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## **THE IMPENETRABLE WALL OF ADMINISTRATIVE SILENCE IN SERBIA\*\***

**Abstract:** *The administrative silence, as an apparent manifestation of maladministration, has become an ever-increasing problem in Serbia. The number of administrative silence lawsuits submitted to the Administrative Court has increased more than 26 times in the last 10 years. Two potential reasons why the parties do not submit administrative appeals and administrative silence lawsuits to the Administrative Court even more often could be the lack of necessary legal knowledge (most of the parties are lay persons) or their distrust in the available legal protection mechanisms. Unfortunately, the legislator and the judiciary have undertaken measures that further aggravate the situation. This paper discusses two forms of legislative and judicial support to administrative silence, which discourage parties from using legal remedies against administrative silence and engaging lawyers. The legislator effectively supports administrative silence by, save for one exception, preventing parties from claiming damages for the damage they sustained due to the failure of competent administrative authorities to decide in their cases in a timely manner. The Administrative Court supports the administrative silence by a legal stand prescribing that a party is not entitled to reimbursement of the costs of the proceedings, including the costs of lawyer's services, provided that the first-instance administrative authority replaced its act challenged by an administrative appeal before the Administrative Court decided on the administrative silence lawsuit.*

**Keywords:** *administrative silence, compensation for administrative silence, procedural costs.*

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## 1. Introduction

“In silence there is safety.” These were the words of the Serbian writer, Nobel Prize winner, Ivo Andrić, in his novel “The Bridge on the Žepa”. This could be the motto of the Serbian administration as well. In Serbia, administrative silence is regulated so as to offer a safe haven for administrative authorities, provided they have the interest to avoid deciding in a certain case. Administrative silence shall almost never entail financial liability of relevant authority or personal accountability of responsible civil servants.

Administrative silence is a serious problem in Serbia. This conclusion derives from the fact that the number of administrative silence lawsuits filed with the Administrative Court against has increased in the last 10 years more than 26 times (from 489 cases in 2012 to 13,124 cases in 2021) (Milovanović, 2021: 64). Moreover, there are indications, derived from older research and interviews with civil servants, that the legal remedies against administrative silence (administrative appeals and lawsuits filed with the Administrative Court) are filed in a very small number of cases in which the parties were entitled to file them, i.e. in which administrative authorities failed to decide a case within the legally prescribed deadline (Cucić, 2020: 390). Hence, even this increased number of lawsuits covers only a small portion of cases in which administrative silence has occurred.

Given the lack of research (official data and interviews), one can only assume the potential reasons for passive behavior of parties regarding administrative silence. Since most of the parties are lay persons, the most probable reason for their omission to utilize available legal remedies is the lack of necessary legal knowledge on their side. Another potential reason could be the absence of faith in the available legal protection mechanisms, i.e. the belief that the system is set in a manner that deprives them from efficient and expedient justice in case of administrative silence.

This problem is further aggravated by the interventions of the legislator and the judiciary, which shield the administration from financial liability in case of administrative silence (on the one hand) and eliminate the parties' incentive to engage lawyers in their struggle against administrative silence (on the other hand). This paper discusses the issue of the aforementioned legislative and judicial support to administrative silence.

## 2. Legislative Support to Administrative Silence

The state announced a public call to the refugees in Serbia to apply for state-owned apartments in order to solve their housing situation. A list was made

and top 20 ranked persons on the list got the apartments. One of the criteria for ranking the applicants was the number of persons in their household. The competent authority did not decide on the matter within the prescribed deadline, but issued a decision before any administrative appeal was filed against its silence. In between the expiry of the deadline for deciding (two months at the time) and issuance of the decision, the factual situation changed (i.e. some applicants got children as new members of their households and some applicants lost members of their household for various reasons), which altered the applicants' ranking. Therefore, had the competent authority decided in time, before the expiration of the deadline, certain applicants would get the apartment. As the authority did not issue a timely decision, and the number of household members was reduced in the meantime, these applicants were left out. Obviously, they sustained damage due to the untimely action of the administration.

