

THE ROLE OF INDEPENDENT CONTROL BODIES IN EXERCISING EFFECTIVE SUPERVISION OVER PUBLIC ADMINISTRATION

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Abstract: The Great Depression which the world faced in the 1930s imposed the need for the states to be better organized. The challenges of the time called for appropriate response. One of the solutions was found in establishing independent control bodies. These bodies were meant to ensure more efficient and more economical performance thanks to qualified personnel at their disposal. The United States started looking for the solution in establishing new bodies (agencies). The agencies were entrusted with broad powers, which gave rise to criticism that they acted outside the scope of the existing system of division of power. The wave of establishing independent bodies (agencies) later spread from the US to the European continent.

Since 2000, a large number of independent bodies have been founded within the legal system of the Republic of Serbia, following the example of other European states. The legal status of these bodies varies and the degree of their autonomy and independence depends on their organizational forms.

The role of science but also of the society as a whole is to point out the importance and necessity of the existence of independent bodies, especially in the states undergoing transition.

Keywords: independent control bodies, administration, control powers, regulatory powers, executive powers.

INTRODUCTION

There are several reasons for writing this paper. First of all, there is certainly the indisputable significance of the topic itself. Secondly, there is a need to provide an overview of the historical origin and significance of independent bodies. Thirdly, to offer the legal and professional public a concise over-

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view of the essence of these bodies, which have existed for about a century within some legal systems and which entered our national legal system only at the beginning of the 21st century.

The subject matter under review encompasses independent control bodies within the legal system of the Republic of Serbia. The intention of the paper is to offer viewpoints and conclusions that will represent scientific contribution to determining the position and role of independent control bodies and that will point out their significance in the control of administration within the legal system of Serbia. In fact, when we speak about independent control bodies, we refer to a theoretical construct originating from scholarly curiosity, aimed at clarifying insufficiently precise statutory terminology and at pointing out common properties and the role that such bodies have in our legal system (Milkov, 2014:25-28).

Standard forms of administration control are never sufficient. The need for additional forms of control over administration has resulted in the emergence of independent control bodies.

The process of introducing independent control bodies is part of a broader process. This process is a characteristic feature of modern political systems. Although, if truth be told, the term agency does introduce a certain confusion as regards terminology. It first originated in the US and denoted all administrative bodies. From there, it slowly spread to other countries. It adopted a narrower meaning in the Continental European legal system. Agencies were created with the aim of ensuring more efficient and economical performance, thanks to the highly qualified staff at their disposal, their specific organisational structure and funding, as well as their independent position in respect of other organs and bodies (Davinić, 2004; Davinić, 2018; Lončar, 2015:145-148).

AGENCIES IN THE LEGAL SYSTEMS OF THE US

The Great Depression of the 1930s resulted in the establishment of a significant number of agencies in the United States. The agencies were established primarily with a view to resolving myriads of problems accumulated in the society and they therefore employed experts from various areas of social life (Burnham, 2002: 196-197).

During the great economic crisis, the agencies were entrusted with broad powers. In order to restrict such broad powers, the Congress passed the Federal Administrative Procedure Act in 1946. This Act generally regulates the procedure in which agencies make regulations and decisions, as well as the procedure for their judicial control (Shapiro, 1994: 55-65).

In the second half of the 20th century, there was a wave of emerging new agencies making regulations and decisions that started to significantly influence the daily lives of American citizens. This period interrupted the process of deregulation of certain areas of social life. The process resulted in the simplification of procedures within agencies, the downsizing of administration as well as abolition of certain agencies whose work was no longer needed.

The definition of an agency is very broad and includes a large number of different organs and bodies in the legal system of the US (Pusić, 1954: 135). The Administrative Procedure Act defines agencies as "each authority (whether or not within or subject to review by another agency) of the Government of the United States". Regardless of the fact that Congress, courts, and the function of the US president should be exempted from this definition, it still remains broad (Funk, Seamon, 2001: 5).



