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms were also taken as the basis. Practicians and legal scholars of Germany, Austria and other states gave their expert opinions on the draft Code.

The part of the Code dealing with the organisation of administrative courts will come into force on 1 January 2001. The Code foresees the establishment of separate administrative courts of first instance. Proceeding from that, an administrative court may review more serious administrative cases collegially, i.e. with the participation of three judges. At the present moment, a single judge tries administrative cases in a court of first instance.

## **2. Competence of an Administrative Court and the Protection of Persons' Rights**

### **2.1. GENERAL BASES**

Subsections 3(1) and 4(1) and (2) of the Administrative Court Procedure Code currently in force has tried to establish the competence of an administrative court mainly by listing the types of pleadings, administrative agencies and officials. The fact that the list is incomplete and non-exhaustive, has often caused disputes in court practice on whether it is possible to file an appeal with an administrative court against the act of one or the other administrative agency, and which disputes fall within the competence of an administrative court and which ones fall within the competence of a county or city court, etc. Such method of determining the competence of an administrative court does not guarantee and is not in compliance with the constitutional principle of judicial protection. Pursuant to § 15(1) of the Constitution everyone whose rights and freedoms are violated has the right of recourse to the courts. This principle has been elaborated by §§ 3 and 4 of the Courts Act pursuant to which the task of the courts is to protect everyone's rights and freedoms in accordance with the Constitution and laws. Citizens have the right to be protected by the courts if their life, health, personal liberty, property, honour and dignity or other rights and freedoms guaranteed by the Constitution, are violated.<sup>6</sup> § 3(1) 1) of the new Administrative Court Procedure Code defines the competence of an administrative court by the method of a general clause – the resolution of disputes in public law falls within the competence of an administrative court. Subsection 3(2) of the Code fixes the disputes in public law for which the law prescribes another way of procedure and which are because of this excluded from the competence of an administrative court. According to § 4(1) of the Constitutional Review Court Procedure Act, the Constitutional Review Chamber of the Supreme Court reviews the constitutionality of enforced laws passed by the parliament, the conformity of

parliamentary resolutions with the Constitution and the law, the constitutionality of laws that have not been promulgated by the President and that have not yet become effective, the constitutionality of presidential legislation, the conformity of enforced legislation of general application of the executive state power and local governments with the Constitution and the law, and the constitutionality of international treaties that have not yet become effective. An administrative court does not review the complaints procedure for resolution of which is provided by the Civil and Criminal Court Procedure Codes. Thus, the disputes in public law contained in the latter codes do not fall within the competence of an administrative court. Although the legislator has not excluded any more disputes that may be caused by the relations in public law from the competence of an administrative court, still, for example, the President's decisions by which the laws are promulgated as well as some other disputes stemming from the relations in political law do not, in essence, fall under the jurisdiction of an administrative court. An administrative court is primarily entitled to deal with the disputes proceeding from the relations in administrative law. At the same time it should be mentioned that, on the basis of the constitutional principle of judicial protection, the Administrative Law Chamber of the Supreme Court has extended its competence also to disputes that, in essence, are not disputes in administrative law. For example, an administrative court proceeded with a complaint filed against a procedure carried out in the preliminary investigation of a criminal case. This concerns the complaint submitted to the Public Prosecutor against a prosecutor's performed procedure and rejected by the former. The Administrative Law Chamber of the Supreme Court observed in its decision that as the Criminal Procedure Code does not provide for the resolution of complaints filed with the Public Prosecutor against his or her subordinate prosecutors then the resolution of such complaints filed against Public Prosecutor's legislation or act falls within the competence of an administrative court. Further, the Supreme Court pointed out that, at the same time an administrative court does not interfere with the criminal proceeding and does not control the observance of law by the institutions carrying out preliminary investigation. Pursuant to the Administrative Court Procedure Code, an administrative court reviews only whether the Public Prosecutor has acted lawfully while resolving the complaint.<sup>7</sup> Although with regard to the above-mentioned case the position of the Administrative Law Chamber of the Supreme Court was justified, the court decision, one way or the other, touched the substantial aspects of criminal procedure. Therefore, first of all the pertinent gaps should be eliminated in the Criminal Procedure Code and not left to be filled by an administrative court because otherwise it may happen that an administrative court will, one way or the other, interfere with the

criminal procedure.

