

HUMAN RIGHTS ASSURANCE PRINCIPLES IN ADMINISTRATIVE PROCEDURES IN SELECTED CENTRAL AND SOUTH EASTERN EUROPEAN STATES

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Abstract:

Principles are fundamental value base of any legal regulation to be followed in its design and interpretation in any legal procedure. This paper explores administrative procedural law principles as a tool to make operational the basic constitutional safeguards for the protection of individuals from abuse of power. Since the modernization process of regulation of public administration (PA) is nowadays more heading towards reducing detailed rules on every step of PA's business process, i.e. administrative proceedings (AP), giving more emphasis on general principles, we analysed the development and the state of art of fundamental AP principles in general administrative procedures acts (GAPA) of selected countries: Slovenia, Croatia, Former Yugoslav Republic of Macedonia and Czech Republic. Despite common heritage of Austrian GAPA of 1925, countries took different approaches and pace as regards the reform of the APs; some taking more modernized or radical approach than the others. But all four GAPAs define very similar fundamental principles in introductory provisions, stating essential duties and guidance to the authorities when deciding in administrative matters, as well as certain rights of parties (legality, equality, proportionality, predictability, protection of parties' rights, assistance to parties, hearing of the parties, right to a legal remedy) due to European convergence (Council of Europe, EU). However, there are some differences in the assurance of rights. The most modern regulated principles seem to be introduced by Croatia and Czech Republic with focusing on partnerships in administrative-legal relations (between the authority and the party) and good administration. The latter are *de lege ferenda* guidelines for other countries too to protect public interest and constitutional safeguards of the parties in administrative procedures.

Key words: principles, administrative procedures, human rights, good administration, CEE, SEE.

1. Introduction

1.1 The Notion of Human Rights Protection (in Administrative Relations)

The importance of human rights protection and combat of society to achieve and improve this protection is an ever evolving process, having its roots in historical conflict between authority and citizens. In times of absolute monarchies the authority was executing its powers *ex imperio* with rather no acknowledgment of individual's rights, the latter being unilaterally subordinated to the state. The existing regulation was intended to support state apparatus and execution of its powers. These trends changed with the rising of bourgeoisie, French revolution (1789-1799) being the mile stone of it. The latter was very important for development of administrative law and origins of individual's rights. One of the results of revolution was also the codification of human rights in Declaration of the Rights of Man and of the Citizen. Declaration already codified basic principles setting new approaches for the state-citizen relation, for example: "*The Law has the right to forbid only those actions that are injurious to society.*"² Separation of powers as already recognized by Montesquieu (1689-1755) is precondition of rule of law, freedom of individual, his/her human rights and fundamental freedoms.³ The fallibility of human beings, although performing duties as public officials, should be taken into consideration, limiting their powers and having established sufficient legally supervision system, based on law.⁴

The idea of rule of law (*Rechtsstaat*) was developed during the nineteenth century also by German writers having its roots in Age of Enlightenment as a contradiction to absolutism and police state (*Polizeistaat*). Firstly (until twentieth century) the idea was concentrated on legal formalism and linked to bureaucratic apparatus which guaranteed the functioning of the system. But with the Second World War and Nazi regime which abused the law by adopting tyrannical rules, the idea of *Rechtsstaat* had to be significantly changed, including not only formal legality (being

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² And: "Nothing that is not forbidden by Law may be hindered, and no one may be compelled to do what the Law does not ordain" (Article 5). Furthermore Article 12: "To guarantee the Rights of Man and of the Citizen a public force is necessary; this force is therefore established for the benefit of all, and not for the particular use of those to whom it is entrusted." English version source: <http://www.britannica.com/bps/additionalcontent/8/116846/Declaration-of-the-Rights-of-Man-and-of-the-Citizen>, 6.2.2013.

³ The authority setting the rules should be separated from the one executing them (Kerševan, 2008: 1132-1133).

⁴ By Herzog, see more in Kerševan, 2008: 1133.

important for procedural safeguards) but also constitutionally recognized protection of human rights supervised by constitutional court (Ziller, 2009: 167-168). This doctrine is of major importance within the research presented in this paper since most of the respective states in CEE and SEE area have been in administrative field under German and Austrian influence (namely Slovenia, Czech Republic, and Croatia). The German understanding of the rule of law more closely relates to the separation of power and to the administration being bound by the law than for instance the American one (cf. Künnecke, 2007: 23, Pavčnik, 2009: 33). *Rechtsstaat* implies the elimination of arbitrary authority and is the ideal of the democratic state. Yet in order to implement the concept of the rule of law, a legalistic approach (e.g. the constitutional provision about the independence of judges) does not suffice and it is necessary to examine and act as appropriate in the implementation of legal norms in practice. In this framework the administrative procedures in most Eastern Europe are understood as concrete decision-making in individual matters only (so called *adjudication* or *Verwaltungsverfahren* as opposed to general policy's decision-making, cf. Rusch, 2009: 5, Galligan et al., 1998: 17-26). Administrative procedural law has been developed historically in this area primarily to protect fundamental human rights of the parties in relation to (mis)use of power by administrative authorities (as *constitutional law in action*, see Künnecke, 2007: 8). Due process or fair trial is the core of administrative constitutional and supranational law.