If we wanted to classify all the agencies in existence within the US legal system into specific groups, we could say that there are, conditionally speaking, four types of agencies. The most important among them are the ones constituting administrative departments. They are headed by members of the presidential cabinet. The second type of agencies consists of administrative bodies within the departments. They are headed by officials appointed by the US President based on the opinion of and upon the approval of the Senate or the head of a department. The third group of agencies are outside specific departments. They are not part of the departments. Their heads are also appointed by the US President subject to opinion and approval of the Senate. The three abovementioned types of agencies are part of the executive branch. Therefore they are under control of the President of the United States who is, in fact, the head of the entire executive branch of the United States (Kagan, 2001: 2245-2385).

The fourth type of agency differs from the previous three. These are, in fact, independent regulatory agencies. They are neither within the administrative departments nor under immediate control of the President of the United States. They are headed by a group of people as a collegiate body, appointed by the President for a certain period of time. They can be replaced when there are specific reasons for that. Yet broader independence of this type of agency is to be understood conditionally, given the existence of a strong factual influence the US President in relation to them (Strauss, 2002: 133-135).

All types of agencies in the United States have a specific position since they integrate all three branches of government in their work. Therefore, some are inclined to claim that their position violates the principle of separation of powers. The basic principles of the American political system set out in the US Constitution are certainly the principle of division of powers into legislative, judicial and executive, as well as the principle of “brakes and balance” which should prevent any of these three powers from becoming independent and enable their mutual control. Agencies also had to find their place in such a system. However, their significance and specific position have led some analysts to consider them the fourth branch of the US government (Funk, Seamon, 2001: 24-25). It is clear that the establishment of these agencies was not provided for in the US Constitution. Hence the criticism that they operate outside the existing system of division of powers and that their functioning, which bypasses clear control by the legislative, judicial and executive branches, can result in the creation of a fourth branch of government (Strauss, 1984: 573-669).

The agencies have quasi-legislative powers, executive powers, as well as quasi-judicial powers. Yet their executive powers are not called into question due to their principled affiliation with the executive branch (Rosenbloom, 2003: 11-12).

The position and powers of the agencies in the United States gave rise to the doctrine of ‘delegation’ in American jurisprudence. This doctrine starts from a functional approach in the interpretation of the US Constitution. It was created, primarily, by the rulings of the US Supreme Court. The agencies are to be viewed as an important factor in resolving a large number of problems occurring in the society. This has resulted in the possibility for Congress to also entrust the agencies with the tasks (quasi-legislative and quasi-judicial) that – in their nature - belong to other branches of the government (Lowi, 1987: 295-296).

The delegation of these powers to the agencies has contributed to the existence of strong control over them by all three branches of government. Thus Congress has organisational and financial powers in relation to the agencies. It passes acts that establish agencies, determines their form and structure, transfers certain powers unto them and provides funds for their work. On the other hand, the President of the United States has broad personal powers in relation to the agencies. He appoints the heads of the agencies based on the opinion of and upon approval by the Senate, while he can independently appoint lower-ranking agency officials. The President exercises detailed control through executive



orders, the issuance of which is within his competence. In addition to this, members of Congress and the President have informal contacts with the management of the agencies, thereby directing the work of these organs (Breger, Edles, 2000: 1111-1294). The control exercised by Congress and the President over the agencies is, above all, a form of political control. On the other hand, there is also judicial control by the courts through which protection is provided to holders of such rights (citizens and organisations) as may have been violated or endangered by the agencies' activities.

As for the control exercised over the agencies by Congress, the US President and courts, it must be continuous and effective in accordance with the powers vested in these entities as representatives of all three branches of government. However, the control must not stifle the freedom that the agencies have in order to be able to successfully perform the complex functions for which they have been established. This freedom is only a framework within which the responsibility and independence of the agencies should come to the fore (Schoenbrod, 1999: 731-766; Wilson, 2000: 259-260).