## **2.2. AN ADMINISTRATIVE ACT AND THE PROTECTION OF PERSONS' RIGHTS**

As at present we do not have an Administrative Procedure Code then we cannot find the definition of an administrative act in substantive law in the Estonian legal order either. Subsection 4(3) of the valid Administrative Court Procedure Code has tried to define a legal act against which a complaint may be submitted to an administrative court: a resolution, order, directive or other legislation of no normative content issued by the body, agency or official referred to in this section as well as an administrative agreement denote a legal act against which a complaint or protest may be filed with an administrative court. Such a definition is of course a failure. Firstly, the above provision foresees that such legislation may be issued only by the agencies of executive state power the list of which is given in § 4(1) of the pertinent Act. As it has been mentioned already, the corresponding list is not exhaustive. For example, it does not contain the President and others. At the same time other state bodies, such as the parliament, exercising the administrative function assigned to them by law as a secondary function are absolutely left aside. With regard to this, the administrative court has made certain corrections in its decisions and interpreted the pertinent provision extensively. The following case serves as an example here. On 21 September 1994 the Riigikogu (the parliament of Estonia) removed, by its resolution and on the basis of § 26(5) of the Status of Judges Act, from office the judge S. D. because of the reorganisation of courts. S. D. submitted a complaint against it to an administrative court and later an appeal to a circuit court. The circuit court repealed the judgement of the administrative court and terminated the proceeding as it held that the complaints against the resolutions of the Riigikogu did not fall within the competence of an administrative court. S. D. appealed to the Supreme Court. The Administrative Law Chamber of the Supreme Court observed in its decision that the resolution of the Riigikogu to remove a judge from his or her office is an individual act of public law character that terminates the service relations with a civil servant. Consequently, the Supreme Court admitted that in the above-mentioned court case it dealt with an administrative act. Subsequently the Supreme Court emphasised that such a dispute may not be resolved by way of constitutional review because, stemming from § 6(1) of the Constitutional Review Court Procedure Act, only the President of the Republic, the Legal Chancellor and the courts and not the person who considers that his or her rights are violated are entitled to initiate constitutional review proceedings in the Supreme Court. Consequently, only an administrative court is competent to review the complaint pertaining to the resolution of the Riigikogu on the issues of service.<sup>8</sup>

Secondly, the essential criterion of a legal act against which it is possible to submit a complaint to an administrative court, i.e. the criterion that the act is not, in content, legislation of general application, is improper and confusing. Estonian legal doctrine and legal practice treat legislation that contains rules of law as legislation of general application.<sup>9</sup> Consequently, § 4(3) of the Administrative Court Procedure Code bears in mind the legislation that does not contain rules of law. But at the same time certain legislation that does not contain rules of law is issued in the sphere of relations of political law. Such legislation should fall within the competence of the court of constitutional review. The new Administrative Court Procedure Code has tried to resolve the problem. Subsection 4(1) of the Code offers a substantive definition of an administrative act: an order, directive, resolution, precept or other legislation of an agency, official or other person performing administrative tasks in public law that have been issued in public law relations for the regulation of an individual case denote an administrative act against which it is possible to file a complaint or protest with an administrative court. Here the notion of an administrative act tries to reveal as closely as possible the notion of an administration act known in theory.<sup>10</sup>

Compared with the definition of an administrative act embodied in § 35 of the German Administrative Procedure Code (*Verwaltungsverfahrensgesetz*) there is one difference, namely the Estonian definition of an administrative act lacks the characteristic of "being directed beyond administration".<sup>11</sup> In Germany, the contest of legislation of an administration that has no "beyond-effect" is generally excluded by the restriction established on the recourse to an administrative court. Pursuant to § 7(1) of the German Administrative Procedure Code, a person who considers that legislation or action of an administration has violated his or her rights or restricted his or her freedoms, i.e. his or her subjective rights in public law, has the right of recourse to an administrative court. At the same time this definition enables such resolutions (expressions of will) of an administration that have no direct "beyond-effect" but that, one way or the other, invade personal rights to be contested in court.