1.2 *The notions of HR and Public Interest's Protection in Administrative Procedures*

One of the main goals of democratic authority in the modern state remains establishing and protecting public interest. The content of public interest in different states is evolving and changing being dependent on time and place. Protection of human rights is an important component of this interest. In theory we distinguish different generations of human rights, changing also with development of society thorough time. Typical for first generation is protection of citizen and political rights (such as freedom of movement, personal dignity, inviolability of human life).⁵ These, so called *rights of negative status*, demand *negative status duties* of the state meaning the state should suspend its intervening in the rights' beneficiary field. Nevertheless certain degree of state action (and in so far also positive duties) is expected to effectively assure these rights. The second generation of human rights is distinctive for social and economic rights⁶ which are rights of positive status, meaning the active action of state is expected.⁷ The state should establish such actual and legal conditions for individuals to be able to enjoy and execute these rights. Furthermore the theory distinguishes third generation of collective rights deriving from the collective right to self-determination and fourth generation as a result of development of post-industrial characteristics (for example right to healthy living environment). The latter two groups are often acknowledged in administrative procedures (Lampe, 2010: 48-49).

Part of good governance doctrine is also right to good administration as narrower, legal concept, based on procedural rights (Commission for Democracy through Law, 2011: 3 and the following). The concept of good administration can be detected already in Resolution (77) 31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities (Adopted by the Committee of Ministers on 28.9.1977), regulating the right to be heard, access to information, assistance and representation, statement of reasons and indication of remedies. In 2007 based on European Code (2001) and Resolution (77)31, Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration was adopted. The Recommendation contains Code of Good Administration (Code), taking viewpoint that good administration is one of the aspects of good governance, and instructing member states (not just EU, but wider circle) to promote good administration within the principles of the rule of law and democracy. Code promotes nine principles of good administration: principle of lawfulness, equality, impartiality, proportionality, legal certainty, taking action within a reasonable time limit, participation, respect of privacy and transparency. Further on it sets rules as regards issuing administrative decisions, appeals and compensation.

Furthermore Charter of Fundamental Rights of the European Union adopted already in December 2000 as Recommendation and becoming later on, in 2010, obligatory primary law (OJ C 83/389, 30.3.2010), regulates in Article 41 right to good administration as one of the fundamental citizens' rights. The right originally derived from the case-law of Court of Justice of the European Union and General Court and was at the beginning binding as fundamental legal principle (Mendes, 2009: 3). According to Article 41 it demands impartial, fair, within reasonable time handling of affairs and includes: right to be heard, right to have access to file, obligation to give reasons for decision, right to use official EU languages and right for compensation of damages caused by institutions/its servants while performing their duties. To explain the meaning of right to good administration in practice the European Code of Good Administrative Behaviour (European Code)⁸ was adopted with resolution by the European Parliament in 2001. Right to good administration is nowadays fundamental right comprised of set of individual rights and obligations, to prevent arbitrary administrative behaviour in Union. The European Code represents concretisation of these individual rights and

⁵ The main international document relevant is International Covenant on Civil and Political Rights (1966, UN General Assembly).

⁶ The main international document relevant is International Covenant on Economic, Social and Cultural Rights (1966).

⁷ Positive state duties derive also from the European Convention on Human Rights demanding from all contracting parties to secure everyone within their jurisdiction rights and freedoms as established by Convention (see Article 1).

⁸ Certain institutions adopted their own codes of good administrative behaviour (see European Commission for Democracy through Law, 2011: 14). For example European Centre for the Development of Vocational Training (CEDEFOP, OJ C 285/3, 29.9.2011).

obligations (Mendes, 2009: 3. Hirsch-Ziemebińska, 2007: 10). However, the key principles are intertwining and are basically the same (see Table 1).

Means to provide principles of good administration are administrative proceedings, which establish important part of quality of public administration.⁹ The latter is according to Rusch (2011: 6) prerequisite for political and economic performance. Furthermore the administrative procedure is nowadays fundamental business process of public administration aiming at improving rationality of functioning through alteration of Statutes regulating administrative procedure, also in the view of elimination of administrative barriers to increase effectiveness of public policies (Kovač, 2011: 35-37). Despite tendencies for more partners oriented relationship between the state and citizens (for example mediation, administrative contracts, public-private partnership etc.), the main distinctive character of state-citizen relations still remains – superiority of public interest over private interests. Therefore, functioning of the state especially its executive powers is regulated by administrative law (substantive and adjective). The administrative procedure as part of its formal aspect is the tool of creation and implementation of public policies within state's development. The trend goes from strict authoritative functioning to modernization of administrative procedure, i.e. partnership. Modern state is therefore more oriented to the user of public services, being partner with the individual party (Schuppert, 2000: 786), within the protection of public interest and interest of the third parties. End of 80-ies several private principles and methods were introduced in public sector as a result of evolving new public management (NPM), which emphasized efficiency of management, democracy and user orientation. NPM principles were put into force to different extent in states, such as: privatization, decentralisation, deregulation, new forms of responsibility and efficiency measurement. NPM was as a theory and practice an additional key source for the *doctrine of good governance*. According to this doctrine the state should only ensure authority and protection of general social benefit, but the state itself is not the only holder of the authority (development from authoritative, centralised to service, decentralized function of state). Good governance concept thus derived mainly from private sector, being introduced in 1990 by World Bank, with the emphasis on the economic aspects (the connection between quality of the system of state ruling and capability to achieve sustainable economic and social development) and not involving democratic aspects. Later on the concept was taken on by different international organisations, which included also democratic aspects.¹⁰