Agencies in the US legal system are established in order to regulate various areas of social life. Therefore, their activities are manifested in various forms. Nevertheless, there are two basic instruments available to the agencies for the purpose of ensuring good quality performance of their functions. These are the enactment of regulations as general legal acts and decisions as individual legal acts (Becrmann, 2000: 4).

Apparently, despite the tendencies towards deregulation of different social areas, activities of the agencies will continue to have a major impact on the daily life of citizens and organisations in the US. Their existence will not lose importance or be called into question. Yet they still have to make efforts in order to achieve better results and justify their existence (Fox, 2000: 9).

The wave of establishing these bodies swept first the US and then Europe, and the phrase 'fourth branch of government' has been used to point out a special position of these bodies in the traditional system of state organisation. These independent bodies incorporate several functions of the government: legislative (adopting regulations), administrative (passing individual acts) and judicial (sanctioning) (Vasić, Jovanović, Dajović, 2014:99).

The leading roles in this process were played by Great Britain, Scandinavian states and France.

France saw the beginning of this process in early 1980s. However, unlike the situation in other countries, the American term 'agency' was immediately replaced by a number of different independent administrative bodies (*autorités administratives indépendantes*) that became part of the administrative system, having clear legal position. This was the case, for instance with the National Commission on Informatics and Liberty established on 6th January 1978, The Higher Audiovisual Council founded on 17th January 1989, National Commission for Communications and Liberties, founded on 30th September 1986, Commission on Access to Administrative Documents, established on 17th July 1978, National Committee for Control of Security Interceptions, established on 11 July 1991, etc. Yet over the past few years, there have been a number of bodies called 'agencies'. In order to determine their legal status in practice and thereby the question of control over the documents they adopt, the State Council adopted criteria for their determination on 11 September 2012 (*Conseil d'État, Étude Annuelle pour 2012, Les agences: une nouvelle gestion publique?*) (Chapus, 2001:347-373; Braibant, Strin, 2002: 81-86; Maillard Desgrées du Loù, 2011: 222-227).



INDEPENDENT CONTROL BODIES IN THE LEGAL SYSTEM OF SERBIA

Since 2000, a large number of bodies have been established within the legal system of the Republic of Serbia following the example of European states. The majority of the newly founded entities have been dubbed agencies. On the other hand, the legal status of these entities may vary, which makes it difficult to legally define them (Martinović, 2012: 391-400).

There are opinions in the national legal theory that the agencies were established due to an error in translation from the English language. The term should have been adjusted to our legal tradition. In such a situation we would not have agencies today, as there are none in the laws of Germany and Austria (Milkov, 2014: 25-31).

It was in this way that agencies found their place in our national legal system at the beginning of the 21st century. In addition to the agencies, though, other entities have been established within the legal system of Serbia under different titles (commissioner, ombudsman, etc.). However, there has been some terminological confusion in respect of their position, role and function. The terminological confusion is additionally compounded by the fact that the term 'agency' is used to denote a variety of bodies and organisations. In this sense, for additional clarification, let us note that the term agency may refer to:

- 1) An administrative body within a ministry (Military Intelligence and Military Security Agency within the Ministry of Defence);
- 2) A specialised organisation (Security-Information Agency; Republic Agency for Peaceful Settlement of Disputes);
- 3) A public agency (Business Registers Agency);
- 4) An independent regulatory body (Energy Agency);
- 5) An independent control body (Agency for Prevention of Corruption).

The degree of an agency's independence is related to the organisational structure of the agency. It will be the lowest with the administration bodies within the ministries and the highest with the independent control bodies.