In the initial period (1993-1994) of operation of Estonian administrative courts the problems arose in connection with the qualification and determination of these resolutions of an administration on the basis of which the administration used the forms in private law. The same problem in German legal doctrine has been dealt with in relation to a so-called two-stage theory (*zwei-Stufen Theorie*).<sup>12</sup> The question was whether the decision "whether" made at the first stage and based on public law, and followed by "how" with regard to which form of private law is used, could be treated as an administrative act and contested in an administrative court. Present court practice holds that if the decision made at the first stage is

directly determined by the norms of public law then we are dealing with an administrative act that can be contested in an administrative court.<sup>13</sup> In connection with this, two main fields have become topical in our court practice — privatisation of property in the ownership of the state or a local government and public procurement, and to a lesser extent the resolutions pertaining to the accomplishment of administrative tasks by an administration in the forms of private law and the delegation of these tasks to persons in private law. Pursuant to the Privatisation Act, the privatisation of state property is arranged by the Privatisation Agency (a government agency) the board of which determines, for example, by its decision and pursuant to § 9(2) 11) of the aforementioned Act, the most successful tender in negotiated limited tendering and on the basis of this decision enters into a contract of purchase and sale (a contract in private law) with the person whose tender was the best.<sup>14</sup>

Administrative courts regard such decisions of the Board of the Privatisation Agency as administrative acts and they have reviewed the pertinent complaints. But disputes pertaining to the contract of purchase and sale fall within the competence of county or city courts. The organisation of public procurement procedures is regulated by the Public Procurement Act pursuant to which the contracting authority (a state or local government agency or other legal person in public law on behalf of the state or local government) determines by its decision and pursuant to § 28(1) of the Act, the most successful tender on the basis of which the procurement contract (a contract of purchase and sale or any other contract entered into after the acceptance of a tender) will be concluded.<sup>15</sup> Interested parties, primarily other participants in tendering, have filed complaints against such decisions. Administrative courts have regarded these decisions as administrative legislation. The reason for that lies foremost in the fact that these decisions are also determined by the norms of public law. The grounds for the contest of these acts are the infringement of tendering procedures, the ignoring of the principle of equality and others.

However, in the cases when the decision of an administration (an expression of will) is not directly determined by the norms of public law, the courts have not dealt with them. For example, they have not reviewed resolutions (orders) of city or rural municipality governments that serve as the basis for the conclusion of lease contracts or contracts of purchase and sale of municipal property and that do not fall within the sphere of the Public Procurement Act.

Decisions of the administration the essence of which is the delegation of administrative tasks in public law to persons in private law or the accomplishment thereof by an administration in the forms of private law should also be contested in administrative courts. At present there is no relevant court practice but as administrative tasks are these in public law then the disputes concerning them should

naturally fall within the competence of administrative courts. For example, a local government council decides by its resolution that is based on § 7(2) of the Common Waterworks and Sewerage Act who will be the water undertaker (the one who guarantees the water supply from common waterworks and the drainage and cleaning of wastewater with the help of common sewerage).<sup>16</sup> If a legal act that serves as the basis for granting special or exclusive rights does not provide for the procedure of special or exclusive rights then, pursuant to § 15(3) of the Competition Act, the council must organise for the granting of the pertinent right a public competition pursuant to the procedure established by the Government of the Republic.<sup>17</sup> The relevant decision of a council may be contested in an administrative court.