Is there a place here for civil liability of the administration? Are their legal grounds to claim damages for the damage caused by the failure of the competent public authority to decide within the legally prescribed deadline? Unfortunately, it seems that the answer is negative.

The legislator effectively supports administrative silence by disabling the parties to claim damages for the damage they suffered due to administrative silence. Specifically, in order to claim damages, parties must prove that the action or inaction (omission) of the administration that caused the damage was illegal (Nešković, 2015: 241-245). Nonetheless, the Serbian legislation indicates that a failure to decide within the legally prescribed deadline, save for one exception, does not constitute the legal grounds for claiming damages.

Systematic interpretation of the procedural administrative law indicates that there is only one instance in which administrative silence can lead to successful claim of damages. Namely, Article 72 of the Administrative Disputes Act (hereinafter: ADA)<sup>1</sup> stipulates that the plaintiff has the right to claim damages for the damage caused by non-execution or untimely execution of a judgment rendered by the Administrative Court. Two things can be derived from this provision.

Firstly, the legislator does not consider the failure of the administration to decide within the legally prescribed deadline to be illegal *per se*. Had that been the case, it would be redundant to prescribe the possibility for the plaintiff to claim damages. The application of the general civil law rules would allow that. *A contrario*, since the legislator found it necessary to specifically outlaw administrative silence in this particular instance, the legislator recognized that otherwise administrative silence would not be illegal.

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<sup>1</sup> Administrative Disputes Act (ADA), *Official Gazette of the Republic of Serbia*, no. 111/2009.

Secondly, given that in all the other cases of administrative silence (e.g. when first-instance or second-instance administrative authorities fail to render administrative acts within the legally prescribed deadline, or when they fail to undertake factual acts that ought to have been undertaken under the law<sup>2</sup>) the legislator did not particularly allow the parties to claim damages, damage caused by administrative silence in those instances cannot be compensated.

These conclusions are further supported by the interpretation of other provisions of the same legislative act. Article 16 ADA states that the plaintiff can claim damages for the damage caused by the execution of the challenged administrative act.<sup>3</sup> Article 45 ADA stipulates that the Administrative Court can decide on the plaintiff's claim for damages within the judgment annulling the challenged administrative act. Hence, in both instances, it is specified that the damages can be claimed only for the damage caused by the execution of an administrative act. On the other hand, compensation for the damage caused by the administrative silence cannot be claimed.

The General Administrative Procedure Act (hereinafter: GAPA),<sup>4</sup> as the other pillar of the Serbian procedural administrative law, provides additional evidence that a compensation cannot be sought for the damage caused by administrative silence. The only article mentioning damages is Article 149 (para. 3, subpara. 1), which prescribes that the damages can be claimed for the damage caused by the failure of the competent public authority to perform its contractual obligation contained in an administrative contract.

Additionally, pure linguistic interpretation of the GAPA provisions on administrative appeal suggests that there is a huge difference between the administrative appeals against administrative acts and administrative appeals against administrative silence. For instance, Article 170 GAPA states that an administrative appeal shall be rejected provided the appellate authority finds the challenged act to be *legal*. On the other hand, Article 173 GAPA, regulating the administrative appeal against administrative silence, operates with different terminology. It does not mention legality or illegality of administrative silence, but *justified* or *unjustified* reasons for the failure of the competent administrative authority to decide within the legally prescribed deadline.

The mentioned arguments indicate that damages cannot be claimed not only in dubious cases (like the one described at the beginning of this section, where

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2 For various types administrative silence in Serbian law see Cucić, 2020: 374-375.

3 Both administrative acts and other non-appealable individual legal acts of public authorities can be challenged before the Administrative Court, Art. 3 ADA, see Dimitrijević, 2019: 401-403.

4 General Administrative Procedure Act (GAPA), *Official Gazette of the RS*, no. 18/2016 and 95/2018.

the authority decided before any legal remedy against administrative silence was utilized) but even in screamingly unjustified cases (like the situation of repeated silence of the first-instance administrative authority, where the appellate administrative authority had already determined that the first-instance administrative authority had no justified reasons for its failure to decide within the legally prescribed deadline). Moreover, it seems that in the only instance in which a party can claim damages for the damage caused by the administrative silence, it is not administrative silence as such that is considered to be illegal but the non-execution of the Administrative Court judgment.