An important question that arises concerns their legal basis. In this sense, the legal basis is the Constitution of the Republic of Serbia (Official Gazette of RS, No. 98/2006), Law on State Administration (Official Gazette of RS, Nos. 79/2005, 101/2007, 95/2010, 99/2014, 47/2018, 30/2018-other law), as well as Law on Public Agencies (Official Gazette of RS, No. 18/2005, 81/2005-correction, 47/2018) but also special laws by which they were established (e.g. Law on the Protector of Citizens, Law on State Audit Institution) and other acts.

Thus the Constitution, in Article 137 paragraph 3, stipulates that "according to the Law, particular public powers may (also) be delegated to specific bodies through which they perform regulatory function in particular fields or affairs". It refers to public agencies and independent regulatory bodies. The Constitution also, in Articles 96 and 138, directly regulates the position of two independent control bodies (the State Audit Institution and the Protector of Citizens).



Article 4 of the Law on State Administration stipulates that “certain state administration tasks may be conferred by law to autonomous provinces, municipalities, cities and city of Belgrade, public companies, institutions, public agencies and other organisations”.

The Law on Public Agencies specifies that public agencies are organisations established for developmental, professional or regulatory affairs of general interest (Article 1, paragraph 1) and that they are autonomous in their work (Article 4, paragraph 1). The founding rights in them are exercised by the Government on behalf of the Republic of Serbia (Article 8, paragraph 1). The Government appoints and dismisses the Chair and members of the Management Board (Article 16, paragraph 2 and Article 20, paragraph 1), as well as the Director of the public agency (Article 24, paragraph 1). Supervision over the work and activities of the public agency is performed by the competent ministry (Article 44 paragraph 1). Such legal solutions emphasize the fact that the public agencies perform a regulatory function in the sense that they are entrusted with the task of enacting regulations for the implementation of laws and other general acts of the National Assembly and the Government (Article 3 paragraph 1 item 1) but they cannot claim the status of independent bodies since they are subordinated to the Government in a hierarchical sense (Lekić, 2012: 360).

Independent bodies are characterized by true organisational and functional independence in relation to the executive branch of government. However, this does not mean that they are outside and above the law and all branches of government. In carrying out their activities, they are accountable to the National Assembly (legislative branch), to which they submit reports (regular and special) and which appoints and dismisses officials who head them.

It should be borne in mind that independent bodies themselves differ among themselves. Differences can be best seen if viewed from a functional standpoint. Thanks to this criterion it is possible to conclude whether an independent body performs regulation or control, or both of these functions.

The regulatory function implies the authority to adopt general bylaws and the control function implies the adoption of individual legal acts and the performance of administrative actions. However, this may also lead to confusion regarding the status and legal position of independent bodies (Šuput, 2015: 256).

Yet notwithstanding the existing uncertainties, the dominant powers of control are related to supervising the work of the following independent bodies:

- 1) Protector of Citizens (Official Gazette RS, No. 79/2005);
- 2) Commissioner for Information of Public Importance and Personal Data Protection (Official Gazette RS, Nos. 120/2004, 54/2007, 104/2009, 36/2010);
- 3) Agency for Prevention of Corruption (Official Gazette RS, Nos. 35/2019, 88/2019, 11/2021-authentic interpretation);
- 4) State Audit Institution (Official Gazette RS, Nos. 101/2005, 54/2007, 36/2010);
- 5) Commissioner for Protection of Equality (Official Gazette RS, No. 22/2009);
- 6) Republic Commission for Protection of Rights in Public Procurement Procedures (Official Gazette RS, No. 91/2019).

In addition to these, there are other independent bodies that exercise control powers within the national legal system (Cucić, 2020: 134-155).



Independent bodies are characterized by a number of important features. First, they are legally endowed with public authority to create policy in a certain area of social life in accordance with the goals established by the legally established goals. Second, they are independent of other state bodies. They are independent legal entities with the status of legal persons and their own scope of competence. They have functional independence, enjoy financial autonomy, etc. Third, they are not subject to the principle of traditional democratic legitimacy. They are not directly elected by the citizens. Therefore, the question that can be raised is whether their existence is justified in a democratic society. This shortcoming is to some extent justified and mitigated by the fact that the staff employed in the independent bodies possesses professional competencies, knowledge and skills that are required for lawful operation as well as the creation and implementation of political goals and measures in complex spheres of social life.