Top-down, unilateral behaviour of public authorities in their relation to citizens is thus changing to more horizontal relation with characteristics of client relationship¹¹ in private sector with new values entering in administrative decision making/regulation of administrative services, such as transparency, simplicity, clarity, participation, responsiveness and towards citizens oriented performing (Rusch, 2011: 5). An attempt of less top-down approach was also acceptance of European Commission's White Paper on European Governance (COM(2001) 428 final, 25.7.2001)¹², which concerned the way in which the EU uses powers given to it by its citizens and established 5 principles of good governance, such as: openness, participation, accountability, effectiveness and coherence.¹³ Main goal was to higher involvement of citizens/organisations in EU policy making. As stated in white paper (2001: 10) these 5 principles are important for establishing more democratic governance and support democracy and rule of law in member states, furthermore they apply to all levels of government (global, European, national, regional and local). According to SIGMA (1999: 5-7) key components of good governance are: rule of law, principles of reliability, predictability, accountability and transparency; technical and managerial competence, organisational capacity and citizens' participation. From these key components *principles of public administration* were derived, being defined also through jurisprudence of national courts and European Court of Justice and are seen as *public administration standards*. Main administrative principles common to western European countries are according to SIGMA (1999: 8, 9-14) divided to 4 groups: legal certainty; openness and transparency; accountability; efficiency and effectiveness. As indicated in Table 1 there is naturally more orientation towards HR protection in the "good administration" concept as in the "good governance" one, since the first notion derives from *Rechtsstaat* doctrine as opposed to the latter promoting effective policy making as well.

⁹ According to Rusch (2011: 6) current principles of good administration are reliability and predictability (respecting the rule of law, also by discretion decision making; furthermore decision-making in reasonable time); openness and transparency (use of simple, clear language; encouragement of participation of everyone affected by decision; right to be heard); accountability (supervision by other branches of authority; possibility of legal remedies; giving reasons for decision; access to files etc.); judicial control system and effectiveness and efficiency.

¹⁰ European Commission for Democracy through Law, Stocktaking on the notions of »good governance« and »good administration«, 2011: 3-4.

¹¹ Development of partner oriented public administration was also a result of critique of more or less stiff Weber's model of hierarchically organised and legally bound public administration.

¹² By definition in White Paper (2001: 8): "*Governance*" means rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence."

¹³ See http://ec.europa.eu/governance/index_en.htm, 11.2.2013.

Table 1: Good Administration & Governance Concepts as a Base to set Principles of Administrative Procedures

Concept	Selected Documents	Issuer Year	Principles: a) Classical constitutional safeguards b) Managerial and modern GG/GA principles
<i>Good Administration</i>	European Convention on Human Rights	Council of Europe 1950	a) <ol style="list-style-type: none"> 1. Principle of lawfulness; 2. Equality, fairness, non-discrimination; 3. Impartiality, proportionality, certainty; 4. The right to be heard, access to information, respecting privacy; 5. Use of language; 6. Assistance and representation; 7. Reasoning and indication of remedies; 8. Compensation of damages. b) <ol style="list-style-type: none"> 1. <i>Participation;</i> 2. <i>Transparency;</i> 3. <i>Effectiveness, efficiency, taking action within a reasonable time limit.</i>
<i>Good Administration</i>	Resolution (77)31 on the Protection of the Individual in Relation to the Acts of Adm. Authorities	Council of Europe 1977	
<i>Good Administration</i>	European Code of Good Administrative Behaviour	European ombudsman (EU) 2001, 2005	
<i>Good Administration</i>	Recommendation CM/Rec(2007)7 to member states on good administration	Council of Europe 2007	
<i>Good Governance</i>	European Principles for Public Administration (Paper No. 27)	SIGMA (OECD) 1999	a) <ol style="list-style-type: none"> 1. Human rights protection; 2. Rule of law; 3. Reliability and predictability; 4. Coherence; 5. Equity; 6. Ethical behaviour; 7. Combating corruption; 8. Decision-making in reasonable time; b) <ol style="list-style-type: none"> 1. <i>Transparency, openness, participation;</i> 2. <i>Technical and managerial competence;</i> 3. <i>Organizational capacity;</i> 4. <i>Accountability, effectiveness, efficiency;</i> 5. <i>Simplification of procedures;</i> 6. <i>Responsiveness to people's needs.</i>
<i>Good Governance</i>	White Paper on European Governance	European Commission (EU) 2001	
<i>Good Governance and Good Administration</i>	Stocktaking on the Notions of GG and GA (Study no. 470/2008, CDL-AD(2001)009)	Venice Commission (Council of Europe) 2011	<i>Combining all GG & GA principles.</i>

The parties need to be active in gaining their rights, meaning they cannot for example receive building permit unless they submit an application to the respective administrative authority. Thus we talk about rights of positive status to be exercised in administrative procedures. Parties are bond and dependent to the state/local authorities in enforcing their rights as well as when authorities are imposing obligations to them, therefore it is of great importance the respect of human rights also in these procedures. Most countries (Austria (1925), Yugoslavia (1956), Poland (1960), Hungary (1957), Czech Republic (1967, 2004), Germany (1976), Italy (1990), Slovenia (1999), Croatia (2009), Former Yugoslav Republic of Macedonia (FYRM, 2005))¹⁴ adopted a statute governing administrative procedure, which is the tool of self-limitation of authority (Statskontoret, 2005: 73). Regulation is aimed to protect parties against the abuse of power when deciding about administrative and other public matters. Such regulation is a sign of democratic regime extremely important for protection of individual's position since it enables the prediction of public authorities' conduct. Through administrative procedure parties have several procedural safeguards, which guarantee democratic procedures and implementation of constitutionally ensured safeguards from abuse of power. Main principles for enabling the protection of human rights and fundamental freedoms in administrative proceedings are the principles of separation of powers, legality; equality before the law and proportionality (Grafenauer, Breznik, 2009: 54-65). They are usually enshrined already in constitution. In general legal principles are of great importance for all branches of law, administrative law being no exception. They present value based criteria how to behave in different legal relations, including administrative-legal ones. Principles give the decision-makers the possibility to value and estimate the relevance, (way of) using of legal rules in concrete case situations (Pavčnik, 1997: 78-83). Rules define way of behaviour and acting, in

