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**Support for Improvement in Governance and Management**

A joint initiative of the OECD and the European Union, principally financed by the EU

## **ADMINISTRATIVE PROCEDURES ON THE TERRITORY OF FORMER YUGOSLAVIA**

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## **I. The Yugoslav Tradition of General Administrative Procedure**

Following the civic (bourgeois) revolutions — beginning with the French revolution of 1789 — public administration was subject to a stricter definition of legality. Administration could only perform those functions that were explicitly stated as within its competence, and administrative decisions had to be based on relevant substantive law and prescribed procedure. However, different administrative bodies acted on the basis of procedural norms scattered about in various regulations. General administrative procedure was codified at the beginning of the 20<sup>th</sup> century. All administrative bodies were to follow general administrative procedures when deciding on the rights, obligations, responsibilities, and legal interests of citizens, entrepreneurs and other legal subjects. The first codification in the world was conducted in Austria in 1925, although the Law on General Administrative Procedure (LGAP) was claimed to have been necessary long before that date (Medvedović, 2003: 382).

The Law on General Administrative Procedure of the Kingdom of Yugoslavia, adopted in 1930, was based on the Austrian model. Prior to the Yugoslav LGAP, regulation of administrative procedures on those territories had been segmented — different procedural regulations regulated administrative procedures in different administrative fields (taxes, customs, building permits, etc.) or some basic procedural issues in different fields (the content of administrative decisions, the right to appeal, etc.). Courts had a special role in standardising administrative procedure<sup>1</sup>. Austria was followed by Czechoslovakia and Poland in adopting their LGAPs in 1928.

The first Yugoslav LGAP was abolished in 1946, although its norms could be implemented as legal rules under certain circumstances. Administrative practice once again returned to the segmented regulation of administrative procedures, both for different administrative fields and for procedural issues. The second Yugoslav LGAP was passed in 1956, as a federal law. With its 303 articles it represented “the most comprehensive and most detailed codification in the world” (Krbek, 2003: 36). The LGAP of 1956 was changed and amended four times, in 1965, 1977, 1978 and 1986. It was a subsidiary law, i.e. it was applied in those administrative procedures and issues that were not regulated by special laws.

It can be concluded that the Austrian idea of GAP codification was accepted on the territory of the former Yugoslavia rather early<sup>2</sup>. Ten years after the end of World War II, there was another, more comprehensive and more detailed codification. This codification was carried out despite the then predominant ideas of “socialist legality”, which in reality meant that administrative actions had to reflect and enforce the wishes of the ruling (and only) party, the Communist Party. Thus, citizens and administrative personnel learned to rely on the LGAP.

## **II. The New States and General Administrative Procedure**

After gaining independence, the new states took over the former Yugoslav LGAP in its final version of 1986, while the Federal Republic of Yugoslavia (declared in 1992) continued to implement it<sup>3</sup>. Apart from certain minimal changes, this LGAP is still implemented in Croatia.

Bosnia and Herzegovina adopted four new LGAPs due to the significantly changed state system. The BiH Federation passed the first LGAP in 1998 (with a revision in 1999). The LGAPs of the Republika Srpska, the Brčko District, as well as Bosnia and Herzegovina (state level, revision in 2004) were adopted in 2002 (Seizović et al., 2005: 223). Slovenia adopted a new LGAP in 1999, and amended it in 2002 and 2004 (Jerovšek, Trpin et al., 2004: 36). The former Yugoslav Republic of Macedonia adopted its new LGAP in 2005 (Sl. Vesnik na RM no. 38/2005).

The FR Yugoslavia implemented the LGAP of 1986 until 1997, when it passed the new LGAP (revised in 2001). After the constitutional changes of 2003, the Federal Republic of Yugoslavia was transformed into the State Union of Serbia and Montenegro. Serbia continues to implement the LGAP of the FRY, while Montenegro adopted a new LGAP in 2003 (Lilić, 2004: 2-3).

The regulation of general administrative procedure (GAP) in all new states continues to be based on the Austrian tradition of general administrative procedure. This is a very solid regulation, but also a very

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<sup>1</sup> Court practice of the Austrian Administrative Court in Vienna was particularly interesting in this respect, although courts in charge of controlling the legality of administrative functioning in other countries also had an important role in creating administrative procedural law (Krbek, 2003: 36).