### **2.3. ADMINISTRATIVE AGREEMENT AS AN ADMINISTRATIVE ACT**

With regard to administrative agreements, the situation in the Estonian legal order is somewhat peculiar. Namely, at present we have neither defined an administrative agreement in substantive law nor established the requirements for the content and form thereof. At the same time special laws allow certain administrative agreements to be entered into and local government units also use them rather often for the delegation of administrative tasks in public law to persons in private law. Court practice has not been able to develop this institute as no administrative agreement has been contested hitherto. In order to fill the gap at least in some way, § 4(1) of the new Administrative Court Procedure Code defines an administrative agreement as an agreement regulating relations in public law. Thus, agreements in public law regulating individual cases fall within the competence of an administrative court. In the new Administrative Court Procedure Code an administrative agreement is equated to an administrative act. Subsection 4(1) of the Code provides that, in the meaning of the present Code, an administrative agreement is also regarded as an administrative act. Undoubtedly this equalising causes certain complications for the administrative court procedure. An analogous legal construction can be found in the German Administrative Court Procedure Code (*Verwaltungsgerichtsordnung*). Hereby one cannot but agree with the position of the German legal researcher G. Ress that both these forms of administrative acts include different aspects of unlawfulness and that they differ in substantive law as well as in procedure law.<sup>18</sup> The consequences of unlawfulness thereof are also different. As the legislator has not provided for the requirements of invalidity of an administrative agreement then here the application of analogy of law, primarily the provisions of the General Part of the Civil Code Act pertaining to transactions, helps to fill the gap to some extent.<sup>19</sup> The General Part of the Civil Code Act distinguishes between void and voidable transactions. Pursuant to §§ 66(1) and (2) of the

Act, a transaction that is contrary to the constitutional order or good morals or law, save if the law is not significantly violated, is void. Besides the aforementioned essential mistakes, a transaction may be, pursuant to the General Part of the Civil Code Act, void because of the failure to comply with the form of a transaction (§ 93(1)), because of the agency without mandate (§ 103(1)) or because of other reasons. A void transaction is invalid from inception and it need not be performed (§§ 66(3) and (4)). The General Part of the Civil Code Act does not prescribe that the court must declare a transaction invalid although certain grounds of invalidity of a transaction may sometimes be quite ambiguous (a conflict with good morals, a significant infringement of law) and disputable and require additional interpretation. Therefore, the Civil Chamber of the Supreme Court has, for example, declared in one of its decisions the invalidity of a void transaction in civil law.<sup>20</sup> Obviously an administrative court should similarly declare the invalidity of a void administrative agreement so much the more as a significant violation of law mentioned in the General Part of the Civil Code Act has different meanings in civil law (a civil contract) — generally a prohibition proceeding from the law — and in administrative law (an administrative agreement) — an activity not permitted by the law. Thus, not only the pertinent provisions of the General Part of the Civil Code Act come into consideration as the criteria of invalidity of an administrative agreement but also the infringement of requirements stemming from the principle of administrative legality. Pursuant to § 6(3) 3) of the new Administrative Court Procedure Code it is possible to seek declaration of invalidity of an administrative agreement.

Pursuant to § 67(1) of the General Part of the Civil Code Act, a transaction that a court may declare invalid at the request of an interested person on the bases provided by law is a voidable transaction. A party may demand performance of a voidable transaction until the transaction is declared invalid. Subsection 67(2) of the same Act provides that if a court declares a voidable transaction invalid, it shall be deemed invalid from inception. The same principle applies to void transactions. Consequently, there are no differences between void and voidable transactions as to their legal consequences. The General Part of the Civil Code Act establishes the following grounds for the contest of a transaction: misrepresentation, duress, error, a transaction exceeding passive legal capacity of a legal person and others. But the Act does not fix the unlawfulness as a ground for the contest of a transaction. That is not the case with an administrative agreement that, pursuant to the provisions of the new Administrative Court Procedure Code, may be contested from the aspect of its unlawfulness. Hereby the time limits for submission of complaints provided for in § 9(1) of the new Code must be taken into consideration. A complaint against an administrative act or action may be filed with an administrative court within 30

days as of the date the person filing the complaint becomes or should have become aware of the contested administrative act or action unless otherwise provided by law. Thus, it is possible to seek entire or partial invalidation of an administrative act within 30 days. Subsection 6(2) 1) of the new Administrative Court Procedure Code enables in principle to seek conclusion of an administrative agreement also in the cases where there is a pertinent prior resolution in public law to that effect. Subsection 6(3) 1) of the new Code enables the unlawfulness of an administrative agreement to be ascertained. Thus, an administrative agreement may, from the aspects of administrative procedure, be void, voidable and unlawful.