¹⁴ Others developed rules on administrative procedure through case-law and different parts of legislation without having explicitly statute regulating administrative procedure (Belgium, France, United Kingdom, Ireland) cf. Rusch, 2009: 8. Statskontoret, 2005: 73.

contrast to principles, which do not have such distinctive one-way defined behaviour (more about theory on principles see Ávila, 2007: 5-82). In accordance with principle of legality, the authorities are strictly bound to legislation in force, the latter being abstract and general to achieve the widest possible circle of addressees. It would be irrational to expect all life situations are covered within the legislation, furthermore within the existing legal rules decision-makers often come to situations where the applicability of certain rule is not clearly defined. In such cases the fundamental principles are core interpretative instrument to be used (more in Pavčnik, 1997). Although legal principles are in a way “blank concepts”, being kind of elusive the theory and practice recognises them as very important for law (making and enforcement).¹⁵ Furthermore theoreticians like Dworkin and Esser see in principles not just instrument to apply, when we need to define the use of certain legal rule, but as legal guidance which operate on the same level as legal rules and have direct impact on everyday judicial decision-making (Novak, 2010: 215-219). Principles are viewed no more as of subsidiary relevance, but judge has to use them simultaneously with the rules.

2. Administrative procedure regulation in selected Central and South Eastern European States

In order to identify basic commonalities and divergences in several states we carried out an analysis of general laws on administrative procedures in four selected states. Our initial respective state to be taken into consideration was Slovenia as a state at the cross-section of East and West, Central and Southern Europe, (post)socialist legacy and stable Europeanization with full membership in EU from 2004. Croatia seemed as a natural direct comparison for Slovenia as another post-partition state out of former Yugoslavia, being in rather similar geo-political position as Slovenia with becoming EU MS in July 2013. We added Czech Republic as EU MS from 2004 and economically as successful as Slovenia. And to include more Southern area with states striving for modernization we included FYR Macedonia too. All respective states are very similar – if compared to majority of Western European states - also according to size (rather small), political culture, politicization, macro-economic criteria, etc. Laws in force presently of the states selected have been developed on the Austrian and socialism’s heritage, namely:

- *Zakon o splošnem upravnem postopku*, Slovene APA (Official Gazette No. 80/99 and amendments);
- *Zakon o općem upravnom postupku*, Macedonian APA (Official Gazette No. 38/05 and amendments);
- *Zákon č. 500/2004 Sb., o správním řízení (správní řád), ve znění pozdějších předpisů*; (Administrative Rules);
- *Zakon o općem upravnom postupku*, Croatian APA (Official Gazette No. 47/09).

We used normative, comparative and historical methods with axiological-deontological evaluation of final findings.

2.1 Administrative legacies in CEE and SEE

Common to all four compared states is the heritage of Austrian model. Austria adopted its law on administrative procedure already in 1925, being followed by Czechoslovakia in 1928 and Kingdom of Yugoslavia in 1930. The beginnings of administrative procedure regime in the territory of Slovenia date back even earlier, to 1923. In 1946 the first law on general administrative procedure in Yugoslavia was abolished, and new federal law was enacted in 1956 (Koprić, 2005: 2). In the meantime procedural provisions of different laws were applied, partly also sectoral laws. The federal law was during its more than 40 year’s validity period amended only four times (1965, 1977, 1978, and 1986).

With gaining independence in 1991 the Republic of Slovenia succeeded the legal order of former Yugoslavia to the extent which was in accordance with new state regime. General Administrative Procedure Act (GAPA) was therefore taken over as “Slovene law”. Only in 1999 Republic of Slovenia adopted new act (being enforced in 2000), which was still based on Yugoslavian one, introducing certain changes (use of APA also for public service providers when deciding on rights/obligations; subsidiary principle; redefinition of legal principles; reduction of legal remedies etc., more in Kovač, 2011: 23-50), to adopt the regulation to new state organisation and new market driven societal environment. In the last 14 years Slovene GAPA was amended already eight times (see Table 2), emphasizing the need to reduce administrative burdens and introduction of new technologies (exchange of data from official records by civil servants, e-communication, renunciation of the right to appeal, right to access to the file and access to public information etc.). Its volume is still extensive with 325 articles.

Republic of Croatia also became independent in 1991, taking over Yugoslavian GAPA. In April 2009 new GAPA was adopted, being enforced on 1st of January 2010.¹⁶ Until now (last 3 years) there were no amendments. It took definitely longer in Croatia in comparison to Slovenia to enact new GAPA, but this later in time enactment brought far more new modern approaches, with half less articles. Some of the novelties are introduction of new or certain amendments of existing principles; regulation of administrative contracts; “silence means consent” institute (if so explicitly foreseen by the law); amendment of legal remedy system (introduction of objection for administrative contracts disputes; actions of public authorities and public service providers); electronic communication etc. In the view of APA’s novelties amendment of sectoral regulation as alignment process is needed, especially since the new APA does not explicitly

¹⁵ SIGMA PAPERS: No. 27, European Principles for Public Administration, 1999: 9.

¹⁶ First draft of new GAPA was prepared as a result of CARDS 2003 project: Support to the Public Administration and Civil Service Reform, see: <http://www.delhrv.ec.europa.eu/?lang=en&content=287>, 8. 4. 2013.

define its subsidiary application (Hus & Katić Bubaš, 2011: 20-24). Croatian GAPA definitely took an interesting approach, combining traditional regulation (as was Yugoslavian GAPA) and modern approaches.