<sup>2</sup> The term “rather early” is conditional, of course. The first codification of administrative procedure in Europe happened long after criminal and civil procedures had been codified (Krbek, 2003: 37).

<sup>3</sup> The respective LGAPs were adapted to the new constitutional and organisational structure of public administration. There were also some terminological and other minor changes.

traditional one from today's point of view. It better corresponds to the traditional model of regulated, literate, documented, legally bound Weberian administration than to more modern administrative concepts (the New Public Management, good governance).

Some procedural legal institutes and their regulation have become somewhat obsolete, such as the regulation of mail delivery during a procedure, which still needs to happen on a personal basis. This is also the case when making submissions to an administrative body. ICT has opened numerous new possibilities in that area.

Public services are faced with significant problems in ensuring legality of procedure. Decisions on the rights, obligations, and responsibilities of pupils, students, patients, socially deprived individuals, consumers of public services, etc. as well as of schools and universities, healthcare institutions (hospitals, etc.), social welfare institutions (social welfare centres, old people's homes, homes for orphans, etc.), power supply, and other public services are of great importance and require fair and transparent procedures. In most new states, the obligation to apply the LGAP in public services is dubious as well as inappropriate concerning the complexity of GAP.

Fragmentation in the legal regime of administrative procedure, which appeared because of state and constitutional changes, is visible all over the territory of the former Yugoslavia. It is particularly conspicuous in Bosnia and Herzegovina, where there are four different legal regimes. However, it is a favourable circumstance that all new LGAPs are based on the same Yugoslav LGAP, which creates minimal standardisation of the new GAP legal regulation.

A trend of segmenting GAP legal regulation can be observed in most new states. An increasing number of special administrative procedures are continuously being adopted, thus creating legal insecurity of citizens, entrepreneurs and others subject to these procedures.

The complexity and segmentation of legal regulation decreases the civil servants' work efficiency and creates room for incorrect implementation of such regulations, due to either ignorance or corruption. During the tumultuous events of the 1990s, numerous civil servants were replaced (Koprić and Marčetić, 2000). Their successors have poor knowledge of administrative procedure, lack necessary skills and are not stimulated to continue administrative education and training. Along with a personnel crisis, the new states are often faced with a real organisational and institutional crisis. Insufficient organisational and legal knowledge, combined with excessive influence of politics, has led to the careless formation of new institutions in local self-government and state administration. Such circumstances have aggravated the implementation of the LGAP and fair procedure in general.

### **III. Modernisation of Administrative Procedure**

Administrative procedure requires (further) modernisation in all new states. Simplification, quick and efficient functioning, protection of the ever broader citizens' rights regarding public administration, fair procedure, impartiality and availability are the many (and often contradictory) requirements for contemporary public administration and its functioning. General administrative procedure needs to be reformed.

Some countries have already started the reform — primarily Slovenia. Montenegro and Bosnia and Herzegovina have also made the first steps. The Slovenian LGAP of 1999 took over most structural solutions of the Yugoslav LGAP of 1986 and adapted it to the new political and legal arrangements, with some interventions regarding procedural provisions. Along with continuous modification and considerable modernisation, the biggest innovation is the legal regulation of electronic communication in administrative procedure (Jerovšek, 2004: 239)<sup>4</sup>. The implementation of the LGAP has been considerably extended, even to cases where various organisations — the providers of public services — decide on the rights and obligations of service users (article 3)<sup>5</sup>. It is considered to be a "tremendous innovation" (Jerovšek, Trpin

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<sup>4</sup> Numerous LGAPs include similar provisions, e.g. the Austrian LGAP of 1991 and the Estonian LGAP of 2001. Some issues and possibilities that should be included in the new legal regulation are: opening of a procedure via telephone, fax, or the Internet; delivery of information, requests, summons, etc., and all other communication between citizens and public administration by e-mail; ensuring access to electronic forms on the web pages of various administrative bodies; delivery of documents in electronic form; use of electronic signature; availability of documents in electronic form and on an electronic medium.