#### **2.4. OTHER ACTS OF AN ADMINISTRATION AND THE PROTECTION OF PERSONS' RIGHTS**

Both, the existing and the new Administrative Court Procedure Codes prescribe the possibility to submit a complaint against other forms of action of an administration. Pursuant to § 4(2) of the new Code, an action against which it is possible to file a complaint or protest is the activity or inactivity or delay in public law relations of an agency, official or other person performing administrative tasks in public law. The action of an administration means here the real acts of an administration that besides actual activities include other forms of action. For example, in the Estonian legal order it is possible to submit a complaint against single procedural steps of administrative procedure, not only against final decisions. For example, § 55(1) of the Public Procurement Act provides that a participant in a tendering procedure has the right to submit a complaint against acts performed or decisions made in a tendering procedure before acceptance of the successful tender. The above provision foresees that the protest be filed with the Public Procurement Office or an arbitral tribunal but taking into account the fact that no obligatory out-of-court procedure for resolution of disputes of the kind has been established, a person may still choose between out-of-court and judicial procedures. Most important here is whether or not the corresponding act of an administration invades the person's rights and freedoms. The new Administrative Court Procedure Code enables complaints to be submitted against such acts of an administration as the concordance, approval and others that are real acts in case they invade persons' rights. For example, § 17(2) 2) of the Planning and Building Act prescribes that prior to being publicly displayed, comprehensive plans (i.e. a plan which is prepared for the territory of a rural municipality or city and the drawing of which is administered by a local government) must be in concordance with the local governments neighbouring on the planning area. Pursuant to § 22(6) of this Act, a person exercising supervision over the planning must approve a plan prior to its adoption.<sup>21</sup> In accordance with § 6(2) 2) of the new Administrative Court Procedure

Code, a person may seek both the concordance and approval of a plan in case it is not concordant or approved (the right to seek performance of the act not performed). Also complaints against the concordance and approval are relevant. For example, one may seek declaration of these acts unlawful and the review or substitution (reversal) thereof.

### **3. System of Types of Complaints and Scope of Judicial Protection**

#### **3.1. INTRODUCTION**

The Administrative Court Procedure Code currently in force does not establish the types of requests embodied in a complaint. Pursuant to § 20(1) 1 (types of court decisions) of the Code, an administrative judge may declare the complained or protested legal act or action unlawful in full or in part. From § 71(5) of the Code it stems that the court decision also contains a binding precept to an administration as to what the latter must do. Thus, a person may, firstly, seek declaration of the legal act or action unlawful and, secondly, he or she himself or herself must substantiate the remaining part of the request — what he or she endeavours that the administration should do. As administrative court practice shows, such relatively insufficient regulation has restricted the possibilities of protection of persons' rights and freedoms in an administrative court because the complainants often cannot formulate the request essentially precisely. But the valid Administrative Court Procedure Code as well as the new one embody a principle according to which the court must stay within the limits of the submitted request. The new Administrative Court Procedure Code has tried to fill this gap. True, the new Code does not expressis verbis mention the types of complaints but it enumerates in § 6 the types of requests. By a complaint or protest it is possible to seek:

- (1) annulment of an administrative act or a part thereof;
- (2) implementation of the suspended administrative act or the issuance of an administrative act that has not been issued, performance of an action that has been suspended or not performed;
- (3) ascertainment of unlawfulness of an administrative act or action;
- (4) compensation for damages caused by an unlawful administrative act or action;
- (5) ascertainment of the existence or non-existence of the relation in public law.

Dogmatically, the following types of complaints may be derived from the requests embodied in a complaint:<sup>22</sup>

- (1) a complaint seeking annulment;
- (2) a complaint seeking the imposition of an obligation;
- (3) a complaint seeking ascertainment.

If we compare the essence of this system of types of

complaints with that incorporated in the administrative court procedure codes of Germany and Austria then we can see the difference. Although the terms used for the denotation of types of complaints in the new Estonian Administrative Court Procedure Code greatly coincide with those in the German Administrative Court Procedure Code, their content is still different.