Former Yugoslav Republic of Macedonia (FYRM) becoming independent in 1991 also took over Yugoslavian GAPA of 1956. In 2005 Macedonian Law on General Administrative Procedure (LGAP) was enacted, being amended in 2008 and 2011. The LGAP of 2005 was more or less the continuation of Yugoslavian LGAP with few minor changes such as new principles and delivery methods.¹⁷ The main novelties brought through amendments in 2008 were shortening of deadlines to decide in administrative matters (simple matters 15 days (before 1 month) and complex cases 30 days (before 60 days)) and no more two-level decision rule, the right to an appeal became a possibility that can be prescribed by the LGAP or substantive laws¹⁸ and introduction of mechanism “silence means consent” (Todevski, 2011: 26). Amendment of 2011 developed the latter mechanism further on and defined obligation of gathering all the documents from official records by civil servants. For introduction of the principle “silence means consent” the Parliament amended more than 130 laws. The complex appeal system though undermines the application of this principle.¹⁹ One of priorities of FYRM’s Government is modernization of the public administration system, administrative procedure reform being one of the most important parts. Current administrative procedures are namely still seen as too lengthy and unnecessary (Todevski, 2011: 25). In 2010 “Public Administration Reform Strategy 2010-2015” was adopted, furthermore European Commission and FYRM’s Government launched in March 2012 High Level Accession Dialogue (HLAD), which is aimed to promote EU accession reform process, public administration reform being one of the five priority policy areas. One of the results of the first HLAD session was Government’s decision to elaborate new Law on General Administrative Procedure (LGAP), since good LGAP is precondition of quality and legal correct administrative decisions; administrative procedures being important for good administrative behaviour, serving the community, promoting social trust in executive branch, political stability, social wealth and economic development (SIGMA, 2012: 4). SIGMA recommendation (2012: 10) is to complete the drafting process of new LGAP by the end of 2013 and a carry out of 12 - 18-month programme before the legal effect of the adopted LGAP as to ensure its correct implementation.

The disintegration of Yugoslavia followed in 1993 split up of Czechoslovak Federal Republic, Czech Republic becoming independent, adopting new constitution (already in December 1992). Part of Czech constitutional law²⁰ is also Charter of Fundamental Rights and Basic Freedoms, which was taken over from former legal order. Since 2004 Czech Republic is a member of European Union. Similarly as the ex-Yugoslavian states, also the development of public law in Czech Republic was strongly influenced by Austrian law and after 1950 also by Soviet system. After 1989 important changes were initiated, emphasizing fundamental human rights and freedoms (Staša & Tomášek, 2012: 59). Administrative procedure was codified already in Czechoslovakia in 1928 also following Austrian codification of 1925. Later on the administrative procedure was enacted in 1967, being several times amended, especially during the 1990s (Statskontoret, 2005: 73). In 2004 new Administrative Procedure Code was enacted, (enforced on January 2006), aiming at simplification.²¹ The nature of the code is subsidiary, followed by more than one hundred special regulations. The Code takes certain modern approaches, such as public contracts regulation, issuance of measures of general nature, complaint against inappropriate conduct of persons in authority, etc. (for details see Table 2 & Table 3).

As indicated in the Table 2 it is directly evident that recent laws (despite merely several years in-between) incorporate more modern approaches with broader scope, including agreements and administrative contract and general administrative acts’ design and implementation but simultaneously regulate these procedures on rather more abstract level, pursuing principles to operational (over)detailed rules. Such approach seems to be more flexible, allowing incorporation of broader spectrum of life events under the regulation, and stable at the same time, not requiring constant amendments and decreasing legal certainty and transparency of the regulation.

¹⁷ Davitkovski & Pavlovska-Daneva, 2009: 126. Public Administration Reform Strategy 2010-2015, R of Macedonia, 2010: 22.

¹⁸ Public Administration Reform Strategy 2010-2015, Republic of Macedonia, 2010: 23. This amendment was done to implement constitutional change, which allowed an appeal or *other legal protection* against the first-instance administrative acts, meaning a direct administrative dispute against first-instance decision was possible (Davitkovski & Pavlovska-Daneva, 2009: 128).

¹⁹ Commission Staff Working Document, The Former Yugoslav Republic of Macedonia 2012 Progress Report, Brussels 10. 10. 2012, SWD(2012) 332 final: 9. For the functioning of “silence means consent” mechanism see Todevski, 2011: 26; Davitkovski & Pavlovska-Daneva, 2009: 129-134.

²⁰ Having the same force as constitution. There is no single constitutional document, but multitude of constitutional laws, together composing constitutional order (see Bobek, 2009: http://www.nyulawglobal.org/globalex/czech_republic.htm, 5.3.2013).

²¹ Beside this Code, there is also other legal regulation on administrative processes, dealing with different activities of administrative bodies. More on these activities and about particular regulation of administrative procedure see in Staša, Tomášek, 2012: 62-64: furthermore the tax and charges regulation is completely autonomous, meaning the administrative procedure code does not apply. Slovenia on the other hand enacted special Act on Tax Procedure in 2006, which was several times amended and has altogether 424 articles; nevertheless General APA is still applied in accordance with the principle of subsidiarity.