<sup>5</sup> Moreover, according to article 4, the LGAP is applied in all public law cases that have the character of an "administrative matter" and where there is no special procedure in accordance with a special regulation.

et al., 2004: 48)<sup>6</sup>. The Montenegrin LGAP has taken a similar path (Lilić, 2004), as has the LGAP of the BiH Federation (Medvedović, 2004: 271, fn. 3). A significant innovation of GAP, which is to be incorporated in the reform, is a more precise regulation of administrative bodies' discretionary decision-making<sup>7</sup>. Along with that innovation, numerous other modernisation measures are also available<sup>8</sup>.

GAP reform should include careful and appropriate regulation of the instance supervision. Territorial and functional decentralisation has enabled local self-government units and legal entities with public competence to decide on an increasing number of administrative procedures. Since it touches the autonomous, self-government scope of activities, it is necessary to form instance supervision (appeals, special legal remedies, administrative supervision, etc.) rather carefully in order to ensure the appropriate protection of citizens' rights, as well as the local units' right to self-government<sup>9</sup>.

The LGAP might be the place to regulate one legal institution that neither the Yugoslav laws nor the laws of the new states contain. This is the administrative contract or public law contract, originally developed in the French legal system, and now known and regulated in other European countries as well (*contrats administratifs, öffentlich-rechtlicher Vertrag, contratto ad oggetto pubblico*). It is a contract where at least one party is a public law subject. The contract is concluded for the purpose of performing a public service, according to a special procedure. A public law subject has a stronger and somewhat different legal position than the other contract party<sup>10</sup>.

Along with the modernisation of general administrative procedure, it is important to ensure other prerequisites for its successful implementation. Firstly, a permanent and professional monitoring of legal regulation and an assessment of its appropriateness must be provided since there is a constant change of social circumstances, technological possibilities, and requirements of the relevant environment. Secondly, it is equally important to monitor the implementation of the LGAP to ensure prompt and adequate reaction to practical problems that constantly spring up everywhere.

The next precondition for successful implementation of the LGAP is skilful, educated, quality administrative personnel. The following measures should be taken (as a minimum): ensuring an adequate position of administrative process law within the system of legal and administrative education, and conducting permanent professional training of administrative personnel in charge of administrative procedures, etc.

Finally, there must be sound quality control of LGAP implementation in practice via appeals, special legal remedies, inspections, ombudsman and other bodies, etc.

A certain trend towards harmonisation has provided important guidelines for GAP reform. This trend is visible in the activities of the Council of Europe, the EU and other international organisations and bodies, and in the interaction between different countries that are learning from each other. Today, the codification of administrative procedure is rather widespread. Countries that do not have any regulation of GAP (such as France) are quite rare<sup>11</sup>. The Council of Europe works in the same direction by preparing international agreements and conventions, resolutions and recommendations. A European Administrative Space is being created based on the principles developed through the judgements of national courts and the European Court of Justice<sup>12</sup>. Common administrative standards are being identified within the process of EU

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<sup>6</sup> The Commission for Reducing Administrative Barriers was founded in Slovenia in 2001. It identified three strategic options for improvement: (a) wider application of ICT; (b) identification and maintenance of records of special administrative procedures for the purpose of unification and simplification; and introduction of the one-stop shop; (c) in-service training of administrative personnel and quality control of internal procedures and relations with citizens (Seizović et al., 2005: 223).

<sup>7</sup> For Montenegro, see Lilić, 2004: 6. In 1996, the Croatian Constitutional Court abolished two provisions that provided for discretionary decision-making. See also Jerovšek, 2004: 250.

<sup>8</sup> Some of these measures concern the instance that decides on the appeal against the first instance administrative act. The fYR Macedonia has an interesting solution: 12 commissions specialised in different administrative areas decide on the appeals (SIGMA, 2003: 21). The Slovenian LGAP has tried to define an "administrative matter" (art. 2), regulate administrative verification of signature and document copies (art. 178 — 178h), etc.

<sup>9</sup> On the concrete problems of the organisation of instance supervision in Croatia, see below.

<sup>10</sup> More about administrative contracts can be found in: Borković, 2002: 34-40; Pirnat, 2000; etc.