#### **3.2. COMPLAINT SEEKING ANNULMENT**

The new Administrative Court Procedure Code (§ 26(1) 1)) vests an administrative court with the right to invalidate an unlawful administrative act. Here it is important to mention that the existing Administrative Court Procedure Code does not foresee this possibility – a court may just declare that an unlawful administrative act or action is unlawful. Thus, a person may seek by his or her complaint annulment of an administrative act or a part thereof. Besides an administrative act we can speak of an "annulment-complaint" with regard to an administrative agreement (equated to an administrative act in the new Code). An "annulment-complaint" may not be submitted against other forms of activity of an administration that may restrict persons' rights (real acts). An "annulment-complaint" may be filed with an administrative court within the time limits established for submission of appeals to an administrative court, i.e. within 30 days as of the date the person becomes or should have become aware of the appealed administrative act unless otherwise provided by special laws. After the expiration of the deadline for submission of appeals to an administrative court, an administrative act generally has the force of law and pursuant to the principle of legal certainty may not be repealed. This is not an absolute rule because the court has the right, at the request of the appellant, to restore the term if it finds that the deadline has been exceeded for due reason (§ 12(3) of the new Code). Proceeding from § 26(1) 1) of the new Code (the competence of an administrative court), a person may, in addition to seeking annulment of an administrative act, seek reversal of an administrative act in order to eliminate the consequences caused by the act.

#### **3.3. COMPLAINT SEEKING THE IMPOSITION OF AN OBLIGATION**

By this type of complaint a person may seek the issuance of an administrative act that was not issued, implementation of the suspended administrative act, and performance of an act that was not performed. A person may also seek the abstaining from the issuance of an administrative act or of the performance of an act. The complaint may be aimed at the reversal of the real act in case it is done together with the requirement of ascertaining the unlawfulness of the performed act (a complaint seeking ascertainment). With the help of a complaint seeking the imposition of an obligation a person may also require the conclusion of an administrative agreement when there is the pertinent prior resolution of an adminis-

tration and the administration delays the entrance or refuses to enter into a contract. If in the person's opinion the conclusion of an administration agreement prejudices his or her interests, he or she may seek abstention from the conclusion of an administrative agreement. Pursuant to the new Administrative Court Procedure Code, a person may also seek compensation for damages caused by an administrative act, administrative agreement or other action of an administration. The valid Code does not foresee this possibility. It means that a person must first seek declaration of unlawfulness of a legal act or action by an administrative court and only after that he or she may submit a claim for damages to a county or city court. A person may also seek by this type of complaint other pecuniary compensation to be paid by an administration.

#### **3.4. COMPLAINT SEEKING ASCERTAINMENT**

With the help of an "ascertainment-complaint" a person may seek ascertainment of unlawfulness of an administrative act, administrative agreement or action. He or she may also require assertion of invalidity of an administrative act or administrative agreement. By this complaint it is also possible to seek ascertainment of the existence or non-existence of the relation in public law. Substantially this type of complaint also includes claims for ascertainment of rights and duties and legal status in the relations of public law.

#### **3.5. TYPES OF COMPLAINTS AND THE LEGAL MEANING THEREOF**

The distinction of types of complaints is of importance primarily from the systematic aspects. Practically the new Code does not limit the number of different requests in one complaint. Hereby it is essential that the requests would be directed at only one participant in the procedure (the one and the same whose legislation or act has caused the submission of the complaint). An appellant may without changing the object of the complaint substitute one request for another or change the object pending the trial if other participants in the procedure consent to it or the court decides that this is expedient (§ 19(8) of the new Code). But one must bear in mind that different types of complaints have different legal meanings and consequences. As it has been mentioned already, a person may seek annulment of an administrative act within 30 days after the date he or she becomes or should have become aware of the appealed administrative act (a complaint seeking annulment). The same time limits apply to the complaints by which the issuance of an administrative act that has not been issued, implementation of a suspended administrative act, also performance of an act that has not been performed or abstention from the issuance of an administrative act or performance of an act are sought (a complaint seeking the imposition of an obligation). If a person seeks ascertainment of unlawfulness of the performed action (a complaint

seeking ascertainment) together with a claim for its reversal (a complaint seeking the imposition of an obligation) then he or she must also consider the aforementioned time limits. A complaint seeking the imposition of a compensation obligation for damages caused by an administration may be submitted within three years as of the date the person becomes aware of the damage but not later than after 10 years from the date the administrative act was issued or other action performed. There are no fixed deadlines for submission of "ascertainment-complaints". Also other specific requirements apply to different types of complaints. A complaint seeking annulment and that seeking the imposition of an obligation may be filed by a person who considers that his or her rights have been violated by an administrative act or other action. An "ascertainment-complaint" may be lodged by a person who has the pertinent grounded interest (§ 7(1)).