Table 2: The Enforcement and Scope of APAs in Selected States

State	Enforcement / Codification	No. of Art.	Scope of Application/Regulation
<i>Slovenia</i>	2000 / 1999 Am.: 2000, 2002, 2004, 2005, 2006, 2007, 2008, 2010	325	Issuing individual administrative acts (deciding about concrete administrative-legal relations); use of GAPA when deciding on other public matters, which do not have special procedure enacted ²² (Art. 1–4).
<i>FYR Macedonia</i>	2005 / 2005 Am.: 2008, 2011	302	Issuing individual administrative acts in administrative matters (i.e. all acts and activities through which public administration authorities are represented and executed) (Art. 1 and 2).
<i>Czech Republic</i>	2006 / 2004	184	Process of administrative authorities ²³ when issuing decision to constitute, alter or cancel rights and/or duties of particular person in particular case / issuing decision declaring that a person does not have rights/duties in particular case (Sec. 9). Contentious proceedings, disputes arising from public contracts, disputes arising from civil, labour, family or business legal relations (only when provided by special statute) (Sec. 141). Proceedings to determine a legal relationship (Sec. 142). Issuing statements, certificates, notifications (Sec. 154–158). Public contracts (Sec. 159–170). Issuing measure of general character (Sec. 171–174). ²⁴
<i>Croatia</i>	2010 / 2009	171	Issuing individual administrative acts; administrative contracts; for protection of rights/legal interests of the parties when public service providers decide on their rights/obligations/legal interests ²⁵ ; any other activity of public administration bodies in the field of administrative law that directly affect rights, obligations or legal interests of parties (Art. 1–3).

2.2 Contemporary European convergences in CEE and SEE

From EU perspective, the latter allowed differences in administrative legal systems of member states, based also on the fact that each country usually developed its own administrative system through history with long tradition. The convergence thus developed through different acts (conventions, recommendations, declarations, and directives), prescribing general principles, standards of public administration (reliability, predictability, openness, transparency, responsibility, efficiency, economy, effectiveness, participation of citizens, etc., Davitkovski & Pavlovska-Daneva, 2010: 127-132), based also on common legal tradition and democracy of member states. Therefore it is not surprising that by now there has not been a coherent codification of administrative law for EU, only some fragmented regulation. Special role in the field of shaping (European) administrative law goes to Court of Justice case-law. From the latter derive legal principles governing administrative activity in European Union law. The court leaned in his case-law on unwritten general principles collective to constitutional/administrative traditions of member states (Schwarze, 2011: 10-11). According to Schwarze (2011: 10), the “European administrative law” is a relatively new branch of law, narrowly meaning the administrative law for the EU and in a broader sense the approaching of administrative laws between member states and EU. Combination of the principles of legality, proportionality, and legal certainty, protection of legitimate expectations, non-discrimination, fair administrative process and effective judicial review represent the core of European administrative law.

By comparison of selected states we detected a large extent of common institutes in administrative procedures regulation. The latter would be expected since all four states’ administrative procedures codification have Austrian roots (law of 1925 being a role model), belonging to civil system law and Germanic continental legal space. Further on all states decided to join the European Union, Slovenia and Czech Republic joining in 2004, Croatia joining in 2013 and FYRM being a candidate country. To successfully finish EU accession process the harmonization of national legal

²² Minimal procedural safeguards should be ensured also in these matters (e.g. misdemeanours, disciplinary proceedings, etc.).

²³ Authorities of executive branch of the government, of regional self-governing units and other authorities when performing competences in the field of public administration (see Section 1).

²⁴ In general APC does not apply to civil, business, or labour legal actions performed by administrative authorities etc. (Section 1/3). For scope of application of Czech APC see also Staša & Tomášek, 2012: 60: the today’s concept of administrative procedure regulation in Czech Republic is focusing on *activities of administrative body* and not the persons to whom the conducting is directed to. The issuing of measure of general character is only one instance procedure; the measure can be subject to judicial review by administrative courts (Staša & Tomášek, 2012: 62).

²⁵ If no judicial or other legal protection is prescribed by law (see Hus & Katić Bubaš, 2011: 20: school’s decision on kids’ diet, doctor’s wrong treatment prescription to patient).

system with the EU *acquis communautaire* is one of the preconditions. Administrative systems are therefore also affected, being responsible for successful implementation of EU obligations.

If we compare the history of enactment in selected four countries and the rest of the EU member states, we can conclude that all four have a very long tradition and history of administrative procedure codification. Most of EU member states enacted (or modified) administrative procedure only after 1990's (Statskontoret, 2005: 72-73). The latter is definitely a result of societal changes, not only emphasizing the fundamental needs of protection of public interest and protection of individuals' rights, but also enhancing partnership tendencies, requiring higher flexibility of public decision making. Administrative procedure is especially important for different segments of business processes (such as establishing a company, taxes, public-private partnership etc.), especially with the EU memberships' free market rights influencing also countries' economic growth. Although this long tradition of AP codification is a sign of democratic regulation approach and rule of law, some rigidity and inflexibility can be caused by it as well. That is not all bad, since only copying ideas and solutions from other (especially western) countries' legal systems is not necessarily the most effective way of change. Every countries legal tradition and history is a very important part of countries "legal identity" and intrusive, alien interventions can produce even less effective conducts or become only nice looking legal institutes on the paper that are never used. Both in the end are unproductive. Therefore each change in regulation should be carefully thought through and a multidisciplinary research (from at least legal and economic view) beforehand should be made. It does seem, by taking subjective look of course, that most Eastern, Central European countries run into European Union, taking over legal order, without much resistance, for the sake of successful accession. Most of these countries are still young democracies as regards independence period; therefore certain deviations in effectiveness of public administration activities are normal. The process of evolving legal order is namely affected also by society itself, especially its values and "ripeness". Therefore the enhancement of public administration system is an ever evolving process in each country taking its time and place. Croatian and Czech APA are definitely already taking modern approaches with new institutes, such as public contracts, regulation of abstract acts etc. FRYM with new APA in process has great opportunity to enhance its regulation. Slovenia is for now satisfied with the APA from 1999, having tendency to patch it up every few years with certain novelties. One approach would be of course to adopt new shorter law, with less formalistic regulation (and higher flexibility), although the question is how much discretion will then be put on public administration and is the society with recently very low trust in the rule of law, ready to put bigger trust to public authorities. At the moment we think the timing is not right for major changes. Still one of the main guidelines for possible changes of any kind of regulation in the future in any state is to enact clear regulation, understandable to average population of people (having in mind the simplicity of proceedings) and with continuation (not changing with each government change – that implies especially to sectoral regulation).