<sup>11</sup> An outline can be found in Medvedović, 2003: 382-383.

<sup>12</sup> These principles include: the rule of law, openness and transparency, accountability, efficiency and effectiveness. More in Cardona, 2004; SIGMA, 1998; etc.

accession, where SIGMA plays an important role. European administrative convergence and Europeanisation of national public administrations are some of the topics under discussion<sup>13</sup>. The question is whether we are moving towards a model LGAP or towards European, or even global, administrative procedures law. Is it possible to speak about the harmonisation of administrative process law at least on the territory of former Yugoslavia? This could be based on the common tradition and on similar efforts to adopt European administrative standards.

#### **IV. Administrative Procedures in Croatia — Possible Lessons for Other Countries**

Numerous special administrative procedures have been introduced since 1990 (tax procedure, customs procedure, public procurement procedure, access to public sector information procedure, procedure concerning civil servants' rights and obligations, child adoption procedure, health insurance procedure, procedures concerning construction and civil engineering, procedure concerning communal utility services, etc.). These procedures regulate certain procedural issues in a specific manner, which decreases the predictability of administrative functioning and requires additional education of administrative personnel. Furthermore, specific regulation of such procedures is sometimes insufficiently tuned to the principles and rules of the LGAP, or it creates legal gaps, which hinder application of the rule of law, leave room for free, unbound assessment, and provide opportunities for corruption.

The LGAP has remained a relatively long and complicated law, which regulates numerous legal and other issues in a somewhat traditional way. For various reasons, it has become quite unintelligible to citizens. Certain legal-technical interventions might make the text clearer and more accessible to citizens *and* civil servants (article titles, more precise formulations, simplifications, etc.).

The LGAP has vaguely defined the obligation of public institutions and other bodies that perform public services to act in accordance with its provisions. Moreover, in cases where these bodies make decisions, the procedure regulated by the LGAP is sometimes inadequate and too complicated in relation to the nature of their decisions. The application of GAP should be extended in particular to those cases where institutions, public companies, and other bodies performing public services as well as other legal entities with public competences decide on users' rights and obligations<sup>14</sup>. In such cases, however, meticulous legal regulation of the LGAP usually proves to be much too complicated. It requires simplification so that it is appropriate for the situations to which it refers. It is necessary to establish minimal procedural standards that are guaranteed in each contact between citizens and the public administration in order to ensure the administration's impartial conduct and to protect citizens' rights. Nevertheless, such standards must not be established at the expense of the efficiency of public services.

The application of GAP by local and regional self-government bodies is yet another problem, since the Law on Local and Regional Self-Government of 2001 and the previous Law on Local Self-Government and Administration of 1992/93 contain poor regulation regarding LGAP application, competences of local administrative bodies, appeals procedure and competence, and application of special legal remedies, etc.

The fact that the same state administrative body frequently decides on the same administrative case at first and second instances (appeals) prevents efficient legal protection and violates the constitutional right to appeal (article 18 of the Croatian Constitution).

The application of the LGAP to different newly established agencies with regulatory and supervisory competences — as well as the competence to decide on individual cases — constitutes another problem. Their decisions are often rather important and have far-reaching consequences — they touch upon market monopoly prevention, granting and revoking of telecommunication licences, decisions with regard to power supply, etc. In such cases, the legislator has almost without exception prescribed subsidiary application of the LGAP, but has not provided for the right to appeal, which is one of the basic constitutional rights.

The Croatian public administration has begun to apply the one-stop shop organisational principle. The Financial Agency (FINA) is authorised to act as administrative support for citizens, entrepreneurs, and others concerned in a wide range of public affairs<sup>15</sup>. However, neither procedural regulations nor

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<sup>13</sup> For critical opinions, see Olsen; Rutgers and Schreurs, 2000; Page, 2003; etc.

<sup>14</sup> The Slovenian LGAP has moved in that direction, as has the Finnish LGAP of 2003.

<sup>15</sup> See the Law on the Amendments to the Law on Financial Agency, *Narodne novine* (Official Gazette) Nr. 42/2005 and Government's Decree on the Identification of Affairs from Articles 4A and 4C of the Law on Financial Agency, *Narodne novine* Nr. 98/2005. Enactment in April 2006.

application of the LGAP have been prescribed, which leaves physical and legal entities without any procedural rights and possibilities for protection.