### 3. Judicial Support to the Administrative Silence

For 140 years, since the judicial control of the administration was established in Serbia in 1869, until 2009, the legislator protected the administration against financial losses in judicial proceedings. Namely, each party had to pay its own expenses in the administrative dispute proceedings (Cucić, 2019: 170-172). This meant that plaintiffs had to pay lawyers' services even if they succeeded in the proceedings. Hence, the legislative protection of the administration was twofold. Firstly, even in the case of issuance of an illegal administrative act or an unjustified failure to issue an administrative act within the legally prescribed deadline, the administration did not have to pay the expenses of plaintiffs' lawyers. Secondly, incentive for the plaintiffs to engage lawyers was significantly diminished given that they had to pay the lawyers' services themselves. Consequently, the position of the administration in the judicial proceedings was relieved since in most instances it did not face legal professionals but only lay persons.

This changed in 2009, when the currently applicable ADA, through subsidiary application of the Civil Procedure Act<sup>5</sup>, enabled the parties in an administrative dispute to claim costs of proceedings, including the costs of lawyer's services in case of success in the proceedings (Art. 74 ADA). In 2017, this changed with respect to certain situations in which plaintiffs filed a lawsuit against administrative silence with the Administrative Court. The Administrative Court issued a legal stand,<sup>6</sup> which is applied by all judges in their deliberation, which stated as follows:

"1. There is no place for the court to act pursuant to Article 29 of the Administrative Disputes Act when the first-instance authority during the administrative

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<sup>5</sup> Civil Procedure Act, *Official Gazette of RS*, no. 72/2011, 49/2013, 74/2013, 55/2014, 87/2018 and 18/2020.

<sup>6</sup> Administrative Court (2017): Legal stand determined at the 71<sup>st</sup> session of all judges of the Administrative Court on 4 April 2017, Retrieved 18 January 2022 from [http://www.up.sud.rs/cirilica/view\\_setence/](http://www.up.sud.rs/cirilica/view_setence/)

dispute initiated by the lawsuit against the silence of the second-instance authority renders a decision on the appeal on the basis of Article 225 of the General Administrative Procedure Act.

2. *There is no silence of the defendant authority* when during the administrative dispute, on the basis of a lawsuit against silence, the first-instance authority renders a decision on the appeal on the basis of Article 225 of the General Administrative Procedure Act.

3. *The request of the party for reimbursement of the costs of the administrative dispute is unfounded* when the lawsuit against the silence of the second-instance authority was rejected during the administrative dispute due to the fact that the first-instance authority decided on the appeal and replaced the appealed decision with a new one.” (*emphasis added*)

Before analyzing the cited legal stand, it should be clarified to which situation of administrative silence it applies.

There are three possible situations in which administrative silence can be challenged by a lawsuit before the Administrative Court. The first one is the situation in which a first-instance administrative authority rendered a decision against which a dissatisfied party filed an administrative appeal with the second-instance (appellate) administrative authority, which then failed to decide on the administrative appeal within the legally prescribed deadline. The second is the situation in which both first-instance authority and second-instance authority did not decide on the request and the administrative appeal of a party within the legally prescribed deadline. The third is the situation in which administrative procedure had only one instance, i.e. in which administrative appeal was excluded by a law, and the only administrative authority deciding in the administrative procedure failed to decide within the legally prescribed deadline.

The cited legal stand of the Administrative Court applies to the first situation, which is most frequent in practice. In that situation, the administrative silence can end in three possible ways. The first is the one in which the Administrative Court decides to accept the submitted lawsuit and orders the defendant authority to decide on the administrative appeal within 30 days as of the day of delivery of the judgment (Art. 69 ADA). In the second case, the defendant (second-instance administrative authority) shall decide on the filed administrative appeal before the Administrative Court decides on the lawsuit against its administrative silence. In that case, the Administrative Court shall ask the plaintiff if he or she is satisfied with the rendered act and, depending on the answer, permanently suspend or continue the administrative dispute (Art. 29 ADA). The third is the situation in which the first-instance authority decides on the filed administrative

appeal (in accordance with its competences prescribed in Art. 225 GAPA<sup>7</sup>) before the Administrative Court decides on the lawsuit against the administrative silence of the defendant, second-instance authority.