3. Principles in Administrative Procedure Acts (APA)

Administrative procedural law principles are a traditional tool of democracy whose purpose is to make operational the basic constitutional safeguards for the protection of individuals from abuse of power.²⁶ The procedural guarantees are therefore important for the protection of fundamental rights and freedoms. Furthermore the protection of fundamental, constitutional rights is inextricably linked to correct administrative procedure (Schwarze, 2004: 96-97). Basic guideline for regulation of administrative procedures was given in 2005 by SIGMA, stating *general principles of administrative activity* (such as legality, impartiality, procedural fairness, openness and transparency, accountability and liability) and *principles governing administrative procedure*: definition of administrative activity, form of AP (general and special regulations of AP), beginning of AP, language, evidence, hearing of the interested parties, time limits and reinstatement, termination, administrative silence and retrial. Some of principles can be defined already in constitution and not necessarily repeated in GAPA, of course still legally binding administrative actions.²⁷

Such practice is valid for all four countries. The compared APAs introduce majority of principles as set by SIGMA in 2005; new approaches in Croatia (2009) and Czech Republic (2004) were heading towards shorter regulation pursuing higher level of simplicity, introducing elements of good administration. Regulation of general administrative principles is typically part of APAs introductory provisions, which apply to whole administrative procedure. APAs or sectoral regulation can define also certain special principles, being used in certain parts/types of procedure. Except Croatian APA the rest explicitly recognise "principle" of subsidiarity²⁸, meaning provisions of General APA are applied also in special administrative processes, principles including (cf. Statskontoret, 2005: 72).

²⁶ The administrative proceeding is in accordance with the protection of constitutional rights fundamental instrument of the rule of law and democracy against potential abuse of power by administrative authorities (Schuppert, 2000, str. 788-793).

²⁷ Checklist for general law in administrative procedures, SIGMA, 2005: 1-16.

²⁸ Czech APA: Section 1/2; FRYM APA: Article 3; Slovene APA: Article 3. Croatian APA on the other hand in Article 3/1 explicitly requires the use of GAPA in all administrative matters, except certain individual questions of administrative procedure can be regulated differently in other statute if that is necessary for certain administrative fields and not in contradiction with GAPA, with no ordinance to subsidiary use of APA (Hus & Katić Bubaš, 2011: 22).

By normative analysis we can detect a lot of similarities in all four APAs, but on the other hand also differences. All four have in common certain principles for example principles of legality, protection of public interest, protection of parties' rights, and economy/effectiveness of procedures, ascertaining the case without reasonable doubt/substantive truth; right to legal remedy (appeal) (see Table 3).

Table 3: Principles in APAs of Selected States²⁹

No.	Principles: 1-13 Classical (protection of HR) 14-17 Managerial and modern (GG and GA)	Slovene (Art. 6-14)	FYRM (Art. 4-19)	Czech (Sec. 2-8, 81-, 175)	Croatian (Art. 5-14)
1	Legality	x	x	x	x
2	Predictability and stability of decision-making/ Protecting rights attained by the parties/ Finality/ Legal effectiveness of the decision		x	x	x
3	Equality, impartiality and objectivity/ Independence	x	x	x	x
4	Proportionality in protection of parties' rights and public interest	x	x	x	x
5	Protection of affected persons' rights/ Assistance/ Equality	x ³⁰	x	x	x
6	Notification of the affected persons and right of defence/ Hearing	x	x	x	
7	Official use of languages and scripts / alphabet		x		x
8	Ascertaining the case without reasonable doubt/ Substantive truth	x	x	x	x
9	Data access and protection				x
10	Independence/discretionary evaluation in assessing evidence	x	x		x
11	Duty to speak the truth and fair use of rights/ Notify administrative authorities about on-going public procedures	x		x	
12	Bringing decisions without unnecessary delays/ Economy and urgency of the procedure/ Efficiency	x	x	x	x
13	Usually two-instance administrative procedure when issuing individual decisions/ Right to appeal/legal remedy ³¹	x	x ³²	x	x
14	Accountability		x		
15	Mutual cooperation of administrative authorities in the interest of good administration			x	
16	Public administration is a service to public/ Service orientation		x	x ³³	
17	Right to complaint against inappropriate conduct of persons in authority or against the proceedings of administrative authority			x	