Legal theory distinguishes the concepts of independence and autonomy. Thus 'autonomy' is a term used to refer to the position and form, the objective state and position of the institution and the place of its function. 'Independence' relates to the action, the dynamism of decision-making of an institution. The independence of a body is a somewhat broader concept as compared to that of autonomy. Independence implies a greater degree of separation both in the functional and organisational sense in relation to other bodies (Milkov, 1981: 185-187).

However, in the current legal system of Serbia this distinction is not fully specified. The 2006 Constitution makes this distinction in such a way as to guarantee autonomy and independence to some state bodies in terms of their legal position. In this sense, Article 142 paragraph 2 stipulates that "courts shall be separate and independent in their work and they shall perform their duties in accordance with the Constitution, Law and other general acts, when stipulated by the Law, generally accepted rules of international law and ratified international contracts". Certain bodies are guaranteed only independence. Thus Article 138 paragraph 1 stipulates that "the Civic Defender shall be independent state body who shall protect citizens' rights and monitor the work of public administration bodies, body in charge of legal protection of proprietary rights and interests of the Republic of Serbia, as well as other bodies and organisations, companies and institutions to which public powers have been delegated". The Constitution guarantees the autonomy of public administration bodies by stipulating in Article 136, paragraph 1, that "the Public Administration shall be autonomous, bound by the Constitution and Law and it shall account for its work to the Government". Autonomy is also guaranteed to the State Audit Institution in Article 96 paragraph 1 of the Constitution in the way that "the State Audit Institution shall be the supreme state body for auditing public finances in the Republic of Serbia, autonomous and subject to the supervision by the National Assembly, to which it accounts for its work".

However, the laws governing the legal position of independent bodies do not differentiate between independence and autonomy. In general, these state bodies are defined as being at the same time independent and autonomous in performing tasks within their competence. For example, according to the Constitution, the Protector of Citizens is an independent state body and the Law on the Protector of Citizens stipulates that s/he is autonomous in performing tasks within their competence (Article 2, paragraph 1). The situation is similar with the State Audit Institution, which according to the Constitution is an autonomous state body, and the Law on State Audit Institution stipulates that it is an autonomous and independent state body (Article 3, paragraph 2).

The theoretical distinction between independence and autonomy has already been explained. As for statutory solutions, we find that the terminology used in the Constitution and statutes needs to be harmonized and that these concepts need to be precisely defined in future.



This inconsistency between constitutional and legal provisions can be explained by the fact that the Law on the Protector of Citizens and the Law on State Audit Institution were adopted before the 2006 Constitution. However, there was a failure to harmonize these provisions with the Constitutional provisions in the amendments to the laws that were passed after the adoption of the Constitution, although there was such an obligation.

The basic status characteristics of these bodies involves independence and autonomy. Their independence and autonomy are ensured in various ways, such as: the manner of election and dismissal of office holders in these bodies; financial autonomy; the right to legislative initiative, etc. Their independence and autonomy are limited by the system of control over them exercised by the National Assembly and the courts.

Independent control bodies have numerous control powers in relation to administrative entities. In the legal system of the Republic of Serbia, the subject under control by independent control bodies is very broadly defined. The subjects under control currently include: legality and regularity of the work of the administration; legality and regularity of spending of budget funds by budget users; achieving publicity in the work of administrative entities through the right to access information of public importance; exercising the right of citizens to equal treatment before the administration; protection of the right to access personal data on citizens; the existence of a conflict of public and private interest that may arise during the performance of the function, etc. (Vasiljević, Vukašinović Radojičić, 2019: 264-273).