Special laws, among which the Law on Local Self-Government is the most controversial, widen the scope for issuing administrative acts in an abridged procedure, namely without oral hearing and formal evidence procedure. In practice, an abridged administrative procedure is used much more often than allowed, which thwarts the regular identification of facts, disrupts legal security, damages citizens' rights, and leads to unlawful administrative decisions (more in Medvedović, 2004: 281-286).

The Department of Administrative Inspection, which is responsible for supervising the implementation of the LGAP, has a limited capacity due to an insufficient number of civil servants and weak organisational support. It is but one of the departments of the Central State Office for Public Administration, and it has difficulties with its original task of administrative control, let alone with tasks such as monitoring and improving the legal regulation of administrative procedure or providing the necessary education and counselling of administrative personnel in matters concerning administrative procedure.

LGAP modernisation in Croatia comprises:

- Reduction of special administrative procedures;
- Simplification of GAP and increased processing speed, as well as simplification of administrative functioning in general;
- Extension of LGAP application to public services, with guaranteed minimal procedural standards for users;
- Ensuring the implementation of the new ICT in administrative procedures;
- Regulation of administrative contract, spatial planning procedures, as well as requirements concerning knowledge and skills of civil servants who conduct administrative procedures, etc.

## V. Final Remarks

A modern, complex public administration — in a globalised world that is exposed to dynamic processes of rapid change, particularly in transition countries — is faced with numerous challenges in the regulation of administrative procedure:

1. The subsidiarity of general administrative procedure, however reasonable it may seem, can easily provoke the legislator to introduce an ever-increasing number of special administrative procedures and to create specific regulations for individual administrative procedure issues.
2. Practical needs often lead to situations where even those issues that would better be regulated by by-laws end up in the LGAP. It might be more convenient for both citizens and civil servants with limited knowledge to have all procedural rules in the same law. However, this makes GAP regulation more complicated and less transparent. This problem touches on the issue of how to best differentiate between the use of law and the use of by-laws.
3. The improvement of the quality and clarity of the LGAP text is a continuous task. Some of the issues of GAP improvement are: omission of organisational issues from the LGAP; regulation concerning the activities of inspections that decide on the rights, obligations and responsibilities of physical and legal entities; regulation of the procedure concerning citizens' complaints, suggestions and comments to administrative bodies; regulation of the procedure concerning the protection from unlawful actions of administrative bodies in case they do not pass a formal administrative act, etc.
4. The extension of administrative execution (at the expense of court execution) of administrative acts to the execution of financial obligations established in those acts, as in the Slovenian LGAP, is a possible development path for other countries to follow. Other adjustments are possible in order to provide for a swift and efficient execution of administrative acts under changing social and economic circumstances.
5. The legislator should consider the abolishment of appeal against *conclusion* as the only procedural decision, narrowing the grounds for appeal, as well as the simplification of the system of special legal remedies (that can be applied after the appeal has been decided upon).
6. The system of internal and external monitoring and control, together with educated administrative personnel, is of great importance for the constant quality of administrative procedures. Some of the most important methods of internal monitoring and control are: Internal statistics; periodic expert analyses of LGAP implementation; expert advice and counselling for better administrative work; and inspection of

LGAP implementation. Along with judicial review, external control encompasses supervision via an ombudsman and similar institutions. The knowledge and skills necessary for administrative procedure can and must be acquired during administrative education and in-service training<sup>16</sup>.

To conclude, quality GAP is of great importance for the community, as it:

- ensures the transparency of administrative functioning and the protection of citizens' rights (including the rights of entrepreneurs and others concerned);
- prevents arbitrariness in administrative decision-making and prevents bureaucratisation;
- facilitates access to public services for citizens and entrepreneurs;
- ensures predictability and impartiality of administrative functioning;
- narrows the room for corruption;
- accelerates and improves the functioning of public administration;
- represents an important part of the institutional and social capital of a country (more in Koprić, 2004: 1-2).

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<sup>16</sup> Gagro (2004) suggests a similar approach.

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