The cited legal stand covers the third situation. There are three reasons against the legality of this legal stand of the Administrative Court.

### ***3.1. Sustaining Illegal Behavior of the First-Instance Authority***

The first issue with the cited legal stand of the Administrative Court is the fact that it sustains illegal behavior of the first-instance administrative authority.

Article 165, para. 1 GAPA prescribes that the first-instance authority may replace its appealed decision with a new one (the appealed decision is then quashed) in order to satisfy the appeal request. However, Article 166, para. 1 GAPA stipulates that the first-instance authority may do this only within 15 days as of the day of receipt of the appeal, or within 30 days if the appeal was sent to the opposing party for answer. After this deadline lapses, the first-instance authority is obliged to forward the appeal along with the case file to the second-instance, appellate authority.

Hence, by allowing the first-instance authority to replace its appealed decision after this deadline lapses, the Administrative Court effectively sustains its illegal behavior and breaches the provision of Article 166, para. 1 GAPA.

### ***3.2. Contradicting Legal Stands regarding Administrative Silence***

The second issue with the cited legal stand derives from the existence of another legal stand relating to the administrative silence, which contradicts it. This legal stand<sup>8</sup> states as follows:

“1. If the court during an administrative dispute against administrative silence determines that the defendant subsequently issued the administrative act due to whose non-issuance the dispute was initiated, and that the plaintiff submitted a lawsuit against that act in order to have its legality assessed, the court shall not submit to the plaintiff a subsequently passed act for a statement but will *reject the lawsuit against administrative silence*.

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7 This is Art. 225 of the previous GAPA (*Official Gazette of the Federal Republic of Yugoslavia*, no. 33/1997 and 31/2001, and *Official Gazette of the Republic of Serbia*, no. 30/2010), which corresponds to Art. 165 of the current GAPA.

8 Administrative Court (2019): Legal stand determined at the 93<sup>rd</sup> session of all judges of the Administrative Court on 25 December 2019, Retrieved 18 January 2022, from [http://www.up.sud.rs/cirilica/view\\_setence/](http://www.up.sud.rs/cirilica/view_setence/)



2. When the court rejects the lawsuit against administrative silence due to the fact that the defendant subsequently issued the act due to whose non-issuance the dispute was initiated, the plaintiff is entitled to *reimbursement of costs* for the lawsuit if it was filed by a lawyer, if it was grounded *at the moment of its submission*, and if the request for reimbursement of costs was raised in the lawsuit." (*emphasis added*)

Therefore, in this situation, the Administrative Court recognizes the successful party's right to compensation of procedural costs, in particular the costs of lawyer's services. On the other hand, this is not the case with the previously cited legal stand. In that case, the plaintiff is not entitled to reimbursement of the costs of lawyer's services. Are there legal grounds for this discrepancy?

When comparing these two situations, one can notice that the only difference is the fact that in one situation it is the first-instance authority that renders the administrative act whose non-issuance was the reason for submission of the lawsuit against administrative silence (in which case the costs cannot be reimbursed), while in the other situation the second-instance authority is the one that decides on the administrative appeal and ends administrative silence (in which case the costs can be reimbursed). This, nonetheless, does not explain why such a significant difference regarding costs reimbursement is made between the two. Specifically, administrative silence occurred in both situations (i.e. the second-instance authority did not decide upon the submitted administrative appeal; in both situations the second-instance authority subsequently was asked again to decide on the administrative appeal;<sup>9</sup> in both situations the plaintiff was forced to submit a lawsuit to the Administrative Court so as to end administrative silence and get the requested decision. The fact that the first-instance authority ended administrative silence, by deciding on the administrative appeal instead of the second-instance authority, and after it was authorized to do so, in contravention of Article 166, para. 1 GAPA (see *supra* section 3.1), cannot be regarded as a valid, legitimate and legal reason for denying plaintiffs the right to compensation of the costs of lawyer's services.