### **4. Appeal for Judicial Review of a Specific Norm**

Pursuant to § 15(1) of the Estonian Constitution everyone has the right, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional. The right to appeal to an administrative court for judicial review of a specific norm is provided more thoroughly in both the existing and the new Administrative Court Procedure Codes. Although § 15(1) of the Constitution refers besides laws to other legislation and procedures the § bears in mind the laws and legislation of general application (acts containing legal norms) issued by an administration. The pertinent judicial review in an administrative court may be initiated by a natural or a legal person as well as the court. Pursuant to § 25(5) of the new Administrative Court Procedure Code, an administrative court, when deciding a case before it, does not apply any law or legislation of general application that is in conflict with the Constitution. The Constitution has not vested the courts with the right to invalidate the laws or other legislation of general application that are in conflict with the Constitution. Only the Supreme Court (the Court of Constitutional Review) is competent to do this. From the aspects of uniformity and stability of the legal order, judicial review decisions concerning specific norms must get their final evaluation in the Constitutional Court. If an administrative act or other procedure declared unlawful by the decision of the court was issued or performed on the basis of an unconstitutional law or other legislation that an administrative court did not apply then pursuant to § 26(6) of the new Code the court informs the Supreme Court and the Legal Chancellor of its decision whereby a constitutional review proceeding in the Supreme Court is initiated. As our court practice shows, appellants have many a time resorted to this possibility. This right stemming from the Constitution offers

additional guarantees for the protection of persons' rights. A problem here is that an administrative court takes the corresponding position in its substantial court decision without awaiting the decision of the Supreme Court. If, for example, the decision of a first-instance court is not appealed against (the decision comes into force) and the Supreme Court rejects the request of an administrative court then the unlawful decision of the first-instance court remains in force. That is undoubtedly not in compliance with the principle of uniform application of law (the principle of equality). If an administrative court comes to the conclusion that an unconstitutional law or other legislation of general application has served as the basis for an administrative act or procedure, it should have the right to suspend the proceeding until the Supreme Court will make its decision.

In connection with the judicial review of norms by administrative courts the problem whether to vest administrative courts with the right to exercise, to a certain extent and at a certain level, abstract judicial control over the legislation of general application of an administration, has come under discussion among lawyers. Such legislation includes, for example, the regulations (by-laws) of a local government, regulations of corporations, agencies and foundations in public law and others. This issue needs more thorough analysis and discussion including among other things such questions as who should have the right to initiate an abstract norm review, on what grounds the proceedings should be initiated and so on. The Estonian Constitution is not an impediment here.

## Conclusion

The new Administrative Court Procedure Code has substantially expanded the protection of persons' rights and freedoms by administrative courts and created conditions for operative rehabilitation of infringed rights. So the new Code foresees a possibility of annulment of an administrative act as well as reversal of the implemented administrative act. Persons are entitled to seek compensation for damages caused by an administration, the issuance of an administrative act that has not been issued, ascertainment of unlawfulness of administrative real acts together with the reversal thereof, ascertainment of a relation in public law, etc. On the basis of the system of requests the following types of complaints can be mentioned: complaints seeking annulment, complaints seeking the imposition of an obligation, complaints seeking ascertainment, and complaints for judicial control of a specific norm. At the same time the fact that the development of administrative procedure is somewhat ahead of substantive law has caused problems for administrative court procedure. For example, there are no provisions establishing the requirements for the content and form of administrative acts and administrative agreements. Especially difficult is the situation with administrative agreements in the case of which it is not

possible to entirely apply legal analogy in the form of provisions of the General Part of the Civil Code pertaining to transactions because the aspects of invalidity and unlawfulness of an administrative agreement and those of a transaction in civil law differ greatly. There is nothing more than hope that the administrative law reform in progress (the Administrative Procedure Code is being elaborated) will fill this gap in the near future. But meanwhile, this is the task of court practice.