Since Slovenian, Croatian and FYRM's APAs overtook Yugoslavian solutions it is of no surprise these 3 have most common principles (see Table 3). FYRM kept also some other principles, which Slovene and Croatian APA excluded, such as accountability, final decision and legal effectiveness of the decision. Even though these institutes are not defined as general principles in the rest of APAs they derive from other provisions or other systemic regulation (for example in Slovenia: Civil Servants Act, Public Administration Act etc.) or are already defined by constitution (like liability for damages, legal effectiveness (Articles 26 and 158 of Slovene Constitution)). Croatia introduced some new principles in 2009, such as principle of the right of parties to legal remedy (which includes more remedies: complaint, objection against public contracts or other activities of public body/public service provider; and administrative dispute) and principle of data access and protection, giving parties right to access to data, internet pages, forms, professional advice/help. Principle of the hearing of the party (or any affected person with legal interest) is not anymore explicitly expressed in general provisions, although it can still be derived from later APA provisions (for example Articles 30, 52). Czech APA sets it as right of defence (Section 4/3 and 4/4). Slovene (Article 9) and FYRM (Article 10) APA took over Yugoslavian principle of parties' right to express itself before the decision is issued. Another important dimension of parties' participation rights is the use of languages/alphabet/scripts, all regulations defining it, FYRM and Croatia as part of introductory provisions, Czech (Section 16) and Slovenian (Article 62) APAs as rules of procedure.

In theory some of basic principles of Czech APA are seen as the projection of general legal principles in positive law (Staša & Tomášek, 2012: 65). Some principles are derived from Constitution and Charter of Fundamental Rights and Freedoms, such as principle of Section 2/4 ("adopted solution should be in accordance with public interest, administrative authority complies with circumstances of particular case and there should be no groundless differences

²⁹ The content of the table was focusing on the introductory provisions of APAs, regulating fundamental principles of administrative procedures. Although some of the principles are not strictly mentioned in these provisions and may therefore not be marked in the Table 3, they might be defined in later APAs provisions or other regulation (like Constitution, Public Administration Act, and Law on Free Access to Information of Public Sector, etc.). Table 3 does not include certain Slovene and FYRM APAs institutes regulated in the basic principles chapter such as the definition of administrative matter, obliged authorities to use APA, definition of authority/civil servant and subsidiary application of law. Cf. also Hus & Katić Bubaš, 2011: 20, and Skulová et al., 2011: 6.

³⁰ Part of principle protection of parties' rights and public interest (Article 7).

³¹ Final decision is subject to judicial review in all four states (cf. Staša & Tomášek, 2012: 61, etc.).

³² Right to appeal became with 2008 amendment only an option, not a must – being regulated by law, meaning a two-instance rule is not basic principle of APA, although still enshrined in chapter Basic Principles (Davitkovski & Pavlovská-Daneva, 2009, 128).

³³ Requirement of polite behaviour (see Section 4/1).

when deciding factually identical/comparable cases”), which introduces principles of predictability and stability of decision-making. Czech jurisprudence understands them as principle of (protection) of legitimate expectations (predictability of a decision) or as principle of justified confidence in the procedures of public administrative authorities, as well as equality of addresses, prohibition of abuse of discretion and requirement to reason a decision (Skulová et al., 2011: 3, 7). Principle of equality derives also from Section 7 stating equal status of affected persons’ procedural rights/demanding performance of procedural duties in the same manner from all affected persons. Furthermore Section 4 defines public administration as service to public, demanding polite behaviour and satisfying the affected persons if possible. Parties have a right to complaint against inappropriate conduct of persons in authority (Section 175) (see Table 3). Section 8/2 explicitly demands from authorities to cooperate in the interest of good administration. According to Skulová et al. principles of activities of administrative authorities as enshrined in Sections 2–8 correspond to considerable degree to the principles of good governance (2011: 7). Modern principle with “service to public” element is followed also by current FYRM APA regulating principle of service orientation of the authorities when deciding in administrative matters (Article 7). Service orientation principles should be followed also by new envisaged APA.

Therefore, fundamental principles as an expression of parties (human) rights protection detected in compared regulations are principle of legality, equality, participation, protection of parties’ rights and legal remedy (appeal) and principle of protecting rights attained by the parties (*res iudicata*). These principles together with other obligations imposed to the authorities (such as principle of independence, establishing substantive truth, mutual cooperation of authorities in the interest of good administration, accountability, impartiality and objectivity) are a procedural safeguard and guarantee for protection of human rights also in administrative procedures what constitutes administrative law in this respect as *materia constitutionis*.

4. Conclusion

The analysis of institutions enshrined in the regulation of the APAs of selected states shows the prevailing legal tradition, having Austrian GAPA for the basis, with certain new modern approaches such as public contracts, issuance of general acts, “silence means approval” institute, public service providers’ obligation to apply APA when deciding about citizens’ rights/obligations; e-communication etc. AP regulation remains classical, arising from the citizen-authority subordinated relationship, protecting the weaker party by prohibiting arbitrariness of authoritative decision-making based on separation of powers principle (two-instance procedures, administrative decisions being subject to judicial review). We can conclude all four countries belong to the first generation of APs regulation as defined in theory by Barnes (in: Rose-Ackerman & Lindseth, 2011: 350-354), but with certain citizen-state partnership elements. New APs principles such as mutual cooperation of authorities, accountability, service orientation of the authorities etc. are defined, reflecting good administration approaches. Furthermore all four countries’ APAs include other main elements reflecting good governance (and good administration), such as transparency, responsiveness, rule of law, effectiveness and efficiency (cf. Apelblat, 2011: 40). Prerequisite for protection of human rights is performance and respect of these good administration principles as part of good governance also in practice when implementing the regulation set. As a result of (further) EU accessions/memberships³⁴, memberships in Council of Europe and overall globalisation, we will probably continue to experience the trend of convergence also in the future, bearing in mind the importance of quality regulation of administrative procedure as the main decision-process for states’ economic growth and effectiveness of public administration activities.

³⁴ Influencing the regulation also by funding different projects to encourage reforms, such as CARDS 2003 project and similar.

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