### ***3.3. Wrongful Rejection of Lawsuits against Administrative Silence***

In the two cited legal stands, the Administrative Court prescribed that a lawsuit ought to be rejected if a first-instance or a second-instance authority renders requested administrative act before the Administrative Court decided on the lawsuit against administrative silence. We find that this legal stand has no valid legal grounds.

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<sup>9</sup> This is a prerequisite for submission of a lawsuit against administrative silence before the Administrative Court in accordance with Article 19 ADA.



A lawsuit against administrative silence shall be founded and accepted by the Administrative Court if the following conditions are met: 1) the defendant administrative authority was obliged to decide within a certain deadline – this is the case when the proceedings is initiated by a party (by filing a request or an administrative appeal) or if it is initiated *ex officio* but in the party's favor (e.g. when a minor has no legal guardian (Tomić, 2017: 396)), whereas it is not the case when the proceedings is initiated *ex officio* but not in the favor of the party<sup>10</sup> (e.g. when the procedure is initiated in order to determine duties of the party); 2) the defendant administrative authority did not decide within the legally prescribed deadline;<sup>11</sup> 3) the party subsequently, after the lapse of the legally prescribed deadline for deciding in a case, once again requested from the defendant administrative authority to decide in a case and the defendant authority failed to do so within the following seven days (Art. 19 ADA); and 4) the defendant had no justified reason for its silence.<sup>12</sup>

Provided that one of these conditions is not met, the Administrative Court shall reject the lawsuit against administrative silence or dismiss it (without going into the merits of the case) if the plaintiff provided no proof that a subsequent request for deciding was submitted to the defendant (Art. 26, para. 1, subpara. 3 ADA).

The wording of the two cited legal stands indicates that the first three conditions are met and that the existence of a justified reason for administrative silence is not considered by the Administrative Court (since the defendant authority is not asked for reasons for its failure to decide within the legally prescribed deadline). The only possible explanation is that the Administrative Court rejects the lawsuits against administrative silence because the administrative silence was ended by the issuance of a requested administrative act. This approach of

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10 There is an exception in the field of inspection supervision. Article 38 of the Inspection Supervision Act (*Official Gazette of RS*, no. 36/2015, 44/2018 and 95/2018) enables the parties (supervised entities) to request the inspection supervision proceedings, as the proceedings initiated *ex officio* but not in the favor of the party, to be ended within the prescribed deadline.

11 For deadlines for various types of administrative silence in Serbian law, see Cucić, 2020: 374-375.

12 This is not explicitly mentioned in the ADA but can be derived by systematic interpretation of the ADA and the GAPA. Article 71 (para. 3) ADA prescribes that, if a defendant administrative authority fails to timely issue new administrative act instead of the one that was previously annulled by the Administrative Court and the plaintiff submits a special request for issuance of that act, the Administrative Court shall check whether there were justified reasons for such failure. Additionally, Article 173 GAPA stipulates that, if the second-instance authority finds that the first-instance authority did not render a decision within the legally prescribed deadline for a justified reason, it may extend the deadline for issuing a decision. Hence, the inexistence of justified reasons for failure to timely decide is woven into the legal concept of administrative silence in Serbia.

the Administrative Court can be considered as legally sound only if the Administrative Court is allowed to adjudge the lawsuits against administrative silence based on the facts that occurred after the judicial proceeding was initiated. The subsequent fact we are referring to is the issuance of the requested administrative act. Nevertheless, there is no legal ground in the ADA or the Civil Procedure Act (whose subsidiary application in administrative dispute is prescribed by the ADA) to claim that this is actually allowed.

Namely, when the Administrative Court decides on the legality of challenged administrative acts, it does not take into account any fact subsequent to the moment of their issuance. The Administrative Court assesses whether the act was legal at the moment of its issuance. This can be deduced from the systematic interpretation of the ADA. Article 56 (para. 1, subpara. 1) ADA stipulates that the proceedings concluded with a final judgment or court decision shall be reopened if the party learns about new facts on the basis of which the dispute would have been resolved more favorably for the party. However, these facts are not truly new (i.e. subsequent to the moment of issuance of the challenged administrative act) but newly discovered (i.e. they existed in the moment of issuance of the challenged act, but the party was not aware of them) (Tomić, 2010: 558). Consequently, even when it comes to assessing the legality of challenged administrative acts *via* extraordinary legal remedies (the lawsuit for reopening a case), their legality can be assessed only on the basis of the facts existent at the moment of their issuance.