One of the further development trends of administrative court procedure could be the exercise of abstract norm control over the legislation of general application of the administration.

## Notes:

<sup>1</sup> RT (Riigi Teataja = State Gazette) 1919, 10, 23; 1929, 16, 110.

<sup>2</sup> A.-T. Kliimann, *Haldusprotsess. (Administrative Procedure.)* Tartu, 1937, p. 276.

<sup>3</sup> Eesti Vabariigi Põhiseadus. Riigi Teataja toimetuse väljaanne. (Constitution of the Republic of Estonia. Publication of Editorial Board of Riigi Teataja.) Tallinn, 1994.

<sup>4</sup> RT I 1993, 50, 694; 1998, 61, 981.

<sup>5</sup> RT I 1999, 31, 425.

<sup>6</sup> RT I 1991, 38, 472; RT I 1998, 4, 62.

<sup>7</sup> Court Order of the Administrative Law Chamber of the Supreme Court in administrative case No. III-3/1-32/95.— Riigikohtu lahendid. (Decisions of the Supreme Court.) 1995. Tallinn, 1996.

<sup>8</sup> Court Order of the Administrative Law Chamber of the Supreme Court in administrative case No. III-3/1-33/97.— Riigikohtu lahendid. (Decisions of the Supreme Court.) 1997. Tallinn, 1998.

<sup>9</sup> K. Merusk, *Kehtiv õigus ja õigusakti teoria põhiküsimus.* (Law in Force and Principal Issues of the Theory of Legal Act.) Second amended edition. Tartu, 1995, pp. 6-8.

<sup>10</sup> I. Pilving, *Halduskohtute korraldus ja pädevus halduskohtumenetluse seadustiku eelnöös.* (Administration and Competence of Administrative Courts in Draft Administrative Court Procedure Code.)— Juridica, 1998, 10, p. 518.

<sup>11</sup> F. O.Kopp, *Verwaltungsverfahrensgesetz.* 6. wesentl. überarb. Aufl., München, 1996, p. 606.

<sup>12</sup> H. J. Wolff, O.Bachof, R.Stober, *Verwaltungsrecht I.* 10. Aufl., München, 1994, pp. 214-216; F.-J. Peine, *Allgemeines Verwaltungsrecht.* Heidelberg, 1994, pp. 185-187; H.-U. Erichsen, (Hrsg.). *Allgemeines Verwaltungsrecht.* 10. Aufl., Berlin, New York, 1995, pp. 41-44; W. Schmitt Glaeser *Verwaltungsprozessrecht.* 12. Aufl., Stuttgart, München, Hannover, 1993, p. 42.

<sup>13</sup> Court Order of the Administrative Law Chamber of the Supreme Court in administrative case No. III-3/1-4/94.— Riigikohtu lahendid. (Decisions of the Supreme Court.) 1993/1994. Tallinn, 1995; Court Order of the Administrative Law Chamber of the Supreme Court in administrative case No. III-3/1-14/94.— Riigikohtu lahendid. (Decisions of the Supreme Court.) 1993/1994. Tallinn, 1995.

<sup>14</sup> RT I 1997, 9, 78.

<sup>15</sup> RT I 1997, 9, 79.

<sup>16</sup> RT I 1999, 25, 363.

<sup>17</sup> RT I 1998, 30, 410.

<sup>18</sup> G. Ress, Handlungsformen der Verwaltung und Rechtsschutz in der Bundesrepublik Deutschland. — Forschungen aus Staat und Recht 89. Entwicklungstendenzen im Verwaltungsverfahrensrecht und in der Verwaltungsgerechtsbarkeit. Wien, New York, 1990, pp. 15-16.

<sup>19</sup> RT I 1994, 53, 889; 1999, 40, 773.

<sup>20</sup> Decision of the Civil Chamber of the Supreme Court in civil case No. III-2/1-126/97. — Riigikohtu lahendid. (Decisions of the Supreme Court.) 1997. Tallinn, 1998.

<sup>21</sup> RT I 1995, 59, 1006; 1999, 29, 399.

<sup>22</sup> I. Pilving Q.v. note 10, p