The powers of the independent control bodies in exercising control over the work of administrative entities are mostly of a procedural nature and not of the meritorious one. They relate to the right to propose the dismissal of officials to the competent authority, as well as the right to initiate certain legal proceedings (criminal, misdemeanour, etc.). Regardless of the fact that these powers are of the procedural nature, their impact is still substantial in practice.

In addition to the above, an important power of the independent control bodies in exercising control over administrative entities is the possibility to point out certain instances of unlawfulness or irregularities occurring in the course of performing control within the annual report submitted to the National Assembly. The reports are the subject of attention not only of the National Assembly but also of a considerable part of the media, which in this way contribute to raising awareness about the importance of control performed by independent control bodies (Lončar, 2015: 145-158).

Naturally, the control over the work of administrative entities by the independent control bodies also refers to their control over the work of the police. In fact, the police are an important part of the state administration system. Also, the importance of such control should be kept in mind considering the powers that the police have at their disposal in carrying out tasks and duties. These powers often encroach on the domain of human freedoms and rights.

However, it should be kept in mind that the work of the independent control bodies is also subject to control. This control is, on the one hand, exercised by the National Assembly, and on the other hand by the courts. So, the control of constitutionality and the legality of the general acts of the independent control bodies, and also the control of their individual acts and actions that impinge on the constitutional rights and freedoms, when all other means of their protection are exhausted or have not been provided, can be exercised by the Constitutional Court. This constitutes the institute of constitutional complaint.

Another possibility of judicial control is performed through an administrative dispute, but it is not comprehensive. Thus the Law on State Audit Institution precludes the possibility of any judicial pro-



tection against acts passed by this independent control body (Article 3, paragraph 4). It is a separate question whether such a legal provision is in agreement with the Constitution of the Republic of Serbia and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

CONCLUSION

- 1) The wave of establishing independent bodies spread from the United States and swept European countries. Towards the end of the 20th century, this phenomenon also characterised transitional societies, and at the beginning of the 21st century it found its way into our national legal system.
- 2) There is no doubt that the states undergoing the process of transition are affected by numerous weaknesses related to the need to develop the state based on the rule of law. The role of independent bodies in this process is prominent and they are irreplaceable. The purpose of independent bodies and a number of other institutions is give their contribution to “healing” the societies over time, so that transitional countries could become truly democratic and based on the rule of law.
- 3) The constitutional and legal order of every country, including Serbia, should clearly define the relationship of these bodies with the legislative, judicial and executive branches in an environment where all of them together should ensure the rule of law.
- 4) The main reason for introducing independent control bodies into modern constitutional and legal systems, including the national legal system of Serbia, is reflected in the need to exercise control over entities holding administrative powers as places of real power and political influence. In order to give their contribution in the process of strengthening of the *rechtsstaat* and the principle of the rule of law, they must not be an extended arm of the executive political power in practice. In fact, some of the most important independent bodies need to exist precisely in order to control the executive branch of government (State Audit Institution, Agency for Prevention of Corruption, Ombudsman, etc.).
- 5) In the forthcoming period, it is vital to modify the legal framework by more clearly and accurately defining the place and role of these bodies and thus terminological confusion which we have pointed out above.
- 6) It must be borne in mind that every reform and introduction of new institutes initially faces resistance and miscomprehension. Let us remember that the famous English public law classic, Dicey, sharply criticised the concept of special administrative law and the specialised judiciary in France (Dicey, 1979:329-390). However, after more than 200 years of its existence, it is rightly pointed out today that “the Council of State is the bastion of civil liberties in France.” ... “Because of this the Council of State is also referred to as the guardian of the morality of administration” ... “Administrative law in France is one of the best protectors of citizens against the new despotism of the state administration. The Council of State has managed to establish administrative law that is a defender of civil liberties.” (Marković, 2002: 31-32).

We can only hope that the independent control bodies within the Serbian legal system will manage to achieve the same in a much shorter period of time.



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