There is no provision in the ADA allowing the Administrative Court to make such a temporal difference between the assessment of the legality of challenged administrative acts and the assessment of justification of administrative silence. In the first case, the Administrative Court does not take into account any development subsequent to the moment of issuance of the administrative act, while in the second case it takes into account the facts (the issuance of the requested act) that took place after the administrative silence occurred, i.e. after the lapse of the deadline for deciding. Put differently, the Administrative Court would have to be explicitly authorized by the law to make such a differentiation.

Therefore, we are of the opinion that the cited legal stands of the Administrative Court lack legal grounds and that the existence and potential justification of administrative silence should *ratione temporis* be evaluated with respect to the moment when the deadline for issuance of requested administrative act lapsed. Consequently, the lawsuits against administrative silence should in these cases still be accepted as well-founded and the plaintiff should be entitled to reimbursement of the costs of the proceedings.

### **3.4. Discouraging Parties from Engaging Lawyers**

The legal stand denying plaintiffs the right to reimbursement of costs of lawyer's services in situation in which administrative silence was ended by a decision of the first-instance administrative authority on administrative appeal shall discourage them from engaging lawyers in their legal struggle against administrative silence. Specifically, while fees for submission of lawsuits to the Administrative Court are rather small, the costs of engaging lawyers are not. Furthermore, in many situations, lawyers offer the parties to represent them and charge their services only once the proceedings are over. In such situations, the parties can get the justice for free. This, however, shall not happen if the lawyers are not sure of success.

Not only will the party be discouraged to engage lawyers in described situation but they will also be discouraged to engage them in all situations in which second-instance administrative authorities did not decide on administrative appeal within legally prescribed deadlines (which covers the majority of instances in which administrative silence occurs). The reason for this lies in the fact that parties can never know who is going to decide on their administrative appeal – the first-instance or the second-instance authority. In the first case, they will lose the right to reimbursement of the costs of lawyer's services. Obviously, the Administrative Court finds such behavior of the first-instance administrative authority not to contravene the law (see *supra* section 3.1). Furthermore, the administration may (mis)use this loophole to its advantage. The second-instance administrative authority, to which the first-instance authority is subordinated as a rule, can order the latter to decide on the administrative appeal so as not to reimburse the costs to the plaintiff. Hence, with lawyers 'out of the picture', the parties lose, while the administration and the Administrative Court gain; the former by not being disturbed in their silence and the latter by reducing the number of lawsuits against administrative silence (see *supra* section 1).

## **4. Conclusion**

The administrative silence, as an apparent manifestation of maladministration, has become an ever-increasing problem in Serbia. While the number of lawsuits against administrative silence submitted to the Administrative Court increased more than 26 times in the last 10 years, there are indications that all these cases still represent an insignificant portion of all the cases in which the administrative authorities did not decide within the legally prescribed deadlines.

Two potential reasons why the parties do not submit administrative appeals and lawsuits to the Administrative Court against administrative silence more often could be the lack of necessary legal knowledge (as most of the parties are

lay persons) or their distrust in the available legal protection mechanisms, i.e. the belief that the system is set in a manner that deprives them of efficient and expedient justice in case of administrative silence.

On the assumption that the two reasons for parties' passive conduct have been correctly identified, a possible solution for both of them could be the inclusion of lawyers in a wider combat against administrative silence. Unfortunately, the legislator and the judiciary have undertaken measures to ensure that the lawyers stay far away from these cases. This paper has discussed two forms of legislative and judicial support to the administrative silence, which discourage parties from using legal remedies against administrative silence and engaging lawyers.

The legislator effectively supports the administrative silence by preventing parties from claiming damages for the damage they sustained due to the failure of competent administrative authorities to decide in their cases in a timely manner. Except for the situation where an administrative authority fails to render a new administrative act in accordance with the judgment of the Administrative Court annulling previous administrative act issued in the same case (Art. 72 ADA), the legislator does not allow parties to claim damages caused by administrative silence.

The Administrative Court also supported the administrative silence by issuing a legal stand, which all judges abided by in their case law; the legal stand prescribed that a party was not entitled to reimbursement of the costs of the proceedings, including the costs of lawyer's services, despite the fact that the party was forced to file a lawsuit in order to end the administrative silence, provided that the first-instance administrative authority replaced its act challenged by an administrative appeal before the Administrative Court decided on the lawsuit against administrative silence. The aforementioned legal stand sustains illegal conduct of the first-instance authority, which ought to replace its challenged acts within 15 or 30 days as of the day of submission of administrative appeal. It makes an illegitimate and illegal differentiation between this situation and the situation in which the administrative silence is ended by the decision of the second-instance administrative authority (the second cited legal stand of the Administrative Court). It also leads to groundless rejections of lawsuits, in spite of the fact that the administrative silence did occur and that the party was forced to use legal remedies in order to end it. Finally, it discourages parties from engaging lawyers.

Preventing parties from claiming damages and removing lawyers from the equation of administrative silence resolution provides a clear incentive to the administration not to be worried about the deadlines and timeliness of its work; in a worse case scenario, it enables the administration not to decide in the cases

they do not want to decide upon for any possible reason (including potential corruption). With lawyers 'out of the picture', the wall of administrative silence can remain intact. Parties will either be unaware of the legal remedies against administrative silence, or they will refrain from using them due to the lack of necessary legal knowledge.

Therefore, in order to prevent administrative silence, the legislator and the judiciary should follow the opposite path. They should reinforce administration's responsibility for the timeliness of its work. The Administrative Court should immediately abandon the mentioned legal stands. The legislator should envisage the possibility for the aggrieved parties to claim damages for damage they sustained due to the administrative silence. Given that this might further flood the judiciary by increasing the number of civil litigations, the legislator could consider other potential solutions. For instance, in the Netherlands, the administration makes payments to the party for each day of administrative silence (De Graaf, Hoogstra, Marseille, 2020: 201). This could strengthen the liability of the administration without increasing the workload of the judiciary. It would also reinforce the rule of law. Nevertheless, such legislative solution should be analyzed *ex ante*, i.e. it should be preceded by an evaluation of the necessary organizational, procedural and financial implications thereof. They should be accompanied with a set of clear rules on the situations in which the payments should be made by the administrative authority and when such payments should later be reimbursed from the responsible civil servant.<sup>13</sup> It would increase not only the liability of the administration as a whole but also the personal liability of civil servants.

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<sup>13</sup> On responsibility of civil servants for damage, see Dimitrijević, 2005: 204-207.

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## **НЕПРОБОЈНИ ЗИД ЋУТАЊА УПРАВЕ У СРБИЈИ**

### **Резиме**

Ћутање управе постаје све већи проблем у Србији. Подаци показују да се број тужби против ћутања управе увећао 26 пута у последњих 10 година. Упркос поменутом повећању, постоје индиције да се правна средства против ћутања управе изјављују у занемарљиво малом броју случајева у којима надлежни органи нису одлучили у законом предвиђеном року. Два могућа разлога за то су незнање странака (већина њих су лацици) или неповерење у расположиви систем правних средстава против ћутања управе. Нажалост, законодавац и судство су додатно погоршали ситуацију. Рад се управо бави законодавном и судском подршком ћутању управе, која одвраћа странке од изјављивања расположивих правних средстава и подстиче их да се уздрже од ангажовања адвоката. Законодавац подржава ћутање управе тако што, с једним изузетком, не дозвољава странкама да траже накнаду штете претрпљене услед ћутања управе. Управни суд је подржао ћутање управе заузимањем правног ставе према којем тужилац нема право на накнаду трошкова поступка у случају кад је поднета тужба против ћутања другостепеног органа, а првостепени орган је заменио сопствени ожалбени акт пре него што је Управни суд одлучио о тужби.

**Кључне речи:** ћутање управе, накнада штете настале услед ћутања управе, трошкови поступка.